

How does the Draft Treaty deal with a case of corporate human rights abuse?

The case of Niassa Tree Plantations.

With the release of the draft legally binding instrument, FIAN International seeks to analyse the strengths and weaknesses of the draft instrument. **As it currently stands, how will the legally binding instrument actually serve the individuals and communities whose human rights are abused by the activities of transnational corporations and other business enterprises which have a transnational character?** This is ultimately the most important question which State representatives and civil society will be seeking to answer going into the 4th session of the open-ended intergovernmental working group negotiating the legally binding instrument. In this document, we depart from a real case documented by FIAN International in 2012 which involves the establishment of large-scale tree plantations in the Niassa province of Mozambique, impairing the human rights of peasant communities, especially their access to land and water which are fundamental for their livelihoods. In 2005, a subsidiary company of the Global Solidarity Forest Fund in Mozambique, namely Chikweti Forest of Niassa, acquired some 45000 hectares of land to establish pine and eucalyptus plantations. In addition to the impact on the communities' access to land and other natural resources for their livelihoods which constitute abuses of their right to food and right to water, there were no adequate consultations undertaken with the communities affected neither proper impact assessments.

Due diligence obligations

“Meaningful consultations with groups whose human rights are potentially affected by business activities”. **Art.9.2.g**

Peasant are not included as “groups”.

Consultations were not conducted to women (land is traditionally a resource accessed and passed on through women in matrilineages).

Art.9.2.g above

Not all communities were consulted.

Art.9.2.g above

Arrival of TNC subsidiary

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Impact assessment

“Pre and post environmental and human rights impact assessments”. **Art.9.2.e**

TNCs should not be the actors carrying out impact assessments (independent and transparent).

Impact assessment was carried out by Chikweti FN (neither reports nor records are available for the public).

Chikweti Forests of Niassa (Global Solidarity Forest Fund)

Disclosure

Disclosure requirements are “subject to an assessment of the severity of the potential impacts on the individuals and communities concerned”. **Art.9.2.d**

Should go beyond “non-financial matters”. TNCs should have to disclose information and declare the different groups of enterprises of entities to which it is linked.

This could be essential in order to see how Chikweti FN is connected to foreign investors (responsibilities).



Abuses of human rights by TNCs or its subsidiaries

Chikweti Forests of Niassa impacts on communities' access to land and livelihoods, on communities' access to water, and on environment.

Access to justice

"Effective and prompt access to justice and remedies", **Art.8.1**

including "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims" **Art.8.1.a**

and "environmental remediation and ecological restoration when applicable, including covering of expenses for relocation of victims, and replacement of community facilities". **Art.8.1.b**

There is no reference to precautionary measures.

Need of precautionary measures: establishing mechanisms to prevent continuation of harm and abuses during the court process. Chikweti FN would have to stop activities that cause social or environmental impacts on the communities' members.

Liability

States are required to establish legal liability under both their civil and criminal laws for TNCs. **Art.10**

TNCs' harms are included when they "exercise control over the operations" (art.10.6.a), they "exhibits a sufficient close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection between its conduct and the wrong suffered by the victim" **Art.10.6.b**

or "to the extent risk have been foreseen or should have been foreseen of human rights violations within its chain of economic activity". **Art.10.6.c**

Liability shall not be limited by the compliance of due diligence but determined departing from the duty of care and the produced harm.

It is important that TNCs became accountable of their economic activities, making GSFF responsible for Chikweti FN's impacts and human rights abuses: wording cannot allow corporations to hide their responsibilities as they currently do.

Jurisdiction (judicial competence)

Victims can access justice both in the "court of the State where acts or omissions occurred" **Art.5.1.a**

or in the court of where the TNCs "are domiciled" – including, where the TNC has its "statutory seat", "central administrations", "substantial business interests" or "subsidiary, agency, instrumentally, branch, representative office or the like". **Art.5.2**

Member communities could access justice in Mozambique, as well as in Sweden and the Netherlands (to be read together with **Art.10.6.c** – "to the extent risk have been foreseen or should have been foreseen of human rights violations within its chain of economic activity").

Applicable law

Victim's protection is strengthened through allowing them to choose the law which is more favorable to them. **Art.7.2**

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Liability and enforcement

Art.10.8 Creates an international standard for criminal liability of TNCs.

The last par. of **Art. 10** says that when criminal liability is not applicable, other non-criminal sanctions shall be applied the last should be eliminated and criminal responsibility mandatory. More details on administrative responsibility are needed.

It is important because not every States have such provisions in their domestic laws.



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Mutual legal assistance and international cooperation



Mozambique could request both Sweden and the Netherlands (and vice versa):

“information and supply of all evidence at their disposal and necessary for the proceedings in order to allow effective, prompt, thorough and impartial investigations”. **Art.11.2**

Such information could be provided “without prior request” if it “could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings”. **Art.11.4**

“Any judgement of a court [...] shall be recognized and enforced in any Party”. **Art.11.9**

States may “refuse” recognition and enforcement “where the judgement is contrary to the public policy of the Party on which its recognition is sought”. **Art.11.10.c**

Such provision is limiting and may jeopardize the effective protection of victims. Regarding Niassa plantations, the Netherlands didn't want to intervene and didn't conduct any research (as Sweden and Mozambique did) because that would have meant to go against its policies. In the event of a judgement in Mozambique or Sweden, could the Netherlands refuse to apply it to Dutch investors?

Consistency with international law

Existing and future Free Trade and Investment Agreements shall be “interpreted in a way that is least restrictive on their ability to respect and ensure their obligations [...]”, notwithstanding other conflicting rules of conflict arising from customary international law or from existing trade and investment agreements”. **Art.13.7**

“Nothing in these articles shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law”. **Art.13.3**

Due to existing asymmetric (power) relation between investors' rights and human rights, the primacy of human rights over trade should be reaffirmed in order to fulfill with rights of victims.

ISDS should not be applicable when undermining states capacity to comply with their human rights obligations.

Committee

“Make general comments on the understanding and implementation of the Convention based on the examination of reports and information received from the States Parties and other stakeholders”. **Art.14.4.a**

The Committee has the capacity to receive and consider complaints.

It is important for the decisions of the Committee's complaints mechanism to be binding on States.

Justice

