

# **Compilation of statements delivered by non-State stakeholders during the State-led negotiations of the eighth session**

## **Note by the Secretariat**

### *Summary*

The present document contains a compilation of statements made by non-State stakeholders during the State-led negotiations of the eighth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.<sup>1</sup> It has been prepared in accordance with paragraph 25 (c) (iii) of A/HRC/52/41. Statements have been reproduced in the original language of submission and are included only if they were shared with the Secretariat in written form.

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<sup>1</sup> These statements have also been posted online at <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session8/oral-statements>.

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## **Compilation of statements made by non-State stakeholders during the State-led negotiations of the eighth session**

### **A. Article 6**

#### **1. CCR**

Thank you, Chair.

Concerning the 3rd revised draft, we strongly support the changes suggested by South Africa and Palestine for paragraph 6.3 c made in the 7<sup>th</sup> session of the Working Group. We also support the amendments offered by Cameroon and Palestine regarding paragraph 6.4 d bis., and 6.8 also made in the 7th session of the Working Group.

We certainly agree with comments made this morning that negotiating on two texts is counterproductive to our goal here. The revised text is the authoritative work product of this intergovernmental mechanism, made through a necessarily iterative and democratic process, and therefore the 3<sup>rd</sup> revised text should remain the sole concern of the ongoing negotiations. On this we support the position of Namibia, supported by many other states, on the methodological concerns of this process so far.

However, as US organization, we must state unequivocally our strong disagreement with the US Government's recommendations concerning the removal of protections for various groups of people contained in the Chair's recommendations. What use is a treaty of this kind that does not reflect international law's long-standing acknowledgement of the importance of heightened protections for Indigenous peoples, women, marginalized groups and others at heightened risk of vulnerability?

Among other concerns, we are unable to reconcile this position of the US Government with its repeatedly stated desire to ensure protection for human rights defenders, many of whom belong to these categories of people. Indeed we note this position does in fact contravene the US's existing and long-standing international obligations outlined by such instruments as ILO Convention 169.

Thank you.

#### **2. Joint statement on behalf of the Centre for Human rights, University of Pretoria and the African Coalition for Corporate Accountability and their partners**

This intervention is made on behalf of the Centre for Human Rights, University of Pretoria and the African Coalition for Corporate Accountability and their partners.

With regards to Article 6, and any interventions going forward, we align ourselves with interventions made by the State representatives of South Africa and Palestine and others insisting on working with the text of the 3<sup>rd</sup> draft and comments made at the 7<sup>th</sup> session.

We reiterate the view as in our intervention during the 7<sup>th</sup> session that Articles 6.1 and 6.2 have gaps in that they fail to categorically require States to make changes in corporate laws that are necessary to render businesses accountable and liable for fundamental rights violations, as well as to create direct human rights violations. As such we support the suggestions and textual changes made by South Africa, Mexico, Brazil and Panama on Article 6.2 and support Cameroon's input of Addition of Article 6.2 ibis which requires TNCs to NOT take any measures that present a real risk of undermining and violating human rights and to identify and prevent human rights violations and risks of violations throughout their business operations.

We insist that there exists a gap between assessing the potential abuses arising from business activities and taking appropriate measures to enforce compliance. In saying this we align ourselves with South Africa and Palestine proposal to require State Parties to require business enterprises and all actors **across the value chain** to undertake **ONGOING/CONTINUOUS** and **FREQUENTLY UPDATED** human rights due diligence.

We endorse Palestine's suggestion of the inclusion of environmental and workers' rights in the text of Article 6.3 (a).

We reiterate the importance of recognizing indigenous peoples' rights and are in full support of all States who suggested the inclusion of the meaningful consultation of indigenous peoples and local communities.

On par 6.4 d. we would like to emphasise that the consultations with indigenous peoples in accordance with the internationally agreed standards of free, prior and informed consent; are conducted in a transparent manner ensuring that communities have the right to say no to development projects that will negatively affect them in accordance with the principle of FPIC. We feel strongly that the only way to have effective prevention mechanism is to have effective FPIC measures that put communities at the centre of decisions regarding development projects in their communities.

### **3. Joint statement CETIM and the Global Campaign**

Gracias Sr. Presidente.

Como se ha señalado en la intervención anterior, dada la extensión de este artículo, los comentarios de la Campaña van a dividirse en tres intervenciones, encabezadas todas ellas por el rechazo contundente al cambio de metodología impulsado por la presidencia. Mantenemos que el único documento que puede basar la negociación es el tercer borrador revisado.

En esta segunda intervención, dedicada a las obligaciones de las empresas, queremos subrayar que en este artículo y en el conjunto del texto, debe utilizarse la expresión "empresas transnacionales y otras empresas con carácter transnacional" propuesto por una mayoría de Estados, entre ellos Cuba, Egipto, Pakistán, Camerún o Irán. Además, debe eliminarse del conjunto del texto la referencia a la obligación de "mitigar", como ha señalado Egipto. Recordamos que desde la óptica de derechos humanos no es posible considerar la "mitigación" de una violación como una política aceptable, ni para Estados ni para empresas. Igualmente, toda obligación debe entenderse aplicable al conjunto de la cadena global de producción, según ha remarcado Palestina y debe evitarse la referencia a "*severe*" *human rights violations* ya que el término "severe" es sujeto a interpretación y en todo caso demasiado restrictivo.

En relación a las obligaciones de las empresas transnacionales, queremos reafirmar que la inclusión de obligaciones directas para las transnacionales son el corazón del tratado y deberían recogerse en un artículo dedicado en exclusiva a esta cuestión. Esto es algo que se ha repetido insistentemente en esta sala., y que sigue sin reconocerse plenamente en el 3er borrador revisado.. Recordamos que solo recogiendo estas obligaciones es posible cumplir con el mandato de la Resolución 26/9 que prescribe la regulación, en el derecho internacional de los derechos humanos, de las actividades de estas empresas.

Al afirmar esto no estamos pidiendo algo imposible, al contrario las empresas transnacionales tienen obligaciones derivadas del derecho internacional de los derechos humanos y estas obligaciones son diferentes, existen independientemente y se suman al marco jurídico vigente en los Estados de acogida y de origen. Tampoco esto es nuevo, en el ámbito del derecho internacional de los derechos humanos existe ya un cuerpo consolidado de instrumentos internacionales que establecen responsabilidades para las empresas de manera directa. La mayoría de estos textos han sido subrayados a lo largo de los debates que sobre este tema se han desarrollado en las sesiones de este grupo.

Así, el Tratado debe y puede establecer una lista clara y abierta de obligaciones normativas para que las ETNs respeten los derechos humanos en el marco de sus actividades, que deberán aplicarse de forma directa e independiente cuando los marcos legales nacionales no existan, sean ineficaces o no se ajusten al instrumento jurídicamente vinculante.

Algunas de las obligaciones fueron propuestas por los Estados y deben mantenerse y ordenarse de manera conjunta en este nuevo artículo, que se titularía "Obligaciones de las Empresas Transnacionales". Entre otras, además del cumplimiento efectivo de los derechos reconocidos en este Tratado destacamos las siguientes propuestas de Camerún.

- Como obligación general no adoptar ninguna medida que suponga un riesgo real de socavar y violar los derechos humanos.
- No obstaculizar la aplicación del Tratado por los Estados Parte en este instrumento, ya sean Estados de origen, Estados receptores o Estados afectados por las actividades de las ETN.
- Incluir expresa y detalladamente, en línea con las propuestas de Palestina o Sudáfrica, las consultas obligatorias, adecuando la redacción al derecho internacional vigente.

La obligación más desarrollada en el texto que estamos negociando es la “diligencia debida” cuyo tratamiento se abordará en la próxima intervención de la Campaña Global

**4. Joint statement on behalf of CIDSE, Trocaire, CAFOD, CCFD-Terre Solidaire, KOO, DKA, Broederlijk Delen, ALBOAN, Fastenaktion Misereor and Red Iglesias y Minerías**

Dear Mr Chair,

I am delivering this statement on behalf of CIDSE, Trocaire, CAFOD, CCFD-Terre Solidaire, KOO, DKA, Broederlijk Delen, ALBOAN, Fastenaktion Misereor and Red Iglesias y Minerías

Mr Chair,

It is essential that we set clear rules on a company’s obligation to respect human rights and prevent abuses.

We have heard some states question the prescriptiveness of the draft. Yet, most of them have few qualms in setting extremely prescriptive rules with regards to international trade and tariffs, including strong judicial enforcement mechanisms. Therefore, why should rules preventing human rights harms be vague and non-enforceable?

We encourage states to create a clear and precise framework offering guidance to businesses. In particular, we support the amendment advanced by the Philippines this morning on **6.4.a** and the amendment advanced by Argentina and Palestine last year on **art 6.4a bis**. Article **6.4** should also clearly recognise a company’s obligation to always obtain indigenous people’s Free, Prior and Informed Consent.

When it comes to large-scale investments, communities must always have an avenue to deny their consent to economic projects that would impact their rights or territories. In order to ensure inclusive, transparent and meaningful stakeholder consultations, we invite States to support the new **6.4c** proposed last year by Palestine, Panama and South Africa.

In the spirit of the universality and indivisibility of human rights, we believe there is no case in which mitigation of human rights abuses is acceptable. Therefore, we support the amendments advanced by Panama, Mexico, Brazil, and South Africa in **art 6.2 and by Palestine in art 6.b**. When businesses cause harm or contribute to harm, they must cease the abuse or the activities causing it to fulfill their obligations.

Moreover, an instrument without provisions for environmental and climate due diligence would be a missed opportunity as our planet stands at the precipice of climate breakdown. We urge states to support the introduction of the precautionary principle suggested by Palestine in art 6.1 ter, including the precautionary principle in environmental matters. This is key to ensuring the right to a clean, healthy and sustainable environment. We also call on delegates to ensure that companies meaningfully reduce their contributions to greenhouse gas emissions to meet international recognised standards on this matter, to meet with the 1,5°C Paris Agreement goal.

Finally, human rights and environmental defenders play a crucial role in the defence of our planet and human family. We urge States to support Uruguay’s call for States to adopt measures to protect Human Rights Defenders in a new paragraph **6.8 quarter**.

**5. Joint Statement on behalf of Conselho Indigenista Missionário CIMI, Red Iglesias y Minería and Articulação dos Povos Indígenas no Brasil - APIB**

We join their peers to support the 3rd Revised Draft, as it is based on a participative, open and transparent manner and we call on States to work on this very document.

We support Article 6 on prevention measures. This is all the more important in the context of the disproportionate impact business activities on indigenous peoples and traditional communities. We particularly support language on Article 6.4 (d) on free, prior and informed consent. We also strongly support the proposals made by Palestine(6.1ter) and Cameroon (6.2 bis). Article 6 can be strengthened and capture the whole existing international legal framework. For instance, the well-established principle of precaution should be fully represented under Article 6. This issue gains relevance in the aftermath of the recognition of a clean, healthy and sustainable environment as a human right, as the UNGA approved last July. Moreover, many jurisdictions recognize this principle in their constitutions, laws and norms, which forms state practice, in the context of Art. 31 of the Vienna Convention on Law of Treaties.

Besides the need to listen to the views of indigenous peoples and traditional communities on matters that influence their rights, through the FPIC standard, there is a need for the future treaty to provide for a stronger legal principle by which no plan, project or action is allowed, unless there is evidence such they do not interfere with human rights, particularly this specific sector of society.

We respectfully propose the following complementary formulation:

*States Parties shall apply the principle of precaution and refrain from applying laws, policies and regulations and from carrying out plans, projects or activities relating to business activities, and enforce this principle on business enterprises, which pose risks of violation of human rights, in particular indigenous peoples and traditional communities, or risks of environmental degradation or climate change.*

I thank you.

6.9 - Os Estados Partes aplicarão o princípio da precaução e abster-se-ão de aplicar leis, políticas e regulamentos e de realizar planos, projetos ou atividades relativas às atividades empresariais, e aplicar este princípio sobre as empresas, que representam riscos de violação dos direitos humanos, em particular os povos indígenas e comunidades tradicionais, ou riscos de degradação ambiental ou mudanças climáticas.

**6. FIAN**

Gracias señor presidente.

Nos centramos en los comentarios al tercer borrador Nos gustaría reiterar, en línea con lo que muchos Estados han señalado, que las negociaciones se deben basar en el tercer borrador revisado. Las propuestas del presidente carecen de múltiples aspectos y matices importantes que contiene el borrador revisado. Tener dos documentos dificulta significativamente el logro de acuerdos, incluyendo entre sesiones.

Enseguida presentamos algunos comentarios con respecto a las propuestas de los Estados, que demuestran su fundamento en los actuales estándares del derecho internacional.

En el artículo 6.1 sugerimos la inclusión de las cadenas de valor, después de la mención de las corporaciones transnacionales y otras empresas. Esta propuesta pone el tercer borrador en línea con los últimos desarrollos regulatorios a nivel nacional y regional incluso por las directrices de la OCDE sobre empresas y derechos humanos.

En cuanto al artículo 6.2, apoyamos las declaraciones de las delegaciones de México, Panamá y Sudáfrica que se refieren a la mitigación del riesgo y no del daño, puesto que la mitigación del daño significaría que los estados aceptan cierto grado de violación de derechos, lo cual es contrario a las obligaciones de derechos humanos consagradas en los instrumentos internacionales. En relación con este mismo aspecto, respecto al artículo 6.3. B, manifestamos nuestro apoyo a las declaraciones de México, Panamá, Brasil y Palestina y recordamos lo ya establecido por la Corte Internacional de Justicia en varias de sus

sentencias, especialmente en que implican la prevención del riesgo como regla (caso Hungría- Eslovaquia). Según lo contemplado en el artículo 31 de la Resolución sobre Responsabilidad Internacional de los Estados y analizado extensivamente por la Comisión de Derecho Internacional, la mitigación del daño es un elemento que afecta el alcance de la reparación y hace más gravosa la situación de las víctimas, esto se da siguiendo la misma línea que ya se ha establecido frente al principio precautorio en Derecho Internacional Ambiental.

En relación con el comentario de Francia sobre la importancia de la proporcionalidad, recordamos que el artículo 6.3 del tercer borrador ya incluye este criterio, ausente en la propuesta del presidente.

Tal como los expresamos en la declaración de CIMI que co-patrocinamos apoyamos la inclusión de los aspectos ambientales en diversos artículos pertinentes, recordando la reciente aprobación del derecho a un medio ambiente sano, limpio y sostenible por el Consejo de Derechos Humanos y la Asamblea General de Naciones Unidas.

También apoyamos la propuesta de Bolivia de incluir al campesinado y otras personas que trabajan en áreas rurales en el Art 6.4.c, en línea con la UNDROP, adoptada democráticamente por el Consejo de Derechos Humanos y la Asamblea General de las Naciones Unidas.

Recordamos que el artículo 6.8 se encuentra en línea con el artículo 5.3 de la Convención Marco para el Control de Tabaco, que contiene lenguaje acordado en el marco de la OMS y apoyamos las propuestas del estado de Palestina.

Por falta de tiempo no podemos profundizar, pero apoyamos los nuevos aportes sobre personas defensoras de derechos humanos, medidas cautelares y acciones afirmativas, necesarias para reforzar la prevención.

Gracias señor Presidente.

## **7. Friends of the Earth International**

Artículo 6. Primera intervención — ALBERTO FOEI

Gracias Sr. Presidente.

Mi nombre es y hablo en nombre del

Dada la extensión de este artículo, los comentarios de la Campaña van a dividirse en tres intervenciones, encabezadas todas ellas por el rechazo contundente al cambio de metodología impulsado por la presidencia. Mantenemos que el único documento que puede basar la negociación es el tercer borrador revisado. Pedimos por tanto la retirada del documento informal de Chair, tal y como han dicho South Africa, Namibia, PAlestine and Kenya. Ese documento NO ha sido redactado sobre la base de las negociaciones anteriores.

Comenzamos con señalar que el artículo 6 tiene un título que no se adecúa al contenido, pues bajo la rúbrica “prevención” el texto conjuga un conjunto de preceptos que regulan las obligaciones de los Estados, algunos derechos de las personas y comunidades afectadas y las obligaciones para las empresas, con especial atención a la diligencia debida. Por todo lo anterior, consideramos que el contenido debería dividirse en dos disposiciones distintas: obligaciones de los Estados y obligaciones de las empresas transnacionales.

En primer lugar, el artículo 6 debe contener un listado claro de las obligaciones que, como mínimo, los Estados deben asumir respecto de las empresas concernidas por el Tratado, tal y como ha remarcado Cuba.

También es fundamental mantener, como propusieron Camerún o Palestina en la pasada sesión, las siguientes obligaciones de los Estados:

La prohibición de contratar con empresas que incumplan las obligaciones establecidas en este tratado o hayan sido condenadas por violaciones de derechos humanos.

La obligación de adoptar medidas cautelares para evitar

La obligación de actuar de manera transparente y proteger sus políticas, leyes e instituciones de la influencia indebida de intereses corporativos.

La adopción de todas las medidas a su alcance para garantizar que las instituciones financieras en las que participan o con las que firman acuerdos no contribuyan a las violaciones de los derechos humanos causadas por las empresas transnacionales.

También apoyamos la propuesta de Palestina sobre la jurisdicción universal en el art. 6.7 y la adición fundamental respecto de la obligación de los Estados de establecer normas para obligar a las empresas a respetar los derechos de las y los defensoras de derechos (**Uruguay, Panama, Palestine, Mexico, Brazil**)

Nos oponemos a la propuesta de Brasil relativa a la inclusión permanente de la referencia al derecho nacional.

También consideramos que es fundamental la inclusión en el Tratado de manera clara del principio de precaución. Este tema adquiere relevancia tras el ya bien conocido reconocimiento de un medio ambiente limpio, saludable y sostenible como un derecho humano por la Asamblea General de las Naciones Unidas en julio pasado.

En concreto, respecto de esta cuestión, apoyamos la siguiente redacción sugerida por Camerún y por distintos movimiento sociales: Los Estados Partes aplicarán el principio de precaución y se abstendrán de aplicar leyes, políticas y reglamentos y de realizar planes, proyectos o actividades relacionados con actividades empresariales, y harán cumplir este principio en las empresas comerciales que presenten riesgos de violación de los derechos humanos o riesgos de degradación ambiental o cambio climático.

## **8. Franciscans International and Feminists for a Binding Treaty**

This statement is made on behalf of Feminists for a Binding Treaty, of which Franciscans International is a member. Our comments pertain to the text of the 3<sup>rd</sup> revised draft.

It is essential to make clear that the instrument also applies to violations committed by the State or its agents in the context of business activities. In line with our statement made last year, we suggest reintroducing the notion of human rights violation in the text, and maintaining the clarification, in the current draft, that the definition of business activities and relationships include those involving state entities in Articles 1.3 and 1.5. In general, we regret that the role of the State as an economic actor is still not addressed in the text including under article 6.

In regard to Article 6.2, we suggest editing the text so that it reads in part “respect internationally recognized human rights, avoid and prevent human rights abuses and violations throughout their business activities and relationships.” We support States that suggested deleting the term “mitigate.”

To ensure accessibility and transparency of human rights due diligence assessments done by businesses, we recommend adding at the beginning of art. 6.3 (a), “In partnership with potentially affected communities and individuals, identify, assess and publish in an accessible manner”. In the same vein, we also suggest amending Art. 6.3(d) so that it reads, “Communicate regularly and in a public, appropriate, and accessible manner to the public and stakeholders, including through gender-responsive consultation with local and Indigenous communities”.

Regarding 6.3(b), we suggest retaining “avoid” -so that it reads “take appropriate measures to avoid and prevent abuses.” In that regard, we also suggest adding a sentence in 6.3 (b) on situations where mitigation of risks is impossible such as in certain contexts of conflict. The issue of immitigability should also be reasserted in Article 6(4)(g), with an additional emphasis in relation to compliance with international humanitarian law, so that it reads:

“Adopting and implementing enhanced and ongoing human rights due diligence measures to prevent human rights abuses in conflict-affected areas, including situations of occupation, and ensure that businesses respect international humanitarian law standards. Given the risk of gross human rights abuses in conflict-affected areas, certain situations may require that businesses refrain from entering into activities and/or relationships or cease them depending on the phase of operation.”



We support maintaining the third revised draft's reference in Article 1.2 to the right to a clean, healthy, and sustainable environment and to fundamental freedoms in the definition of human rights abuse. We hence support language in Art. 6.4(a), where human rights due diligence includes 'environmental and climate change impact assessments; as well as language in Art. 6.4(e) on public reporting by businesses on environmental and climate change standards.

We recall that a gender perspective is essential to understand businesses' differentiated human rights impacts including in the context of human rights due diligence. We hence generally support article 6.4(b) of the third draft and reiterate the textual proposals we made last year to strengthen this provision. Consultations with Indigenous peoples must be undertaken in accordance with the internationally agreed standards of free, prior and informed consent in article 6.4(d).

