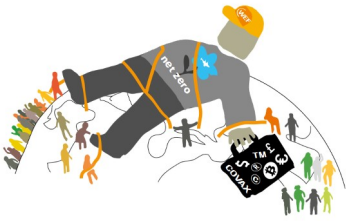
Global Campaign to RECLAIM PEOPLES SOVEREIGNTY, DISMANTLE CORPORATE POWER and STOP IMPUNITY



Amigos de la Tierra América Latina y el Caribe

ARGUMENT PAPER ON THE SCOPE OF THE LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS

Global Campaign to Reclaim People's Sovereignty, Dismantle Corporate Power and Stop Impunity

November 2024

> *"I mentioned the great growth in their economic power, political influence and corrupting action. That is the reason for the alarm with which world opinion should react in the face of a reality of this kind. The power of these corporations is so great that it goes beyond all borders. [...]*
>
> *They make huge profits and drain off tremendous resources from the developing countries. [...]*
>
> *We are faced by a direct confrontation between the large transnational corporations and the states. The corporations are interfering in the fundamental political, economic and military decisions of the states. The corporations are global organizations that do not depend on any state and whose activities are not controlled by, nor are they accountable to any parliament or any other institution representative of the collective interest. In short, all the world political structure is being undermined. Dealers have no country. The only thing they care about is where they make their profits."*
>
> (Salvador Allende, UN General Assembly, New York, 1972)

Introduction

In this paper, the Global Campaign, a network representing over 250 social movements, organizations and communities affected by transnational corporations (TNCs), explains why the scope of the future Legally Binding Instrument (LBI) on business and human rights must focus on TNCs and should be defined both in subjective (actor) and in objective (activity) terms. Currently under negotiation at the United Nations Human Rights Council, the LBI process was established to close a gap in the international legal framework that allows TNCs to evade accountability for crimes committed throughout their global value chains.

This paper provides legal and political arguments and precedents in support of the scope as mandated by the spirit of Resolution 26/9[1], which established the Open-Ended Intergovernmental Working Group (OEIGWG) that for the last 10 years has been negotiating the LBI's terms. Clearly determining the scope of the LBI is fundamental to the advancement of all other provisions, and to determining the power and effectiveness of the LBI.

Context

Trade and investment regimes and treaties have created an international legal framework that protects corporate profits to the detriment of peoples' and States' sovereignty. Investor-State Dispute Settlement (ISDS) mechanisms, which legally allow TNCs to sue States for approving laws or public policies that might jeopardize expected profits, is a glaring example. While these norms

[1] UN Human Rights Council, Resolution 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A /HRC/RES/26/9.

and awards from arbitration tribunals protecting investors are binding and enforceable, there are no international structures in place to protect States' sovereignty and peoples' human and environmental rights vis-à-vis TNCs. Nor are there any international legal instruments that can hold these corporations accountable for crimes committed throughout their value chains.

The scale, income and profits of the economic activities of TNCs often surpasses the GDP of many countries. This undeniable power imbalance constitutes an international architecture of impunity that allows TNCs to simultaneously evade justice and interfere in democratic processes, directly violating States' sovereignty. On the one hand, the intricate legal and economic structures of TNCs, combined with their economic power and extensive capacity for corporate capture and corruption, allow them to exploit legal loopholes and slip through the cracks of domestic legislation. On the other hand, they erode States' democratic power by undermining sovereign decisions, often obliging them to lower national standards of protection so to win a perverse race to the bottom.

The most emblematic example is Chevron's ISDS case against Ecuador. This case illustrates very well how the sovereignty of a country is being jeopardized when facing transnational corporate interests and balancing domestic interests. An investment arbitration award in the Netherlands is being recognized as having more authority than the sentence of the Ecuadorian Constitutional Court on a human rights case won by affected communities in Ecuador (UDAPT) against Chevron.

There is thus a significant regulatory gap in international law regarding human rights which enables these powerful entities and groups to violate human rights and environmental standards with relative impunity – a gap which a strong and effective LBI will be able to fill. Ensuring legal accountability throughout TNCs value chains is therefore essential for guaranteeing TNC accountability in an era where capital flows freely, but justice does not.

The importance of focusing on TNCs

Since the beginning of the process, the Global Campaign has been defending the original scope established in Resolution 26/9 not only to respect the democratic legitimacy of the process but also to guarantee efficacy to the future instrument.

