



FACT SHEET

8 Reasons

Why African States Should
Support the Legally
Binding Instrument on
Business & Human Rights



Strengthening Africa in World Trade





Introduction

African states are signatory to more than 900 investment treaties. Majority of these have been signed with non-African states. The intention for signing investment treaties is vested within the solo interest to protect the rights of foreign investors in the host state, albeit at the cost of human rights and the host states' development interests.

For more than "20 years, 'human rights' and 'business' were very rarely used in the same sentence. Human Rights were the business of Governments while companies just had to mind their own business." The rise of the human rights era was mainly anchored around the State, both as the main protector of human rights but also a major violator. It was driven by the State obligation not only to promote, protect and respect human rights, but also to ensure that non-state actors including business entities, respect all human rights. Human rights are the inalienable basic rights i.e. the right to food, shelter, dignified employment, health, education, freedom from discrimination, gender equality and development. Access to these rights is both a moral and legal issue, not charity.

However, currently, states have been confronted by a number of limiting dynamics. For example, the current course of globalization, influence and power are being wielded by corporations, both domestic and foreign, to increase their own protection against state's regulatory mandate to promote, protect, respect and fulfill human rights. In fact, currently, Multinational Corporations (MNCs) in developed countries are increasingly directing the design and influencing negotiations for Bilateral Investment Treaties (BITs) and other investment contracts to ensure that they secure protection of their investments through investor rights and arbitration courts. Consequently, the definition of certain provisions such as "expropriation" have been broadened beyond the traditional direct expropriation - to include indirect expropriation. This impetus has ultimately impacted the growth of a power imbalance between the so called economic elites, private investors (both domestic and foreign) and Multinational Corporations (MNCs) on one hand; and governments and communities on the other, with the latter losing out.

This fact sheet will act as an information tool for government officials, policy makers, civil society, trade unions and other key stakeholders to better understand and appreciate the importance of the UN Treaty on Business and Human Rights amidst the current global and regional trade; and investment policy dynamics, growing corporate capture and dwindling policy space for states to regulate businesses and citizens to hold corporations accountable. The fact sheet will also act as an advocacy for civil society, trade unions and other key stakeholders in their participation and engagement with their governments in this process.





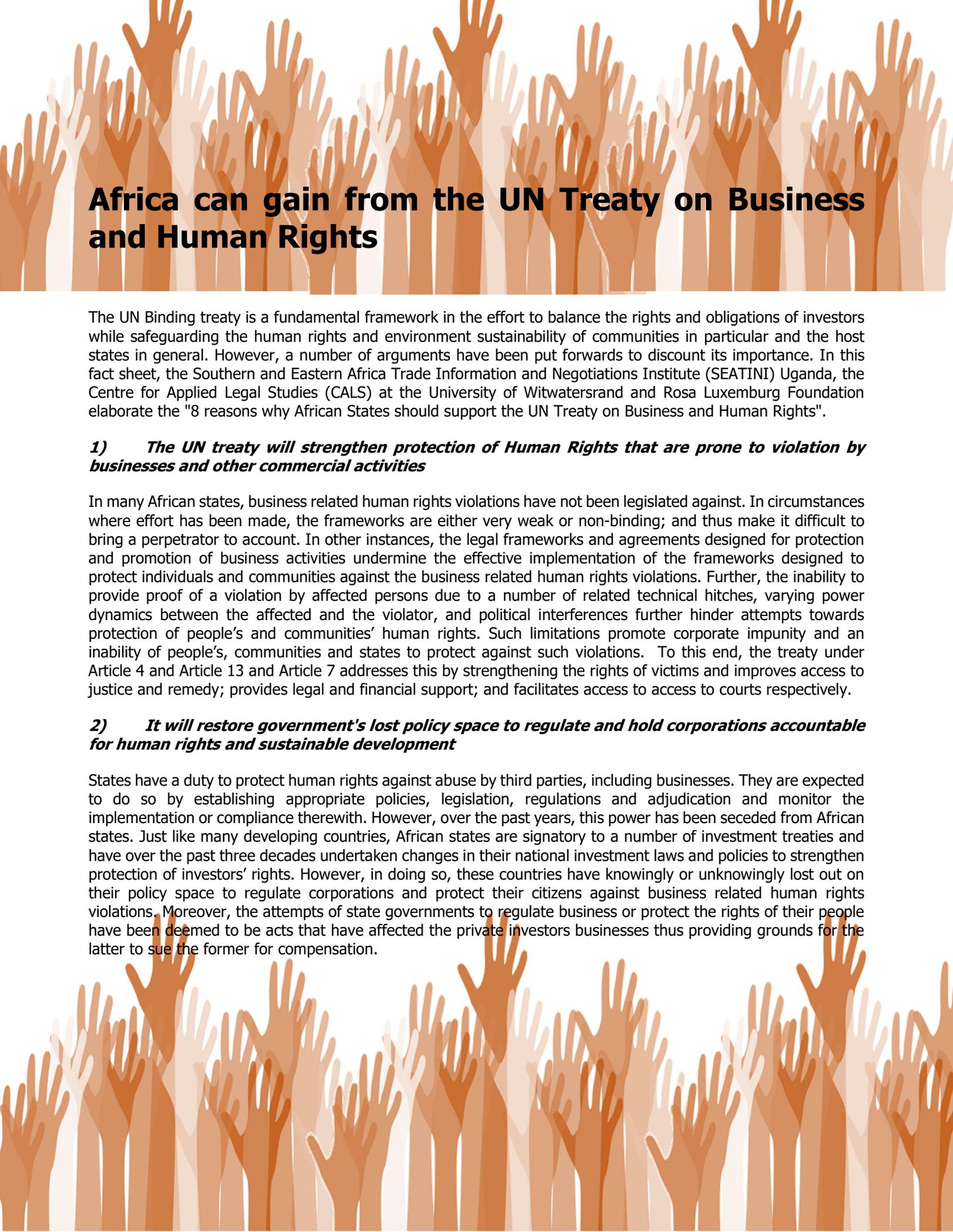
The UN Guiding Principles were not sufficient, so they are evolving into the UN Binding Treaty

