



NGO Statement for the Sixth Session of the Open-ended intergovernmental working group for the elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to human rights, Resolution A/HRC/26/9 - 26 to 30 October 2020

Thank you, Chair.

This statement is on behalf of the Mind the Gap consortium, a group of 11 NGOs exposing harmful corporate strategies that result in the avoidance of responsibility for human rights or environmental impacts. Our multi-jurisdictional research has found that corporations will routinely devote a lot of time and legal resources to insist that a case be moved to a jurisdiction with a weaker rule of law, lower human rights standards, and a higher likelihood of a court determining it does not have jurisdiction to hear the case, leaving affected rights-holders without access to remedy.

We welcome the direction in which the draft text has evolved on Article 9 regarding **Forum necessitates, and urge the preservation of sections of 9 (4) and 9 (5).**

Under Art 9 (4): "Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is closely connected with a claim against a legal or natural person domiciled in the territory of the forum State"

In the context of these negotiations, some states have suggested this section risks undermining state sovereignty and increases the likelihood of parallel proceedings.

However:

- It will create the conditions for avoiding parallel proceedings as it allows claimants to sue a parent company and its subsidiary in the same proceedings and jurisdiction.
- Furthermore, this not a legal novelty; this section is in line with EU legal developments as it recalls the Recast Brussels Regulation, which confers a right on claimants to sue an EU domiciled defendant in EU courts.

Section 9(4) alone however is insufficient for ensuring access to remedy for claimants. Business activities of a transnational character often engage multiple jurisdictions, and 9(4) does not capture all these connections

In the interests of access to remedy, we strongly argue in favor of keeping the current wording of article 9 (5) in the instrument.

Art. 9 (5): "Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection to the State Party concerned."

- This clause is needed to ensure effective access to justice in cases where the justice systems in both the home state and host state are unwilling and/or unable to address the case, but a (sufficiently close) connection can be found to another jurisdiction.

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- It will create an obligation for courts of the home state to exercise jurisdiction no matter where the victims are from, making it impossible there to invoke the 'forum non conveniens' argument to get a case dismissed.
- Despite the arguments of some states that this is an aberration, it is a long established common law principle that the possibility of substantial injustice in the natural forum is an exception to the *forum non conveniens* principle.

Article 9 paragraphs 4 and 5 need to be preserved as they form a backbone of this treaty, and are essential to closing an existing governance gap on access to remedy.

The provisions on adjudicative jurisdiction must reflect the reality of how transnational business is conducted. Transnational activities of a corporation need to be met with commensurate accountability in the jurisdictions in which it operates.

Cases of corporate human rights abuses have fallen through the jurisdictional cracks for too long. This is our chance and obligation to change that, and ensure access to remedy for communities, workers, and human rights defenders wherever they are.

Thank you.

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