Finally, the LBI must protect against corporate influence in government decision-making in the context of business activities, we support maintaining the third revised draft's Article 6.8 addressing this concern and suggest strengthening it in line with our comments from last year.

## **9. International Commission of Jurists**

Monsieur le Président,

La Commission internationale de juristes réitère son soutien à l'adoption de dispositions fortes et claires sur la prévention des abus et violations des droits humains par les entreprises.

En effet, l'obligation de diligence raisonnable pour les entreprises n'est pas la seule mesure de prévention à envisager dans le traité. Les Etats doivent aussi prendre des mesures de prévention par rapport à leurs propres activités commerciales.

Dans ce contexte, la CIJ soutient les propositions faites par le Cameroun par rapport à l'article 6.1, pour que les Etats adoptent des normes plus élevées visant à garantir le respect des droits humains dans leurs propres relations commerciale, notamment dans le cadre des marchés publics.

Concernant la diligence raisonnable pour les entreprises, la CIJ est d'avis que le paragraphe 3 devrait être rédigé au plus près possible de la formulation figurant dans les Principes Directeurs. Tout élément supplémentaire à inclure dans le processus de la diligence raisonnable et qui découlerait de l'expérience de sa mise en oeuvre au niveau national devrait quant à lui être stipulé au paragraphe 4 du projet.

A notre avis, ces éléments nouveaux sont déjà présents dans l'article 6 mais ils auraient besoin d'une approche plus cohérente : il faut mettre l'accent sur la participation et la consultation des travailleurs et autres parties prenantes ; accentuer la transparence et la publication des informations sur la structure et organisation de l'entreprise multinationale, et accroître la visibilité des mécanismes de vigilance, d'exigibilité, et de sanctions pour manque de conformité.

Pour finir, en relation à l'article 6.6, la CIJ est d'avis que celui-ci pourrait être renforcé en reprenant certains éléments formulés par le président du Groupe Intergouvernemental dans ses suggestions informelles notamment celle qui appelle à l'établissement d'une autorité nationale compétente et indépendante pour surveiller la mise en oeuvre des obligations du traité.

Merci Monsieur le Président.

## **10. International Human Rights Association of American Minorities (IHRAAM)**

Greetings – good morning distinguished Chair and all participants,

Chair's text and 3<sup>rd</sup> revised draft 6 to 13

RFB Nothing specific on human rights defenders in the document or peoples threatened with retaliation?

### **Article 6. Prevention**

6.1. States Parties shall regulate effectively the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control, including transnational corporations and other business enterprises that undertake activities of a transnational character.

RFB “otherwise under their control” , including transnational corporations and other business enterprise that is installed in violation of the international right of self-determination?

6.2. States Parties shall take appropriate legal and policy measures to ensure that business enterprises, including transnational corporations and other business enterprises that undertake activities of a transnational character, within their territory, jurisdiction, or otherwise under their control, respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their business activities and relationships.

RFB United Nations studies already questioned the legitimacy of “otherwise under their control”, by NSGTs or any other limitation of sovereignty.

6.3. For that purpose, States Parties shall require business enterprises to undertake human rights due diligence, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships, as follows:

a. Identify, assess and publish any actual or potential human rights abuses that may arise from their own business activities, or from their business relationships; 8

b. Take appropriate measures to avoid, prevent and mitigate effectively the identified actual or potential human rights abuses which the business enterprise causes or contributes to through its own activities, or through entities or activities which it controls or manages, and take reasonable and appropriate measures to prevent or mitigate abuses to which it is directly linked through its business relationships;

c. Monitor the effectiveness of their measures to prevent and mitigate human rights abuses, including in their business relationships;

d. Communicate regularly and in an accessible manner to stakeholders, particularly to affected or potentially affected persons, to account for how they address through their policies and measures any actual or potential human rights abuses that may arise from their activities including in their business relationships.

6.4. States Parties shall ensure that human rights due diligence measures undertaken by business enterprises shall include:

a. Undertaking and publishing regular human rights, labour rights, environmental and climate change impact assessments throughout their operations;

b. Integrating a gender perspective, in consultation with potentially impacted women and women’s organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experienced by women and girls;

c. Conducting meaningful consultations with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas;

d. Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent;

e. Reporting publicly and periodically on non-financial matters, including information about group structures and suppliers as well as policies, risks, outcomes and indicators concerning human rights, labour rights, health, environmental and climate change standards throughout their operations, including in their business relationships;

f. Integrating human rights due diligence requirements in contracts regarding their business relationships and making provision for capacity building or financial contributions, as appropriate; 9

g. Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation.

6.5. States Parties may provide incentives and adopt other measures to facilitate compliance with requirements under this Article by micro, small and medium sized business enterprises.

6.6. States Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential human rights abuses resulting from the business enterprises' size, nature, sector, location, operational context and the severity of associated risks associated with the business activities in their territory, jurisdiction, or otherwise under their control, including those of transnational character.

6.7. Without prejudice to the provisions on criminal, civil and administrative liability under Article 8, State Parties shall provide for adequate penalties, including appropriate corrective action where suitable, for business enterprises failing to comply with provisions of Articles 6.3 and 6.4.

6.8. In setting and implementing their public policies and legislation with respect to the implementation of this (Legally Binding Instrument), States Parties shall act in a transparent manner and protect these policies from the influence of commercial and other vested interests of business enterprises, including those conducting business activities of transnational character.

## **11. International Organisation of Employers**

Thank you Chair, I am speaking on behalf of the International Organisation of Employers.

As a general comment, the draft provision seems to be far from possible implementation.

As for the scope, we continue to express our concerns as for the limited scope referring only to transnational companies.

On 6.3. the entire provision should be aligned to the UNGPs 15, 17 and 18.

On 6.4, the clause should be deleted in its entirety and replaced with the language of the UNGP 21. The current text is too vague, and problematic.

On 6.4.bis parent and outsourcing enterprises cannot have obligations whatsoever to give "all the necessary technical and financial means" to their business relationships in their global value chain for them to be able to implement their due diligence.

On 6.7. Reference to "adequate penalties" should be omitted as penalties should be set in line with national judicial systems.

On 6.7.bis: the proposal is calling for "universal jurisdiction" which is largely unimplementable and should be left to States to decide. It should be deleted.

On 6.8. This provision restricts freedom of speech and expression enshrined in Article 19 of the Universal Declaration and should be omitted.

On 6.8. bis and ter. The proposals regarding "international financial institutions" loses sight of the fact that this draft is aimed at States and non-state actors such as companies.

### Turning to the Chair's new proposals:

On 6.1, this proposal should refer explicitly to the obligations of States (First pillar) to support businesses in their responsibility to respect. Prevention is a shared responsibility between States and businesses.

The wording on 6.1. (b) "strengthen the practice of human rights due diligence by business enterprises" is not clear enough and should be replaced by "provide support, advice and guidance to business enterprises on respecting human rights by appropriate methods, including on HRDD, as well as through capacity-building and awareness-raising."

“Active participation from businesses, in particular, SMEs, as well as Employer Organisations” under (d) should be explicitly included.

On 6.2. “Necessary independence and resources” should be added to this proposal. Also, to avoid any subjective language, the term “undue influence” should be omitted.

On 6.3. Again, this proposal does not consider the obligations arising from the State’s duty to protect human rights which should provide guidance and support to companies when undertaking their HRDD. Additionally, these legally new enforceable requirements would be extremely burdensome for business enterprises.

Point 6.3. (d) remains unimplementable. Public security is granted by States: not by a company, as a consequence of its HRDD.

Finally, State Parties should have the possibility to exclude micro-companies and small and medium enterprises (MSMEs) from legally binding due diligence obligations.

On 6.4, What does “third party” means in this context? Are we referring to suppliers? This language should be clarified.

Thank you.

## **12. Institute of Policy Studies and the Global Campaign**

Gracias Sr. Presidente,

Mi nombre es Adoración Guamán, soy profesora de derecho de la universidad de Valencia y hablo en nombre del Institute for Policy Studies y de la Campaña Global

Como se ha señalado en la intervención anterior, esta es la tercera intervención de la Campaña Global al artículo 6 y se encabeza, por supuesto, por el rechazo contundente al cambio de metodología impulsado por la presidencia. Mantenemos que el único documento que puede basar la negociación es el tercer borrador revisado. Por añadidura, debemos remarcar que respecto del tema de la “diligencia debida” la propuesta del Chair supone un retroceso significativo no solo del texto anterior sino de los marcos regulatorios ya existentes a nivel nacional e incluso de la propuesta de Directiva sobre la diligencia debida de las empresas en materia de sostenibilidad, publicada por la Comisión Europea.

La regulación de la diligencia debida debe orientarse de manera directa a las empresas transnacionales, incluyendo igualmente las obligaciones de los Estados de adoptar las medidas necesarias para el adecuado control del cumplimiento. Esta regulación no solo no es susceptible de poner en peligro los marcos normativos estatales o regionales sino que va a coadyuvar a conseguir ese terreno de juego nivelado al que aspira la Unión Europea con su propuesta de Directiva. En todo caso, y esto es una obviedad en términos de derecho internacional, los Estados siempre podrán legislar en sentido más beneficioso para los Derechos Humanos.

Por tanto, en materia de Diligencia Debida, recogemos como fundamentales las siguientes propuestas añadidas por los Estados en la sesión anterior incluyendo las sostenidas desde la Campaña Global:

- Eliminar la palabra mitigar como señalan Cuba, Palestina o Egipto
- Integrar la obligación directa de las empresas de identificar los riesgos y tomar las medidas oportunas para evitar, prevenir y cesar, incluyendo la finalización de la relación contractual si es preciso, como señaló Palestina.
- Determinar que el alcance de las obligaciones de diligencia abarca la totalidad de los eslabones de las cadenas globales de producción.
- Integrar la obligación de las empresas de extender todas las medidas de diligencia debida a sus relaciones comerciales y al conjunto de la cadena global de producción.
- Incluir dentro de las obligaciones de las empresas de manera específica las relativas al respeto de los derechos laborales, en particular los relativos al trabajo decente y la libertad sindical (propuesta de Argentina)

- Establecer la obligación de que todas las actuaciones relativas al levantamiento de información, diseño de las medidas de diligencia debida y aplicación y revisión de las mismas se realice con plena participación de la sociedad civil y respetando en particular los derechos de información y consulta de los sindicatos.
- Incluir una mención específica al contenido de los Acuerdos Marco Internacionales como parte del contenido de las obligaciones de diligencia, si la empresa transnacional hubiera firmado uno de estos acuerdos.
- Recoger como parte del proceso de diligencia debida, el cumplimiento del conjunto de obligaciones para las empresas contenidas en el Tratado.
- Establecer la obligación para los Estados de crear una autoridad administrativa de supervisión (la propuesta de Camerún en este caso está en línea con la Directiva) Coincidimos con Cuba en este aspecto, la evaluación en ningún caso puede quedar en manos de las empresas.
- Establecer la obligación de los estados de asegurar el acceso de individuos y comunidades afectadas a la justicia para exigir el cumplimiento por parte de las empresas de las medidas de diligencia debida

Recordamos que, como ya hemos subrayado en otras ocasiones, la diligencia debida es fundamentalmente una obligación de medios que en ningún caso, debe sustituir al establecimiento de obligaciones de resultado (no dañar) que se deben integrar en el Tratado respecto de las empresas transnacionales, incluyendo igualmente de mecanismos de acceso a la justicia para permitir las sanciones a estas empresas por las violaciones de derechos humanos cometidas de manera directa o a través de su cadena global de producción.

Así mismo, es fundamental evitar que el mecanismo de diligencia debida pueda servir como vía para exonerar la responsabilidad de las empresas por el mero cumplimiento de las obligaciones establecidas. La empresa NO puede ser absuelta de responsabilidad por cumplir las medidas de diligencia, la violación debe ser siempre reparada y en su caso las entidades culpables deben ser condenadas.

Gracias Sr. Presidente.

### 13. International Trade Union Confederation

Thank you, Chairperson. I speak on behalf of the global trade union organisations I cited in my opening intervention.

As indicated yesterday, we will comment on the third revised draft and share our views on amendments to the text proposed by member States last year and during this session.

Chairperson,

Article 6.2

[We welcome the fact that Article 6.2 firmly embeds the requirement of States Parties to take *all* necessary legal and policy measures to ensure that business enterprises respect human rights and prevent and mitigate rights abuses throughout their operations. While articles 6(3) and (4) bring the focus of prevention back to mandatory human rights due diligence legislation, it is clear that art. 6(2) sets expectations of States to go *beyond* due diligence – very much in line with the UNGPs. Therefore, ] we strongly recommend including a non-exhaustive list of *other* legal and policy measures here. Our proposal is to include the following text at the end of Article 6.2:

*Such measures may include injunctive relief, precautionary or protective measures, and strict liability for human rights abuses, as appropriate.*

In this respect, we welcome new Article 6.1 ter as proposed by the State of Palestine.

Regarding Article 6.3(b), we would request that the word ‘reasonable’ be struck from the second part of this sub-article concerning human rights abuses to which an enterprise is *directly linked*. If we look at the HRDD framework of the UNGPs from which this Article takes inspiration, although they set out a greater number of factors to be considered where an

enterprise has a *business relationship* in order to determine what appropriate action may be required, there is *no* suggestion that the action to be decided on as appropriate is lesser or limited to only what is *reasonable*. For this reason, we would recommend the deletion of the term reasonable.

In relation to Article 6.4, we think that it would be important to highlight the specific need to consult workers and their representatives – as rights-holders themselves. Our suggestion is to amend the first line of Article 6.4(c) so that it reads as follows:

c. Conducting meaningful consultations with individuals, communities, workers, and workers’ representatives whose human rights can potentially be affected by business activities...

And finally,[ regarding the extremely important provision on enhanced HRDD in Article 6.3(g), we think that it would be important to also cover *other situations* that can put a State under a level of stress similar to those in conflict situations. – in line with As the UN Working Group on Business and Human Rights’ stated in their Guidance on human rights due diligence in conflict situations, genocide and crimes against humanity can occur during peacetime. And instability leading to rights abuses can emanate from serious levels of political volatility.

Therefore, we would recommend an amendment to Article 6.4(g) so that it covers human rights abuses in situations of instability and national stress

Chair,

We also welcome the amendments proposed by Cameroon at [6.4] and [6.8 bis and 6.8ter] in relation to financial assistance for companies to conduct appropriate HRDD and the role International Financial Institutions respectively. We also welcome Cameroon’s proposed amendment at 6.4 to ensure that a national competent authority has allocated responsibilities and adequate financial and human resources Similarly, new 6.1bis proposed by Cameroon add value by focusing on the State role relating to public procurement and public contracts.

We would also support the amendment by the State of Palestine t Article 6.3(a) referring to actual or potential environmental and/or human rights abuses, including those that infringe upon workers’ rights. This amendment addresses the fact that Human and environmental rights due diligence processes will necessarily require enterprises to avoid causing or contributing to adverse rights impacts that specifically affect workers, including internationally recognized human rights that necessarily entail environmental aspects such as those relating to a green transition in a lead firm’s own activities or business relationships. We have indeed argued that workers have a *right* to a just transition protected under international law.

Further, as elements of criminal liability have not been fully developed in the revised draft, we appreciate the State of Palestine’s efforts to address the question of universal jurisdiction over human rights violations that amount to international crimes at new 6.7bis

We also appreciate the efforts made by Argentina at 6.4a(bis) – and now supported by Namibia and others - to highlight fundamental labour rights such as the rights to freedom of association, including the right to strike, and the right to collective bargaining.

We would also support Uruguay’s proposed Article 6.8 quarter. State parties shall enact norms to ensure that business enterprises respect the rights of human rights defenders. (Uruguay, Panama (potential add to Chair’s proposal), Palestine, Mexico, Brazil)

We had previously argued that the term “victim” should also include the immediate family members or dependents of the direct victim, and *persons who have suffered harm in intervening to assist victims in distress or to prevent victimization*. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted. A comprehensive definition of victim should include persons who have suffered harm in intervening to assist victims in distress or to prevent victimization so that human rights defenders, including trade unionists, are implicitly covered by the term.

Finally, Chair, we also welcome all amendments relating to the obligation to conducting meaningful consultations with stakeholders, including with communities, in line with principles of free, prior and informed consent and throughout all phases of operations.

Thank you.

**14. Joint statement on behalf of MISEREOR, Brot für die Welt, Global Policy Forum, FIAN Germany and Women Engage for a Common Future (WECF)**

Dear Mr. Chair,

In the name of MISEREOR, Brot für die Welt, Global Policy Forum, FIAN Germany and Women Engage for a Common Future (WECF), I would like to make three comments on Art. 6 of the Third Draft and on proposals discussed this morning:

1) According to the UN Guiding Principles on Business and Human Rights and Art. 6.3 of the third revised draft of the LBI, human rights due diligence refers to any “actual and potential negative impacts” or abuses. This includes both risks and impacts of business behavior.

However, the informal proposals of the Chair suggest limiting human rights due diligence to “adverse human rights impacts” in the definition of Human Rights Due Diligence. We reject this proposal as it would undermine the preventive approach of the UN Guiding Principles on Business and Human Rights.

2) According to the UNGP and Art. 6.2 of the third revised draft of the LBI, preventive measures must cover “all business activities and relationships” of business enterprises.

However, the informal Proposals of the Chair would limit legal requirements on prevention measures to “human rights abuses by third parties where the enterprise controls, manages or supervises the third party”.

This would be another clear and problematic deviation from the UNGP approach to address all negative impacts, business enterprises may cause, contribute to, or be directly linked to. The proposals of the Chair would delete the element of direct link, which would drastically limit the coverage of due diligence. The severity of human rights impacts has to be the main criteria for priorities in impact assessments and other due diligence measure.

3) We welcomed that the Third Draft LBI includes a State obligation to require business enterprises to assess not only human rights impacts but also environmental and climate impacts in Art. 6.4. Contrary to the Proposals of the Chair, this obligation has to be kept in any future revised Draft of the LBI. This also reflects that the UN General Assembly this year declared the access to clean and healthy environment a universal human right.

To conclude, we emphasize that the Third Draft is a good basis, and must be the only basis for the negotiation on the LBI.

Thank you very much!

**15. Verein Südwind Entwicklungspolitik**

Südwind supported by Austrian Treaty Alliance a coalition of 15 NGOs and trade unions specifically wants to contribute with this statement to Article 6

- Article 6 should explicitly mention that corporations are liable if they fail to comply with their due diligence obligations, in particular with their environmental due diligence obligations.
- Prevention should be highlighted instead of mitigation, so that harm doesn't occur
- Article 6 should clearly define standards for consultations, which should ensure that these consultations are effective. Furthermore these consultations should be designed as an ongoing process, so they should take place prior as well as during the business activities.

**16. United States Council for International Business**

RG Draft Comments on New Chair Proposals for Article 6

We thank the Chair for his efforts and we believe these proposals are indeed a step in the right direction. However, we do have suggestions for clarifying improving the text even further.

Article 6.1 should refer explicitly to the obligations of States as set out in the UNGPs. Prevention is a shared responsibility: States have a duty to protect human rights and associated obligations to support businesses in their responsibility to respect. Indeed, the UNGPs state that “the failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Adopting laws and other measures will not make an effective difference if they are not properly implemented, enforced and reviewed at national level where and when needed.”

We further suggest that the words “strengthen the practice of human rights due diligence by business enterprises” be replaced by “provide support, advice and guidance to business enterprises on respecting human rights by appropriate methods, including on human rights due diligence, as well as through capacity building and awareness raising.”

In Article 6.2, we recommend adding the word “resources”—Competent authorities should not simply have the necessary independence to carry out their function. They should have the resources to do so. But what is “undue” influence in this regard? Who determines it? Here as elsewhere subjective language should be avoided.

In Article 6.3 companies are required to “ensure the safety of those who may be at risk of retaliation.” Presumably we are not speaking here merely of protecting the jobs of corporate whistle blowers. How is a company meant to ensure individuals’ safety through its due diligence process. Public safety and security are prerogatives of the State.

Finally, who are the “third parties” referred to in Article 6.4? If this means suppliers, the text should say so. But more to the point, every enterprise has a responsibility to respect human rights. The proposal seems to shift the responsibility of enterprises in a supply chain to the parent company, an explicit contradiction of UNGP 13. A parent company has a responsibility to use its leverage, if such exists, to encourage entities in its supply chain that cause or contribute to human rights impacts to mitigate them and prevent their recurrence. This does not absolve the enterprise in question from its own responsibilities.

## **B. Article 7**

### **1. Joint statement on behalf of the Movement of affected communities, la Via Campesina and the Global Campaign**

Gracias Sr. Presidente, me llamo Moisés Borges y hablo en nombre de Movimiento de Afectados por Represas, Via Campesina y miembros de la Campaña Mundial.