Within Africa, these developments have further weakened the role of the state and their capacity to regulate corporations and protect human rights. This is despite the fact that these governments have committed to Human rights related conventions regarding protection of people's rights. For example, in 2011, the world agreed to the United Nations Guiding Principles on Business and Human Rights. These guiding principles are a set of guidelines for states and corporations to prevent and address human rights abuses committed in business operations. The principles highlight three key specific areas i.e. protect, respect and remedy. Each of these areas defines concrete, actionable steps for governments and companies to meet their respective responsibilities and duties to prevent human rights violations in company operations and provide remedies if such violations occur.

The UNGPs were developed in view of the fact that business enterprises can profoundly affect people's enjoyment of human rights, either positively or negatively. However, while the UNGPs and general human rights law unequivocally recognize that the states have a duty to protect everyone within their territory and or jurisdiction from human rights abuses committed by business enterprises, the responsibility of business enterprises which impact on people's human rights is still being debated. Existing frameworks such as the UNGPs, the International Convention of ESCRs, and others frameworks so far rely on voluntary non-binding regulations for corporations. Moreover, recent experience and all cases resulting in human rights abuses have shown that such voluntary provisions are not working. But, both states obligations and corporations' responsibilities are complementary. It for this reason, among others therefore that an agreement was reached on the need for a binding treaty on Business and Human Rights for Transnational Corporations and other enterprises.

The process towards the development of the UN Treaty is very critical in strengthening a system for enhanced corporate accountability on the one hand and the protection of people's and communities' rights on the other. However, the participation of states, especially from the global South has remained very low. This is despite the fact that the global South and especially Africa continue to register increasing cases of human rights abuses related to businesses.





Africa can gain from the UN Treaty on Business and Human Rights

The UN Binding treaty is a fundamental framework in the effort to balance the rights and obligations of investors while safeguarding the human rights and environment sustainability of communities in particular and the host states in general. However, a number of arguments have been put forwards to discount its importance. In this fact sheet, the Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI) Uganda, the Centre for Applied Legal Studies (CALs) at the University of Witwatersrand and Rosa Luxemburg Foundation elaborate the "8 reasons why African States should support the UN Treaty on Business and Human Rights".

1) The UN treaty will strengthen protection of Human Rights that are prone to violation by businesses and other commercial activities

In many African states, business related human rights violations have not been legislated against. In circumstances where effort has been made, the frameworks are either very weak or non-binding; and thus make it difficult to bring a perpetrator to account. In other instances, the legal frameworks and agreements designed for protection and promotion of business activities undermine the effective implementation of the frameworks designed to protect individuals and communities against the business related human rights violations. Further, the inability to provide proof of a violation by affected persons due to a number of related technical hitches, varying power dynamics between the affected and the violator, and political interferences further hinder attempts towards protection of people's and communities' human rights. Such limitations promote corporate impunity and an inability of people's, communities and states to protect against such violations. To this end, the treaty under Article 4 and Article 13 and Article 7 addresses this by strengthening the rights of victims and improves access to justice and remedy; provides legal and financial support; and facilitates access to access to courts respectively.

