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STATEMENT OF STATES AT THE 6TH NEGOTIATION SESSION OF THE LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS

POSICIONAMENTO DOS ESTADOS NA 6ª SESSÃO DE NEGOCIAÇÃO DO INTRUMENTO JURIDICAMENTE VINCULANTE SOBRE EMPRESAS TRANSNACIONAIS E OUTRAS EMPRESAS COM RESPEITO AOS DIREITOS HUMANOS

POSICIONAMIENTO DE LOS ESTADOS EN LA 6ª SESIÓN DE NEGOCIACIÓN DEL INSTRUMENTO JURÍDICAMENTE VINCULANTE SOBRE EMPRESAS TRANSNACIONALES Y OTRAS EMPRESAS EN MATERIA DE DERECHOS HUMANOS

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Abstract
O presente trabalho dedica-se a analisar o posicionamento dos Estados participantes da 6a sessão de negociação do instrumento juridicamente vinculante sobre empresas transnacionais e outras empresas com respeito aos direitos humanos. Através da análise dos documentos oficiais da sessão, dos statements divulgados pelos países e do relatório elaborado internamente pelo Homa no acompanhamento das negociações, foram selecionados os posicionamentos mais relevantes em pontos-chave de discussão e caros à efetividade do tratado, a saber, primazia dos direitos humanos, escopo, obrigações diretas para as empresas, responsabilização legal e due diligence, mecanismos de extraterritorialidade, forum non conveniens e forum necessitatis, e assistência legal mútua. Por meio da pesquisa aqui realizada, é possível compreender melhor o cenário atual da negociação do instrumento e traçar panoramas no futuro próximo.

Keywords
International Treaty on business and human rights. Human Rights Council. 6th negotiation session. Position of States.

Resumo
O presente trabalho dedica-se a analisar o posicionamento dos Estados participantes da 6a sessão de negociação do instrumento juridicamente vinculante sobre empresas transnacionais e outras empresas com respeito aos direitos humanos. Através da análise dos documentos oficiais da sessão, dos statements divulgados pelos países e do relatório elaborado internamente pelo Homa no acompanhamento das negociações, foram selecionados os posicionamentos mais relevantes em pontos-chave de discussão e caros à efetividade do tratado, a saber, primazia dos direitos humanos, escopo, obrigações diretas para as empresas, responsabilização legal e due diligence, mecanismos de extraterritorialidade, forum non conveniens e forum necessitatis, e assistência legal mútua. Por meio da pesquisa aqui realizada, é possível compreender melhor o cenário atual da negociação do instrumento e traçar panoramas no futuro próximo.
Palavras-chave
Tratado internacional sobre empresas e direitos humanos. Conselho de Direitos Humanos. 6a sessão de negociação. Posição dos Estados.

Resumen
El presente trabajo está dedicado a analizar la posición de los Estados participantes en la 6ª sesión de negociación del instrumento jurídicamente vinculante sobre empresas transnacionales y otras empresas en materia de derechos humanos. A través del análisis de los documentos oficiales de la sesión, los statements difundidos por los países y el informe elaborado internamente por Homa en el seguimiento de las negociaciones, fueron seleccionadas las posiciones más relevantes en puntos clave de discusión y apreciados por la efectividad de las negociaciones del tratado, a saber, primacía de los derechos humanos, alcance, obligaciones directas para las empresas, responsabilidad jurídica y due diligence, mecanismos de extraterritorialidad, forum non conveniens y forum necessitatis, y asistencia legal mutua. A través de la investigación que se realiza aquí, es posible comprender mejor el escenario actual de la negociación del instrumento y trazar panoramas en un futuro próximo.
Palabras clave
Tratado internacional sobre empresas y derechos humanos. Consejo de Derechos Humanos. 6ª sesión de negociación. Posición de los Estados.

1. INTRODUCTION

In 2020, the negotiations of the International Treaty on Human Rights and Business of the Human Rights Council reached the 6th Session[1], which took place from October 26 to 30, 2020, amidst the coronavirus pandemic. This time, the focus was on the Second Revised Draft[2], published by Ecuador as Chair of the Working Group[3]. The new proposal incorporated some of the discussions and demands of the 5th Session[4], but is still unable to convey the most urgent demands of those affected, and has inconsistencies with the objectives of the Treaty.

There were several changes resulting from the restrictions imposed by the global health crisis: each delegation could send only one representative to attend the event at the Palace of Nations, and several participations took place remotely, with pre-recorded videos or live interventions. Civil society entities were able to follow along, but the side events were limited to digital media only. In addition, the experts could not be present, and it was noticeable how the

1 Official website of the 6th Session: https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx

2 Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

3 The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights no Human Rights Council was created by resolution 26/09.

4 The statemets of the 5th Session can be found in the link: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/Annex_CompilationStatements_5th_session.pdf

emptiness of Room XX became determinant for the faster and more direct speeches, as well as the lack of non-moderated debates.

Another change is that States will be able to submit by February 2021, via their own form, requests for clarification and textual suggestions for the Third Draft.

First, the Chairperson made brief remarks regarding the changes brought about by the new *Draft*, then he passed the floor to the pronouncements of the States, and finally to civil society.

The 6th session had the participation of twenty-seven States[5]; Palestine and the Holy See as observers and the European Union as an international body. However, participation decreased significantly throughout the week and compared to the previous session, seven other countries[6] that were involved in the discussions did not speak, only the Holy See that had not spoken previously and, in this session, actively participated. Such decrease can be related to the coronavirus crises, but it is important to watch out for a possible undermining of the process.

In a different scenario of that of previous sessions, observing the actors who have actively engaged in the topic is essential, since they are the ones who will determine the perspectives of the following sessions, especially for the consultations already scheduled for May and June of 2021 and for the Seventh Session, scheduled for October.

The objective of this work, therefore, is to explain the arguments used by the States and analyze their contribution to the development of the Treaty. It should be noted that we will not discuss the articles themselves, since the Global Campaign has already published its own analysis of the meaning and effects of the provisions.

As of the closing date of this issue, not all of the statements had been published on the official page of the Human Rights Council, and an internal report made by Homa during the session was also used as source to fill in that gap.

2. CENTRAL ELEMENTS AND INTERVENTIONS

2.1 PRIMACY OF HUMAN RIGHTS

The primacy of human rights is one of the pillars that should be part of the foundation of a treaty on human rights and business. This is because it implies the hierarchical superiority of human rights norms over trade and investment treaties, as well as being a mechanism that places on the agenda of States the development of obligations that must be assumed by their governments in order to elaborate a whole system of protection and reaffirmation of the fundamental rights and freedoms of peoples in the face of transnational corporations.