En primer lugar, quiero enfatizar que el Borrador 3 es el único documento representativo de las negociaciones entre Estados y legítimo para servir de base para esa 8 sesión. Nos complace observar una adición, en el artículo 7.1, que reconoce los obstáculos a los que se enfrentan las comunidades afectadas, las mujeres y los grupos marginados para acceder a los recursos. Sin embargo, proponemos algunos cambios:

Enmienda 7.1:

Los Estados Partes dotarán a sus tribunales y mecanismos no judiciales estatales de los conocimientos técnicos necesarios, de conformidad con el presente (Instrumento Jurídicamente Vinculante), para que las víctimas, las personas y comunidades afectadas puedan acceder al debido proceso, a recursos adecuados, oportunos y eficaces y al acceso a la justicia, y para que superen los obstáculos específicos a los que se enfrentan las mujeres, las personas y los grupos vulnerables y marginados para acceder a dichos mecanismos y recursos. *El uso y el acceso a los mecanismos no judiciales no debe comprometer el acceso de los titulares de derechos a los mecanismos judiciales.*

Apoyamos la propuesta de Palestina de añadir un nuevo párrafo 7.1.bis para garantizar los mecanismos de reparación que los Estados deben aplicar en consulta con las comunidades afectadas, mecanismos que deben ser transparentes y libres de la influencia de las empresas



que causaron la violación. Al igual que la redacción más amplia del 7.2 propuesta por Palestina.

También acogemos apoyamos la inclusión del artículo 7.3.d que impide el uso de la doctrina del *forum non conveniens*, como se hicieran en el caso Chevron/Texaco en EUA. Sin embargo, proponemos que se elimine la expresión "casos apropiados de abusos de los derechos humanos", que es demasiado vaga y abierta a la interpretación. El encabezamiento de este mismo apartado debe redactarse de acuerdo con el derecho nacional e internacional, prevaleciendo el más beneficioso para los afectados y las afectadas. Así proponemos mantener la propuesta de Palestina en 7.3d, hablar de "actividades comerciales de carácter transnacional" para estar en consonancia con la resolución 26/9.

En este artículo es importante seguir avanzando en la Tratado para obligar al Estado a adecuar su sistema jurídico a los estándares definidos en el futuro Tratado. La prohibición del *forum non conveniens* es un tema clave para esa agenda, que no puede quedar afuera como se presenta en la "propuesta informal".

Gracias.

## 2. Action Aid

Dear Ladies and Gentlemen

Remedy is an inalienable right that shall be granted to everyone, without exceptions. A right that shall be protected and reinforced by this Legally Binding Instrument heartily and as much as possible. Considering the vulnerability of victims of human rights abuse, ActionAid sees fit to specifically contribute to Article 7, with the proposals to be followed:

Article 7 should include the responsibility of State Parties to periodically monitor the integrity, the competence of their legal bodies and their resistance towards venality, through appropriate, unbiased and thorough mechanisms. An intertemporally functional judicial system is more than vital, in order for proper access to justice and remedy to be provided.

Further emphasis should be put on the obligation of States Parties to provide adequate and effective legal assistance to victims, by including within the Article the right of every person to a competent lawyer.

Another notion that we suggest should be added, is the duty of States Parties to grant protection to the victims, until, during and after the legal process, so as to guard them from being threatened or harmed in any other way, due to them seeking access to justice and remedy. We believe that a robust framework should be created, in which every person or group of persons feels safe to claim their respective rights, even if that requires a legal process against a large business entity.

Thus, the Article should also steer State Parties towards ensuring that possible disparity between the financial status of the victim and the victimiser (here, the business entities), is not a defining factor for the outcome of the legal process and does not, in any way, impede the victim's access to justice.

Within the same context, paragraph 7.4 should be restructured in such a way, that it underlines the need of States Parties **not** to allow the obstruction of victims' rights to justice and remedy by legal costs. The phrasing "*provision for possible waiving of certain costs in suitable cases*" does not reflect the responsibility of States Parties to address every human rights violation- regardless of the victims' financial status- and, thus, their responsibility to provide financial aid or to exempt the economically disadvantaged ones from their legal costs.

Moreover, the necessity of bringing to justice and remedying collective right violations, such as the right to a healthy and liveable environment, is now more essential than ever, given the on-going catastrophic environmental crisis. A related mention of this in the Legally Binding Instrument is no other than purposeful and much needed.

Thank you.

### **3. Centre Europe – Tiers monde**

Gracias, señor presidente.

Mi nombre es Tchenna Maso, miembro de Homa - Centro de Derechos Humanos y Empresas, vengo de Brasil, y hablo en nombre de CETIM, miembros de la Campaña Global.

En primer lugar, pudimos observar cómo el intento de cambiar la metodología sin consulta y con el apoyo de un sólo país ha causado confusión y retraso en las negociaciones. Es la razón por la cual resaltamos la importancia de continuar la negociación sobre el único texto oficial, el 3 borrador, y que este texto sea trabajado a lo largo de esa sesión y para las próximas negociaciones. Por eso, la metodología propuesta, sea de hacer propuestas en los dos textos o incluir las posiciones en el texto del draft 3 es ilegítima y no funciona, por lo que defendemos que no sean tomadas en cuenta las propuestas del Chair. Si algún Estado quiere proponer el texto del chair como suyo, que lo haga de forma transparente directamente en el texto del 3 borrador como han propuesto Sudafrica, Egipto y Pakistán.

Una vez más, volvemos a la pregunta de cómo se pretende construir una negociación consensuada trabajando con dos textos tan incompatibles? Como seguir, si algunos de los Estados presentes en esa sala sólo presentan propuestas en el documento informal?

Sobre acceso a reparación, es esencial que se garantice el acceso a justicia en su forma integral, concepto ya cuñado en los sistemas regionales de derechos humanos, de que muchos países acá son miembros.

Sobre el, Forum non conveniens creímos ser importante mantener su prohibición también en el artículo 7 además de en el de jurisdicción, por ser una disposición esencial para garantizar el acceso a justicia de los afectados y afectadas. Muchos casos concretos son ejemplos de la importancia.

También rechazamos firmemente la reserva de Brasil al artículo 6, una vez que Brasil, además de ser miembro del Convenio 169 de la OIT, tiene obligaciones en la legislación doméstica de garantizar este derecho a los pueblos indígenas. Destacamos que parece haber una disparidad entre lo que propone la misión con lo que preve la propia Constitución del país, además de lo ya firmado en el Sistema Interamericano.

Muchas gracias por su atención.

### **4. Joint statement by the Centre for Human Rights, University of Pretoria, and the African Coalition for Corporate Accountability**

This is a joint statement by the Centre for Human Rights, University of Pretoria, and the African Coalition for Corporate Accountability on Article 7 of the 3<sup>rd</sup> revised draft.

We support and align ourselves with the interventions of South Africa, Egypt and the State of Palestine on the importance of focusing on the 3<sup>rd</sup> revised draft in the negotiations and not the informal proposal from the Chair. While we appreciate and commend the strides taken towards enhancing access to remedy in the 3<sup>rd</sup> revised draft, we note with concern that, there are several areas within the access to remedies framework in the third revised draft that can use some improvement. Access to effective remedy is a core component of the UNGPs and should be as such in the legally binding instrument. We note that a lot of the provisions in the draft are broad and elusive and would thus benefit from more specificity.

We note that one of the greatest practical barrier to access to remedy for affected communities and victims is a lack of access to information which affects their attempts to access remedy and appropriate remedial mechanisms both domestically and internationally.

We believe that insufficient access to information in itself is a form of harm which further exacerbates the violations. Without information provided in a timely and culturally appropriate manner, it can be impossible for indigenous and affected communities to pursue justice at appropriate forums.

Specifically, regarding Article 7.2 we broadly align with the comments made by Palestine during the 7<sup>th</sup> session, to facilitate access to information in a gender sensitive manner and the deletion of the word 'appropriate' in the same provision, noting in this regard that the access

to information should be facilitated in **ALL** cases, without distinction between what might be deemed appropriate or otherwise.

We further emphasise the importance of the duty to cooperate in achieving **EFFECTIVE** remedy, reiterating the need for provisions in Article 7 on the access and exchange of information including with regards to the nature and scope of a transnational business enterprise to accommodate liability for violations.

We also align ourselves with the comments made by South Africa and Palestine on Article 7.3 and should read '**State Parties shall provide adequate and effective assistance to victims throughout the legal process, including by...and on the contrary reject suggestions by some States to include clauses in 'national legislation'**' as this has the potential to impose direct responsibility on the State and not on the companies and OBEs.

We reaffirm that Article 7 should ensure the non- prejudicial guaranteeing of the rights of victims to be heard at all Stages of proceedings, as suggested by South Africa, Panama, Peru, Palestine and Mexico to include the clause in Article 7(3) (b) the phrase, 'avoiding gender and age stereotyping'

The provisions on access to remedy in the third draft, while remaining central to the goal of the instrument need to be revisited. Without radical transformation of the provisions in Article 7 on access to remedy, the legally binding instrument might end up suffering the same fate as the voluntary frameworks that have existed before, like the UNGPs which have demonstrated their ineffectiveness.

**5. Joint statement on behalf of CIDSE, Broederlijk Delen, CAFOD, CCFD-Terre Solidaire, DKA Austria, Entraid et Fraternité, Fastenopfer, Focsiv, KOO, Misereor, Trocaire, and Alboan**

Dear Mr Chair Rapporteurs,

I am delivering this statement on behalf CIDSE, Broederlijk Delen, CAFOD, CCFD-Terre Solidaire, DKA Austria, Entraide et Fraternité, Fastenopfer, Focsiv, KOO, Misereor, Trócaire, and Alboan.

Article 7 of the third revised draft is essential to ensure that the grave imbalances between corporations and rights-holders are addressed, by including credible provisions that lift barriers to justice and reparation faced by victims.

For this to happen, access to remedy must be designed and conducted in a way that puts rights-holders at the centre.

Mr Chair,

Complaint mechanisms, if not designed independently, can provide an opportunity for companies to exert undue influence on community leaders and selected groups of affected people by providing compensation only to selected victims. This way, companies create divisions in communities while claiming they discharged their duties.

For this reason, we support Palestine's proposal from last year on Art 7.1 to centre any non-judicial mechanisms around the rights and the needs of victims. As already stated both by States and civil society colleagues, non-judicial mechanisms should never preclude victims' access to judicial mechanisms.

Furthermore, victims should not be asked to provide evidence that can only be found in corporate offices around the world, or that which requires significant means to be gathered. We therefore support the reversal of the burden of proof in favour of victims in all cases in art 7.5.

Finally, we would like to re-assert the importance of the removal of the doctrine of Forum non-conveniens in Art 7.3, in order to offer certainty of access to justice for victims.

**6. FIAN**

Thank you, Mr. Chair, I speak on behalf of FIAN International.

Our comments are based on the third revised draft as the legitimate basis for negotiation. Regarding the article 7.1, the provision of the necessary competence in accordance with the LBI by the States Parties to their courts and State-based non-judicial mechanisms, as the remedies often are not provided adequately due to the courts' lack of knowledge and considering the complexity of transnational corporation's business relationship and operation. We also welcome the inclusion of specific obstacles that women, vulnerable and marginalized people, peasants and indigenous people and other groups face in accessing remedy in Art 7.1.

With regards to 7.4 we reaffirm as Palestine said, the importance to include the participation of the affected communities. As an example, the case of the condemnation of Total company in France for the oil spill on the Mediterranean sea, with the amount of damage to the environment and the community. In this case, the participation of civil society was central to the creation of a package of measures known as ERIKA TOTAL, also our legal analysis on the cases of POSCO- India Project and Brumadinho Dam disaster have shown the need to ensure effective and meaningful participation of affected communities in the determination of remedies, for them to be effective.

We defend retaining Art 7.4 which ensures that court fees, and other legal costs do not place an unfair and unreasonable burden to victims, ensuring the correction of power imbalances in the judicial process. The Interamerican Human Rights System foresees a legal assistance fund for victims.

With regard to article 7.4 we support the proposal of Mexico on the use of the Escazu Agreement on Access to Justice and recall that due process is a general principle of law recognized in state practice worldwide, from which rights to access to justice emanates, including the material guarantees needed for it.

With regard to article 7.5 we consider that the addition of consistency with both international law and domestic constitutional law has narrowed the scope of this provision and makes it ambiguous in application. We would therefore suggest deletion of "and its domestic constitutional law".

I thank you Mr Chair.

## **7. Franciscans International**

We recognize the advances made to contain key elements that should improve access to justice and address obstacles that may otherwise prevent victims from enjoying their right to an effective remedy including reparations.

In regard to Art.7.3, we support the delineated measures to be taken by States. In subparagraph (a) it would be beneficial to ensure that State make information regarding environmental disasters public, include that related to negotiations between companies and the State, particularly on reparation agreement negotiations.

We recognize that Art. 7.4 attempts to ease the concern of legal costs faced by victims, however, we feel that limiting cases to an 'unreasonable burden' is too broad, and can potentially be challenged by corporations. We are similarly concerned with so-called 'loser-pay' systems which may also deter victims from bringing claims, and may effectively allow corporations to again harm communities.

We support Art. 7.5 in regard to the reversal of the burden of proof, which is fundamental to avoid denial of justice, to protect general principles of law, the interest of justice and equality of arms. We note that such a provision has precedent in the Escazu Agreement, as mentioned and proposed by Mexico.

## **8. International Commission of Jurists**

The ICJ has made comments and proposals to the 3rd Revised draft at the 7th session of this Intergovernmental Working Group in 2021. Those comments and proposals are still valid.

The ICJ supports article 7.1. as it stands in the Third Draft. The ICJ reiterates that access to effective remedy is a universal right already recognized in international instruments. The inclusion of provisions to address some of the specific problems in the implementation of

this right in the context of business activities and abuses, and the existing obstacles that victims face to find justice and reparation are a central contribution of the proposed treaty to international law.

In addition, ICJ considers that the Chairperson's informal suggestions on Article 7 contain a more systematic and clear way to address some of the problems in this article. Therefore, it is suggested that these proposals under Article 7 are merged into the current text in the Third Draft, but eliminating or replacing the ambiguous or vague terms as follows.

In 7.1. the phrase "consistent with its domestic legal and domestic systems", by subjecting compliance with the treaty obligations to national law undermines the substance of the obligation. As such it should be deleted wherever it appears.

The reference to "relevant State agencies" in 7.1.a and other paragraphs should be replaced by "courts or tribunals" to be consistent with existing international standards on the rights of victims. The expression "relevant State agencies" is also vague as it makes reference to a large plurality of agencies, adding unclarity to the obligations under the treaty.

In 7.1.b. the word "progressively" should be removed because it unjustifiably reduces the value and reach of the obligation. In 7.3.f. the word "collective or" should be added before "possibility of group actions".

To finish, the ICJ stresses that the need for consensus and flexibility for national implementation of obligations cannot be obtained by sacrificing needed clarity and strength of the obligation, especially in this crucial subject.

#### **9. International Human Rights Association of American Minorities (IHRAAM)**

IHRAAM requests States to assist in negotiating text to support this proposal.

Proposal of Article 7.1 bis

IHRAAM

**7.1 bis States shall recognize and provide for the competent court of jurisdiction to address violations of a States international legal obligations to ensure that domestic law or its deficiencies are not applied to specific international law obligations. States shall implement the international law political question doctrine to allow states of peoples to address its rights under international law.**

Thank you,

#### **10. International Organisation of Employers**

Thank you Chair, I am speaking on behalf of the International Organisation of Employers.

We appreciate the ability to share our views on this very important topic, and remain committed to assisting business with its responsibility to respect internationally-recognised human rights consistent with the UNGPs.

To that end, and though we certainly appreciate and acknowledge that this is a political process, and that we have a role to play in this political process, we wish to begin by stressing that all parties abandon the understandable desire to fulfill talking points or to seek peripheral language, and to focus instead on whether their submissions truly facilitate a workable and broadly acceptable draft text. In other words, we ask that this group be driven by principled pragmatism.

By way of material example, the draft proposals here continue to disregard that remedy need not, and often is not, achieved through judicial means. One need look no further than the UN OHCHR's Accountability and Remedy Project's excellent work on this subject to recognize the breadth with which remedy can be achieved, and the principled pragmatism in allowing non-state-based and other non-traditional remedies to operate. There is a place for judges and magistrates and lawyers, to be sure, but effective remedy is often best achieved both quickly and locally, and often informally, all while remaining consistent with the UNGP's.

The draft proposals reflect an unwise hierarchy of judicial over non-judicial approaches while, making matters worse, creating a hierarchy of judicial systems favoring the

industrialized and well-developed systems (through attempting to minimize the concept of Forum Non Conveniens) and continuing to insist that parties be guilty until proven innocent without providing meaningful explanation for upsetting this well-settled principle.

## 11. The Global Campaign

Thank you, Mr. Chairman, my name is Nonhle Forlsund and I speak as a member of the Global Campaign. First of all, I would like to emphasise that Draft 3 is the only document that is representative of the negotiations between States and legitimate to serve as a basis for this 8th session. In this sense, I am going to recall the reflections on article 7 of the 3rd Draft, which is key to guarantee access to justice and changing the asymmetry of powers between affected communities and transnational corporations.

We recommend that Article 7.4 is maintained. It guarantees that legal costs and other legal expenses do not represent an unfair and unreasonable burden for those affected.

Regarding paragraph 7.5 on the reversal of the burden of proof, we consider that it should a right of affected persons or communities to ensure both access to justice and due process of law. Furthermore, the term "appropriate cases" should be deleted, as well as the expression "and their domestic constitutional law", as proposed Palestine in the last session.

We recall that the reversal of the burden of proof is an important way of ensuring equality of conditions in the judicial process, removing the barriers to access to justice that many affected communities around the world have suffered from.

On paragraph 7.6, we support the Palestinian proposal to add "violations" and delete "domestic law". Such references to domestic law could detract from the effectiveness of the LBI, and are not necessary once there is already conventionality control.

In light of the above, and in order to strengthen this article, we propose including an article with the principle of in dubio pro persona, as follows:

Proposed new paragraph 7.7:

“States shall ensure that, in case of doubt about the application of the LBI, persons and communities that have been or are affected or threatened by the activities of transnational corporations and other business enterprises of a transnational character enjoy the widest protection of their rights”

We also propose the inclusion of an article on precautionary measures:

Proposed new paragraph 7.8:

States shall make available mechanisms to enable affected communities and individuals to demand precautionary measures to prevent harm.

All our text proposals and amendments have been sent to the secretariat.

Thank you.

## 12. International Trade Union Confederation

Thank you, Chairperson. I speak on behalf of all the global trade union organisations I cited in my opening intervention

We have two proposed textual amendments to Article 7.

Regarding Article 7.2, we think that it would be useful to explicitly refer to the judicial process of *disclosure or discovery*. With our proposed amendment, Article 7.2 would read

States Parties shall ensure that their domestic laws facilitate **disclosure OR discovery** and access to information, including through international cooperation, as set out in this (Legally Binding Instrument), and enable courts to allow proceedings in appropriate cases.

In this regard, we welcome the amendment proposed by the State of Palestine to Article 7.2.

In relation to Article 7.5,

it refers to *allowing judges* to “reverse of the burden of proof”. This is usually not a matter that should be left to individual judges but one that is regulated in national legislation. The article should be strengthened and clearly require ratifying States Parties to provide for the “shifting of the burden of proof”. This is an important provision with respect to labour rights given that there is a significant imbalance between companies and their workers with regard to access to relevant information. This is also why we requested an amendment to Article 7.2.

So, with our amendment, Article 7.5 would read:

States Parties shall enact or amend laws **allowing judges** to reverse the burden of proof in appropriate cases to fulfill the victims’ right to access to remedy where consistent with international law and its domestic constitutional law.

Finally, Chair, we also welcome the amendments proposed by Peru, Panama, South Africa, Palestine, and Mexico to 7.3(b) to ensure that victims are heard in all stages of proceedings in a gender-sensitive and age-sensitive manner.

Thank you, Chairperson.

### 13. **United States Council for International Business**

Yesterday a number of interventions highlighted the fact that fine words are not enough. We agree. Lofty aspirations can only be fulfilled if they are clearly and fully articulated. Mandates can only be converted into impacts on the ground if they are expressed in language that is widely understood and confers legal certainty. For this reason we continue to have concerns over the use in the draft treaty of terms that are subjective, imprecise and/or incompletely defined. This is meant to be a legal text and in legal texts words matter.

For example,

The word “victim” first appears in Article 1. This is a term used to describe a person who has suffered harm and been found to have so suffered by a court of law. No matter how grave the alleged harm or how much sympathy they might command, until then they are a person alleging an abuse. The word victim is not used in the UNGPs and should not be used here, because it prejudices and prejudices — it gives an adjudicative status to a person before the harm itself has been proven. This is not a small point. Words matter.