2) It will restore government's lost policy space to regulate and hold corporations accountable for human rights and sustainable development

States have a duty to protect human rights against abuse by third parties, including businesses. They are expected to do so by establishing appropriate policies, legislation, regulations and adjudication and monitor the implementation or compliance therewith. However, over the past years, this power has been seceded from African states. Just like many developing countries, African states are signatory to a number of investment treaties and have over the past three decades undertaken changes in their national investment laws and policies to strengthen protection of investors' rights. However, in doing so, these countries have knowingly or unknowingly lost out on their policy space to regulate corporations and protect their citizens against business related human rights violations. Moreover, the attempts of state governments to regulate business or protect the rights of their people have been deemed to be acts that have affected the private investors businesses thus providing grounds for the latter to sue the former for compensation.



Since the binding treaty seeks to elaborate a framework that holds corporations/ business accountable for protection of human rights - Art. 5.2 & 5.3. (may be others as well), it will contribute towards creating a balance between their rights and responsibilities. It will also provide a framework that ensures that investors take responsibility when their actions adversely impact peoples' rights and the environment.

3) *The UN treaty provides an omnibus and broad scope in protection of human rights and the environment, something that is not explicitly provided for in national investment codes and policies and investment treaties and contracts.*

Some sectors like construction, mining, large scale agriculture face peculiar challenges in safeguarding rights to life, health and safety. Largescale projects delivered within tight timescales and using complex, widespread supply chains exacerbate the risk of human rights violations, and environmental damage. The need for increasing scrutiny in the area of business and human rights using an omnibus framework that brings both aspects within the same framework cannot be overemphasized. Although similar frameworks exist, the binding nature of the proposed UN Treaty provides an important opportunity for a framework that can strengthen the state duty to promote, protect, respect and fulfill human rights; while holding corporations accountable. (Preamble)

4) *The UN treaty is a globally agreed framework ensuring that the same standards are enforced in all countries around the globe, given their participation and ratification.*

Competition for FDI is a global phenomenon. While countries have made efforts to reduce the barriers to foreign investment over the last three decades, the significance of competition for FDI has increased. Businesses with transnational character have greater power than states and individuals, and thus place states in an untenable situation as they seek to attract greater FDI inflows as well as protect the rights of their people and communities, while realizing their development objectives. Many African governments have justified designing investment promotion laws, policies and agreements that don't include strict provisions on labour standard, environmental standards and other human rights with the argument that such provisions could discourage investment.

This is especially challenging for countries within regional economic zones in which competition for FDI is very evident. In such circumstances, a government's temptation to lower its labour, environment and other human rights related standards i.e. "the race to the bottom" in a bid to appear more attractive to FDI is a major challenge.

Hence it is wise to combine the power and authority of states, individuals and communities/ community associations by establishing globally framed and agreed upon standards, rules and procedures to counter the fear FDI importing countries have, and ensure that the same human rights standards are enforced across all countries globally. (Art. 17).





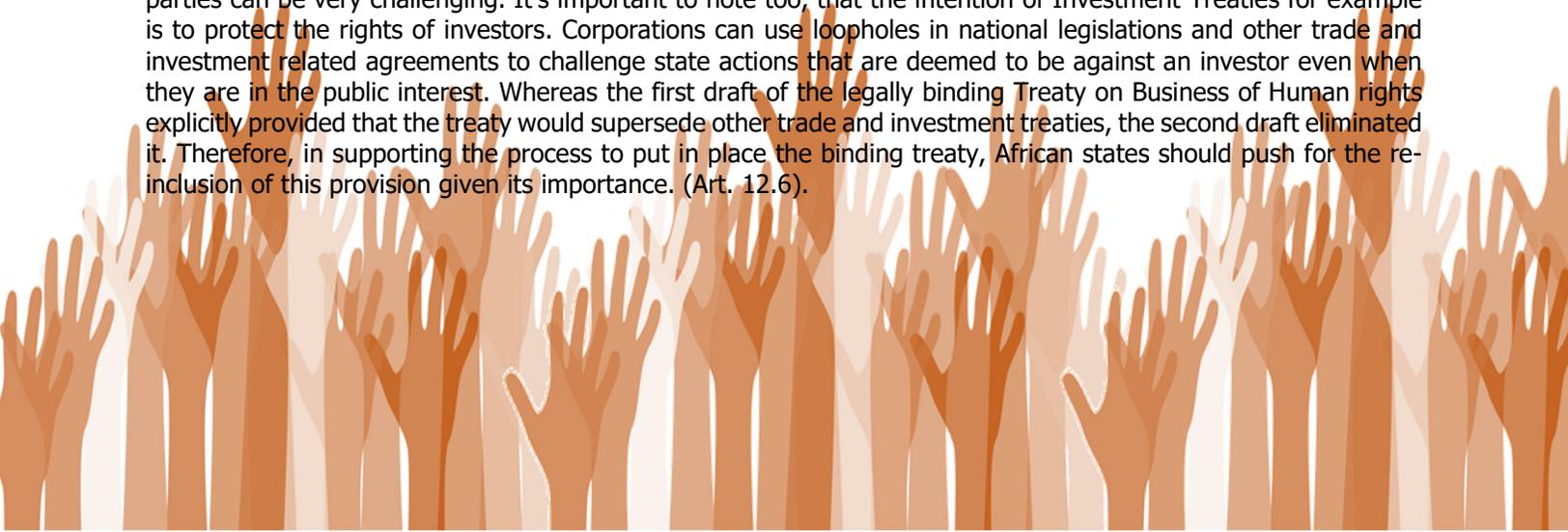
5) *The UN Treaty will provide an alternative framework for African states to counter unfair Investor-State disputes brought against them.*

