



Contribution to the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

for their third session, 23–27 October 2017

CIDSE welcomes the elements for the international legally-binding instrument on transnational corporations and other business enterprises with respect to human rights (hereafter referred to as “the Treaty”), put forward by the Chairperson-Rapporteur.

Businesses of all kinds are a vital part of our society but we must recognize that powerful private sector actors can have negative impacts as well as positive ones. In 2016, nearly four people were killed every week protecting their land from industries like mining, logging and agribusiness in countries including Colombia and the Philippines. November of this year will mark the two-year anniversary of the Samarco mining dam collapse, the worst environmental disaster in Brazil’s history affecting hundreds of thousands of people. There is a **strong demand from communities on the ground for urgent international action** to tackle the flagrant imbalances in power between transnational corporations and people and ensure protection of human rights.

“A binding treaty could put pressure on the companies not only so that they respect national legislation, but perhaps more so that they respect the constitution, in this case, of the Republic of Guatemala, where, from the first article, it is established that the State must promote, defend and protect the common good. Therefore, it is to make the companies be part of this dynamic, so that their activities are truly in favor of the common good.”

– Mgr. Alvaro Ramazzini, Bishop of Huehuetenango, Guatemala¹

By highlighting obligations, prevention, liability, effective remedy, jurisdiction, international cooperation and the primacy of human rights law over trade and investment agreements, the **objectives of the instrument** and sections of the elements respond to pressing acknowledged gaps where national and regional-level action have not been adequate to prevent or remedy abuses in the context of transnational corporate activities.

¹ CIDSE video interview, https://www.youtube.com/watch?v=612XQha_zDg&feature=youtu.be

Taken together, the elements reflect the substantive discussions of the first and second IGWG sessions, building upon the **open and credible process** mandated by the UN Human Rights Council. The elements provide a **good starting point and basis for the negotiations** on the instrument now beginning with this third session.

Since the conclusion of the second IGWG session and the publication of the second session report, **civil society groups have been taking forward work on the substantive issues** that are most pressing for our partner organisations on the ground, researching and deepening ideas and proposals. As CIDSE we commissioned a study by Prof. Markus Krajewski, University of Erlangen-Nürnberg, *Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights* (March 2017); and jointly commissioned² a study by Daniel Blackburn, International Centre for Trade Union Rights, *Removing Barriers to Justice: How a treaty on business and human rights could improve access to remedy for victims* (August 2017). We have consistently called upon States to inform and advance their own discussions and positioning, and have worked to engage with them in this respect at national level as well as in international fora.

This submission is not exhaustive, but rather highlights some main points which we support and others to be strengthened or deepened.

General considerations

1. The **reaffirmation of the UN Guiding Principles on Business and Human Rights** and other such principles and frameworks carries forward the spirit of complementarity between the UN Guiding Principles and the Treaty. This allows for building upon the positive elements of the UN Guiding Principles and States' commitment to their implementation, while addressing the recognized gaps and areas where a legal instrument could help to make further progress. CIDSE agencies have been actively involved in the development of national action plans on business and human rights in states such as the UK, France, Germany, Belgium and Italy. In each case it is clear to us that a Treaty covering the points highlighted in the elements document would significantly enhance national policies and processes to date to implement the UNGPs.
2. The **scope of application** based on the "transnational character" of the *activities* of the enterprise, regardless of the mode of creation, control, ownership, size or structure, is formulated in a constructive way. It is the transnational activities and omissions of business enterprises, with their cross-border reach and influence, which have led to the types of international impunity that this instrument needs to focus on. How this approach would work in practice would need to be further elaborated and defined. As has been the case in the first and second sessions, there will be space for debate and discussion during the 3rd session.
3. The general obligations address the primary responsibility of States. We underline that State measures should include coverage of business operations and relationships in countries other than the countries where the business may be domiciled or headquartered, in line with their **extraterritorial obligations** as defined in General Comment 24 of the UN Committee on Economic, Social and Cultural Rights (CESCR).³ With regards to business operations where States have a particular influence (State-business nexus), similarly to public procurement, this obligation should explicitly cover external trade promotion and subsidies. This section rightly includes obligations of

² Commissioned by Action Aid Netherlands, Brot für die Welt, SOMO, Friends of the Earth Europe, International Trade Union Confederation (ITUC), International Transport Workers' Federation (ITF), the Norwegian Forum for Development and Environment, and CIDSE.