To be effective, different entities need to be regulated differently. TNCs are operating on a growing scale, with unprecedented decentralization and fragmentation of production around the world and along their global value chains. It is estimated that 80% of international trade takes place within the value chains of transnational corporations[2].This process is known as "de-territorialization" and is a significant challenge faced by today's world, whose economies and production are based on fragmented value chains controlled by TNCs[3]. Moreover, these supply/production/value chains[4] controlled by TNCs are usually not disclosed and business relations between them are not always easy to prove.

The parent companies and holdings are mostly domiciled in "developed countries", and when violations occur in "developing countries" along their value chains they often manage to leave and

[2] CETIM, **La Impunidad de Las Empresas Transnacionales**. Geneva, 2016, p.16

[3] ZUBIZARRETA, Juan Hernández; RAMIRO, Pedro, **Against the 'Lex Mercatoria':** proposals and alternatives for controlling transnational corporations. Madrid: OMAL, 2016, p.65

[4] We recognize these terms carry slightly different and have different political uses, but for the sake of the text, we'll use the most common ones, supply chain or value chain.

escape national justice systems. In fact, bilateral agreements, deficient regulatory frameworks, lack of transparency in business relations throughout the value chain, and the absence of means (e.g. financial, legal representation, technical advisory) for communities to access judicial systems make it difficult for those affected by violations to access domestic institutions for reparation and accountability claims.

TNCs do not exist as a single legal entity. Their structure is extremely complex, with many companies registered in different jurisdictions, which are broken down into more subsidiaries or contractors in many other countries. This separation of registration facilitates their benefiting from the theories of limited liability and of separation of legal personality. While for these theories each legal person is seen as a separate entity, parent companies are profiting from violations without ever being liable for it[5]. These giant economic groups are organized in such a cryptic way that getting to the real decision maker – if there is one to be singled out – or to the parent/controlling company is almost impossible, and transparency of contracts and management activities are not common practice for large conglomerates.

Domestic institutions are, in general, not able to effectively deal with such transnational issues, which results in a powerful and coercive 'architecture of impunity'. Built upon Free Trade Agreements, Intellectual Property Rights, and ISDS mechanisms, this architecture is one by which companies ensure that trade and investment laws (*lex mercatoria*) have maximum force while no effective international regulatory framework is capable to enforce the protection of human rights with even half the vigour.[6] Finally, there are currently no international mechanisms specifically established to provide for legal claims or validation of judgements in relation to corporate activities in a third country.

These are gaps that must be addressed, and that cannot be achieved without the narrowing of the scope of the future Treaty on TNCs and OBEs with transnational or cross-border activities. The LBI must be able to address the issues above in sufficient detail to be effective, and it can only do so with a clear focus. If the LBI is to effectively regulate TNCs activities, it must establish specific obligations for TNCs and economic groups to respect human rights, recognizing their joint and several liability with all the entities along the supply chains they control or profit from. There must be, for instance, the expanded extraterritorial mechanisms and jurisdiction, provisions on mutual legal cooperation and adjudication, norms that all related to a focus on the cross-border movement of goods, services and profits.

When violations occur in the framework of domestic activities of State-ownedor small and medium enterprises (SMEs) **without** a transnational character, they should fall into the scope of domestic legislation and can thus be remedied by domestic legislation alone. States have the power and the possibility to regulate companies acting only within their territory, while TNCs use their complex structure to evade this regulation. In fact, one of the main challenges remains accessing the parent or controlling company at the top of the chain. This is necessary because even when it is possible to reach a favourable judgement against the national branch of a TNC, the subsidiary, or the

[5] URIBE, Daniel and DANISH, **Designing an International Legally Binding Instrument on Business and Human Rights**. Geneva: South Centre, 2020. https://www.southcentre.int/wp-content/uploads/2020/07/Designing-an-International-Legally-Binding-Instrument-on-Business-and-Human-Rights-REV.pdf

[6] ZUBIZARRETA, Juan Hernández; RAMIRO, Pedro. **Against the 'Lex Mercatoria':** proposals and alternatives for controlling transnational corporations. Madrid: OMAL, 2016

supplier, the enforcement of such a sentence with regard to the parent or controlling company is often far harder to achieve.

Some argue that State-owned enterprises or domestically registered companies could escape liability if the scope of the LBI remains as established in Resolution 26/9. Nevertheless, in case a State-owned enterprise has transnational activities, or if a SME is part of the supply chain of a given TNC, they will naturally fall under the scope of the Resolution.