This topic constitutes the second among the seven main points presented by the Global Campaign[7], which must necessarily be addressed in the Treaty to ensure its effectiveness. However,

5 There were nine Asian countries (Armenia, Afghanistan, China, India, Pakistan, Philippines, Russian Federation, Indonesia, Iran), eight Latin American (Brazil, Argentina, Chile, Ecuador, Mexico, Panama, Cuba, and Venezuela), eight African (Burkina Faso, Egypt, Ethiopia, Mozambique, Namibia, Senegal, South Africa), and three European (France, Switzerland, and the United Kingdom).

6 Algeria, Angola, Colombia, Honduras, Peru, Spain and Saudi Arabia

7 Global Campaign. UN Binding Treaty: Written Contribution Of the Global Campaign, February, 2019, p. 12. Available at: https://www.stopcorporateimpunity.org/un-binding-treaty-written-contribution-of-the-global-campaign-march-2019/ Accessed on: 10 Feb 2021.

the topic is barely touched upon, despite being the heart of the document, and thus needing a clear presentation.

Notably, the Campaign proposes the creation of a specific article on the "Primacy of Human Rights"[8], which seeks to establish general obligations on State parties and transnational corporations to ensure that all their activities take into account the respect and protection of human rights.

However, with the exception of the State of Palestine, which is an observer member, no country emphasizes the absence of a clear mention of the primacy of Human Rights in the text of the Draft. The comments regarding the protection of Human Rights as one of the pillars of the Treaty, at most, make mention of the Guiding Principles, whose provisions imply the trinomial Protect, Respect and Remedy which entails a certain protective bias. However, these Principles consist of open standards, with a very generic text, since they constitute only guiding parameters, which are not sufficient to give effectiveness to the LBI[9], in opposition to what is aimed at with the adoption of the expression Primacy of Human Rights.

2.2 SCOPE

The scope of the treaty is also one of the central elements of dispute in the negotiation. In this sense, in order to guarantee the effectiveness of the document, it is crucial to limit the power and end the impunity that currently favors the TNCs, so as to achieve a more effective protection of Human Rights.

Thus, the scope is a key point of the Treaty[10], and there is a great debate about its wording, to the extent that, for companies, extending the applicability to all types of businesses leads to a practical inapplicability of the Treaty, favoring their monetary interests, since there would be little oversight. On the other hand, the limitation on the incidence of Human Rights protection only harms groups that are vulnerable to corporate action, falling once again into a context of practical ineffectiveness.

Then, Article 3 of Draft 2 brought a text that is mostly compatible with business interests, which diminishes the effectiveness of the Treaty, adopting broad concepts and provisions that leave great openings for States to act. Thus, the Global Campaign proposes that the article in question, in order to become more solid, should include in its text the delimitation of the scope to transnational corporations or those that carry out transnational activities, at the risk of making the document ineffective[11]. In addition, it suggests adding all the Human Rights recognized in international treaties, referring to the list in the preamble that is expected to be expanded.

[8] Global Campaign. Key points of the Global Camping in relation to the UN Treaty. Available at: https://www.stopcorporateimpunity.org/wp-content/uploads/2019/05/Pontos-chave-para-a-Campanha-Global-sobre-o-tratado-vinculativo.pdf Accessed on: 09 Feb, 2021

9 Legally Binding Instrument.

[10] Global Campaign. Key Points of the Global Campaign regarding the UN Treaty. Available at: https://www.stopcorporateimpunity.org/wp-content/uploads/2019/05/Pontos-chave-para-a-Campanha-Global-sobre-o-tratado-vinculativo.pdf Accessed on: 09 Feb 2021

11 Global Campaign. Key Points of the Global Campaign regarding the UN Treaty. Available at: https://www.stopcorporateimpunity.org/wp-content/uploads/2019/05/Pontos-chave-para-a-Campanha-Global-sobre-o-tratado-vinculativo.pdf Accessed on: 09 Feb 2021

Let's look at the position of some countries on the issue, according to their statements delivered at the 6th Session[12]:

2.2.1 Brazil

The Brazilian delegation is in favor of maintaining the expanded concept, which, as stated, contributes to the ineffectiveness of the document. Notwithstanding, contrary to the position of the Campaign, which suggests that the Treaty implement all internationally recognized Human Rights, Brazil is in favor of applying only the rights contained in treaties ratified by the countries themselves.

2.2.2 China

The Chinese delegation, in turn, is unhappy with the amplitude of the definition of the scope, in relation to all commercial activities, and also disagrees with the positions referring to Human Rights and fundamental freedoms of recognition through customary international law, arguing that such standards are not supported in all countries of the world. The delegation also criticizes that many of the Human Rights protected by the Treaty would already be protected by national laws of the countries, so that it would not be necessary to spend resources to guarantee them, but only to aim for a text that is complementary to domestic laws.

2.2.3 Egypt

Egypt states that the scope of the treaty should remain focused on TNCs, in accordance with the objectives of Resolution 26/9. In addition, it is important to consider value chains and accountability for abuses that occur along value chains. It also emphasizes the importance of the centrality of the victims in the process, since one of the objectives of the Treaty is to guarantee them protection and access to the necessary remedies. Thus, the Egyptian delegation stresses the need for equal access to justice and attention to non-discrimination, and nevertheless supports the inclusion of protection and redress of the environment.

2.2.4 Namibia

The country believes that the wording of the article regarding transnational corporations and other business enterprises comes close to the objectives of Resolution 26/9. It emphasizes, however, that throughout the text, TNCs should indeed be the ones under focus, and not the generic application of the LBI to any company, since what is sought is a legal direction, in an attempt to protect Human Rights from violations perpetrated by large corporations, as well as to provide remediation mechanisms for victims. In this regard, Namibia also pointed out that the adoption of the Guiding Principles on Human Rights and Business gives States a degree of flexibility to implement obligations that lead to greater favoritism for corporations and, as a result, cause greater impacts in the context of human rights protection.

12 The statements from the 6th session can be accessed via the link: https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx

2.2.5 ETHIOPIA

For Ethiopia, the scope of the treaty should stick to the provisions of Resolution 26/9, restricting itself to the observance of the TNCs. The country also points out that the text of the article is vague and unclear, and it is necessary to better establish the provisions made in order to not create uncertainties in the application.