³ The Covenant establishes specific obligations of States Parties at three levels – to respect, to protect and to fulfil. These obligations apply both with respect to situations on the State's national territory, and outside the national territory in situations over which States Parties may exercise control.

transnational corporations and other business enterprises, subject of the instrument. The implementation of these obligations is then to be discussed. At the same time, we encourage States to elaborate more explicitly and systematically on extraterritorial State obligations on the basis of General Comment 24 in the future text of the Treaty.

Prevention of human rights abuses should be at the heart of the Treaty

4. The elements include ways to strengthen preventive mechanisms, reinforcing the due diligence approach of the UN Guiding Principles on Business & Human Rights by giving it a legally binding nature. They **build upon important recent developments in national law**, in particular the 2017 French duty of care legislation requiring large corporations to adopt preventive **vigilance plans**. This demonstrates the feasibility of such a measure, together with the potential of enhancing global standards and a level playing field.
5. We encourage States to refer even more explicitly and systematically to the concept of human rights due diligence (HRDD), as they are elaborated in pillar 2 of the UN Guiding Principles on Business and Human Rights. Moreover, the definitions of the elements of binding HRRD should be **coherent** in all sections of the Treaty (see sections 3.1., 3.2. and 4). The text of the treaty should clearly state that human HRDD must not only cover operations and supply chains of companies but also any other business relationships throughout the whole **value chain** such as supply, export, services, insurance and finance and investment.
6. The section on preventive measures should be read together with the section on **liability**. Civil, criminal and administrative, personal and collective liability. It is important that States adopt legislative measures for enterprises to implement due diligence procedures in their operations in supply chains, but also in their business relationships. The boundaries of this liability will need further discussion to provide greater legal certainty. An explicit reference to HRDD and its interpretation in the Interpretative Guide of the OHCHR may be helpful in this regard.

Access to Justice – Addressing the existing barriers

7. The sections on access to justice, jurisdiction, and international cooperation aim to respond to some of the pressing barriers to justice. This should apply to all companies within the scope of the Treaty and to all cases of abuse. Establishing a framework for judicial cooperation will improve the effectiveness of State enforcement. We especially welcome the **reversal of the burden of proof** in the context of huge power and resource asymmetries between corporations and affected communities. The **protection of human rights defenders** is also essential, given the trend of increasing killings and threats of those protecting their land and livelihoods, including the particular challenges faced by women human rights defenders, with the adequate measures to be taken by States still to be defined.

Ensuring the primacy of human rights in trade & investment policies

8. CIDSE has promoted the potential of the Treaty to strengthen measures so that trade and investment can serve to protect human rights rather than infringe upon them.⁴ We have proposed concrete wording for a clause establishing the **primacy of human rights obligations in the Treaty** over other obligations in trade and investment agreements, elaborated by Prof. Markus Krajewski. We welcome that the draft elements recognize the primacy of human rights obligations over trade and investment agreements and the States obligation to refrain from entering into agreements that are inconsistent with human rights obligations. We encourage States to spell out in the Treaty that human right impact assessments (HRIA) on trade and investment agreements and other trade related initiatives must be undertaken prior to the start of negotiations and be repeated before the conclusion

⁴ CIDSE, Human Rights in Trade and Investment Policies: The potential of a UN Treaty on transnational corporations and other businesses, April 2017.

and regularly during the implementation of trade and investment agreements. We also encourage States to include a clause that makes sure the obligations of the Treaty must fully be taken into account in any trade and investment dispute settlement mechanism.

Effective implementation of the Treaty

9. Enforcement mechanisms will be crucial to the success of the Treaty. The elements rightly recognize the important of both national and international levels, which can help to **reinforce national judicial systems**. The inclusion of potential international judicial mechanisms such as an international court among the options is positive, while requiring more work.

The elements present a holistic view of the challenges requiring international action. It is now for States to consider the different elements and to **formulate constructive proposals for further elaboration** of these elements and of the actual text of the Treaty. This submission highlights a number of areas which governments will need to take forward for more thinking and work. This will be part of the necessary steps to best to move from elements to Treaty text. As Catholic development agencies, we have been participating in national level policy discussions to ensure that businesses respect human rights throughout their operations and strongly encourage our own governments to participate actively in the UN session of the Inter-Governmental Working Group.

There is growing momentum for the UN Treaty across many sections of society. From 20 States voting for the 2014 resolution establishing the Treaty process, some 80 States participated in the 2016 IGWG session. For the 3rd session beginning on 23 October, **all States should come prepared to negotiate the content of the Treaty**, considering carefully the potential of the elements and their effective implementation to put a stop to corporate-related human rights abuses.