Similarly, the phrases “imposition of strict or absolute liability in appropriate cases” and “ensuring fair disclosure” provide insufficient legal clarity. We urge that such subjective language be avoided wherever possible.

Legal concepts matter as well. Article 7.3 advises States to reverse or reduce the evidential burden of proof. In some cases this could be admissible, especially for serious violations. However, the reversal of the burden of proof should not become the norm. It contravenes the well settled legal principle of “innocent until proven guilty” and the notion that “he who asserts must prove.” Indeed, requiring that an accused party prove his or her innocence violates due process principles and fundamental notions of fairness in most jurisdictions.

## C. **Article 8**

### 1. **Joint-statement Centre Europe – tiers monde – Corporate Accountability**

Thank you, Mr. Chairman. I am Joseph Purugannan, from Focus on the Global South, speaking on behalf of CETIM and member of the Global Campaign.

First, I would like to emphasize that the 3rd draft is the only document representative of this intergovernmental negotiations and the only one legitimate to serve as the basis for this 8th session. In this regard, I will recall the proposals considered positive for the consolidation of an effective international instrument that can fill the legal gaps on corporate responsibility of companies with a transnational character, in relation to violations of Human Rights in all their global value chains.

Therefore, we defend the excellent contributions made by Palestine in article 8.7. 8.8 8.10bis and 8.10ter of the 3rd draft that establish an adequate definition of Human Rights due diligence, recognizing violations of those Rights by transnational corporations, without considering such measures as excluding liability, whether for natural or legal persons. Furthermore, we reinforce the need to require States Parties to ensure that their national legislation is adapted to the possibility of recognizing the criminal responsibility of legal persons, in accordance to international human rights law, in addition to the excellent provision for joint responsibility throughout the value chain. These proposals are set out below:

“8.7. Human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or violations or failing to prevent such abuses and violations by a natural or legal person as laid down in Article 8.6.

8.8. States Parties shall ensure that their domestic law provides for the criminal liability of legal persons for human rights abuses or violations that amount to criminal offenses under international law, including but not limited to customary international law, and humanitarian law. Regardless of the nature of the liability, States Parties shall ensure that the applicable penalties are proportionate with the gravity of the offense. This Article shall apply without prejudice to any other international instrument which requires or establishes the criminal or administrative liability of legal persons for other offenses.

8.10 bis. All companies involved in human rights abuse or violation, whether a subsidiary, a parent company or any other business along the value chain, shall be jointly and several responsibility for human rights abuses in which they are involved.

8.10 ter. State Parties shall ensure that their domestic law provides for the criminal liability of legal or natural persons for acts that directly or indirectly contribute, cause, or are linked to human rights abuses or violations.”

Thank you, Mr. Chairman.

**2. Joint statement on behalf of CIDSE, Broederlijk Delen, CAFOD, CCFD-Terre Solidaire, DKA Austria, Entraide et Fraternité, Fastenopfer, Focsiv, KOO, Misereor, Trocaire, Alboan and SIEMBRA**

I am delivering this statement on behalf of CIDSE, Broederlijk Delen, CAFOD, CCFD-Terre Solidaire, DKA Austria, Entraide et Fraternité, Fastenopfer, Focsiv, KOO, Misereor, Trócaire, Alboan and SIEMBRA.

My name is Marina, I come from Brazil and I am affected by the Vale dam collapse in Brumadinho, Brazil. 272 dead, we still search some bodies, hundreds of houses, plantations and biodiversity destroyed. People, water, soil and air contaminated by heavy metals. 26 cities and about 1 million people affected by this crime.

5 months before Vale's dam failure, the Brazilian subsidiary of German Company TUV SUD attested to the dam's stability. There were email exchanges between the company's employees, indicating problems in the dam. More than 3 years later, neither company has been held responsible and now the victims are asked to prove the control of the parent company over its subsidiary.

As the draft lacks a rebuttable presumption of control, it can be assumed that "to establish legal liability, it must be proven in each individual case that a company effectively exercised control over their business relationships.”

Victims of corporate activities in intricate value chains cannot be asked to prove the control of one entity over the other, as corporate structures are often intentionally opaque and difficult to scrutinise. The percentage of shares held by different actors, contractual relationships, and purchasing practices, all contribute to the *de facto* control of one business entity over another.

To reflect the variety of control situations and the differences between legal systems, the text should require States to ensure that their domestic systems provide for a **presumption of control** in the meaning of Art 8.6.



A sentence should be added to Art 8.6, worded as follows:

*“States Parties shall determine in their domestic law that control over one legal person by another legal person **is presumed** with reference to corporate, contractual and other business relations between the former and the latter into account.”*

We support the strengthening of provisions on civil liability, including several and joint liability, as per the amendment proposed by the delegation of Palestine on Art 8.1 this year.

We reiterate the importance of separating liability for harm from sanctions for failure to comply with the corporate due diligence duty. For this, Art 8.7 should be amended as proposed by the Palestinian delegate in the text of the third revised draft.

Thank you, Mr. Chair,

### **3. Joint statement on Behalf of ESCR-Net and Al-Haq, Law in the Service of Man**

Mr. Chairperson,

Distinguished delegates and colleagues,

Article 8 must retain mention of “comprehensive and adequate systems of liability” as well as the broad jurisdictional approach of the Third Draft (“conducting business activities within their territory, jurisdiction or otherwise under their control”).

Criminal, civil and administrative legal liability for abuses and violations related to business activities must be clearly articulated. There should be a clear legal standard classifying how business activities will be prosecuted by State Parties through this legally binding instrument and in accordance to different scopes of liability. This Article must further be enshrined in rights - rather than needs. Any reference to victims “needs” instead of “rights” is very concerning because it frames this concept as a weaker mechanism through which victims of corporate abuse and violations can access the justice system. **Further, the gravity of violations and abuses may differ but endeavors for legal liability and subsequent avenues must be at the disclosure of those affected or impacted by human rights abuses or violations.**

Liability of legal and natural persons under Article 8 must not be limited to crimes accessory to the commission by the main perpetrator such as conspiracy as well as aiding and abetting - it must also refer to situations where legal or natural persons may be directly involved in violations and abuses of human rights - whether separately or jointly with other actors. Categories of accessory liability such as conspiracy are not standards adopted in international law (i.e. the Statute of the ICC).

In Article 8.4, the notion of criminal liability could be further strengthened by the mentioning of specific examples of sanctions or penalties that companies could face should they be prosecuted such as withdrawal of licenses or termination of contracts for company projects and so on.

It would be crucial to ensure that criminal liability under Article 8 is triggered also by a business activity that violates war crimes, crimes against humanity, and other grave breaches of international human rights and humanitarian law. This would ensure that the gravity of the abuse, the public interest and justice is reflected in the kind of legal liability attributed to the perpetrator and the sanctions applied.

Article 8 should also include a provision reaffirming the joint and several responsibilities between all companies involved in an abuse or a violation, be it along the global value chain or in the time of armed conflict. In particular - in Article 8.10, we agree with the proposal by Palestine to include the following provision: *“All companies involved in human rights abuse or violation, whether a subsidiary, a parent company, or any other business along the value chain, shall be jointly and several responsibility for human rights abuses in which they are involved.”*

Thank you.

#### **4. FIAN**

Muchas gracias, sr. Presidente, soy Julian Tole, profesor de derecho internacional de la Universidad Externado de Colombia y hablo en representación de FIAN Internacional, presentamos las siguientes consideraciones.

En cuanto al artículo 8.4 es clave la reparación de las víctimas, que debe ser adecuada, rápida, efectiva, y proporcional respecto a las violaciones. Recomendamos añadir este aspecto, tal como se ha establecido en la Resolución sobre Responsabilidad Internacional de la Asamblea General en su artículo 31 y soportado, a su vez, por los principios Bassiouni recogidos en la Resolución 1998/43 de la Comisión de Derechos Humanos.

Reafirmamos el carácter esencial del artículo 8.6 sobre la determinación de responsabilidad de las personas físicas y/o jurídicas que realicen actividades empresariales, incluidas las de carácter transnacional. Un elemento clave es la responsabilidad solidaria por las violaciones de los derechos humanos que se producen a lo largo de sus relaciones comerciales, incluso a través de sus cadenas de valor. Así, como fue propuesto por Palestina, proponemos modificar el artículo 8.6, para incluir explícitamente la “responsabilidad solidaria”, que garantiza que todas las empresas involucradas en el “abuso”, según los términos del artículo 8.6, sean co-responsables de los daños causados por terceros a través de sus relaciones comerciales que, permite al mismo tiempo, garantizar recursos integrales para las comunidades afectadas o individuos.

Respecto al artículo 8.7 la diligencia debida en materia de derechos humanos nunca debe eximir ni automáticamente o de otra manera de la responsabilidad por causar o contribuir a abusos o violaciones de los derechos humanos. Lo cual puede socavar sistemas jurídicos nacionales que prevén mecanismos de responsabilidad jurídica que van más allá de esta figura jurídica, los cuales se verían afectados por las restricciones que se derivan de los principios rectores. Recomendamos que se suprima la segunda frase de este párrafo, que sugiere que la responsabilidad depende del cumplimiento de las normas de diligencia debida en materia de derechos humanos.

Finalmente recomendamos la inclusión de la responsabilidad objetiva para actividades peligrosas o de alto riesgo, tal como se hace en varios sistemas jurídicos, por ejemplo, con respecto a las sustancias tóxicas.

#### **5. Friends of The Earth International**

Thank you, Mr. Chairman. My name is Erika Mendes, speaking on behalf of Justiça Ambiental from Mozambique and Friends of the Earth International, members of the Global Campaign.

First, I would like to emphasize that the 3rd draft with the proposals from States is the only document legitimate to serve as the basis for the 8th session. In this regard, I will recall the proposals considered positive for the consolidation of an effective international instrument that can fill the legal gaps on corporate responsibility of companies with a transnational character, in relation to violations of Human Rights across their global value chains.

Human rights violations, and in particular situations of undecent work, including modern slavery, land grabbing, and irreversible environmental destruction are located at the base and weaker links of the chains, places deliberately chosen and built to circumvent and evade trade union, regulatory and administrative controls and thus maximize exploitation. When TNCs and their representatives say that a legislation is ‘not implementable’, in fact they mean ‘not as profitable’, which is why their interests are contrary to the objectives of this process. It is essential to clearly establish the responsibility of parent companies for the whole chain.

For all the above reasons, we consider it essential to maintain the first and second paragraphs of art. 8.4, thereby supporting Palestine’s proposal presented at the 7th session.

We also note that, during the last session, important contributions to the third draft were made to guarantee the duty of States to ensure that their domestic legislation establishes adequate and inclusive reparation mechanisms, considering, with the use of appropriate language, that the companies can and do commit human rights violations. In addition, these contributions recalled the mandate of Res 26/9, which establishes the scope of the text only on transnational

corporations and other businesses with a transnational character. In this regard, we highlight the proposal of Egypt to Article 8.4:

"8.4. States Parties shall adopt measures necessary to ensure that their domestic law provides for adequate, prompt, effective, gender and age-responsive reparations to the victims of human rights abuses and violations in the context of business activities, including those of a transnational character, in line with applicable international standards for reparations to the victims of human rights violations.

Where a legal or natural person conducting business activities of a transnational character is found liable for reparation to a victim of a human rights abuse or violation, such person shall provide reparation to the victim or compensate the State, if that State has already provided reparation to the victim for the human rights abuse or violation resulting from acts or omissions for which that legal or natural person conducting said business activities is responsible"

Continuing with this line of argument, we support the maintenance of article 8.5 of the 3rd Draft, against Brazil's proposal to delete it. In this same direction, we support the maintenance of article 8.6 without the reservations defended by China. China's position prevents this process from taking the necessary step forward towards including liability for transnational corporations.

Thank you.

## 6. Franciscans International

Thanks to the Chair,

In regard to article 8.1 from the 3<sup>rd</sup> draft, we suggest adding, "causing or contributing to" before human rights abuses, to be consistent with 8.3.

In 8.3, we suggest amending so that it reads "where legal or natural persons conducting business activities have caused or contributed to human rights abuses or violations of international humanitarian law."

For consistency, we suggest adding "abuses" in 8.4, so that the first sentence reads in part, "reparations to the victims of human rights violations or abuses. And we then suggest adding, "Particular attention should be given to cases of **environmental damage or contamination in order to limit ongoing and future human rights abuses or violations**, including to ensure that all necessary measures are undertaken in close consultation with impacted communities."

We also suggest adding 8.6 bis, which would read "State Parties shall also ensure that their domestic law provides for liability of state authorities who fail to adopt and adequately enforce environmental and other related legislation, which may unduly permit and prolong human rights abuses from business activities."

We underscore the necessity of Art. 8.7. This is particularly important as more States are negotiating and implement due diligence laws; given the varying standards and rigor in application of human rights due diligence, businesses must continue to be held accountable for any adverse human rights impacts that they have caused or contributed to. We cannot accept any language that would imply that human rights due diligence can shield business from liability. We support Palestine's proposal to delete the last line of that paragraph.

Finally, we would like to warn against the inadequate and disproportionate deference to domestic law that de facto may interfere with States' mandate to negotiate and implement international binding rules. We also warn against any language that would imply that different types of liability may be mutually exclusive; or any language that would exclude the direct liability of business for human rights abuses (as the main perpetrators).

## 7. International Human Rights Association of American Minorities (IHRAAM)

RFB Reference to Article 8 – legal liability - All Indigenous Peoples currently sit outside the sphere of domestic jurisdiction since the Constitution of the United States of America does not allow for unilateral annexation of territory, as admitted by President Thomas Jefferson in

response to the Louisiana Purchase of 1803. UN studies call for proof, stating the burden of proof is on States, that they legitimately acquired territory belonging to Indigenous Peoples or other peoples. What is domestic law and how does it apply when States violates its own Constitution in annexation of foreign territory? The USA and its political sub-divisions already admit that Alaska and Hawaii and other territories are not properly annexed into the United States of America.

IHRAAM RFB Article 8.1

Does **or otherwise under their control** assume this applies to peoples or other States under colonial domination or foreign occupation. If that is the case then the Geneva Conventions must apply, that include such circumstance whether by armed or other forms of forceful control? Article 8 needs its own paragraph for the duty of States administering Non-Self-Governing Territories or for peoples under colonial domination or foreign occupation that the sacred trust obligations apply under the Geneva Conventions and international human rights and humanitarian law, including for all peoples under colonial domination or foreign occupation.

## 8. International Organisation of Employers

I speak on behalf of the International Organization of Employers. We appreciate the ability to share our views on this very important topic, and remain committed to assisting business with its responsibility to respect internationally-recognised human rights consistent with the UNGPs.

I wish to begin by expressing our sincere hope that any treaty serve as an instrument to facilitate good corporate governance and conduct, rather than only as a tool to punish those who are alleged to have engaged in wrongdoing.

It is here where there is critical work to be done, and we should not miss this opportunity to build upon, instead of replace or supplant, the varied and extensive existing or developing mandatory human rights due diligence legislation. From France to Holland, to Germany to the EU and now Japan, many national governments are heeding the UNGPs call on this issue. There is more work to done, of course, particularly outside of the EU, but creating a mandatory due diligence scheme that punishes outcomes without creating some incentive for those that create robust protocols misses the point entirely and walks past an important opportunity for doing impactful work.

We keep asking business to fulfill state-like obligations to investigate and remedy human rights impacts while offering little more than punishment if or when they fail – when viewed through largely subjective regulative criteria. We seem to be creating an unwise *fait accompli*. Business is doing strong and important work here, and needs to be supported in that work, by simply having this process follow the UNGP’s process-based approach and by incentivizing the best processes with some measure of liability mitigation.

## 9. International Trade Union Confederation

Thank you, Chairperson. I speak on behalf of the global trade union organisations I cited in my opening intervention.

Chairperson,

Article 8 goes to the very heart of what we’re here to achieve. As you know, for us one of our priorities for this Treaty is that it caters for parent company-based extraterritorial regulation and access to justice for victims of transnational corporate human rights violations. So, a comprehensive and clear liability regime is essential.

Therefore, we commend the drafters’ efforts in putting together Article 8.6. However, we think that a slight re-ordering the Article will help *differentiate* the forms of liability – namely tortious negligence and strict liability - applicable to the various way in which lead firms - or economic employers as we call them – organise their supply chains.

So, a revised Article 8.6 would read as follows:

States Parties shall ensure that their domestic law provides for the liability of business enterprises for human rights abuses caused or contributed to by another legal or natural person where a business enterprise:

- a. that controls, manages, supervises or otherwise assumes responsibility of another legal or natural person with whom they have a business relationship fails to prevent that person's activity which caused or contributed to human rights abuse; or
- b. effectively controls another legal or natural person that caused or contributed to human rights abuse; or
- c. should have reasonably foreseen the risk of human rights abuses in its business activities or business relationships but failed to prevent the human rights abuse.

Regarding Article 8.7, we welcome the inclusion of a provision stating that HRDD shall not automatically absolve an enterprise from liability for rights abuses. It is our firm view that the requirement to practice human rights due diligence and the requirement to remedy any harm resulting from human rights violations should be treated as separate and complementary obligations. While the language used in the present text partly reflects that used in the UNGPs in relation to this issue – that is – HRDD should not ‘automatically and fully absolve’ – we believe that the word ‘necessarily’ may be more appropriate than ‘automatically’ as this would make it appear less an assumption that hrdd would otherwise provide a shield *but for* this language.

Chairperson,

We also strongly recommend that the final sentence of Article 8.7 be deleted in its entirety. This sentence seems to suggest that the implementation of human rights due diligence standards *does* determine the liability of a business entity, which seems to be in conflict with Article 6 and the first part of the present Article. Again, we would emphasise that the requirement to practice human rights due diligence and the requirement to remedy any harm resulting from human rights violations should be treated as separate and complementary obligations. For these reasons, we would strongly recommend the deletion of the final sentence in this Article.

Finally, Chair, we welcome the new Article 8.10bis proposed by the State of Palestine, which explicitly refers to the doctrine of joint and several liability for human rights abuses in supply chains.

## 10. United States Council for International Business

This forum has focused exclusively on the actual and potential harms that can be laid at the doors of multinational companies. Without denying such harms exist, is it impossible to admit that there are positive sides to business — that it brings jobs, products, and services that create wealth, improve lives and foster prosperity and development? In that regard, and with respect to liability rules, is it better for companies to “stay and behave” or would you rather have them “cut and run.”? The companies I represent are ready and willing to work to improve situations in their supply chains. Regulations on supply chain liability that go too far are likely to lead to counterproductive consequences: companies would likely find it necessary to withdraw from places with difficult human rights situations if they are held liable for adverse effects on the ground over which they have little or no control.

There is no legal certainty in the draft text on the conditions under which companies would be held liable, particularly since the definition of human rights due diligence in Article 1 does not wholly reflect that of the UNGPs. Since liability is extended to natural persons, this opens a vast uncertainty. As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprises’ alleged contribution to a harm, although these may not be framed in human rights terms.

The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has substantial effect on the commission of a crime. As it stands, Article 8.3 would go far beyond this standard. There is no reference here to the level of implication needed for a business to

be considered complicit. This allows wide latitude for national courts to decide who to hold liable and goes against the essence of the UNGPs. Conducting appropriate human rights due diligence should help enterprises address the risk of legal claims against them by showing they took every reasonable step to avoid involvement with an alleged human rights abuse. The treaty should incentivize companies to do the right thing, not punish them if their efforts in that regard are imperfect.

## **D. Article 9**

### **1. AIDS - IPS**

Thank you, Mr. Chair.

My name is Julia, a member of MAB and Via Campesina, and I speak on behalf of ABIA and TNI, members of the Global Campaign.

First, I would like to emphasize that the 3rd draft is the only representative document of the intergovernmental negotiations and the only legitimate one to serve as the basis for this 8th session.

On the third draft, we stress the importance of maintaining the prohibition of the use of the forum non conveniens thesis in article 9.3, and we therefore strongly reject China's proposal to suppress this part. Similarly, Egypt's proposal to add "unless an adequate alternative forum exists that would likely provide a timely, fair, and impartial remedy" may open a gap for applicators to use the forum non conveniens doctrine, as there will never be a full guarantee that an adequate alternative forum exists.

We welcome provision 9.4 on related claims, which will allow, for example, the possibility of trying a parent company and its subsidiary operating abroad before the same court. This is an important first step in establishing their joint and several responsibility. However, we reject Brazil's proposal to add "directly" before "connected", and believe that this provision should be improved by adding paragraphs defining how the term "connected" should be interpreted.

Finally, we welcome the provision of 9.5, which indicates the use of the forum necessitatis, as it may help to avoid the denial of justice, but the list that has been added makes its application more restricted.