Moreover, in accordance with the mandate established in Resolution 26/9, it is not the competence of this OEIGWG to deal with State-owned or domestically registered companies that do not have any transnational character. Of course, these companies have obligations in relation to human rights and should be regulated nationally, but the gaps the LBI should focus on and for what it was advocated for from its inception are the ones TNCs benefit from. If those companies are integrated in a TNC supply chain – therefore having a transnational character – they will and have to be covered by the scope in Resolution 26/9.

In order to ensure this, it is imperative to establish clear and effective provisions that define economic groups, and recognise the joint and several liability of TNCs with all the entities along their supply and production chains – including private and public investors, international economic and financial institutions, domestically registered companies with cross-border activities, and banks and financiers participating through investments in the production processes, for all of their activities.

The spirit of Resolution 26/9 and the LBI's intended scope in the successive Drafts

This section will explain the main elements of this debate in order to have the necessary arguments to defend Resolution 26/9 and to refocus the discussions on the core of the problem: the global architecture of impunity that TNCs profit from.

Resolution 26/9

Resolution 26/9, which defines the mandate of the OEIGWG and was democratically adopted by the Human Rights Council in June 2014, states that:

- Operative paragraph 1: *[The Human Rights Council] Decides to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be* ***to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises;***[7]

Resolution 26/9, in its first footnote, defines 'other business enterprises' as follows: "*Other business enterprises" denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.*

[7] Emphasis added.

Resolution 26/9 consequently clearly establishes the mandate of the OEIGWG and the subjective scope (or subjects) of the future instrument. Nevertheless, the footnote does not clearly define what 'transnational character' or 'operational activities' mean. Since most States require local registration to authorize a transnational corporation to operate in their territories, the future LBI, if explicitly excluding "*local businesses registered in terms of relevant domestic law",* could in practice render itself ineffective. Given the immense economic power of TNCs, they could always try and find a way to appear to be, in legal terms, just another 'local business'. This is a very limited and ill-intended interpretation of the footnote, but it is one that needs to be considered if TNC activities are to be truly regulated. The fear that TNCs might "get away with murder" simply by registering locally is one of the main arguments used by some States and organizations to expand the scope of the future LBI to be applicable to all business enterprises and activities. If all businesses are covered, they argue, then there is no escape for TNCs.

However, the interpretation of the LBI provisions can never be done in isolation. As has been argued by the Global Campaign from the start, Resolution 26/9 and its footnote need to be interpreted as part of a whole system of international human rights law (encompassing treaties, customary norms, case law, doctrine, soft law instruments)[8] and, accordingly, as part of the evolving and progressive interpretation of international human rights norms. It is obvious that "other business enterprises" of Resolution 26/9 refers to those parts of TNC-controlled transnational value chains, only disregarding exclusively local businesses that are in no way a necessary part of these chains.

The scope of application of the future LBI should then be able to determine two levels: first, the "who", i.e. which entities will be held liable (the subjective scope), namely TNCs and other business enterprises (OBEs) with a transnational character; second, it should establish "what" activities of TNCs and other business enterprises with a transnational character fall under the application of the LBI (its objective scope), namely, according to the Resolution, their transnational or cross-border activities.

It is therefore not only unnecessary but definitely also not advisable to include in the future LBI a specific definition of TNCs and OBEs of a transnational character based on their legal registration because one can always count on fancy lawyers finding legal loopholes in definitions[9]. Thus, it is imperative that the future Treaty avoids falling into this trap. This means that Art. 1 on *Definitions* should **not** include a definition of TNCs or OBEs. Nevertheless, Articles dealing with "*Access to Remedy*", "*Liability*" and "*Jurisdiction*" should include clear language and effective provisions to establish joint and several liability of parent companies with all entities along their supply chains[10]. Thus, the core of the scope of the future LBI becomes relational, not static.

In addition to reaffirming its subjective scope on TNCs and OBEs that have a transnational character, the future LBI should then also clearly define its **objective scope throughout the document.** This means that the LBI should also clarify that it will apply to "all human rights

[8] Article 38 of the Statue of the International Court of Justice.

[9] URIBE, Daniel and DANISH, **Designing an International Legally Binding Instrument on Business and Human Rights**. Geneva: South Centre, 2020. https://www.southcentre.int/wp-content/uploads/2020/07/Designing-an-International-Legally-Binding-Instrument-on-Business-and-Human-Rights-REV.pdf

[10] Similar provisions are enshrined in the concept of "Unidad de Empresa" or in "Grupo Econômico", respectively in Colombian and Brazilian legislations.