2.2.6 EUROPEAN UNION

The participation of the European block was brief and incisive. There was only a request for clarifications regarding the new terminology used in the scope, without adopting a position on the changes made or even suggestions for a new wording.

2.2.7 MEXICO

Mexico is also in favor of the terminology of all business enterprises, which implies the expansion of the scope of the Treaty to a focus on all enterprises, not only transnational corporations, as what is seen in the text. Nevertheless, the country stand for the elimination or at least the reformulation of §3 of Article 3 (*Scope*), which deals with international human rights instruments considered in the Treaty, since there are differences among States, in the sense that not all ratify the same treaties, which could create uncertainty about the obligations demandable by victims.

2.2.8 PANAMA

Panama presents its position with the purpose of making the wording of the Treaty clearer, as it is necessary to differentiate which provisions relate to any and all companies and those specifically directed to TNCs. However, the country sees the wording of §3 as limiting, in the sense that when establishing the applicability of conventions to which States are parties, this criterion can make access to justice more difficult for victims.

2.2.9 CUBA

The Cuban delegation takes the position that the Treaty, as a document that seeks to limit the power of companies to act should be limited to the provisions of Resolution 26/9, that is, its scope should refer to TNCs. The other companies and the violations committed by them must, or should, be covered by the internal regulation of the countries and not by an international instrument, unless they are mentioned in a general and voluntary manner throughout the text. In this way, the treaty could be considered as a basic element to inspire domestic legislation to regulate companies within the national borders of the countries, without harming the binding effectiveness of the instrument, compromising its objective.

2.2.10 PALESTINE

The State of Palestine, contrary to the position adopted by most of the other nations, states that the scope of the Treaty should focus on the actions of the TNCs and, furthermore, also reinforces the Right of Self-determination of Peoples, as well as the application of the norms of international

humanitarian and criminal law, in addition to the provisions already contained in Paragraph 3 of Article 3 (*Scope*).

2.2.11 RUSSIA

The country does not agree with the existence of an article limiting the scope of the treaty, on the grounds that it would be too general and would go against the provisions of Resolution 26/9, and should therefore draft the text in such a way as to restrict the protection of human rights within the framework of TNCs. It also argues against expanding the obligations of the States and holding individuals or corporations accountable for human rights violations. It states that the wording of the article, which brings an exemplary list of international agreements to be considered for the protection of human rights, can only act as a complication for companies - that are left without understanding the parameters that must be met. In this sense, if they act in accordance with national legislations, companies could be subject to complaints, bringing a burden that not all of them would be able to deal with. The Russian Federation questions the effectiveness of the treaty, arguing that it would be more interesting to assume the obligations for the protection of Human Rights through other multilateral mechanisms, leaving them up to the States - as it has already been done by many.

2.3 DIRECT OBLIGATIONS FOR BUSINESS

Without the imposition of clear and objective sanctions to curb the mechanisms that allow impunity of transnational corporations, and without the establishment of direct obligations, there will not be an effective protection of human rights and a recognition of the accountability of transnational corporations for their violations. In this sense, the mandate of Resolution 26/9 foresees the need for these obligations to be emphatically listed and in distinct sections for States and companies, taking into consideration the corporate capture of States that have a certain economic dependence on the activities performed by TNCs.

By the wording of Article 3.2 of the Draft 2, which maintains the obligations only for the States and make them responsible for establishing obligations for companies, it ignores the economic dependence that some nations have on business activities. In this way, the fear of losing business investment in their territory corroborates to the lack of inspection of these nations of those corporations, making many of these States vulnerable and susceptible to the perpetuation of human rights violations. The lack of this provision limits the document's effectiveness and reproduces the logic of the Guiding Principles, according to which, States would be violating such rights and therefore obligations would be assigned to them, and companies, who would promote impacts or abuses, would only have to follow principles in their activities.

Moreover, even the obligations directed to the States have as a characteristic the vagueness and the imprecision of their provisions, without the forecast of public policies that make their fulfillment effective, making the voluntarist character remain, as well as the gap at an international level of an effective normative framework of accountability of companies for human rights violations.

In this sense, the Global Campaign is in favor of the creation of direct obligations to TNCs[13], aiming at the respect of the private agents to the principles and parameters of Human Rights imposed by the United Nations and the primacy of individual rights, with the identification of the dimension and protection of their rights, either in the prevention, mitigation or reparation of violations caused by corporations. Let's take a look at the position of the countries that have expressed themselves on the subject:

2.3.1 Argentina

The Argentinean delegation agrees with the statement that companies have the responsibility to respect Human Rights, not causing harm or negative impacts. However, it adds that this responsibility does not rely on the size or sector of the company, which corresponds with a probable approval in relation to the scope of the treaty. It also emphasizes that violations of these rights have a disproportionate impact on different social groups, and that the State should pay special attention to minority and vulnerable groups.

2.3.2 Armenia

The country believes that no human rights violation by companies can occur without the tacit support of the State, or at least without its omission regarding the way business activities are being carried out in its territory, and that there must be obligations for both actors. It is necessary to examine the relation of complicity between governments and transnational corporations.

2.3.3 Brazil

The Brazilian delegation points out the generality and lack of clarity of the instrument regarding direct obligations, questioning whether the legal liability plan would bind obligations to companies or only to States. It also criticizes the excessive aiming of these obligations to States, which could make it difficult to implement the document.

2.3.4 Burkina Faso

The nation points out the need for the draft to focus on the accountability of transnational corporations when it comes to human rights violations, rather than the excess of obligations directed at States, although it recognizes that it is their primary duty to respect and protect the rights of their people.

2.3.5 China

Taking a conservative position on corporate accountability, China advocates for not creating "unnecessary" burdens on private entities in order to protect their right to development, as well as their legitimate interests. Notwithstanding, it advocates flexibility and respect for each country's domestic laws to protect those affected by human rights violations rather than internationally

[13] Global Campaign. Key Points of the Global Campaign regarding the UN Treaty. Available at: https://www.stopcorporateimpunity.org/wp-content/uploads/2019/05/Pontos-chave-para-a-Campanha-Global-sobre-o-tratado-vinculativo.pdf Accessed on: 09 Feb 2021

imposing new obligations on States. This understanding clashes with the position of the Global Campaign in not taking into account the corporate capture marked by the difficulty in overcoming the corporate lobby and the inefficient regulatory frameworks on human rights in each country.

Even with regard to prevention, China defends the vagueness of the processes and mechanisms that ensure due redress for individuals, through a broadly worded provision that merely reaffirms the obligation of States to ensure due reparation.