Indeed, the last words "as follows" announce a closed list when the list should be opened. The following three points should only be examples to guide judges without tying their hands. It is therefore desirable to end the paragraph with "such as" instead of "as follows", and to delete the last point 9.5.c. In fact, 9.5.c is already a criterion of jurisdiction in 9.2 and including this criterion in 9.5 would encourage judges to demand more connections than required by the forum necessitatis.

In the end, as Brazil highlighted yesterday, the treaty is a human rights document, and universal civil jurisdiction is already a discussion in international human rights law that cannot be ignored by an international treaty in these circumstances. Several States already have jurisprudence favourable to the exercise of the jurisdiction of necessity, so that ignoring this progress harms those affected in a relevant way.

We will send our specific text amendments for these different proposals.

Many thanks Mr. Chair.

### **2. CHR et al.**

With regards to Article 9, and any interventions going forward, we align ourselves with interventions made by the State representatives of South Africa and Palestine and others insisting on working with the text of the 3rd draft and comments made at the 7th session.

With regards Article 9.1 we endorse the submissions made by South Africa and the State of Palestine during the 7th session to add 'or violations' after the words human rights abuses,

as well as ‘upon the victims and their family’s choice’ . We believe this offers a victim centered approach to issues of adjudicative jurisdiction.

In Article 9.1 (c) we endorse the State of Palestine’s addition of the words ‘including in their business relationships and global production chain’, noting that this approach offers broader protection to victims.

In 9.2 we align ourselves with the State of Palestine’s suggestion for the deletion of the words ‘domestic law’ and inclusion of including through their business relationship and global production chain’

And 9.2 bis which adds a place where substantial assets are held to be considered as a place of domicile for a company.

Under Article 9.3 we support South Africa’s input in the 7th session for the text to read.

Courts vested with jurisdiction on the basis of Article 9.1 and 9.2 shall avoid imposing any legal obstacles, including the doctrine of forum non conveniens, to initiate proceedings in line with Article 7.5 of this (legally binding instrument).

And endorse the State of Palestine and Namibia’s intervention, contrary to other suggestions to keep reference to forum non conveniens.

### 3. **DKA et al.**

9.1. Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

#### **We propose to amend the Article 9.1 as follows:**

9.1. Jurisdiction with respect to claims brought by **or on behalf of** victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses **or violations** covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

9.1. Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses **or violations** covered under this (Legally Binding Instrument), shall **upon the victims and their family’s choice**, vest in the courts of the State where: **(Palestine, South Africa)**

9.1 Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses **or violations** covered under this (Legally Binding Instrument), shall vest in the courts of the State where: **(Egypt)**

- a. the human rights abuse occurred and/or produced effects; or
- b. an act or omission contributing to the human rights abuse occurred;
- b. an act or omission contributing to the human rights abuse **or violation** occurred;

#### **(Palestine)**

c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled; or

d. the victim is a national of or is domiciled.

This provision does not exclude the exercise of civil jurisdiction on additional grounds provided for by international treaties or domestic laws.

9.2. Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal person conducting business activities of a transnational character, including through their business relationships, is considered domiciled at the place where it has its:

- a. place of incorporation or registration; or
- b. place where the principal assets or operations are located; or
- c. central administration or management is located; or
- d. principal place of business or activity on a regular basis.

**d bis. substantial assets are held. (Palestine)**

9.3. Courts vested with jurisdiction on the basis of Article 9.1 and 9.2 shall avoid imposing any legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings in line with Article 7.5 of this (legally binding instrument). **(South Africa)**

**We support keeping the doctrine of forum non conveniens in Article 9.3 as supported by South Africa, Palestine and Namibia.**

**And propose a new Article 9.3:**

**New Art. 9.3. on a Provision regarding jurisdiction with respect to criminal claims, including the provision for universal jurisdiction for certain crimes.**

**(Keep reference to *forum non conveniens*: Palestine, Namibia)**

9.4. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is connected with a claim against a legal or natural person domiciled in the territory of the forum State.

**We propose to add a New Art. 9.4. on a Provision regarding jurisdiction with respect to administrative claims**

9.4. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair judicial process is available and there is a connection to the State Party concerned as follows: **(Palestine (regarding entire article))**

- a. the presence of the claimant on the territory of the forum;
  - b. the presence of assets of the defendant; or
- a substantial activity of the defendant.

**4. ESCR-Net and Al-Haq**

Mr. Chairperson,

Distinguished delegates and colleagues,

Article 9 must absolutely retain the language in the Third Draft which includes, “victims, irrespective of their nationality or place of domicile,” can bring a claim for human rights violations and abuses. This sentence must not be eliminated in the treaty text. Victims and their families should be able to decide where to adjudicate a case.

We reiterate that all negotiations should be based on the third revised draft and are concerned that proposals supported for example by the USA and IOE are dangerously undermining the legal advances proposed by several States last week to strengthen this Article.

It is also important for the treaty text to articulate what is meant by domicile - this should include both where the company is headquartered but also the place where its substantial assets are held to ensure remedy for affected communities. We agree with the proposal of Palestine last year to include a provision to this effect in Article 9(2)d bis.

Article 9 should also not restrict the advancement in applicability of international law based on applicable domestic or State laws. This defies the very purpose of this treaty which would be to expand avenues for remedy and corporate accountability by setting legal standards that would enhance the ability to adjudicate cases of abuses and violation related to business activity extraterritorially across different jurisdictions. The aim of this treaty is not to limit liability but to expand it so that corporate accountability may be possible.



Finally, States should incorporate or otherwise implement within their domestic law appropriate measures for universal jurisdiction for human rights violations and internationally recognized crimes mentioned in the preceding. This was mentioned in the zero Draft under Article 6 and should be reintroduced. As such, we support the textual suggestion by the State of Palestine to add the following provision in the draft treaty: “Where applicable under international law, State Parties shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to international crimes.”

Thank you

## 5. FIAN

El trabajo de casos de FIAN desde hace 36 años nos ha demostrado la importancia de asegurar el acceso de las comunidades afectadas a la justicia en los estados en donde se encuentran las empresas controladoras de las empresas transnacionales y cadenas de valor y donde se encuentran los activos necesarios para garantizar el acceso a remedio de las víctimas.

Este artículo es clave para hacer implementables las previsiones sobre prevención, responsabilidad jurídica y acceso a remedio efectivo. Hay un sin número de fuentes que justifican la jurisdicción extraterritorial, incluyendo los principios de Maastricht sobre Obligaciones Extraterritoriales, la Observación General 24 del CESC y basta jurisprudencia de las cortes Interamericana y Europea de Derechos Humanos. Casos emblemáticos son el de CASO ASOCIACIÓN BURESTOP 55 Y OTROS Vs. FRANCIA de la Corte Europea de DDHH y el caso "Andrew Harte y Familia" (Petición contra Canadá) de la Comisión Interamericana de DDHH.

Apoyamos a Palestina en la eliminación del término “derecho interno” en el artículo 9,2 con base en el artículo 27 de la convención de Viena y la Resolución 5683 (artículo 32) y el principio Elettronica Sicala contemplado en el caso contencioso entre EEUU e Italia.

Es clave mantener el artículo 9.5, sobre el principio de forum necessitatis. Este se aplica en legislaciones comunitarias y nacionales, tal como se ha hecho en el reglamento europeo sobre Sucesiones Internacionales,

Reiteramos la relevancia de mantener la prohibición del forum non conveniencie o figuras similares esencial para asegurar el derecho al acceso a la justicia efectiva consagrado en instrumentos regionales como la CADH, artículo 8 y 25, o la CEDH en los artículos 6 y 13.

Finalmente recomendamos la inclusión de un párrafo adicional en el artículo 9, del siguiente texto:

“9.6. All courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State for human rights abuses and violations which constitute the most serious crimes of concern to the international community as a whole.”

La extraterritorialidad ha sido reconocida en el derecho comercial de inversión , en materia de corrupción, lavado de activos, tráfico infantil, entre otras. Porque negarla en la protección de los derechos humanos?

Gracias Sr. Presidente.

## 6. FIDH

Thank you, Mister Chair.

FIDH reaffirms its position that the Third Revised Draft (as commented on by states) remains the basis for negotiation and supports States which have made interventions in this direction.

A robust article on jurisdiction setting clear, common international rules is critical for access to remedy of victims. In this respect, we remind that the chances that victims will engage in so-called “forum shopping” or lead to a multiplication of cases if this LBI is adopted are extremely low, given the limited means and huge challenges in access to justice for victims.

On Article 9 of the Third Revised Draft Treaty we suggest the following:

- Article 9.1 (b) makes a reference to “contributing” which can be potentially limiting, in that it would leave out instances of direct causation. “Causing” should be added, to use the same language as Article 9.1(c) which correctly uses “causing or contributing”.

- We also support Palestine and Egypt’s suggestion to add the term “violation” in the text.

- Art. 9.3 which seeks to avoid dismissal of cases on the basis of the *forum non conveniens* doctrine is extremely important. We support Mexico’s suggestion, however, to use the somewhat more straightforward and simple formulation of the Second Revised Draft:

*State Parties shall ensure that the doctrine of forum non conveniens is not used by their courts to dismiss legitimate judicial proceedings brought by victims.*

- Regarding 9.5, we suggest making the list of grounds non limitative by replacing “as follows” by “such as” and enlarging the grounds in article 9.5.c by modifying “a substantial activity” by “some activity” in 9.5.c. This would read as follows:

*Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial judicial process is available and there is a connection to the State Party concerned, as follows such as:*

*a. the presence of the claimant on the territory of the forum;*

*b. the presence of assets of the defendant; or*

*c. ~~some a-substantial~~ activity of the defendant*

## 7. FOEI

Art 9 - Mai Taqueban Friends of The Earth International

Thank you, Mr. Chairman.

On behalf of our partner indigenous communities, I speak on behalf of my home organisation in the Philippines, Legal Rights and Natural Resources Center, Friends of the Earth International and the Asia Task Force on the LBI, members of the Global Campaign.

First, I would like to reiterate that the 3rd draft is the only representative document of these Inter-State negotiations and serves as the legitimate basis for this session.

The wording of the provisions of Article 9, which speak of jurisdiction, are of key importance and represent one of the main points to ensure the effectiveness of the treaty. Jurisdiction is one of the main gaps in international law and impedes the right of those affected to access to justice. For this reason, the Chair's proposals represent an unacceptable regression.

We agree with the Palestinian proposal in 9.1 and 9.1.c.

In 9.1, it is important to specifically mention commercial relations and global value chains of transnational corporations—to ensure that it will be possible to take legal action in the country of origin of the parent company or contractor, even as this may be provided for in various national due diligence laws passed in recent years.

In this regard, we also support the Palestinian proposal in Article 9.2. We welcome the reintroduction of paragraph 9.1 (d), which states that the country of which the victim is a national or in which they are domiciled also has jurisdiction.

On the other hand, in 9.2, the inclusion of the definition of domicile encompassing the "assets" of companies is positive, but 9.2.b should be reworded: The criterion should be the existence of sufficient resources to ensure remedies for those affected, and in accordance with the demands of the plaintiffs.

Expressions that leave a loophole in the questioning of companies to avoid liability, such as "activity on a regular basis" in 9.2.d, should also be eliminated, as they can be difficult to interpret and seem redundant with "where operations are located" in 9.2.b.

In addition, "principal place of business" should be in the plural; and we support Palestine's 9.2.d bis proposal to add "substantial business interests", which is a well-known expression in European law, for example.

Regarding Article 9.2, it is also very important that the forum necessitatis be established as a criterion of jurisdiction, articulated with the proposal in 9.5 for the establishment of non-traditional links for the application of jurisdiction.

A document with established prevention measures and human rights obligations is of no use if there is no guaranteed access to justice for those affected, including through the judiciary. Moreover, with the de-territorialization of production, the constitution of economic groups and the rise of digital media, the traditional criteria for the establishment of jurisdiction are no longer sufficient. According to the principle of progressive development of international law, as Bolivia mentioned yesterday, this treaty should be a pioneer and close this gap.

Thank you, Mr. Chairman.

## **8. Franciscans International**

With your permission, I am coming back on article 8 to express support for article 8bis as proposed by Namibia and supported by other States.

On article 9, we generally support it as it has been proposed in the third revised draft LBI.

We support suggestions made by States on the third draft to say both abuses and violations in this article.

We also support the maintenance of the reference to forum non conveniens as one of the doctrines that should not be imposed as a legal obstacle to initiate proceedings, as it is in article 9.3 of the third draft and as supported by several States.

We hear the point made by some States that this is not a concept or doctrine that is being used in all legal systems. However, as it is mentioned in article 9.3, it is only one of the obstacles covered (the word including is used in article 9.3 of the third draft), and so not excluding others. In turn, since in our experience, this doctrine is a very real obstacle to legitimate attempts by victims to access remedies in an appropriate jurisdiction and de facto leading to denial of justice, we think it is important to list it explicitly.

Another point that is slightly more general but should have specific implications in the future drafts is an issue we hear from many victims of business abuses and misconduct: many of them and their lawyers highlight that they need to have access to information including in regard to where a company is domiciled, and the location of their assets. Corporate disclosure rules should facilitate information for communities they work with. We thus encourage States to keep strong language about access to information for the proceedings themselves (related to evidence, etc.) as in article 7 of the LBI but also to consider access to information as a prerequisite to make decisions on jurisdiction to bring a claim.

## **9. ICJ**

Sr Presidente,

La Comisión internacional de juristas aprovecha la oportunidad para manifestar su apoyo a la mayor parte de la intervención de la Confederación Sindical Internacional sobre el artículo 8 (responsabilidad jurídica) el día de ayer. La CIJ no pudo comentar en su momento debido a la rapidez en los debates en sala.

Tanto la responsabilidad civil de la empresa matriz o líder del grupo transnacional contenida en el art 8.6 como la responsabilidad penal o funcionalmente equivalente aludida en el artículo 8.8 son esenciales para la consecución de los objetivos de este instrumento jurídicamente vinculante.

Por otro lado, disposiciones sobre la responsabilidad civil, penal y administrativas de la persona jurídica se encuentran también en convenciones de Naciones Unidas sobre el combate a la corrupción y la lavado de activos, por ejemplo, y son vitales para los objetivos de protección de derechos, disuasión y sanción de la conducta desviada de algunos actores. En ese contexto, esas disposiciones no han sido consideradas como punitivas para las

empresas, o demasiado prescriptivas para los Estados. No existe ninguna razón para no tomar la misma actitud positiva a estas medidas en el contexto de la protección de los derechos humanos.

Sobre el Artículo 9 (jurisdicción), la CIJ se permite reiterar su apoyo a este artículo con las acotaciones hechas en la sesión pasada en relación al artículo 9.3 sobre *forum non conveniens*. Queremos señalar que las disposiciones de este artículo no hacen más que reflejar una práctica extendida en el ejercicio de su jurisdicción por parte de los Estados en materia comercial y civil, como también el desarrollo progresivo del derecho internacional.

Por ejemplo, la disposición sobre la jurisdicción por conexidad y por necesidad (párrafo 9.4 y 9.5 respectivamente del proyecto 3ro revisado) que parecen ser cuestionadas por algunas delegaciones, corresponden a recomendaciones contenidas en la Recomendación 16/3 (2016) sobre Empresas y Derechos Humanos aprobada por el Comité de Ministros del Consejo de Europa y también a desarrollos en el ámbito interamericano.

Una jurisdicción relativamente amplia de la autoridad judicial competente en cada país es necesaria para abordar de manera clara y satisfactoria los vacíos de protección de los derechos humanos y laborales inherentes a las actividades transnacionales de ciertas empresas.

## 10. IHRAAM

9.1. Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

9.1. Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses **or violations** covered under this (Legally Binding Instrument), shall **upon the victims and their family's choice**, vest in the courts of the State where: **(Palestine, South Africa)**.

9.1. Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses **or violations** covered under this (Legally Binding Instrument), shall vest in the courts of the State where: **(Egypt)**

a. the human rights abuse occurred and/or produced effects; or

b. an act or omission contributing to the human rights abuse occurred;

**(Has reservations: Brazil)**

b. an act or omission contributing to the human rights abuse **or violation** occurred; **(Palestine)**

c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled; or

c. the legal or natural persons alleged to have committed **including in their business relationships and global production chain** an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled; or **(Palestine)**

d. the victim is a national of or is domiciled.

This provision does not exclude the exercise of civil jurisdiction on additional grounds provided for by international treaties or domestic laws.

9.2. Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal person conducting business activities of a transnational character, including through their business relationships, is considered domiciled at the place where it has its:

9.2. Without prejudice to any broader definition of domicile provided for in any international instrument ~~or domestic law~~, a legal **or natural** person conducting business activities of a

transnational character, ~~including through their business relationships~~, is considered domiciled **including through their business relationships and global production chain** at the place where it has its: **(Palestine)**

- a. place of incorporation or registration; or
- b. place where the principal assets or operations are located; or
- c. central administration or management is located; or
- d. principal place of business or activity on a regular basis.

**d bis. substantial assets are held. (Palestine)**

9.3. Courts vested with jurisdiction on the basis of Article 9.1 and 9.2 shall avoid imposing any legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings in line with Article 7.5 of this (legally binding instrument). **(South Africa)**

9.3. Courts vested with jurisdiction on the basis of Article 9.1 and 9.2 shall avoid imposing any legal obstacles, ~~including the doctrine of *forum non conveniens*~~, to initiate proceedings in line with Article 7.5 of this (legally binding instrument). **(China)**

**(Keep reference to *forum non conveniens*: Palestine, Namibia)**

9.3. Courts vested with jurisdiction on the basis of Article 9.1 and 9.2 shall avoid imposing any legal obstacles, ~~including the doctrine of *forum non conveniens*~~, to initiate proceedings in line with Article 7.5 of this (legally binding instrument), **including the doctrine of *forum non conveniens* unless an adequate alternative forum exists that would likely provide a timely, fair, and impartial remedy. (Egypt)**

9.4. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is connected with a claim against a legal or natural person domiciled in the territory of the forum State.

9.4. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is **directly** connected with a claim against a legal or natural person domiciled in the territory of the forum State. **(Brazil)**

9.5. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair judicial process is available and there is a connection to the State Party concerned as follows: **(Palestine (regarding entire article))**

**(Has reservations regarding entire article: Brazil, China)**

- a. the presence of the claimant on the territory of the forum;
- b. the presence of assets of the defendant; or
- c. a substantial activity of the defendant.

## 11. IOE

Thank you Chair, I am speaking on behalf of the International Organisation of Employers.

As general comment, let reaffirm the third revised draft treaty remain far from possible **implementation**. Strong international support of this draft is what is currently missing, and we regret the fact that the Chair's proposals which are a step in the good direction to achieve this aim are not regarded as a more balanced basis of negotiation.

On the revised third draft treaty:

The proposed scope of article 9 continues to promote extraterritorial jurisdiction with poorly defined terms creating great legal uncertainty for business. **This entire article must be redrafted or omitted.** and we positively welcome States' reservation regarding the entire article as it stands.

Indeed, the new draft defines that a company is considered domiciled where it has "activity on a regular basis". This is not only very vague language but would mean universal

jurisdiction for many multinational companies that are active in most economies around the world.

The extensive jurisdictional scope of the draft is further exacerbated when considering the breadth of the “activities” to be regulated, which include electronic transactions.

The new draft also appears to allow for concurrent jurisdiction in the company’s host country where the harm occurred, the home country where the company is located, or even in a third country. Adding to this jurisdictional uncertainty, the draft continues to explicitly reject the doctrine of the *forum non conveniens*.

Additionally, the text fails to provide for practical and effective pathways to remedy at a local level, allowing States to sidestep any responsibility for maintaining their fundamental obligations regarding remedy under Pillar III.

**In 9.1.** New proposals from would allow the “plaintiffs” and their “family” to decide instead of States where to the claims can be brought upon their discretionary power. This undermines the general principle that the applicable law is that of the forum State. This should be omitted in full.

Additionally, the new inclusion under **new point 9.2.d.** would create liability for companies where substantial assets are held. Who is to be subject to liability needs to be determined by national law and be subject to broader issues of commercial liability. This should be omitted in full.

Turning to the Chair’s new proposals:

Again, as for the third revised draft treaty, the proposed scope of article 9 continues to promote broad extraterritorial jurisdiction, encourage forum shopping and creating legal uncertainty with extreme vague language.

Thank you.

## 12. Trocaire

Dear Mr Chair,

I am delivering this statement on behalf of the Irish Coalition for Human Rights, Trócaire, Oxfam Ireland, Christian Aid Ireland, the Irish Congress for Trade Unions, and our other members.

Our coalition is encouraged that the EU is increasing its engagement at this year’s session, based on the draft Corporate Sustainability Due Diligence directive. However, we are deeply disappointed that eight years into this process, the EU has still failed to develop a formal position on the UN Treaty and has not secured a mandate to negotiate. Ireland has also maintained a disappointing lukewarm position on the Treaty.