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."[11]

Beneath is a presentation of the evolution of the scope provision in all documents and drafts presented by the Chair as a basis of negotiation, in order to show the intention of the OEIGWG when approving Resolution 26/9 and how it has arbitrarly changed without a clear democratic process.

The Document of Elements

In the first document presented by the Chair of the process (the Ambassador of the Republic of Ecuador to the UN) during the 3rd session of the OEIGWG in 2017, the defined scope was clear, and logically in compliance with the mandate established in Resolution 26/9:

> *"[…] based on the deliberations of the first two sessions […] the objective 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 […]."*[12]

The Zero Draft

The following year, at the 4th session of the OEIGWG, the Chair presented the Zero Draft Treaty in which the objective scope was still in line with Resolution 26/9 and the Elements Document, though in a slightly modified and perhaps watered down form that blurs to a certain degree the subjective scope as defined in Resolution 26/9:

> *"This Convention shall apply to human rights violations in the context of any business activities of a transnational character."*[13]

The First Revised Draft

However, not even one year later, in 2019, a few months before the start of the 5th session of the OEIGWG, the Chair presented the First Revised Draft of the LBI, in which both the subjective and the objective scopes of the future LBI were surprisingly and arbitrarily extended to all types of business enterprises, including State-owned enterprises and SMEs that do not have a transnational character or cross-border activity.

> *"This (Legally Binding Instrument) shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character."*[14]

[11] De Schutter, Olivier. The "Zero Draft" for a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises: A Comment, 2018

[12] Elements for a legally binding instrument on TNCs and other business enterprises with respect to human rights, Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9, p.4, 2017.

[13] Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, Zero Draft, 2018).

[14] Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, OEIGWG Chairmanship Revised Draft, 2019.

And the successive Drafts

Since then, despite the protests of organizations, social movements and affected communities gathered in the Global Campaign; despite the reiterated and successive interventions and demands from most of the States of the Global South asking for the reinstatement of the original path of the process, the scope illegitimately continues to apply in the drafts presented by the Chair to any type of business enterprises. Contrarily to what is alleged – i.e. that expanding the scope of the LBI to all businesses and all business activities would improve its application and address some gaps – the text has been systematically and arbitrarily watered down, losing its much-needed focus on TNCs, which shows the real intention of the purported broadening of the scope.

In March 2023, the Chair even attempted to impose on States negotiating the LBI the broadening of the scope and to shut down all discussions in that regard through a procedural document, the guidelines for the intersessional period, disregarding once more the democratic character of the process. Additionally, the Chair indirectly put the blame for the slowness of the process on the States that defend the original scope:

> *"For this process to move forward, States should accept that the instrument will apply to all companies and business activities […]."*[15]

Broadening the scope to "all business" enterprises: Why?

The actors that have been demanding the expansion of the scope – namely the corporate sector, States from the Global North, a few countries from the Global South aligned with Global North' positions, and even some civil-society organizations – never argued that broadening the scope follows the mandate of Resolution 26/9. Indeed, they know very well that this demand does not reflect the agreed and mandated scope. They simply do not accept t the democratic decision and seek to change the nature of the mandate of the Working Group to please big business interests and corporate privileges.

Broadening the scope of the future LBI to "all business enterprises" or "all companies and all business activities" is the centrepiece of corporate strategies to avoid being held liable for human rights violations. This way, they succeed in a double strategy: 1) the future LBI will not focus on cross-border liability, thus having much broader and weaker provisions so that they can regulate all possible corporate structures; and 2) liability will continue to be pushed on to the smaller and weaker links of their value chains.

In fact, these very same actors that actively engage in the negotiations asking for the broadening of the scope are the same ones advocating for the opposite when it comes to national or regional regulations. When debating norms such as the French Corporate Duty of Vigilance Law and the EU Corporate Sustainability Due Diligence Directive, they claim that only big transnational corporations should be covered so that they can protect their domestic companies and economies while benefiting from the remaining legal gaps. However, these actors that advocate for the broadening of the scope of the LBI represent TNC' interests, not SMEs'.

[15] Document of Guidelines for the intersessional work ahead the 9th session, Chairmanship of the OEIGWG, March 2023.

Global North States know that State-owned companies and SMEs account for most of the quality jobs and a significant part of the Industrial Gross Domestic Product in developing countries' economies. Broadening the scope of the LBI is also a way for TNCs to gain competitive advantages over them.

Experts from the International Organization of Employers and the International Chamber of Commerce argue in negotiation sessions that TNCs do not violate human rights, and that whenever "abuses" occur, they are the result of the conduct of subsidiaries and smaller domestic companies. In their reading, only these entities should be held liable, and not the parent company or controlling TNC[16].