In addition, it argues that just as there is a provision that States must protect human rights organizations, there should also be a provision for obligations on the organizations, including, for example, respect for the law, transparency, etc.

2.3.6 CUBA

The country agrees with holding companies accountable through a binding normative instrument with direct obligations. It points out the corporate impunity that afflicts countries and also argues that the lack of an international legal framework corroborates to such impunity.

2.3.7 ECUADOR

The country maintains that the instrument should align with the pattern of other international non-binding instruments, and that binding mechanisms, with the imposition of direct responsibilities, are complementary to voluntary mechanisms, as both are mutually reinforcing. It also argues that the three paragraphs of Article 5 (*Protection of Victims*), should be presented as rights of victims rather than obligations of the State in order to facilitate their application.

2.3.8 EGYPT

Although it recognizes the role of business in socio-economic development, Egypt emphasizes the need to regulate business activities in order for such development to be equitable and inclusive, with respect for human rights. To this end, it stresses the need to impose direct obligations on business, arguing that voluntary instruments of soft law are neither sufficient nor enforceable against corporate power.

2.3.9 FRANCE

The French delegation directs its speech to the commitment to corporate responsibility for its human rights violations and regrets the absence of the imposition of direct obligations on business in Article 6 (*Prevention*).

2.3.10 INDIA

India's position is in favor of imposing direct obligations on TNCs, moving away from a soft law approach. As such, it recognizes the need for corporate accountability through a binding normative instrument. It also points out that such a document must be flexible and balanced if it is to gain broad acceptance among as many States as possible.

2.3.11 MEXICO

With regard to direct obligations, Mexico states that the rules should be clear for the companies, avoiding ambiguity or vagueness as much as possible in the provisions.

2.3.12 RUSSIA

The Russian delegation points out the vagueness and generality of the direct obligations in the document, as well as the need for a conceptual reformulation of what would qualify as a human rights violation, as it believes that such a definition is unduly broad. It points out that the Treaty creates a privileged mechanism for the protection of such rights in the context of corporate activities, but that many of these rights are already recognized in international law, and States already have an obligation to apply them, regardless of corporate activities.

2.3.13 SENEGAL

The country is in favor of imposing direct obligations on States and companies, supporting the implementation of public policies and procedures that provide means of prevention, protection, and reparation for those affected by human rights violations as a result of business activities.

2.4 LEGAL LIABILITY AND DUE DILIGENCE

Legal liability can be conceptualized as the form of legal accountability of States and natural or legal persons for actions or omissions that violate human rights. In this regard, the language of Draft 2 maintains the state-centric logic by delegating to States the task of structuring the legal liability of natural and legal persons. In light of this, it can be said that such a provision is questionable, since it goes against the central objective of the Treaty, which is to create a binding international instrument that allows the liability of transnational corporations.

The Global Campaign has made some important comments on this issue[14]. The first is the defense of the criminal liability of legal persons, seen as an essential aspect, since civil sanctions are not sufficient and do not act as a deterrent to corporate action. Furthermore, the Campaign also defends the express mention of vulnerable groups that need special protection due to their peculiarities. Finally, it emphasized that the provision that companies must keep a fund for any request of compensation that they might come across is fundamental, since it is a way to ensure that these companies are held accountable and can compensate people affected by their activities[15].

Regarding due diligence, that is, a procedure previously adopted by companies in order to assess the risks of their business activities and its impact on human rights, although there is express mention in the wording of the Draft, its textual construction is still very rudimentary, not being able to effectively address human rights violations by companies. In this sense, as it is clear the lack of interest of companies to monitor their own actions, it should be provided for in the Draft for an independent monitoring of due diligence, having Human Rights as its main focus.

[14] Global Campaign. Key Points of the Global Campaign regarding the UN Treaty. Available at: https://www.stopcorporateimpunity.org/wp-content/uploads/2019/05/Pontos-chave-para-a-Campanha-Global-sobre-o-tratado-vinculativo.pdf Accessed on: 09 Feb 2021

[15] Global Campaign. GLOBAL CAMPAIGN STATEMENT ON THE SECOND REVISED DRAFT OF THE BINDING TREATY. Available at https://www.stopcorporateimpunity.org/wp-content/uploads/2020/08/Statement_GC_2nd-draft-TNCs_ENG.pdf

The Global Campaign's position supports the idea of creating direct obligations on companies through the development of binding Human Rights Due Diligence (HRDD) standards by State Parties. It is crucial to establish a rule that obliges the parent corporation to monitor the activities performed by its affiliates, subsidiaries, subcontractors and suppliers. In this way, it will be possible to regulate and verify the damaging potential of corporate activities based on the assumption of a logic aimed at protecting human rights.

Furthermore, the Campaign also states that the mere adoption of due diligence by a company cannot be used as a factor for its acquittal in cases of human rights violations, since the focus is on the result, and not on the simple implementation of the procedure[16].

2.4.1 Brazil

Brazil has a conservative position regarding the legal liability directed at companies. In this context, the country pointed out that it is necessary to demonstrate a clear causal relation between the damage caused and the company, so that the company can be held liable. In addition, it also pointed out that the text of the *Draft* has some provisions that are excessively directed at States, which could hinder the implementation of the binding instrument.

Regarding criminal liability, the Brazilian delegation stated that the writing of the Draft should focus exclusively on administrative and civil liability, and sees the inclusion of criminal liability with concern. Finally, it asked for more calrification regarding international standards that guarantee reparation for victims of human rights abuses and how these can serve as a reference for remediation.

2.4.2 Russia

Russia stated that the notion of criminal liability of legal persons does not exist in its legal system and, therefore, its inclusion in the treaty would represent an obstacle to its adoption. In addition, the country reiterated that the Draft should create standards of human rights protection without prejudging the mechanisms that States can use to enforce them. Finally, it argued that §11 of Article 8 - which provides that States shall adopt, in accordance with their domestic laws, measures to establish the criminal liability of natural and legal persons - is unacceptable from a legal standpoint.

2.4.3 Panama

The State claims that the Panamanian legal system does not provide for criminal liability for legal persons.