If regions legislate in an uncoordinated way and come up with diverging standards of conduct for companies, this could lead to an uneven patchwork of rules worldwide. Creating a more complex situation, new loopholes for companies to escape responsibility, and regulatory uncertainty. But most importantly it will not protect people and the planet from human rights and environmental harms.

Furthermore, while the CSDD Directive has yet to be finalised by the EU’s institutions, the draft from the European Commission contains significant shortcomings. For example, it will cover only 1% of EU businesses and their value chains, and barriers to access to justice remain unaddressed.

A UN Treaty could fill one of the major gaps left by the EU directive on access to justice for victims, for example, by setting international standards on applicable law in article 9, which is a major barrier for communities who seek justice through transnational court cases against companies.

As such, it is important the EU and other states support strengthening Article 9. It is most important that the victim has a choice regarding the jurisdiction that will hear their case, and as such the LBI should explicitly offer them the choice of jurisdiction that shall hear their claim.

Thank you.

### **13. USCIB**

I speak on behalf of the USCIB, and continue to thank the Chair and this group for the opportunity to share my thoughts.

I would like to begin by noting that the draft proposals continue to disregard that remedy need not, and often is not, achieved through judicial means. One need look no further than the UN OHCHR's Accountability and Remedy Project's excellent work on this subject to recognize the breadth with which remedy can be achieved, and the principled pragmatism in allowing non-judicial or non-state-based and other non-traditional remedies to operate. There is a place for judges and magistrates and lawyers, to be sure, but effective remedy is often best achieved both quickly and locally, and often informally, all while remaining consistent with the UNGP's.

The draft proposals reflect an unwise hierarchy of judicial over non-judicial approaches while, making matters worse, creating a hierarchy of judicial systems favoring the industrialized and well-developed systems (through attempting to minimize the concept of Forum Non Conveniens).

A treaty should not, of course, simply retrench the status quo of existing judicial and adjudicative infrastructures. It should not suggest that claims can or should be brought in the Global North or in industrialized countries. The best future world, where the UNGPs can be best expressed, is a world where states with enforcement and adjudicative concerns solve those concerns such that existing laws can be enforced and adjudicated locally, with ready access to evidence and strong rule of law.

The proposals regarding rights-holder choice of venue, or that call for universal jurisdiction, beyond their myriad concerns regarding comity and sovereignty, also disregard fundamental state obligations under Pillar I of the UNGPs. We need not complicate this. Claims should be adjudicated where they factually exist. Doing otherwise incents states – who claim to be treaty supporters – to not develop or reinforce their own rule of law.

## **E. Article 10**

### **1. ABIA and FOEI**

Gracias señor presidente, mi nombre es Manoela Roland, investigadora Homa y hablo en nombre de ABIA y FoEI como miembros de la Campaña Global.

En primer lugar, quiero enfatizar que el Borrador 3 es el único documento representativo de las negociaciones entre Estados y legítimo para servir de base para esa 8ª sesión. El documento presentado por el Presidente no debe ser considerado, de forma que rechazamos la propuesta de Mexico de su inclusión. En realidad, ya se ha demostrado que mantenerlo solo confunde el proceso, además de rebajar todos los estándares de protección de los Derechos Humanos presentes en el último draft.

En este sentido, voy a rescatar las propuestas consideradas positivas para la consolidación de un instrumento internacional eficaz que pueda llenar los vacíos legales sobre la responsabilidad de las empresas transnacionales, en relación con las violaciones a los Derechos Humanos en todas sus cadenas productivas globales.

En este momento, el diagnóstico de la importancia de volver a la discusión sobre el alcance del Tratado, que a partir de la aprobación de la Res 26/9 y su mandato debe orientarse a la negociación de un instrumento internacional vinculante sobre empresas transnacionales o de las empresas de carácter transnacional. Esta dirección garantizaría un mejor espacio de reflexión y dedicación respecto del alcance de la responsabilidad civil, administrativa y penal de estas empresas, a lo largo de toda la cadena productiva mundial, incluso concibiendo esta dimensión con mayor precisión.

Del mismo modo, los mecanismos de extraterritorialidad deben perfeccionarse y considerarse esenciales, independientemente de las condiciones nacionales, o por una arbitrariedad

coyuntural interna. Los recursos previstos no presentan texto relacionado con el aparato sancionador tampoco se corresponden con las exigencias de complementariedad jurisdiccional internacional que ya existen en los Sistemas de Protección Internacional de los Derechos Humanos. O sea, todavía debemos recordar, en esta sesión que estamos discutiendo un Tratado de Derechos Humanos, y no una directriz de la OCDE, o la efectividad de dos UNGPS, y mucho menos una Ley de Devida Diligencia. Necesitamos avanzar y hay paradigmas que romper. Como mencionó el lunes el profesor Surya Deva, la realidad es compleja, y podríamos agregar que las violaciones de los Derechos Humanos por parte de las empresas, especialmente las transnacionales, son cotidianas y no excepcionales, y se benefician de una lógica de impunidad estructural.

Las propuestas de Palestina en relación con el artículo 10.2 se ajustan mucho más a este espíritu que las de Brasil y Mexico, que ha presentado propuestas contradictorias. Pensamos que la propuesta de Uruguay puede ser una iniciativa importante con relación a definición de un plazo específico, en conformidad con los intentos del Sistema Interamericano.

Muchas gracias, señor presidente.

## 2. CAI and IPS

Merci Monsieur le Président, je suis Pierre MAISON, paysan en France et je m'exprime au nom de La Via Campesina, membre de la Campagne mondiale.

Tout d'abord, je tiens à souligner que le 3<sup>ème</sup> brouillon est le seul document légitime et représentatif des négociations entre les Etats pour servir de base à cette 8<sup>ème</sup> session. Dans ce sens, je rappellerais les propositions considérées positives pour la consolidation d'un instrument international contraignant et efficace, conformément au mandat de la Res 26/9, qui puisse combler les lacunes juridiques sur les obligations directes des sociétés transnationales, en plus des mécanismes nationaux et extraterritoriaux qui assurent la responsabilité civile, administrative et pénale de ces sociétés. Cela permet de garantir la prévention des violations des droits de l'homme et une ample réparation pour les personnes ou les communautés affectées.

Ainsi, en ce qui concerne le Statut de prescription, nous proposons le maintien du texte du 3<sup>ème</sup> brouillon sur l'article 10.1, ainsi que la contribution palestinienne sur l'article 10.2, sans incorporer les modifications suggérées par le Brésil. Les textes respectifs sont donc déjà dans le 3<sup>ème</sup> brouillon révisé et ils ont été envoyés au secrétariat.

Merci monsieur le président

## 3. CIDSE et al.

Mr chair,

I am delivering this statement on behalf of CIDSE, CCFD-Terre Solidaire, Broederlijk Delen, CAFOD, Entraide et Fraternité, Fastenopfer, Focsiv, KOO, DKA Austria, Misereor, Trócaire and Alboan.

Dear Mr Chair Rapporteur,

Before we make our intervention on Art.10, we would like to add a short comment on article 9. In particular, we want to underline the importance of the provisions rejecting the doctrine of *forum non conveniens* to ensure that right-holders have effective access to justice. We would like to state our view that it is essential provisions in article 9 are legally binding, and therefore that they are retained in the third draft and not in an optional protocol.

Regarding article 10, we welcome that this article provides essential provisions to allow victims of corporate abuse to be heard and to seek justice.

However, we are concerned about the particular situation of children. Any provisions on statutes of limitations should ensure that child victims are not in a situation where justice is denied. This is also crucial for those who, because of their age, physical, mental or psychological condition, need additional time and resources to seek redress.

For this reason, we support the amendment from Palestine last year on article 10.2.



Mr Chair,

There can be no statute of limitations for crimes against humanity and war crimes. We reiterate our suggestion from last year to add an additional sentence at the end of article 10.2, reading as follows:

*Art. 10.2. State Parties shall ensure that responsibilities resulting from the committing of international crimes will never be subject to statutes of limitation.*

#### 4. DKA et al.

10.1. The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations shall not apply for the commencement of legal proceedings in relation to human rights abuses resulting in violations of international law which constitute the most serious crimes of concern to the international community as a whole.

**We propose the deletion of “the most serious” and “of concern to the international community as a whole” to the Article 10.1**

The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations shall not apply for the commencement of legal proceedings in relation to human rights abuses resulting in violations of international law which constitute ~~the most serious~~ crimes of concern to the international community as a whole under international law.

10.1. The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole allow a reasonable period of time for the commencement of legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time.

**We propose the following amendments to the article 10.2 and it reads as such:**

10.2. The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute ~~the most serious~~ crimes of concern to the international community as a whole under international law shall not run for such a period as no effective remedy is available and shall not apply to civil or administrative actions sought by victims seeking reparation for their injuries. In all cases they must allow a reasonable period of time for the commencement of legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time.

10.2. The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole allow a reasonable **gender-responsive** period of time for the commencement of legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time, **or where the victim is delayed in commencing a proceeding in respect of the claim because of their age, physical, mental or psychological condition. (Palestine)**

10.2. The States Parties to the present (Legally Binding Instrument) shall ~~adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole~~ allow a reasonable period of time for the commencement of legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time. **(Brazil)**

## 5. **EEB**

Dear Ladies, Gentlemen and others,

The article 13 on International Cooperation is a crucial milestone in the discussion of the Legally Binding Instrument, as one has to face that the issues considered on the agenda, having a global perspective, must also have a global point of action and subsequent measures.

Following that, we believe that Article 13 must explicitly mention that state parties should, in the spirit of international cooperation and according to their resources, support the victims in order to defend their human rights. In that sense, We agree with the proposal from the chair that mentions that States Parties that are in a position to do so shall provide (feel obliged to) financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes for the purpose of attaining the aims of this LBI.

From another angle, but also coming from the proposal for the editing of the article 13 from the chair, that promotes the international cooperation to make efforts of public awareness, We believe that said efforts must include the following: "how business-related human rights abuses impact women workers and what steps must be made in each state party to combat said contexts". As it is of great importance that the efforts to achieve global public awareness must include the comprehension that most of these issues are not gender neutral, from their impact on women workers.

Today, the human rights violations that women face in business activities are a combination of gender discrimination and the imbalance of power between business actors and individual women. Today, business models, often driven by international business agreements, stimulate a global demand for cheap labour in places with weak regulations. This creates significant obstacles to justice for women workers, particularly at the lower end of the production chain, as well as for women in the communities where transnational corporations operate.

We therefore need to put into practice the inclusion of women in decision-making processes as agents of their own change, alongside business leaders, multilateral agencies, governments and others in civil society, and not just as victims of rights violations.

Furthermore, the proposal that the international cooperation must include a "global public awareness campaign" is very much well received from our perspective. In that sense, the Article 13 proposal from the chair is a great progress from the third revised Draft, and so We welcome it, as it reinforces that the States Parties must strengthen international cooperation for the prevention of business involvement in human rights abuse and for the remedy of harms arising from such abuse.

Thank you very much.

## 6. **Franciscans International et al.**

This is a joint statement by Franciscans International, FIDH and FIAN International. In general, we highlight the importance of article 10 of the 3rd revised Draft. This article is key to guaranteeing effective access to justice for victims, and in particular inter-generational victims, and in cases where harm and effects continue or manifest over long periods of time as a consequence of business activities. As the Special Rapporteur on hazardous substances pointed out, in cases like the dumping of waste in Arica, Chile, strict implementation of statute of limitations prevented victims access to justice because the effects of the business activities took years to manifest.

In paragraph 1, on the non-applicability of statutory or other limitations, we are of the view that this provision shall not be limited to violations that constitute the most serious crimes and this paragraph should include violations whose effects and impact would continue over long periods of time or when harm have long lasting effects. This would be the case of environmental harms. This should be added also in article 10.2 to make it consistent.

In regard to paragraph 2, we support Palestine's proposal for Art. 10.2, but we suggest adding "and" after "reasonable" so it reads as follows: "allow a reasonable and gender-responsive period of time".

Moreover, any proposal that would refer to domestic legal and administrative systems for the applicability of this article should be rejected.

## 7. IHRAAM

10.1. The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations shall not apply for the commencement of legal proceedings in relation to human rights abuses resulting in violations of international law which constitute the most serious crimes of concern to the international community as a whole.

10.1. ~~The States Parties to the present (Legally Binding Instrument)~~ shall adopt any legislative or other measures ~~necessary~~ to ensure that statutory or other limitations shall not apply for the commencement of legal proceedings ~~regarding the in-relation to~~ human rights abuses ~~covered by the present (Legally Binding Instrument) resulting in violations of international law~~ which, ~~in accordance with international law~~, constitute the most serious crimes of concern ~~of to~~ the international community as a whole. **(Brazil)**

10.2. The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole allow a reasonable period of time for the commencement of legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time.

10.2. The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole allow a reasonable **gender-responsive** period of time for the commencement of legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time, **or where the victim is delayed in commencing a proceeding in respect of the claim because of their age, physical, mental or psychological condition.** **(Palestine)**

10.2. The States Parties to the present (Legally Binding Instrument) shall ~~adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole~~ allow a reasonable period of time for the commencement of legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time. **(Brazil)**

## 8. IOE and USCIB

I speak on behalf of the IOE and USCIB, and continue to appreciate sharing our views in this forum.

To that end, and as we continue to note, statutes of limitations serve vital roles within the broader rule of law, as gatekeepers for ensuring that evidence is available and fresh enough to meaningfully serve fact-finders and adjudicators of law. They also serve to incentivize rights-holders to exercise their rights, ensuring that disputes can be timely heard and remedy obtained.

Time is often not a rights-holder's friend, and allowing rights-holders to bring claims without any time or other similar limitations, serves no legitimate interest. If the concern is that claims cannot be made in situations where causation or other key facts are unknown, this can be addressed, for example, through well-trodden legal concepts like a common-law "discovery rule," that allows a limitations period to run from the time it is known (or should be known) that a claim against a party exists.

Lastly, and specifically, we note:

The determination of statutory limits for the receiving of complaints also needs to recognise a State's existing law. And States should retain the competency to alter, amend or affirm their own statutes in this regard. The language used in the draft is too absolute.

Also, certain proposals here may be laudable in principle but are hard to understand or define, and thus to implement. For example, what would "a reasonable gender-responsive period of time" mean?

Thank you.

## **F. Article 11**

### **1. CETIM**

Gracias, señor presidente,

Mi nombre es Tchenna Maso, hago parte del HOMA y hablo en nombre del CETIM y como miembro de la Campaña Global.

Quisiéramos expresar nuestra posición de mantener el artículo 11, puesto que la institución del "derecho aplicable" ya está bien consolidada. Desde meados del siglo XX ya se aplica en el derecho internacional privado la doctrina de Estados Unidos "better law approach" o sea debe ser aplicada la ley que mejor repare el daño, siendo aún más necesaria cuando hablamos de derecho internacional de los derechos humanos.

Recordamos que jurisdicción no es igual a derecho aplicable, de forma que aún cuando ejerciendo jurisdicción, el juzgador puede y debe evaluar los derechos vinculados al caso para entender cuál se aplica mejor a la protección pro persona.

La propuesta de sacar el artículo, presentada por Brasil y apoyada por Estados Unidos y Panamá, es justamente para limitar el potencial de protección más favorable a las víctimas. El argumento de elección por parte de las víctimas no coaduna con la realidad, pues, primero, los derechos humanos son universales, y segundo, hay una asimetría de poderes entre empresas y afectados y afectadas en la realidad, no siendo el caso de llevar la cuestión como si se trataran de entes privados negociando libremente en igualdad. No hay lógica en transponer la lógica de forum shopping para violaciones de derechos humanos, aún más de individuos y comunidades vulnerables.

Por lo tal, apoyamos la propuesta de Palestina para el artículo, tanto en mantenerlo como las inclusiones que propuso.

Muchas gracias por su atención.

### **2. DKA et al.**

11.2. All matters of procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court seized on the matter.

11.2. All matters of substance which are not specifically regulated under this [international legally binding instrument] may, upon the request of the victim, be governed by the law of another State where:

**(Has reservations: Brazil (particularly regarding "upon the request of the victim"))**

a. the acts or omissions have occurred or produced effects; or

**We propose to add to Article 11.2.a ter the following**

**a) *ter* the victim is domiciled; or**

b. the natural or legal person alleged to have committed the acts or omissions is domiciled.

### **3. FIAN**

Thank you Mr. Chair. I speak on behalf of members of the Feminists for a Binding Treaty.

As reiterated by my colleagues earlier, we consider the third revised draft as the only legitimate basis for negotiations and base our inputs on the same. It is recommended that applicable law must also be the law of the State where the victim is domiciled. It can be added as a new ground as Art 11.2.c.

In line with Mexico and Palestine's proposal, we would also like to emphasize that this article be retained in the legally binding instrument. **This understanding is also in line with the pro persona principle.** This can be added as a new article 11.3 and read as follows:

**"11.3 In the event of conflict of laws resulting from obligations of States under bilateral or multilateral trade and investment agreements and their obligations under this (Legally Binding Instrument, the choice of applicable law shall be in accordance with article 14.5 of this (Legally Binding Instrument)."**

#### 4. FIDH

Thank you Mr. Chair,

This is a joint statement on behalf of FIDH and Franciscans International

Article 11 of the Third Revised Draft contains a critical provision allowing the possibility for victims to choose the applicable law in the cases they bring before courts: it would concretely give to the victims the possibility to choose the most protective legislative framework in case of a dispute, while keeping the case in the judicial system they are more familiar with. This is also particularly important given that domestic law in certain places where harm arises often features inadequate protection of human rights or disproportionately restrictive procedural standards (*e.g.* very short statutes of limitation).

This possibility or similar possibilities already exist in certain legal systems.

For example it exists in the European Union's Rome II regulation with respect to environmental damage. As a matter of fact, several EU institutions, including the EU Agency for Fundamental Rights and the European Economic and Social Committee suggested to expand this principle to all business and human rights cases.

The *pro personae* principle, which implies that legal interpretation should always seek the greatest benefit for the human being is also well established in the Inter-American System, namely in the case-law of the Inter-American Court of Human Rights that derived it from **Article 29 of the American Convention on Human Rights**.

As cases are often decided on the basis of provisions contained in the law applicable to the case, which might not be the law of the forum in which the case is filed, it is crucial that the LBI contains provisions that set general rules on this issue.

**For all these reasons, we strongly support Palestine and Mexico's proposal and recommend to keep article 11 in the LBI.**

#### 5. IHRAAM

11.1. All matters of procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court seized on the matter.

11.2. All matters of substance which are not specifically regulated under this [international legally binding instrument] may, upon the request of the victim, be governed by the law of another State where:

**(Has reservations: Brazil (particularly regarding "upon the request of the victim"))**

- a. the acts or omissions have occurred or produced effects; or
- b. the natural or legal person alleged to have committed the acts or omissions is domiciled.

#### 6. IOE and USCIB

I speak on behalf of the IOE and continue to appreciate sharing our views in this forum. We appreciate the ability to share our views on this very important topic, and remain committed

to assisting business with its responsibility to respect internationally-recognised human rights consistent with the UNGPs.

As general comment, let reaffirm the third revised draft treaty remain far from possible implementation. Strong international support of this draft is what is currently missing, and we regret the fact that the Chair's proposals which are a step in the good direction to achieve this aim are not regarded as a more balanced basis of negotiation.

Regarding article 11, we welcome the Chair's proposal for its entire removal.

Turning to the third revised draft treaty:

We wish to begin by restating our comments in connection with Article 8 and 9, as those comments apply with equal force here.

As we have noted, any treaty should not, of course, simply retrench the status quo of existing judicial and adjudicative infrastructures. The choice of law issue is critical for many of the same reasons that venue is critical and, beyond their myriad concerns regarding comity and sovereignty, also disregard fundamental state obligations under Pillar I of the UNGPs. Making applicable law the subject of rights-holder choice, for example, not only reinforces existing imbalances that foster adverse impacts but also, importantly, creates potentially double-standards for actors in certain jurisdictions but also compliance conundrums for companies seeking simply to comply with applicable domestic law in a particular jurisdiction. There are well-worn precedents for how legal standards should be applied to certain disputes. Again – we need not complicate this or legislate this issue here. Doing so simply reinforces existing imbalances.

Thank you.

## 7. ITUC

Chair,

We did not comment on Article 9 this morning because we believe that the third revised draft essentially offers a broad choice of competent jurisdiction to ensure that remediation is provided either through the forum where the harm was caused, or the forum where the parent company is incorporated or where it has a substantial presence. We welcome the efforts by some States to strengthen the Article. However, Chair, we are also deeply disturbed by what appears to a lack of ambition by some States on the need to overcome jurisdictional barriers by limiting the use of the doctrine of forum non conveniens or the need to apply forum necessitatis allowing a court to be used as a *last resort*, should no other effective forum guarantee a fair judicial process.