Currently, 20% of all International Court for Settlement of Investment Disputes (ICSID) arbitration cases have involved African states. For instance, in Egypt, a French company sued the Egyptian government over a law increasing the minimum wage. In South Africa, an Italian company sued the South African government over implementation of the Black Empowerment Program. In Uganda, the British American Tobacco sued the government of Uganda for developing the Tobacco Regulations. In Tanzania, Acacia mines sued the Tanzania government for its attempts to review the country's mining laws to increase the government's stake in the mining sector. A U.S firm, WalAM Energy Inc. also sued the Kenya government for cancelling its license. The Kenya government argued that it cancelled the license in order to safeguard the environment, public health, avert taxation disputes and appease communities identified for eviction to pave the way for the mining projects. Whereas not all the cases can be highlighted here, the few underscored above reveal that majority of the cases brought against African governments largely seek to challenge a state's action to regulate investments and or pursue their development objectives in public interest. These governments often lose these cases and are subject to payment of compensations worth millions of U.S dollars. To date, one of the most expensive awards, U.S\$935 million was paid by Libya in 2013 over a dispute over a land leasing contract for a tourism project.

They lose because the available human rights related frameworks such as the International Convention on Economic Social and Cultural Rights, the African Charter on Peoples and Human rights, among others are frameworks agreed upon between states, they are often not a point of reference in settlement of disputes between an investor and a state. This is largely due to the fact that the frameworks were designed for states and not necessarily for investors. However, in the case of the UN Treaty, its scope includes businesses/ investors and thus will be a key reference in the settlement of such disputes. (Art.3).

6) *If the UN Treaty is designed to supersede all other trade and investment related treaties and agreements, at national, regional and global levels, African states will not have to suffer with the challenges of negotiating treaties that include provisions on human rights protection.*

Trade and Investment policy making and negotiation of treaties is a contestation of different actors with different power dynamics. Thus, balancing interests of different players within a single framework negotiated by the two parties can be very challenging. It's important to note too, that the intention of Investment Treaties for example is to protect the rights of investors. Corporations can use loopholes in national legislations and other trade and investment related agreements to challenge state actions that are deemed to be against an investor even when they are in the public interest. Whereas the first draft of the legally binding Treaty on Business of Human rights explicitly provided that the treaty would supersede other trade and investment treaties, the second draft eliminated it. Therefore, in supporting the process to put in place the binding treaty, African states should push for the re-inclusion of this provision given its importance. (Art. 12.6).



7) The UN treaty helps to control the influence of private investors over states/ in state policies and contributes to prevention of State capture by corporations.

Currently, all African states are implementing the private sector led approach to economic development. In fact, the private sector is viewed as the engine of development in Africa. However, this approach has come with a number of challenges, notably, "state capture". State capture can be defined as a type of systematic political corruption in which private interests significantly influence a state's decision making processes to their own advantage. Some corporation's annual turn overs are bigger than some country's GDPs. Unfortunately, in many countries, this is happening, albeit mostly indirectly, with many governments, despite making attempts to curb the power and influence of the private sector, especially the foreign investors in decision making processes, they have met with numerous hindrances. To this end, private investors have been seen to deter policy making processes intended to enhance public welfare when they are deemed to have adverse effects on their private business.

In view of these dynamics therefore, a legally binding framework on business and human rights is a fundamental to control the influence private investors may have over states.

8) The UN Treaty will also help to address jurisdiction challenges when it comes to holding corporations accountable and ensure access to remedy for those adversely affected by their operations.

Given the current state of state capture by corporations in many African states and its attendant effects on legislating in the public's interest, there is need for a framework that facilitates the passing into law of legal proceedings without the direct role of the state. The legally binding treaty addresses this by including a provision that allows for a given case to be heard in another court and not necessarily the domestic court (Art. 7). In addition it prevents from the fact that an enforceable jurisdiction can be reviewed but shall be recognized and enforced in any state party. It also states that the re-opening of the merits of the case is not permitted (Art. 10.9).

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