2.4.4 Mexico

Mexico suggests the exclusion of several phrases from the text of the *Draft* that are not in accordance with the countries' domestic legal systems. Thus, the State claimed that the Treaty should recognize in its wording the heterogeneous legal systems of the various States Parties. Regarding financial security, the country asserted that §6 of Article 8 - which requires companies to maintain

[16] Global Campaign. GLOBAL CAMPAIGN STATEMENT ON THE SECOND REVISED DRAFT OF THE BINDING TREATY. Available at https://www.stopcorporateimpunity.org/wp-content/uploads/2020/08/Statement_GC_2nd-draft-TNCs_ENG.pdf

financial guarantees to cover potential claims for compensation - would be counterproductive. Thus, it stated that not all legal or natural persons have the necessary capital to ensure such financial security.

2.4.5 China

Regarding legal liability, China said that Article 8 (*Legal liability*) should include the principle of complementarity, so as to respect the legal stability of each country and the principles of each State. Thus, § 2 and §3 should be more flexible, avoiding the adoption of mandatory regulations. Also, in §3, it argued that the manner of pursuing civil and criminal proceedings is not homogeneous across countries, thus requiring the treaty to have a broad language in order to fully encompass all nations. Moreover, the Chinese delegation informed that some States have already manifested themselves regarding the lack of provision for criminal liability for legal persons, which would make it difficult for them to adhere to the binding instrument. Thus, according to their understanding, it is impossible imagine that all States Parties to the Treaty would fully incorporate the list of international crimes into their criminal legislation, which would constitute a violation of the principle of national sovereignty.

Regarding due diligence, China stated that according to §8 of Article 8 the mere adoption of Human Rights Due Diligence does not account for exempting the company from liability in cases of Human Rights violations. Thus, the country maintained that such a provision makes Article 6 (*Prevention*) useless. Finally, it claimed that the criteria set forth in the *Draft* for compliance with Human Rights Due Diligence is unclear, making large companies to just ''try their best.'' And then, it reiterated that since simply adopting the HRDD is not responsible for exempting liability for human rights violations, companies will lose motivation to adopt it. Thus, according to the State, the HRDD should be an obligation of conduct, rather than an obligation of results.

2.4.6 Philippines

The Philippine delegation pointed out that the *Draft* should be clearer on the issue of whether a natural person incurs liability for human rights violations. According to the State, guided by the corporate activity doctrine, the accountability of members of corporations should be distinct from the accountability of the natural person. Thus, individuals cannot be held liable for the acts or omissions of the legal person, but for a few exceptions.

On the financial security, the country claimed that §6 of Article 8 should adjust its language to adopt a more imposing tone (change from may to shall). Thus, even if the TNCs declare bankruptcy, the claimant will have access to some financial security.

2.4.7 Ecuador

The State pointed out that Article 8 (*Legal liability*) contains several technical improvements when compared to the previous Draft. Nevertheless, it recommends deleting the list of crimes and offenses, and further suggests that the notion of access to justice should be more generic, and should walk in line with the language and purpose of Article 4 (*Right of Victims)*. Finally, it stated that the

Treaty should indicate more clearly which acts or abuses of Human Rights will give rise to criminal, civil or administrative consequences.

In addition, the Ecuadorian delegation further argued that §4 of Article 8 should be reworded to take into account the possibilities for civil consequences. Further, it also pointed out that in §5 there is no adequate reference to an issue of legal liability, as intended by Article 8 in general, and should be relocated to Article 7 (*Access to Remedy)*. Finally, it argued that the idea of Human Rights Due Diligence is linked to the issue of prevention rather than liability, and should be relocated to Article 6 *(Prevention)*.

2.4.8 PALESTINE

The State of Palestine stated that §4 of Article 8 should reinforce the notion of criminal liability - which can be achieved by mentioning specific examples of sanctions or penalties that companies can respond to if they are prosecuted-. As examples, the country cited withdrawal of license to operate and termination of contracts or projects. It further suggested that in the text of §9 of Article 8 it is crucial to state that criminal liability can also be triggered by a business activity.

On the criminal liability of legal persons, the Palestinian delegation stated that States parties should ensure that their national legislations have such a legal provision. Furthermore, the list of crimes should be understood as all crimes already provided for in international law instruments, not only restricted to the list adopted by the *Draft*. Finally, Palestine argued that it would be important to establish a new provision to criminalize political and governmental influences when there is a relation to human rights violations.

With regard to *due diligence*, the observer State said that the focus of the HRDD is not on implementation, but rather on the harm caused in respect to the principle of duty of care.

2.4.9 EGYPT

Regarding the criminal liability of legal entities, the country declared itself aware of the complexity of the issue, since many States do not have this provision in their legal systems. Therefore, it would be feasible to include a specific list of crimes to overcome this obstacle. Finally, it alleged that §9 of Article 8 lacks clarity regarding the expression "criminal offences under international human rights".

The Egyptian delegation emphasized the importance of the *Draft* sticking to the provisions of Resolution 26/9. As such, the State pointed out the need for the reference of the terms abuses and violations. Furthermore, it asserted that the changes in §1 of Article 8 could adversely affect the principle of legality *(non poena sine lege)*. Also, on this point, the term functionally equivalent should be eliminated, and replaced by criminal or administrative liability, so as to eliminate all differences between different legal systems.

Regarding due diligence, Egypt stated that the provisions of §8 of Article 8 are beneficial, since the mere implementation of the HRDD cannot acquit States that have committed *abuses* and *violations*, and the article should be interpreted in line with Article 6 *(Prevention)*.

2.4.10 INDONESIA

It stated that §7 of Article 8 is unclear because it has very broad language. Thus, it creates confusion between the terms business relationship and business activities. Furthermore, regarding due diligence, the country claimed that §8 of Article 8 is also too broadly worded, creating a restrictive formula of how International Courts should come to a decision in judicial proceedings.

2.5 VALUE CHAINS

The phenomenon of neoliberalism was responsible for decentralizing the scales of production of companies in a process of transferring the production order from central countries to those of the global periphery due to the low production costs that are, in turn, direct results of poor labor regulations. This is the context of the emergence of value chains[17], a phenomenon that has increasingly expanded throughout the countries of the Global South given the unbridled quest of companies in search of economic benefits. Considering the text of the *Draft 2*, the document is considerably lacking with regard to value chains, as there are no discussions about the provisions on the responsibilities of companies involved in activities throughout the production process. Thus, although sometimes the topic is mentioned in the text, the wording is flawed. In this sense, due to the lack of conceptualization and clear provisions for the implementation of effective mechanisms that consider the unfolding of this phenomenon - such as the link between parent and subsidiary corporations and their accountability for their actions or omissions - the draft is considered to be unsatisfactory.