Chair,

One of the major problems in global supply chains is that the local suppliers are unlikely to face justice because the administrative or judicial processes may not be able to deal with claims for various reasons. Further, many companies may be significantly undercapitalized, making them essentially judgement-proof even if workers were to obtain a judicial order and efforts were made to enforce those orders. At the same time, lead firms are usually immune from lawsuits, as there is no legal cause of action or jurisdiction over them in the host country or in their home country when the violation is caused by a supplier in a contractual relationship.

This is the reality. An LBI needs to push the agenda *forward*. It needs to be rights-holder centred. It is the needs of rights-holders that should drive this entire process. We strongly encourage States to continue to engage with Art.9 in the 3<sup>rd</sup> revised draft and look to strengthen it further.

In relation to Article 11, Chair, it goes without saying that this Article is critical if we are to have a rights-holder-centred LBI that is truly effective. Article 11 provides a strong choice to victims to request the applicability of the law of another State Party. This provision is important, particularly because lead firms frequently engage in jurisdiction shopping and choose to engage in host countries with legal frameworks that may not be able to address complex cross-border cases.

Our only proposal here is an insertion of a *little c* at Article 11.2 – to include the *law of the domicile of the victim*.

Thank you, Chairperson.

## **G. Article 12**

### **1. CAI et al.**

Thank you Chair

My name is Dominic Brown. I am from South Africa where I am based at the Alternative Information & Development Centre. AIDC is a member of the Global Campaign which includes Corporate Accountability and the Transnational Institute among others.

We remain consistent that the 3rd draft is the only legitimate basis for engagement toward developing a legally binding treaty on business and human rights. A legally binding treaty is important to us as we have many experiences of injustices at the hands of the corporate and political elite in our country and other parts of the global South.

Included in this we strongly propose the inclusion of affected communities' demand for free, prior, and informed consent to enshrine communities' right to say no to potential corporate violations that undermine human rights and destroy our natural environment.

The need for section 12 in the 3rd draft of the legally binding treaty is especially relevant in instances where it is found that corporate violations have taken place. Violations that could potentially have been prevented if communities were guaranteed free, prior and informed consent and the right to say no.

In South Africa an example of this is the case of Lonmin mining. On the 16 of August, 10 years almost 50 mineworkers were gunned down and killed in an event now known as the Marikana Massacre. The reason behind their untimely deaths was the demand for improved working conditions - in line with the conditions required for a decent human existence. 10 years later and there has been no justice for the workers' families.

From the global campaign we want to underline that this article is key to guaranteeing the effectiveness of the future treaty, it is the provision that must ensure that the access of individuals and communities to justice is not frustrated by the element of transnationality.

When corporations with activities in many different countries (and the true beneficiaries of these activities) have been tried and found to be guilty of human rights abuses and violations, they ought to be held accountable for their actions in order to ensure justice for the victims of the deleterious practices of these corporations.

Regarding the content of article 12, we propose to eliminate references to national legislation in some paragraphs, since this type of reference may reduce the scope of this article.

We also propose to remove the mention of "public order" in 12.11.c. This type of vague concept opens room for the countries to arbitrarily reject a judgment and to be captured by private interests, endangering the primacy of human rights.

The concept of public order can no longer be widely used in international law, as it has proven to be inadequate in preventing once it has become a *carte blanche* for authorities from violating human rights and criminalizing human rights defenders and activists.

Finally, we want to support Palestine in excluding paragraph 12.12, since it is a contradiction to subdue an international treaty to national legislation, especially human rights treaties considering the *erga omnes* (or legally binding responsibility) of all countries to ensure reparation whether or not the activity occurred in its territory.

### **2. FIAN**

Merci Monsieur le Président,

L'article 12 est essentiel pour garantir la mise en œuvre effective de cette LBI. Selon le droit international des droits de l'homme, les États ont l'obligation de coopérer pour assurer un

environnement propice à la réalisation des droits humains. Sans cet article, il serait impossible d'assurer une mise en œuvre efficace des articles sur la prévention, la responsabilité et la juridiction, et donc de mettre en œuvre efficacement l'instrument légalement contraignant. Pour cette raison, nous nous opposons fermement à la proposition faite par les Etats-Unis de la suppression pure et simple de cet Article 12.

Comme l'année passée, nous recommandons la suppression de l'article 12.12, qui va à l'encontre de l'objectif même de cet article. La disposition n'offre aucune clarté sur ce qui constitue les "lois applicables" de l'État partie et les motifs qui peuvent exister pour évaluer la demande de l'État partie requis de refuser cette assistance juridique mutuelle ou cette coopération judiciaire internationale. Etant donné la nature et l'impact des activités commerciales à caractère transnational, l'assistance juridique et la coopération judiciaire entre les Etats sont cruciales pour que les communautés affectées puissent pleinement réaliser leurs droits en vertu de l'instrument légalement contraignant.

Nous ne pouvons pas non plus soutenir la suggestion, faite l'année passée, du Brésil d'ajouter le concept d'ordre public, car cela ouvre une très large marge d'objection pour les Etats et génère encore plus de vulnérabilité pour les communautés affectées. Tout comme nous nous opposons à la suppression de sub-articles sur lesquels le Brésil a exprimé des doutes sur leur maintien dans l'article 12.

Il est également impératif que l'article 12.1 soit lu conjointement avec l'article 14.3, afin que la norme la plus élevée en matière de respect, de protection et de réalisation des droits humains qui est prévue (soit dans le droit national, soit dans le droit international, régional) soit suivie pour la fourniture d'une assistance juridique mutuelle et d'une coopération judiciaire internationale. L'article révisé devrait se lire comme suit:

***"12.1 States Parties shall carry out their obligations under this Article in conformity with any treaties or other arrangements on mutual legal assistance or international judicial cooperation that may exist between them. In the absence of such treaties or arrangements, States Parties shall make available to one another, mutual legal assistance and international judicial cooperation to the fullest extent possible under international law and in conjunction with Art 14.3 of this instrument.***

Merci Monsieur le Président.

### 3. IHRAAM

12.1. States Parties shall carry out their obligations under this Article in conformity with any treaties or other arrangements on mutual legal assistance or international judicial cooperation that may exist between them. In the absence of such treaties or arrangements, States Parties shall make available to one another, mutual legal assistance and international judicial cooperation to the fullest extent possible under domestic and international law.

12.2. States Parties may invite any State not party to this (Legally Binding Instrument) to provide mutual legal assistance and international judicial cooperation under this Article on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.

12.3. States Parties shall make available to one another the widest measure of mutual legal assistance and international judicial cooperation in initiating and carrying out effective, prompt, thorough and impartial investigations, prosecutions, judicial and other criminal, civil or administrative proceedings in relation to all claims covered by this (Legally Binding Instrument), including access to information and supply of all evidence at their disposal that is relevant for the proceedings.

12.4. The requested State Party shall inform the requesting State Party, as soon as possible, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request.

12.5. Mutual legal assistance and international judicial cooperation under this (Legally Binding Instrument) will be determined by the concerned Parties on a case-by-case basis.



a. Mutual legal assistance under this (Legally Binding Instrument) is understood to include, *inter alia*:

- i. Taking evidence or statements from persons;
- ii. Executing searches and seizures;
- iii. Examining objects and sites;
- iv. Providing information, evidentiary items and expert evaluations;
- v. Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- vi. Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- vii. Facilitating the voluntary appearance of persons in the requesting State Party;
- viii. Facilitating the freezing and recovery of assets;
- ix. Assisting and protecting victims, their families, representatives and witnesses, consistent with international human rights legal standards and subject to international legal requirements, including those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment;
- x. Assisting in regard to the application of domestic law;
- xi. Any other type of assistance that is not contrary to the domestic law of the requested State Party.

b. International judicial cooperation under this (Legally Binding Instrument) is understood to include, *inter alia*: effective service of judicial documents; and, provision of judicial comity consistent with domestic law.

12.6. In criminal cases covered under this (Legally Binding Instrument), and without prejudice to the domestic law of the involved States Parties,

a. With respect to criminal offenses covered under this (Legally Binding Instrument), mutual legal assistance shall be provided to the fullest extent possible, in a manner consistent with the law of the requested Party and its commitments under treaties on mutual assistance in criminal matters to which it is Party;

b. In cases where such mutual assistance is related to the question of extradition, Parties agree to cooperate in accordance with this (Legally Binding Instrument), their national law and any treaties that exist between the concerned State Parties.

12.7. The competent authorities of a State Party may, without prior request, transmit and exchange information relating to criminal offenses covered under this (Legally Binding Instrument) to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this (Legally Binding Instrument). The transmission and exchange of information shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information, to guarantee the widest protection of human rights.

12.8. States Parties may consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are subject of investigations, prosecutions or judicial proceedings under this (Legally Binding Instrument), the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place, is fully respected.

12.9. States Parties shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution, in accordance with their domestic laws.

12.10. Any judgment of a court having jurisdiction in accordance with this (Legally Binding Instrument) which is enforceable in the State of origin of the judgment and is not subject to any appeal or review shall be recognized and enforced in any State Party as soon as the formalities required in that State Party have been completed, provided that such formalities are not more onerous and fees and charges are not higher than those required for the enforcement of domestic judgments and shall not permit the re-opening of the merits of the case. The enforcement in the requested State of criminal judgments shall be to the extent permitted by the law of that State.

12.10. Any judgment of a court having jurisdiction in accordance with this (Legally Binding Instrument) which is enforceable in the State of origin of the judgment and is not subject to any appeal or review shall be recognized and enforced in any State Party as soon as the formalities required in that State Party have been completed, ~~provided that such formalities are not more onerous and fees and charges are not higher than those required for the enforcement of domestic judgments~~ and shall not permit the re-opening of the merits of the case. The enforcement in the requested State of criminal judgments shall be to the extent permitted by the law of that State. **(Brazil)**

12.11. Recognition and enforcement may be refused, only where:

- a. the defendant furnishes to the competent authority or court where the recognition and enforcement is sought, proof that the defendant was not given reasonable notice and a fair opportunity to present his or her case; or
- b. where the judgment is irreconcilable with an earlier judgment validly pronounced in the State Party where its recognition is sought with regard to the same cause of action and the same parties; or
- c. where the judgment is manifestly contrary to the *ordre public* of the State Party in which its recognition is sought.

12.12. Mutual legal assistance or international legal cooperation under this article may be refused by a State Party if it is contrary to the applicable laws of the requested State Party.

**(Delete: Palestine)**

12.12. Mutual legal assistance or international legal cooperation under this article may be refused by a State Party if it is contrary to the *ordre public* ~~applicable laws~~ of the requested State Party. **(Brazil)**

12.13. States Parties shall not decline to render mutual legal assistance or international judicial cooperation in a claim involving liability for harms or criminal offenses, falling within the scope of this (Legally Binding Instrument) on the sole ground that the request is considered to involve fiscal matters or bank secrecy.

#### 4. IOE and USCIB

Thank you Chair, I am speaking on behalf of IOE and USCIB.

Let me start with our comments on the proposals that came out from the seventh session for article 12 that continue to be unimplementable:

As general comment, countries must undertake more efforts to support each other through technical cooperation, peer learning and the exchange of experience to strengthen judicial systems.

On provision 12.5., the list of proposed actions here to promote cooperation between States such as: "executing searches and seizures"; "examining objects and sites"; and "facilitating the freezing and recovery of assets" are not appropriate as they are not subject to legal due process. These wide- ranging examples could enable politically motivated abuse and frivolous prosecutions against business.

On provision 12.10, under international law, an important check on a foreign court's adjudicative jurisdiction has always been the power of a national court to refuse to recognise the enforcement of that foreign court's decision. This important safeguard continues to be

removed by this draft as it still mandates that all State Parties recognise and enforce another State Party's court order – with very limited exceptions.

Let me now turn to the Chair's new proposals which are a step in the good direction although fall short regarding the following points:

First, we believe that any draft should take greater care to ensure the confidentiality and private nature of certain information, as applicable, as balanced against the relevant policy interests that may exist in contrast.

Second, at 12.3(a)(i), we note that any draft would do better to include greater specificity around certain processes. For example, with respect to "facilitat[ing] the secure and rapid exchange of information concerning all aspects of the enforcement of the measures referred to in Articles 6-8, including for the purposes of the early identification of breaches of such measures[.]" what does "early identification" mean and what policy goal or goals does this serve?

With respect to "concerning issues, challenges, and lessons learned in the prevention of business involvement in human rights abuse[.]" what lessons are contemplated here and how would these "lessons" within an applicable legal or other context?

Thank you.

## **5. Südwind**

As an international delegation of representatives of our generation enabled by Südwind, we especially welcome the attention given to the international legal cooperation required to protect workers from human rights abuse by transnational companies touched upon in Article 12 of the "Third Revised Draft".

In our opinion, this cooperation is essential for ensuring human rights protection in a modern, globalized world.

And this globalised economy is exactly where we believe the issue lies. We truly believe the motivation of many states to try and protect workers from human rights abuse by companies within their borders. However, in an economy dominated by transnational corporations, effectively implementing these motivations becomes difficult. There have been and continue to be an overwhelming amount of examples of transnational companies outsourcing their labour to countries with less strict labour laws, as it is economically beneficial for them to do so. At this point, it becomes very difficult for the countries housing these companies to monitor the upholding of human rights at their production sites.

But ultimately, they have to be monitored, if you want to ensure the upkeep of human rights all around the globe. We cannot leave the people of these countries, who simply want to earn a fair living, in exploitation. We have to prevent these people from bearing the costs of transnational corporations saving money on labour, which, due to the issue explained before, is an international project. And issues like these are exactly what the UN is for. A single country might not be able to control an entire supply chain and its production conditions, but an alliance of countries along such a major supply chain might.

Therefore, we call upon you to establish more concrete means for countries to better and more easily ally in issues concerning human rights protection along global supply chains than proposed in the revised article 12. Clearly, it should be stated that in the absence of existing treaties on legal assistance and judicial cooperation States Parties under the LBI shall make available to one another, mutual legal assistance and international judicial cooperation to the fullest extent possible.

Thank you very much.

## **H. Article 13**

### **1. CETIM**

Thank you, Mr. Chair

My name Antonio Salvador, as member of the Asian Task Force on the LBI, Trade Justice Pilipinas, Third World Network, and SENTRO Labor Union, and I speak on behalf of Centre Europe – Tiers monde (CETIM).

We respectfully express our support for the language proposed by Palestine in Art. 13.2., which provides for a non-exhaustive list of measures for international cooperation.

The letter and spirit of **Art. 13** are obviously motivated and inspired by the need to give access to justice to victims of human rights abuses, labor rights violations, and environmental degradation perpetrated by TNCs – not DIRECTLY – BUT through their GLOBAL VALUE CHAINS, which are working as mere agents or representatives of these TNCs. Thus, the workers of these subcontractors should be treated as employees of the TNCs.

**As regards the ILO Conventions and national labor laws, the** TNC should be responsible to the workers who make its products, regardless of the characterization of the contract between the TNC and the subcontractor, which is nothing more than the nominal employer of the workers.

Art 13, and the entire proposed treaty, is of paramount importance considering the challenges not only in the legal systems but also in the rule of law and peace and order in many developing countries which host the factories that make the products for TNCs.

You can get killed for trying to exercise your rights under the ILO Conventions, even as working as a contractual worker for a subcontractor of a TNC will never allow you to live in dignity. The lives of Environmental activists are constantly under threat, many have been killed.

This article would hopefully head-off the need for additional protocols that we had heard a couple of times in these negotiations. It would hopefully ALSO address the supposed differences in legal systems being foisted continuously as an excuse to prevent progress in the negotiations and make possible the full redress of grievances.

Moreover, Art 13 would hopefully contribute to addressing the issue of alleged legal uncertainty, even as we are confident of the will and the ability of many states to address such uncertainties in the course of the negotiations.

We cannot but feel frustrated by interventions motivated by the DESIRE to protect those who benefit most from subcontracting arrangements, those who shield themselves by transferring to smaller companies in the developing countries the risks of doing business, even though as owners of the intangible property, they are the ones who get the largest portion of the profits.

Cooperation in terms of interpreting both substantive laws and procedural rules is needed in order to avoid misunderstanding as regards legal language, and prevent that the treaty and other laws be used to shield TNCs from the just claims to which communities, women workers, farmers, fishers, indigenous peoples are rightfully entitled.

Thank you Mr. Chair.

## 2. **DKA et al.**

13.1. States Parties shall cooperate in good faith to enable the implementation of their obligations recognized under this (Legally Binding Instrument) and the fulfillment of the purposes of this (Legally Binding Instrument).

### **We propose the amendment of Article 13.1 as such:**

13.1 States Parties shall cooperate in good faith to enable the implementation of their obligations recognized under this (Legally Binding Instrument) and the fulfillment of the purposes of this (Legally Binding Instrument) **including in the prevention and detection of any activity contrary thereto and in the rehabilitation, physical and psychological recovery, social reintegration and repatriation of victims, especially children.**

13.2. States Parties recognize the importance of international cooperation, including financial and technical assistance and capacity building, for the realization of the purpose of the present (Legally Binding Instrument) and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant

international and regional organizations and civil society. Such measures include, but are not limited to: **(Palestine (would like to keep this paragraph))**

13.2. States Parties recognize the importance of international cooperation, including financial and technical assistance and capacity building, for the realization of the purpose of the present (Legally Binding Instrument) and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society. ~~Such measures include, but are not limited to:~~ **(Brazil (and delete all sub-provisions))**

- a. Promoting effective technical cooperation and capacity-building among policy makers, parliaments, judiciary, national human rights institutions, business enterprises and operators, as well as users of domestic, regional and international grievance mechanisms;
- b. Sharing experiences, good practices, challenges, information and training programs on the implementation of the present (Legally Binding Instrument);
- c. Raising awareness about the rights of victims of business-related human rights abuses and the obligations of States under this (Legally Binding Instrument);
- d. Facilitating cooperation in research and studies on the challenges, good practices and experiences in preventing human rights abuses in the context of business activities, including those of a transnational character;
- e. Contribute, within their available resources, to the International Fund for
- f. Victims referred to in Article 15.7 of this (Legally Binding Instrument).

We reiterate our proposal for a new Article 13.3 from last year and it reads as follows:

New Art. 13.3. States Parties shall promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations.

### 3. **EEB**

Dear Ladies, Gentlemen and others,

The article 13 on International Cooperation is a crucial milestone in the discussion of the Legally Binding Instrument, as one has to face that the issues considered on the agenda, having a global perspective, must also have a global point of action and subsequent measures.

Following that, we believe that Article 13 must explicitly mention that state parties should, in the spirit of international cooperation and according to their resources, support the victims in order to defend their human rights. In that sense, We agree with the proposal from the chair that mentions that States Parties that are in a position to do so shall provide (feel obliged to) financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes for the purpose of attaining the aims of this LBI.

From another angle, but also coming from the proposal for the editing of the article 13 from the chair, that promotes the international cooperation to make efforts of public awareness, We believe that said efforts must include the following: "how business-related human rights abuses impact women workers and what steps must be made in each state party to combat said contexts". As it is of great importance that the efforts to achieve global public awareness must include the comprehension that most of these issues are not gender neutral, from their impact on women workers.

Today, the human rights violations that women face in business activities are a combination of gender discrimination and the imbalance of power between business actors and individual women. Today, business models, often driven by international business agreements, stimulate a global demand for cheap labour in places with weak regulations. This creates significant obstacles to justice for women workers, particularly at the lower end of the production chain, as well as for women in the communities where transnational corporations operate.

We therefore need to put into practice the inclusion of women in decision-making processes as agents of their own change, alongside business leaders, multilateral agencies, governments and others in civil society, and not just as victims of rights violations.

Furthermore, the proposal that the international cooperation must include a “global public awareness campaign” is very much well received from our perspective. In that sense, the Article 13 proposal from the chair is a great progress from the third revised Draft, and so We welcome it, as it reinforces that the States Parties must strengthen international cooperation for the prevention of business involvement in human rights abuse and for the remedy of harms arising from such abuse.

Thank you very much.

#### 4. ICJ

Mr Chairperson,

In relation to article 12, the International Commission of Jurists reiterates its concern that many of the provisions in the 3rd revised draft are tailored to specifically deal with the prosecution of certain crimes, and not with the kind of civil liability that is foreseen in the current draft LBI. We see now that our concern is also shared by others.

But this fact, rather than a reason not to have provisions on Mutual Legal Assistance on criminal matters, should prompt us to address more clearly the question of criminal liability or its functional equivalent, which is currently addressed in article 8.8., in such a way that these provisions of Mutual Legal Assistance acquire full meaning and are tailored to the prosecution to these human rights related international crimes, in which certain enterprises are often involved.

On article 13, the International Commission of Jurists would like to reiterate its support to this article in the 3rd revised draft. But we would like also to acknowledge that some elements from the Chair’s informal suggestions appear to be better drafted and should be taken into consideration. Notably, article 13.1 of the chair’s draft could replace the current 13.1 in the 3rd Draft, and 13.2.b from the chair’s draft could be added to the list in 13.2 of the 3rd draft.

