Open-ended Inter-Governmental Working Group on transnational corporations and other business enterprises with respect to human rights

Oral Statement

MISEREOR, Asia Pacific Forum on Women, Law and Development, BUND, CCFD-Terre Solidaire, CIDSE (International family of Catholic social justice organisations), CIEL, FIAN International, SOMO (Centre for Research on Multinational Corporations)

Article 13, Consistency with International Law

Trade and investment-related provisions

Dear Mr. Chairman, I am speaking on behalf of MISEREOR, Asia Pacific Forum on Women, Law and Development, BUND, CCFD, CIDSE, CIEL, FIAN International and SOMO.

Last year, we have welcomed very much that the *Draft Elements* clearly affirmed the primacy of human rights obligations over trade and investment agreements. This principle is crucial, as it would safeguard necessary policy spaces of States to respect, protect and fulfill human rights against abuses by business enterprises at home and abroad. It would also be necessary given the unacceptable privilege of foreign investors to sue States in Investor-to-State-Dispute-Settlement-Mechanisms even for regulations aimed to protect human rights and the environment.

Today, we welcome that the *Zero Draft* addresses possible conflicts between trade and investment agreements and the Convention. However, we express our deep concern that the primacy of human rights is not confirmed in the *Zero Draft* and some of the trade related provisions would fall short of reaching their very purpose:

- Positively, Article 13.6 declares that future trade agreement "shall not contain provisions that conflict with the implementation of the convention and shall ensure upholding human rights in the context of the activities by parties benefiting from such agreements". However, for greater legal clarity, the vague term of "upholding" should be replaced with "respect, protect and fulfill" and concrete measures such as human rights impact assessments should be added.

- According to Article 13.7, States shall interpret trade and investment agreements "in a way least restrictive on their ability to respect and ensure their obligations under the Convention". This is certainly well intended. *De facto* however, the wording would legitimize derogations from human rights obligations and leave it to ill-prepared arbitrators of investment tribunals to interpret which restrictions are acceptable and which are not.

- Moreover, Article 13.3 is highly problematic as it says that the Convention cannot restrict other domestic and international obligations. The unintended result would be

that trade and investment agreements *could* restrict human rights while the human rights *could not* restrict trade and investment agreements.

Such de facto primacy of trade and investment law would not only contradict General Comment N° 24 of the UN Committee on Economic, Social and Cultural Rights. It would also contradict Principle 9 of the UNGP and even the EU Lisbon Treaty that obliges to respect and promote human rights in its trade and investment policy within and outside the EU.

Against this backdrop, we would like to recommend the following modifications in the next Draft:

1) to delete Article 13.3 in order not to neutralize the impact of the Treaty on other areas of international and domestic law;
2) to re-insert the principle of the primacy of human rights over trade and investment agreements in articles 2 and 13, to add a specific supremacy clause and to specify that this primacy must be secured in rulings of any international dispute settlement mechanism;
3) to modify Article 13.7 in the sense that "existing *and future* trade and investment agreements shall be *reviewed*, interpreted *and implemented* in a way that they *do not restrict* the ability of States to respect and implement their obligations under this Convention *and other applicable human rights treaties*.

Thank you very much for your attention!

Armin Paasch, October 16th 2018.