The Global Campaign's position on the issue is that the wording of Draft 2 is not focused on its real objective: to combat impunity for TNCs throughout their value chains. Thus, the important thing would be to expressly establish that the liability provision is related to the value chain as a whole, not restricted only to the parent corporations, but also to the subsidiaries. In this way, the liability of transnational corporations would be extended, not only to cover acts committed directly by them, but also considering indirect acts. In addition, the Campaign believes that it is vital to define the concept of value chains in the text of the Draft in order to prevent these complex structures of corporate architecture from allowing corporations to escape liability.

2.5.1 PALESTINE

In regard to the Value Chains, the State of Palestine says that the Draft is rudimentary, highlighting that the language needs to be strengthened. As such, it recommends adopting terms that ensure accountability of corporations throughout the chain, extending accountability beyond headquarters to include actions taken at subsidiaries as well.

2.5.2 EGYPT

The State mentioned the importance of Resolution 26/9 and the need for the text of the Draft to meet what was established in the mandate. In this way, the country stated that companies operating within a State are governed by domestic legislation and, as such, the real challenging gap

[17] Homa. Cadeias de Valor e os impactos na responsabilização das empresas por violações de Direitos Humanos. Available at: http://homacdhe.com/wp-content/uploads/2018/08/Cadernos-de-Pesquisa-Homa-Cadeias-de-Valor.pdf

in this issue is in regulating the activities of these companies that operate at transnational levels, in order to achieve their accountability throughout their value chain.

2.5.3 NAMIBIA

The Namibian delegation asserts that all activities undertaken by natural or legal persons conducting transnational corporations must be taken into account in the context of the activities performed. In this regard, such activities are not restricted only to those undertaken by parent corporations, but also to those performed by subsidiaries. Furthermore, it states that the wording of §1 of Article 9 should make explicit reference to the term value chain. Finally, it saw §4 of Article 9 as a positive aspect, given the possibility of proving the link between parent and subsidiary companies of transnational corporations.

2.5.4 SENEGAL

The State maintained that the mandate of Resolution 26/9, by establishing the creation of a legally binding instrument on Human Rights and Business, is a decisive step in ensuring corporate social responsibility of business activities. Thus, it claimed that the Covid-19 pandemic is highlighting the vulnerability of informal labor along value chains and that the negotiation of the Treaty is an opportunity to end impunity for human rights violations committed by transnational corporations.

2.5.5 PANAMA

The country stated that it would be relevant to adopt, in §5 of Article 1, the concept of value chain.

2.5.6 SWITZERLAND

The country stated that it would not participate in the negotiations, as they are developing a National Action Plan in accordance with the Guiding Principles. However, it asked for clarification regarding some legal issues addressed by the Treaty. Thus, it said that the Draft addresses the issue of value chains in a way that may lead to divergent interpretations. That said, for reasons of legal certainty and given the importance of the issue, it requested that some clarification on the subject be directed during the Session.

2.5.7 UNITED KINGDOM

The State began its speech by recalling that it was the first country to develop a National Action Plan for the implementation of the Guiding Principles on Human Rights and Business in 2013. Moreover, it stated that its Modern Slavery Act, passed in 2015, was innovative, as it introduced in its wording the need for companies to present measures to address modern slavery in their operations throughout their value chain.

2.5.8 EUROPEAN UNION

The European Union said that the Covid-19 pandemic exposed the vulnerability of value chains and the vulnerability of people who work in them. Thus, the Human Rights and Business

Agenda gained even more relevance. Thus, it must be taken into account that the health crisis has shown the urgency of strengthening the protection given by States to human rights issues in the context of business activities, including labor rights.

2.5.9 FRANCE

France stated that it has been establishing mechanisms to ensure accountability of countries regarding human rights issues. In this sense, in 2017, it approved a national law on the *duty of care*, which aims to make companies accountable for operations within their production chains, considering, for this purpose, regulation occurring from the initial moment in which the business relationship is established with it.

2.6 EXTRATERRITORIALITY MECHANISMS

As far as the activities of transnational corporations are concerned, extraterritoriality refers to activities carried out outside the territory of the parent corporation, including not only liability for recklessness and negligence of human rights conduct, but also the duties of oversight, prevention and redress. Today, with the multiplication of these transnational corporations and the fragmentation of their production chains, it is necessary to incorporate the duties of due diligence into these extraterritorial activities, seeking mechanisms for effective accountability.

In addressing the issue, particularly in the face of Article 9 (Adjudicative Jurisdiction), Draft 2 fails to include "value chains," which are a true reflection of this fragmented production, thus compromising the objective of achieving corporate accountability. Further challenges to this are posed by the fact that there is no provision for attributing liability for violations committed by subcontractors, nor even for linking companies to their subsidiaries.

Currently, the *Draft* provides for extraterritoriality mechanisms such as those provided in §1 of Article 9, among them: the possibility of filing a suit in the State where the human rights violation occurred; in the State where the action or omission that contributed to the human rights violation occurred; or in the State where the legal or natural person allegedly responsible for that action or omission, which contribution to the human rights violation, is domiciled. For this purpose, domicile is considered to be the place of incorporation of the company; the place where the company has legal headquarters; the place where its central administration is located, or the principal place of business of the company.

Here, in addition to the requirements already incorporated in the Draft, as another means of combating impunity, it is understood that the inclusion of the place where the company's assets are located should constitute one of the criteria for establishing domicile. As for the States, in turn, they have the obligation of due diligence in relation to their companies in other countries, as well as to cooperate in the validation of judgments and to create mechanisms to repair damages caused.

Regarding extraterritoriality, the main demands of the Global Campaign are: the possibility to file complaints in the country where the company is located and the possibility to file multiple claims in other jurisdictions. A common criticism of the *Draft* is the lack of inclusion of an international

and universal jurisdiction. In addition, the Campaign has come out strongly in favor of the creation of an International Court[18] to make sure that a universal jurisdiction is put into effect.

The countries' positions on the subject were as follows:

2.6.1 BRAZIL

The country is opposed to extraterritoriality mechanisms. First, it reports the existence of a possible excessive burden on States if such measures are incorporated into the Treaty. It also criticizes the existence of a connection between cases of different countries; and also raises the consideration of the impossibility of a fair trial in the country of the company given the possibility of the victim requesting the use of a law from another State, using, for this purpose, the allegation of legal insecurity. It claims that § 7 and §9 of article 8, as well as §2 of article 11 (*Applicable law*), are responsible for mitigating the principle of natural judge, which can promote the phenomenon of forum shopping.

