



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

October 2018

This is a decisive moment for the process towards shaping a UN Treaty that can bring value to global efforts towards preventing adverse human rights effects of business activities and providing access to justice for affected people and communities. The Treaty is needed to help **address gaps and insufficiencies in the global legal framework**, which has not kept up with evolutions in the global economic and business reality, and to help redress the current imbalances between the rights and obligations of business.

“Enforceable international agreements are urgently needed, since local authorities are not always capable of effective intervention. Relations between states must be respectful of each other’s sovereignty, but must also lay down mutually agreed means of averting regional disasters which would eventually affect everyone. Global regulatory norms are needed to impose obligations and prevent unacceptable actions, for example, when powerful companies or countries dump contaminated waste or offshore polluting industries in other countries.”

Pope Francis, Laudato Si’: On Care for our Common Home, 173.

Rooted in our direct work with women and men, communities and workers negatively affected by business operations, their proposals and experiences, **CIDSE welcomes the zero draft text** for the international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (hereafter referred to as “the Treaty”) as a starting point for negotiations. Following upon the elements paper, the 3rd IGWG session and subsequent consultations, the structure, consistency and focus of the zero draft text are a step forward, reflecting a number of proposals and concerns raised. In this light, it is a solid basis for further constructive debate and dialogue.

We welcome the following positive aspects of the zero draft:

- Complementarity with the UN Guiding Principles on Business and Human Rights
- Focus on prevention and legal liability across the value chain
- Focus on improving access to remedy with an emphasis on rights of the affected people

At the same time, we identify the need for improvements in the following areas:

- Primacy of human rights in trade and investment policies
- Protection of human rights defenders
- Enforcement mechanisms

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

1. The zero draft includes important ways to strengthen preventive mechanisms, crucial for avoiding future environmental and human disasters due to corporate negligence or willful disregard for standards of safety and the rights of people at risk. The text reinforces and **strengthens the four-step due diligence approach of the UN Guiding Principles** on Business & Human Rights by giving it a legally binding nature in Article 9.2 via national legislation. In this way, the zero draft also builds upon important recent developments in national law, in particular the 2017 French duty of vigilance legislation requiring large corporations to adopt preventive vigilance plans, covering the corporate group, subsidiaries, controlled companies, providers and business relationships globally. Article 9.2 goes an important step in this direction by covering “activities of the business’s subsidiaries and entities under their direct or indirect control or directly linked to its operations, products or services”. This could be further strengthened by specifically mentioning **business relationships** related to supply, export, services, insurance and finance and investment, in this way reinforcing the whole value chain approach of the complementary work by the International Labour Conference on decent work in supply chains and other actions in support of Sustainable Development Goal 8 on the promotion of sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. On international level, the recently published OECD Due Diligence Guidance for Responsible Business Conduct is an important reference, bringing helpful **clarity on implementation measures**. In particular, the guidelines require direct engagement with and consultation of affected persons through the life cycle of a project. This, also in relation to human rights impact assessments, is an essential aspect of **Free, Prior and Informed Consent** to ensure adequate space and consideration so that the realities and views of both women and men are taken into account, in support of **gender equality**. The **connection between due diligence and liability** is recognized in Article 9.4, but needs further substantiation in relation to Article 10. These important provisions help to redress the inequality of means and resources between corporations and victims of abuse, providing a legal basis for victims to confront the corporate veil and ensure parent company responsibility. The **boundaries of civil, criminal and administrative, personal and collective liability** need further discussion to provide greater legal certainty.
2. The focus on the rights of the affected people must also reinforce the State's obligation to **protect human rights defenders** working in the context of business activities, closing gaps in this respect in the global and national policy responses to the Guiding Principles. The mention of **environmental aspects** (Art 4.1., 8.1., 9.2.) is necessary, as many of our partner organizations experience threats while working to ensure protection of human rights related to the environment. The references in Article 8 to protecting representatives of victims should be strengthened by explicitly mentioning human rights defenders and by **establishing specific measures**, for example adopting legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any person who seeks to exercise his or her human right to peacefully protest against and denounce abuses linked to corporate activity; refraining from restrictive laws and establishing specific measures to protect human rights defenders against any form of criminalization and obstruction to their work, including gender-specific violence against women human rights defenders; and fully, promptly and independently investigating and punishing attacks and intimidation of human rights defenders.

Access to Justice – Addressing the existing barriers

3. The zero draft’s focus on the rights of the affected people and access to remedy is key, as there is wide State recognition that access to justice and remedy for victims of business-related human rights abuse is largely lacking at present. This can be a strong contribution towards implementation of the third pillar of the UN Guiding Principles, and we believe there are opportunities for important **synergies and cross-fertilization with the OHCHR project on Access to Remedy**.¹ Obstacles to remedy are real² and need

¹ This has been underlined by the UN Deputy High Commissioner for Human Rights, Karen Gilmore in a side event panel debate on the Treaty, Geneva, 20 September 2018.