When advocating for the broadening of the scope, TNCs do not seek to be constructive, to make the future instrument more effective. They defend their interests. This is why representation of the business sector and corporate interests should not be allowed in the negotiation room, since there is a clear conflict of interest. The OEIGWG is not a multistakeholder space of dialogue, it is a State-led space for negotiations to regulate TNCs. Corporations are profit-oriented entities that do not have the protection of the rights of people and communities affected by business activities as a goal, let alone a priority. TNCs should not have the prerogative to choose what kind of obligations they want to have and which norms they want to follow.

To sum up: why would expanding the scope be a problem?

1) By expanding the scope to "all businesses" and all business activities, provisions on *prevention*, *liability* and *jurisdiction,* core elements of an effective LBI, have been weakened draft after draft . It is impossible for one document to be specific enough to be powerful while encompassing all types of businesses that might violate human rights. One can argue that even with a scope focused on all business enterprises and all business activities, specific articles in the LBI could have some provisions focused on TNCs. Nevertheless, even if there are some references to TNCs, the core of these articles would have to be applied to all business, stealing away from the LBI its capacity to address the major legal gaps which allow for TNCs' impunity, weakening its overall potential. This scenario is very much in line with the arguments that corporate representatives and their political allies (mainly Global North States) have defended in previous sessions of the OEIGWG.

For instance, in the latest clean draft presented by the Chair, the transnational dimension was diluted even more significantly, since Articles 6 and 8 only mention TNCs without specifying prevention mechanisms or liability conditions for them regarding their supply chains. In Article 9, on jurisdiction, the word "transnational" is not even mentioned. If the LBI is not able to address the specific legal gaps explored by TNCs in their cross-border activities, it will result in a document that will encounter the same pitfalls as other instruments in the face of growing corporate power and capture, which many States are not able to overcome.

2) Regarding procedural issues, it will be ineffective to address at the same level, and in one same legal instrument, entities like TNCs, SMEs, State-owned enterprises, public and domestic companies without a transnational character and even rural cooperatives, which in most countries

[16] Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Annex to the report on the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (A/HRC/49/65), 2021.

are recognized as “independent enterprises”. What do these last entities have in common with those transnational economic giants that exert monopolistic power over supply chains? It is simply not feasible to regulate key issues such as joint and several liability along global supply chains or jurisdiction of necessity (*forum necessitatis*) if all and every type of enterprises are to be included in the scope.

3) By putting TNCs and entities already subject to national control and regulation in the same basket, the effective implementation of the future LBI would create many technical difficulties. Obligations, guidelines, and monitoring and enforcement mechanisms of the future LBI will be totally void if they have to address millions and millions of companies around the world, from TNCs to SMEs and even peasant cooperatives.

4) The scale, income and profits of the economic activities of TNCs often surpasses the GDP of many States. The LBI must recognize these structural disparities of the globalized world economy, as well as acknowledge that mega-enterprises managed by TNCs are responsible for significant global and local environmental and human rights violations, such as with the collapse of the Fundão Dam in Mariana, Brazil, in 2015. Therefore, broadening the scope of the LBI implies equalizing companies with vastly different operational capacities and potential to violate human rights on varying scales.

Conclusion

It goes without saying that the above-mentioned arguments do not suggest that SMEs or State-owned enterprises operating exclusively domestically cannot violate human rights. However, when discussing an LBI that should address major existing gaps, it is important to focus on those entities with opaque structures and strategies that allow them to escape justice and accountability: transnational corporations, in the framework of their complex global supply chains.

Finally, throughout the negotiations, most States have emphasized the importance of adhering to the mandated scope of Resolution 26/9, most of them also victims of the predatory and monopolistic strategies of TNCs and their allies. For instance, since the 1980s, international financial institutions have been imposing policies and “development” programs (e.g.. the structural adjustment programs of the International Monetary Fund and the World Bank) to countries of the Global South, in exchange for financial aid, prescribing solutions based on the dismantling of States’ prerogatives and on the privatization of State-owned enterprises, precisely with the intent to pave the way for TNCs. The quest for TNC’s accountability is part of the struggle for States’ and peoples’ sovereignty and self-determination.

At the 9th session in October 2023, more than 60 countries of the Global South spoke strongly in favour of defending the scope on TNCs and other business enterprises of transnational character. Therefore, maintaining the scope as mandated by Resolution 26/9 is vital to preserve not only the future LBI’s effectiveness but also the democratic nature of the process.

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