Regarding §5 of Article 9, it pleads for the change of the term close connection by direct/clear connection, in a clear attempt to hinder the incidence of the *forum necessitatis*. Still, it mentions that the provisions of Article 9 (*Adjudicative Jurisdiction*) should take into consideration the principle of subsidiarity, i.e., extraterritoriality may be taken into consideration only after the exhaustion of the process in the State of origin. Finally, it criticizes the provisions of §1 of Article 10, (*Statute of limitations*), in which it is provided that the signatory States undertake to take the appropriate measures domestically, by stating that the general rule of each jurisdiction is sufficient to ensure the protection of the rights provided for in the Treaty.

2.6.3 RUSSIA

The Russian delegation thoroughly criticizes extraterritoriality. It claims that the scope of §1 of Article 9 is too broad, and just like the Brazilian delegation, mentions the vagueness of the expression close connection/closely connected present in §4 and §5 of Article 9, which allows for the possibility of opening prerogative to potential abuse of victims by "selecting" more favorable Courts for adjudication (*forum shopping)*.

Next, the country argues that extraterritoriality would not apply to criminal cases, so that the rule of the place where the crime occurred should prevail, and the trial should also take place in that jurisdiction, otherwise the principle of due process would be violated. Finally, it argues that progressive policies damage the principles of criminal justice and public policy.

2.6.3 PANAMA

Panama criticizes extraterritoriality in view of the possibility of the victim exercising the *forum shopping*. For the Panamanian delegation, the concept of extraterritoriality is still unclear, as it differs from the principle of territoriality present in criminal law. Another target of criticism was the broad scope of extraterritoriality, especially with regard to criminal matters, by claiming that national courts

18 Among the key points raised by the Global Campaign, the 5th is the Creation of an International Court to achieve an international jurisdiction that will overcome the lack of domestic subjects. Global Campaign. Key points of the Global Campaign regarding the UN Treaty. Available at: https://www.stopcorporateimpunity.org/wp-content/uploads/2019/05/Pontos-chave-para-a-Campanha-Global-sobre-o-tratado-vinculativo.pdf

will not be able to properly respond to actions leading to crimes that occurred outside the national territory. In this sense, it suggests that extraterritoriality should be limited to the civil sphere (Article 9 - *Adjudicative Jurisdiction*).

2.6.4 South Africa

The country expresses the need for sticking to the mandate of Resolution 26/9. Given the difficulty of victims to have access to redress, the delegation reinforces the need for extraterritoriality measures, which are a central point of the Treaty. The centrality of victims is the main focus.

2.6.5 Mexico

Mexico goes against extraterritoriality measures. Claiming that the entire content of Article 9 is vague. It positions itself in favor of the trial in the jurisdiction where the violations occurred.

2.6.6 China

The country is firmly against any measures of extraterritoriality. First, it claims that extraterritoriality is contrary to the principle of sovereignty. Next, it says that the scope of the business relationship contained in the *Draft* is attacked for its comprehensiveness, on the grounds that the lack of distinction between what would be a violation of Human Rights pierces the corporate veil.

In this sense, China positions itself in favor of TNC's, stating that large corporations can only try their best to meet the due diligence criteria. Still in relation to due diligence, it understands that this should be an obligation of conduct, not of result.

2.6.7 Philippines

The State advocates for extraterritoriality mechanisms. Regarding §1 of Article 9, it suggests the inclusion of access to the court of the State where the victim is native or resident, since the State of domicile of a transnational corporation may be different from where the victim lives, which would make it difficult to file a suit given the need to go to the State of the transnational corporation to go forth with the process. The Philippine position recognizes the capture of power in a context of fragility of States in the face of the actions of transnational corporations.

2.6.8 Namibia

Namibia is broadly in favor of extraterritoriality. Commends Article 9 (*Adjudicative Jurisdiction*) for contributing to access to justice: which allows the victims to have access to justice even in situations where the person is prevented from filing suit in the Courts of its home State or host-State, but can do so in a third State and in the Regional Courts. Regarding §1 of Article 9, it advocates that the *Draft* re-includes those who may be in a situation of potential harm to their rights, and also that it makes reference to value chains.

2.6.9 ECUADOR

The country takes the position that in addition to the extraterritoriality measures already present in the *Draft,* a plan for the enforcement of judgments should still be included in Article 9 (*Adjudicative Jurisdiction*).

2.6.10 CHILE

The country sees no possibilities in the implementation of Article 9, and is opposed to extraterritoriality measures. And also criticizes the wording of §4 of Article 9 regarding the term closely connected.

2.6.11 EGYPT

The country emphasizes the need for extraterritoriality, under the Treaty's central paradigm of the victims being at the center and of access to justice. It praised the wording of §1 of Article 9.

2.6.12 UNITED KINGDOM

According to the British delegation, extraterritoriality hurts the principles of sovereignty and due process of law.

2.6.13 SENEGAL

The State mentions the importance of extraterritoriality mechanisms for the purpose of effective reparations to victims.

2.6.14 ARMENIA

The State suggested exclusion of 9.1.b, in clear position against extraterritoriality mechanisms.

2.7 *FORUM NON CONVENIENS* AND *FORUM NECESSITATIS*

The *forum non conveniens* is a discretionary power to choose the competent court, allowing a Court to dismiss a case in favor of another Court that is, in theory, better prepared to analyze it. This discretionary power prevents cases of human rights violations from being effectively prosecuted, especially in States where corporate capture prevails to the detriment of institutions.

One of the old demands of the civil society throughout the negotiation process is to not make use of the *forum non conveniens* present in §3 of Article 9 of the Draft, which considers its sealing as essential for the proper accountability of companies for their Human Rights violations, as is intended by the Treaty.

In this regard, the prohibition of the *forum non conveniens* and the inclusion of the *forum necessitatis* is considered to be a good advance, in a way that it enables a broader access to justice. It is important to mention, however, the need to strengthen the language of these concepts in the text of the *Draft*. The *forum necessitatis itself,* for example, is not mentioned textually, although it is incorporated into the *Draft* by means of the possibility for the victim to bring an action against a legal

or natural person responsible for the human rights violation that is not domiciled in that territory if a fair trial of the cause cannot be guaranteed, which is provided for in §5 of Article 9. Moreover, the Campaign advocates for the creation of an International Court, without being tied to the State, in order to obtain a broad access to justice and reparation for the victims of human rights violations[19].

In that matter, the States have positioned themselves as follows:

2.7.1 PANAMA

Differing from the more conservative position on extraterritoriality, Panama came out in favor of the adoption of the forum necessitatis as a principle, aiming at guaranteeing reparation to victims when it is not possible to decide which court should hear the case.