² 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.

to be addressed urgently, also in view of reaching Sustainable Development Goal 16 on the promotion of peaceful and inclusive societies for sustainable development and the provision of access to justice for all. We especially welcome a **broad definition of jurisdiction and of applicable law** as contained in Art. 5 and 7 respectively. This is a serious answer to the known legal obstacles caused by complex corporate structures and relationships. Allowing a **choice for victims** is an important step towards closing the gap of impunity and avoidance of liability in transnational business activity. An explicit reference to **extraterritorial obligations** would strengthen legal certainty and reflect well the shared responsibility of host and home States in our global, interdependent world.

4. We wish to highlight the importance of a number of provisions and urge States to develop those further in view of actions at national level to actually improve access to remedy for people affected and remove existing barriers. First, the reduction of **regulatory, procedural and financial obstacles**; in this light, the requirement to **avoid delays** in the legal process (Article 5c) is key for affected people often facing years of denial of remedy, and should be further specified; the proposed International **Fund for Victims** is a valuable proposal needing further operationalization. Second, we welcome the inclusion of a provision on **access to information**, such as on corporate structures and activities which is often in the possession of corporations, that can substantiate claims of victims and be crucial to determine the role of corporations in human rights abuses. Third, the establishment of the framework for **judicial cooperation** is welcome to improve the effectiveness of State enforcement. Finally, we especially welcome the inclusion in the zero draft of the **reversal of the burden of proof** (Article 10) in the context of huge power and resource asymmetries between corporations and affected communities; its wording should be specified in order to be effective.

Ensuring the primacy of human rights in trade & investment policies

5. CIDSE has promoted the potential of the Treaty to strengthen measures so that trade and investment can serve to support the enjoyment of human rights rather than infringe upon them.³ Trade and investment agreements are reinforcing a power and legal imbalance, giving corporate actors privileged access to arbitration tribunals through the Investor-State Dispute Settlement Mechanism, allowing corporations to drive decisions on national regulation on labor rights, health and environmental standards, while communities whose rights have been abused struggle to have access to justice. The importance of this issue and the value the Treaty could bring in helping to **avoid such conflicts** is recognized in Article 13.6. However, the “least restrictive interpretation” of trade and investment agreements asked in Article 13.7 could be understood as continuing to allow those agreements to have some restrictive effect on the State duty to protect human rights. A **specific clause on the primacy of human rights obligations over other obligations in trade and investment agreements**⁴ would better clarify this relationship, adding to regulatory certainty and a stable legal environment. This is particularly urgent, at a time in which problematic proposals are being advanced to start negotiations on an international framework to protect investor rights (the Multilateral Investment Court). We reject the MIC as it would not change the excessive and vague investor protection standards contained in current trade and investment agreements, further consolidating the flagrant imbalances between the rights and obligations of business.

Effective implementation of the Treaty

6. Enforcement mechanisms will be crucial to the success of the Treaty: resourcing a range of international, regional and national entities, including National Human Rights Institutions and labour tribunals, as well as stepping up monitoring systems will be an important part of making progress. **International action** is necessary to address important acknowledged gaps and help to strengthen national judicial systems; in this light, the number of **derogations** subject to domestic law (Articles 13.1-3 and elsewhere) could severely weaken the effectiveness of the Treaty, as certain existing laws may precisely represent obstacles to justice.

³ CIDSE, [Human Rights in Trade and Investment Policies: The potential of a UN Treaty on transnational corporations and other businesses](#), April 2017.

⁴ 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.

Institutional provisions in Article 14 and the optional protocol must be seriously reviewed: while the establishment of a **complaints mechanism** is welcome, the attributed competences may be too weak to arbitrate the known international challenges and conflicts, as compared to potential international judicial mechanisms such as an international court. A **more balanced articulation** between the national, regional and international levels of action will be needed for the Treaty to work effectively in practice.

General considerations

7. The text maintains a **scope of application** based on the “transnational character” of the activities of the enterprise. We consider the emphasis on **transnational activity** legitimate, as it is in these constellations where we face the biggest challenges and accountability gaps: complex business structures, jurisdictional restraints, divergent legal systems and levels of enforcement resulting in corporations being able to avoid legal liability. At the same time, the zero draft underlines that “**all business enterprises**, regardless of their size, sector, operational context, ownership and structure shall respect all human rights”, without restriction to activities of transnational character. (Article 1). We welcome this clarification of **business obligations**, strengthening the second pillar of the UN Guiding Principles; their implementation is to be discussed. The State’s duty is to protect against human rights abuses by all business, whether transnational or entirely domestic. Measures in the Treaty must therefore also apply to cases of human rights abuses by domestic companies and the regulation of transnational companies should be consistent with the regulation of domestic business activities. Business operations where States have a particular influence (**State-business nexus**), such as public procurement, external trade promotion and subsidies, should not be neglected.

We call on all States to consider the zero draft and to **formulate constructive proposals for further elaboration** at the 4th IGWG session. We believe that a **focus on substantive issues** is necessary to move forward the negotiations on the text for the Treaty, in view of the potential of its provisions and their effective implementation to help put a stop to corporate-related human rights abuses.

We call on States to **constructively engage** and to seize this important window of opportunity to advance **until the “mandate to elaborate an international legally binding instrument” established by UN Human Rights Council Resolution 26/9 is fulfilled.**