2.7.2 BRAZIL

Like the Panamanian statement, Brazil surprisingly praises the implementation of the clause prohibiting the *forum non conveniens*. However, it does say that the Paragraph should be improved, in light of the potential impact on national justice systems.

2.7.3 CHINA

The country thoroughly criticizes the inclusion of the prohibition of the *forum non conveniens* in the Draft, on the grounds that the Treaty must respect the sovereignty of States. Therefore, according to the Chinese delegation, the use of the *forum non conveniens* cannot be arbitrarily disregarded.

2.7.4 NAMIBIA

The State stressed the importance of excluding the *forum non conveniens* for effective redress for victims. The country also highlighted the need for the *Draft* to give more focus to the *forum necessitatis*.

2.8 *MUTUAL LEGAL ASSISTANCE*

By establishing the extraterritorial reach of judgments, the doctrine of mutual legal assistance is of utmost importance for such extraterritoriality mechanisms to be carried out, contributing to the effective reparation to victims. Such cooperation, besides being endowed with the duties arising from good faith (Article 13 - *International Cooperation*), must happen through the duties of information in criminal, civil and administrative matters (Article 12 - *Mutual Legal Assistance and International Judicial Cooperation*).

However, some obstacles remain to its full operation. Article 12, paragraph 10, item c, mentions "public policy". The grounds of being contrary to public policy is identified as one of the greatest obstacles to the enforcement of foreign judgments, which often hinders the access of

[19] Global Campaign. Key Points of the Global Campaign regarding the UN Treaty. Available at: https://www.stopcorporateimpunity.org/wp-content/uploads/2019/05/Pontos-chave-para-a-Campanha-Global-sobre-o-tratado-vinculativo.pdf Accessed on: 09 Feb 2021

affected people to reparation. In this context, the principle of the primacy of human rights is assigned to a secondary role, reducing access to justice and proper reparation for victims.

In relation to article 14 (Consistency with International Law principles and instruments), which deals with the compatibility between the principles of international law and binding instruments, the Draft refers to principles such as sovereignty, elevating States to the position of independent actors. Such a position is the opposite of the intention of civil society during the negotiation process, which values the primacy of human rights in a sense of true sovereignty of peoples, rather than the State's sovereignty. Furthermore, one of the controversial points of this article is brought about by §5, which deals with the compatibility of trade agreements with the content of the treaty under discussion.

Regarding the issues raised, the main positions of the countries involved in the process of negotiating of the Treaty are:

2.8.1 European Union

The European Union's position was around the request for clarification in relation to international cooperation, inquiring about its scope, whether it included criminal or also civil matters.

2.8.2 Brazil

In a stance contrary to mutual legal assistance, Brazil expressed the possible excessive burden on States imposed by Article 12 (*Mutual Legal Assistance and International Judicial Cooperation*) .

2.8.3 Russia

Similar to Brazil's position, Russia has shown concern over the excessive obligations placed on States by these provisions. The country criticizes §5 of Article 14, which imposes compliance of existing trade agreements with the provisions of the Treaty.

2.8.4 Mexico

The country considers it unnecessary to include §1-4 of Article 14 (*Consistency with International Law principles and instruments*).

2.8.5 China

For China, Article 12 (*Mutual Legal Assistance and International Judicial Cooperation*) goes against judicial sovereignty. According to the country, sovereignty and discretion should be fully respected. Furthermore, it claims that the Treaty should explicitly distinguish civil from criminal matters. Finally, it claims that there is no hierarchy between the different types of treaties, ignoring the primacy of Human Rights.

2.8.6 PALESTINE

The State suggests strengthening the terms of article 14.5.a so that existing trade and investment treaties are in accordance with the principle of the primacy of Human Rights. For Palestine, international trade should be regulated in light of the primacy of Human Rights and international humanitarian law.

2.8.7 CHILE

Chile criticizes §5 of Article 14 because, according to the country's position, it harms the principle of free trade and therefore its resulting trade agreements, which are similar to rules.

2.8.8 ECUADOR

The country understands that the purpose of Article 12, by incorporating the principle of mutual legal assistance, is to ensure reparation to victims. It also mentions the fact that Article 14 is not about hierarchy among instruments, but rather about compatibility among existing instruments.

2.8.9 EGYPT

According to the Egyptian delegation, the principle of international cooperation requires that a State should not use its territory in a way that allow Human Rights violations in its jurisdiction, nor in that of other States. Therefore, it advocates for the inclusion of a Paragraph in Article 13 (*International Cooperation*) in order to hold States responsible for Human Rights violations on their territory or on other territories when the violations are caused by TNCs. It also reinforces the limitation of the scope of the treaty to TNCs and provides for extraterritoriality mechanisms.

2.8.10 PANAMA

The state advocates the inclusion of a clause, in Article 12 (*Mutual Legal Assistance and International Judicial Cooperation*), to subject non-signatory states to cooperate on matters of mutual legal assistance.

3. CONCLUSION

In view of the above, it is possible to notice that there are still clear inconsistencies between the wording of the Draft and the objective of the Treaty if compared to what was proposed in Resolution 26/9. It is also possible to notice the difficulty of consensus among the countries, especially in relation to the implementation of points that represent a greater intervention, that is, legal regulation, such as those shown in the text, since they are the issues that would most affect the predatory action of transnational capital.

Nevertheless, considering the statements presented in the document, we can say that the 6th Session represented a wake-up call to the international community, insofar as the countries who attended were, for the most part, unhappy with the few additions - or even the maintenance - of parts of the text that demonstrate a bias toward guarantees of human rights protection.

With that in mind, it is important to emphasize the great danger that the coronavirus pandemic represented for the discussions, insofar as it not only made the more active participation of civil society impossible, but also removed the experts from the Session, as Stated in the introduction of the report. It also provided an opportunity for the absence of countries with little interest in the discussion, which withdrew themselves from the process, opening prerogatives for its disengagement with the process, which may lead to the Treaty not being put into effect or even a major setback in the next Draft.

Thus, it is evident that the international political-economic context is of great relevance to the discussion of a Treaty on Human Rights and Business, as the regulation of business activity is seen by many countries as a problem that would lead to a strong impact on international capital. Thus, many countries have an interest in keeping the situation with as little legal regulation as possible, leaving the burden of combating such violations on the hands of the States, thus perpetuating the power of large transnational conglomerates.

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