Thank you.

#### 5. IHRAAM

13.1. States Parties shall cooperate in good faith to enable the implementation of their obligations recognized under this (Legally Binding Instrument) and the fulfillment of the purposes of this (Legally Binding Instrument).

13.2. States Parties recognize the importance of international cooperation, including financial and technical assistance and capacity building, for the realization of the purpose of the present (Legally Binding Instrument) and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society. Such measures include, but are not limited to: **(Palestine (would like to keep this paragraph))**

13.2. States Parties recognize the importance of international cooperation, including financial and technical assistance and capacity building, for the realization of the purpose of the present (Legally Binding Instrument) and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society. ~~Such measures include, but are not limited to:~~ **(Brazil (and delete all sub-provisions))**

a. Promoting effective technical cooperation and capacity-building among policy makers, parliaments, judiciary, national human rights institutions, business enterprises and operators, as well as users of domestic, regional and international grievance mechanisms;

b. Sharing experiences, good practices, challenges, information and training programs on the implementation of the present (Legally Binding Instrument);

c. Raising awareness about the rights of victims of business-related human rights abuses and the obligations of States under this (Legally Binding Instrument);

- d. Facilitating cooperation in research and studies on the challenges, good practices and experiences in preventing human rights abuses in the context of business activities, including those of a transnational character;
- e. Contribute, within their available resources, to the International Fund for Victims referred to in Article 15.7 of this (Legally Binding Instrument).

## 6. IOE and USCIB

Thank you Chair, I am speaking on behalf of both the International Organisation of Employers and the United States Council for International Business.

I would like to begin by reiterating the value and importance of **including organised business in this process in a meaningful way**. The tripartite ILO standard setting process and the inclusive process that produced the UN Guiding Principles have not only shown the value of access to business expertise. Over time they have demonstrated the value of participation and the resulting consensus in giving effect to the provisions of instruments.

The term “business” encompasses a **myriad of enterprises** in a myriad of industries, operating all over the world. Some, to be sure, have proven to be bad actors — as indeed there are bad actors in every field of human endeavour. But continuing to regard all business actors in a simplistic and purely adversarial manner serves the interests of no one — neither “right holders” seeking redress nor companies seeking to do the right thing, and thereby avoid potential human rights transgressions. **Employer and Business Member Organisations, companies and the private sector at large are important actors in international cooperation**, and effective and meaningful consultation with them, as encouraged by the UNGPs, should not only be allowed, but encouraged. In that regard, we believe that **UNGPs 8, 9 and 10 should be the foundational principles** of this provision on international cooperation and should be included in full as this is a language understandable and accepted by all.

**Increased policy coherence at both the national and international levels** is another important concept missing here. Again, reference to UNGP 8 is important in this regard. **Collective action** through multilateral institutions should also be included as it can help States level the playing field with regard to business respect for human rights by raising the performance of laggards.

Capacity-building and awareness-raising through both national and international institutions can play a vital role in helping all States to fulfil their duty to protect.

However, **raising awareness** without **effective follow-up action from States** will not make a difference on the ground. The fact that informality accounts for more than 60% of commercial activity around the world limits the effect of the rule of law fundamental to effective human rights protections. When not addressed by States, informality deprives those most at risk of serious harm of the basic protections afforded others — creating a double standard that should be unacceptable to all human rights champions.

Thus, international cooperation must also address **the root causes of governance deficits**. Weak institutions and poor rule of law are breeding ground for human rights deficits.

Thank you.

## 7. Südwind

Dear Chair, ladies and gentlemen and others,

MIJARC Europe, supported by Suedwind, highly welcomes the development of the “Third Revised Draft” of the Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. As one of the biggest European coordination networks for rural and Christian youth organisations, we strongly support the defence of the interests and rights of the people in rural areas globally, especially those in vulnerable groups, especially women.

The reason I mention this here is that even if women have equal rights in access and administrating rural land, it is well known that gender inequalities appear among different

stakeholders at different levels – between farmers and foresters, at farm level, etc. There are fewer women working or owning farm and forest holdings in Europe, even though these numbers have been increasing in recent years (i.e., 27% of livestock farms, 24% of organic farms, or 30% of private forest), and their involvement in decision - making is limited. Specifically looked into the implications on gender equity in agricultural Carbon market projects in developing countries shows that female land managers are more prone to adopt new and “green” practices, in line with existing evidence on the role of women as nature stewards. The information on these issues is still scarce and without monitoring.

Acknowledging that human rights consider in any project, company, institution or organisation, that aspires to mainstream a business model across Europe’s and world’s rural areas, the implementation of the Legally Binding Instrument would have a multi-dimensional impact if there is a relevant monitoring support system. Therefore we support the naming of “measures including but not limited to” as suggested in the third draft and clearly supported by the State of Palestine in last year's session. Additional we suggest to include the development of a monitoring support system integrated within the Para.13.2, Art.13. INTERNATIONAL COOPERATION that could contribute in bringing clarity on WHICH are the best strategies for ensuring the defence of human rights at different levels, in diverse environments, HOW, WHEN and WHERE to implement them considering technical, social, economic, environmental and regulatory aspects. This will make all our efforts more effective!

Thank you.

## **I. Preamble – Article 3**

### **1. International Commission of Jurists**

Mr Chairperson,

The International Commission of Jurists reiterates its position in favour of adopting a broad scope including all business enterprises for the Legally Binding Instrument under discussion. Most companies are by definition incorporated under national law and are creatures of domestic law. Excluding these companies from the scope will severely undermine the potential effectiveness of the proposed instrument.

The definition of “victims” in Article 1 of the 3rd Revised draft, largely corresponds to accepted definitions in UN document, such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. But it should be further refined in two respects. First, a victim is defined by reference to a human rights abuse, a term usually taken to refer attributable to the conduct of a non state actor, such a business enterprise. Because in many cases of abuses by companies there is participation (in the modality of complicity or otherwise) by a state agent, it is important that the term “violation” is added here to account for situations of State involvement in the causing harm to the victim.

Secondly, the deletion of “persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” from the definition of “victims” weakens this definition in a manner inconsistent with international human rights standards set in art 2 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The ICJ joins other groups and States to ask for this part of the definition to be restated.

The ICJ recognizes the efforts to align article 4 with adopted language in existing UN instruments, but it also stresses that the draft needs much more alignment, always acknowledging the need to adapt and update them to the context of protecting rights in the context of business human rights abuse may require amendment. In this regard, the ICJ welcomes the changes operated in this article incorporating more clearly a gender perspective, collective reparations and age-sensitive approaches.

Paragraph (b) of 4.2 should be deleted as it overlaps with and effectively contradicts 4.1., which already guarantees all human rights for victims, whereas paragraph (b) unnecessarily only recognizes a few. This would signal an inappropriate expression of hierarchy among human rights, where certain rights are accorded or perceived to be accorded enhanced



protected status, contrary to the principle of indivisibility and interrelatedness of human rights, affirmed by all States in the Vienna Declaration and Programme of action.

Article 5.2 contains protections for human rights defenders, which should be further strengthened by adding a specific reference to trade unionists as human rights defenders, which seems necessary on the face of persistent and growing risk of threats and attacks to unions and workers.

In addition, Art. 5 (2) should integrate “harassment and retaliation” at the end of the provision to protect victims, human rights and workers’ rights defenders against such conduct by businesses and States. The ICJ supports amendments in this regard proposed by Panama and South Africa.

Thank you

## 2. Friends of the Earth International

Buenas tardes a todas y a todos,

Mi nombre es Letícia Paranhos y hablo en nombre de Amigos de la Tierra Internacional, somos miembros de la Campaña Global. El artículo 1 y las definiciones son clave para la eficacia del documento, pues dictan el alcance y el tono del futuro tratado.

Sobre la definición de víctimas, apoyamos la propuesta de Camerún y Palestina de agregar comunidades y pueblos afectados. Este término subraya mejor el protagonismo de las personas afectadas y es una demanda de larga data de los movimientos de la sociedad civil organizada. La propuesta de Estados Unidos de cambiar el termino víctimas por right holders no tiene sentido, es un tratado de derechos humanos, no de derecho privado. Apoyamos a Mexico en mantener la mención a víctimas indirectas.

Asimismo, rechazamos la propuesta de Brasil de sacar a grupos de personas como víctimas. El carácter colectivo de esos derechos son reconocidos en el derecho internacional de los derechos humanos desde el Pacto DESC de 1966. Así lo entiende, el sistema interamericano y su relatoría REDESCA e incluso en la legislación interna de Brasil. Esta propuesta deja aún más vulnerables a las comunidades afectadas.

No reconocemos en qué momento se definió que el uso de *abuses* era pacífico y consensuado, visto que siempre hubo oposición por parte de Estados y de la sociedad civil.

La propuesta de Brasil de agregar “serious and substantive damages” y cambiar in the context por in connection with es preocupante, porque deja margen para que algun daño o violación de derechos humanos sea tolerada, lo que es imposible visto que son innegociables.

Es importante resaltar que las empresas transnacionales tienen obligaciones internacionales en materia de derechos humanos y son capaces de violar esos derechos debido a su carácter erga omnes, algo ya firmado en el derecho internacional de los derechos humanos y por los sistemas regionales de protección, en especial la Corte Interamericana, de la cual hacen parte Mexico, Chile y Brasil, de forma que no entendemos por que proponen tal distinción.

**Por fin, es necesario resaltar que las** Instituciones Financieras Internacionales tienen un impacto innegable en el disfrute de los derechos humanos. Por tal, la Campaña Global reitera la necesidad de que el futuro tratado incluya a actores clave como las instituciones financieras en las definiciones, como propuso Camerún.

Muchas gracias.

## 3. International Organisation of Employers

### Article 1. Definitions (additions and changes)

Thank you Chair, I am speaking on behalf of the International Organisation of Employers.

Let me start with IOE’s comments on the proposals that came out from the seventh session for article 1 which cannot be accepted as they stand:

The use of “victim” should be replaced by “plaintiff” or “complainant” and should not extend the term “victim” to apply to “immediate family members or dependents of the direct victim”.

Victim must be recognised by a court of law. Until then, they are a person alleging an abuse and should not create a preferential category of rights holders who have not suffered direct harm.

The draft continues to consider “business relationships” as “any relationship” and defines “business activities” to include activities “undertaken by electronic means”. These should be omitted as it would create legal uncertainty and would expand extensively the scope of diligence obligations and liability to companies’ relationships without direct link.

The inclusion of a new point 1.5 bis to define “other business enterprises” would include TNCs only and should be also omitted.

Let me now turn to the Chair’s new proposals:

We welcome the definitions of “adverse human rights impact” as well as “Human rights abuse” which are in line with the UNGPs.

On the definition of “Human rights due diligence”, we appreciated the Chair’s efforts, however, the requirement of a complete due diligence process for companies “in every case” would create important financial burdens on companies, notably MSMEs. This definition should be replaced by the text from the UNGPs 17 to 22 in full which is a language understandable and implementable for companies.

Also, on point (b), it should be added “in cases where the business enterprise causes or may cause as well as contributes or may contribute to an adverse impact” to be in line with the sense of UNGP 19. As it stands, the proposal is too vague and could be interpreted as an obligation of prevention and mitigation measures for a company’s entire supply chain.

Point (d) should be modified as to reflect UNGP 21 where the only requirement of formal reporting is for business enterprises whose operations or operating contexts pose risks of severe human rights impacts. The draft should not create an automatic reporting obligation for companies regardless of the context and potential gravity of human rights harms.

Regarding the definition of “remedy” and “effective remedy”, it should specify that effective judicial mechanisms provided by States are at the core of ensuring access to remedy.

Here again the reference to “victim” should be replaced by “plaintiff” or “complainant.”

Thank you.

#### **4. United States Council for Business**

##### **RG Intervention on Article 1**

Yesterday a number of interventions highlighted the fact that fine words are not enough. We agree. Lofty aspirations can only be fulfilled if they are clearly and fully articulated. Mandates can only be converted into impacts on the ground if they are expressed in language that is widely understood and confers legal certainty. For this reason we continue to have concerns over the use in the draft treaty of terms that are imprecise and/or incompletely defined. This is meant to be a legal text and in legal texts words matter.

Let me give three brief examples from Article 1:

Use of the word “victims.” “Victim is a term used to describe a person who has suffered harm and been found to have so suffered by a court of law. No matter how grave the alleged harm or how much sympathy they might command, until then they are a person alleging an abuse. The word victim is not used in the UNGPs and should not be used here, because it prejudices and prejudices — it gives an adjudicative status to a person before the harm itself has been proven. Words matter.

“Remedy” and “effective remedy”: No reference is made in the text to the fact that ensuring access to effective remedy is a responsibility of the State. Effective judicial mechanisms provided by States are at the core of ensuring access to remedy, as States are the first duty bearers under international human rights law. This does not absolve companies of their responsibilities, but to makes clear that they are not the sole actors in this regard. Words matter.

“Human rights Due Diligence”: This is a complex process, and the definition in the treaty should be as clear and understandable as that provided in the UNGPs. As it stands here, the draft definition is far too concise to convey the content of the seven guiding principles laid out in the UNGPs. It therefore does not capture the varied scenarios and associated responsibilities companies may face in the due diligence process. Nor is the responsibility of remediation in cases where businesses have caused or contributed to harm reflected in this definition. This is a key component of the corporate responsibility to respect.

In the search for the consensus that is key to this draft treaty

## 5. United States Council for Business

Thank you Chair, I am speaking on behalf USCIB. As said by my colleague from IOE, I will focus **my intervention on art. 2 and 3 in the first grouping.**

Let me turn to some specific proposals from the seventh session that continue to be unimplementable:

In provision 2.1.b, there is a need of additional language clarifying that this applies “where required by national law”. Obligations only fall on companies only where the law requires it or they themselves have agreed to be bound.

In 2.1. a bis. The new proposed point aim “to regulate the activities of transnational corporations and other business enterprises within the framework of international human rights law”. This should be omitted in full as this framework does not exist and has no legal basis. Current obligations only fall on companies where the law requires it or they themselves have agreed to be bound.

In 2.1.c. It remains ambiguous and vague what are the “effective mechanisms of monitoring and enforceability” and how will these work? What does “environmental harm from business activities in both conflict and non-conflict affected areas by creating and enacting effective and binding mechanisms of monitoring, enforceability and accountability” mean, in practice. These additions are calling for new mechanisms while it is precisely the current States failure at the national level to enforce existing laws that directly or indirectly regulate business respect for human rights that are responsible for the major human rights abuses.

In 2.1 d. the focus should be on remediating the harm caused and that includes through judicial and non-judicial means not the reference to “justice”. The wording here should be **“To ensure access to remediation process both judicial and non-judicial and effective...”**.

As for point 2.1.d and 2.1. e. the new proposals want to include “violations” and focus the scope of the draft to be applicable to transnational companies only and not, as it has correctly been and should be, to all business activities.

Turning now to article 3.

Ever since the start of this treaty process, the “scope” of this draft treaty has been particularly controversial. Indeed, earlier drafts sought to cover only multinational companies, leading to great disagreement.

This Third Revised draft, on its face, appears to broaden the scope to “all business activities, including business activities of a transnational character.”

However, in practice, this apparent broader scope would be undermined and severely narrowed by the very next sub-section in Article 3, which allows for States Parties to determine, via national law, which enterprises are actually covered under the scope of this treaty. Indeed, the States Parties can carve out these exemptions based on vague factors such as the enterprise’s “size, sector, [or] operational context.” Some of the proposals from States Parties appear to intend to formalize these exemptions within the text of the draft Treaty.

The bottom-line is that the States Parties have a wide berth in picking and choosing which enterprises will be subjected to the onerous provisions of this draft treaty, including 1 due diligence obligations, the wide-ranging criminal, civil, and administrative liability, and the broad extraterritorial jurisdictional provisions.

This is a recipe for States Parties to engage in calculated protectionist measures to protect their State-owned enterprises, as well as their local small-and-medium scale enterprises, while making “an example” of foreign private businesses.

Allowing States Parties to carve out such protectionist exemptions is in stark contrast to the UN Guiding Principles which applies to “all business enterprises, both transnational and others.”

We have emphasized this point in prior sessions, but it bears repeating: Human rights victims have no preference as to whether their perpetrators’ operations are State-owned or private, domestic or global. Moreover, the proposed language would lead to absurd results. For example, where a State-owned-enterprise is in a joint venture with a private company, and the joint venture results in human rights abuses, only the private company would be held accountable.

Thank you.

## 6. International Organisation of Employers

Thank you Chair, I am speaking on behalf of IOE and will focus my intervention on the Preamble and article 1, my colleague from USCIB will address article 2 and 3.

As a general remark, **the Preamble** as it stands now is not balanced and has lost its purpose to to define, **in general terms and concisely**, the reasons of concluding this treaty without entering into a listing or repetition exercise. Unfortunately, too vague, repetitive and subjective language still persists.

For example:

**For PP1, PP3 and PP8.** We should stick to the original concise proposal. The proposal in PP3 to add the “WHO Framework Convention on Tobacco Control” should be omitted as falling entirely outside the scope of this treaty.

The principles in points **PP9 bis, ter, quarter, quinquies** should be omitted in full as repetitive being included already in the UN Charter.

**In PP11 and PP18**, the wording “**obligation**” should be replaced by “**responsibility**” to be in line with the UNGPs. Treaties are addressed to States, they do not create direct obligations for companies.

**PP11 remains by far the most concerning, distancing themselves further from the UNGPs:**

The focus on “transnational corporations” is not acceptable as the corporate responsibility to respect applies to all enterprises.

The responsibility to respect concerns internationally recognised human rights as laid down in UNGP 12 and **not all human rights**.

The wording “violations” should be replaced by “Adverse human rights impacts” in line with the UNGPs. As violation only applied to human rights impacts committed by States.

According to last year’s proposals the enterprises would have a responsibility to “**prevent or avoid human rights violations committed all along its global production chain directly or indirectly linked to their operations, product or services by their business relationship**”. This should be omitted or replaced by UNGP 13 and 22. This point would extend the scope of business obligations beyond what is possibly requested from companies in the UNGPs.

**PP11 bis and ter as well as proposals for PP13, PP13 bis and PP18 bis.** Call for extraterritorial jurisdiction and going against the principle of State’s sovereignty and should be omitted in full.

**For PP14bis.** States are signatories of treaties and bound by them, not companies. This point should be omitted in full.

**PP18 ter and quarter.** These new proposals are not acceptable and should be omitted in full as biased and depicting negatively transnational corporations.

## **Turning now to Article 1**

Regarding the revised third draft, the use of “victim” should be replaced by “**rights holder**” and should not be extended to “**immediate family members or dependents of the direct victim**”.

The draft would continue to consider “**business relationships**” as “**any relationship**”, including “**business activities**” to include activities “**undertaken by electronic means**”, extending the scope of liability for companies to entities with whom they have no direct link.

The inclusion of a **new point 1.5 bis** to define “**other business enterprises**” would include TNCs only and should be **omitted**.

Let me now turn to the Chair’s new proposals:

On the definition of “**Human rights due diligence**”, we appreciated the Chair’s efforts but the draft should take **the text from the UNGPs 17 to 22 in full. In particular:**

In point (b), it should be added “**in cases where the business enterprise causes or may cause as well as contributes or may contribute to an adverse impact**” to be in line with the sense of UNGP 19. The proposal is too vague and could be interpreted as an obligation of prevention and mitigation measures for a company’s entire supply chain.

**Point (d) should be modified as to reflect UNGP 21** where the only requirement of formal reporting is for business enterprises whose operations or operating contexts pose risks of **severe human rights impacts**. The draft should not create an automatic reporting obligation for companies regardless of the context and potential gravity of human rights harms.

Regarding the **definition of “remedy”** and “**effective remedy**”, it should specify that effective judicial mechanisms provided by States are at the core of ensuring access to remedy.

Thank you.

## **7. Abia**

Dear secretariat, please see below:

Gracias Sr. Presidente, hablo en nombre de ABIA como miembros de la Campaña Global. Primero, resaltamos que el único documento legítimo para la negociación es el 3r borrador.

Para enfrentar la impunidad que aún disfrutan las empresas transnacionales y cumplir plenamente con el contenido de la Resolución 26/9, que tiene como objetivo "regulating the activities of TNCs and other business enterprises in international human rights law", es necesario que el artículo 2 refleje este objetivo.

En ese sentido, apoyamos la propuesta consensuada por varios estados de enmienda al artículo 2.1a y apoyamos igualmente la propuesta de Egipto de incluir un nuevo párrafo 2.1a.bis sobre el objetivo de regular las actividades de las transnacionales.

En el artículo 2.1.b rechazamos, al igual que Palestina, la propuesta de la Unión Europea y Brasil que persiste en su empeño de devaluar las obligaciones de las empresas de respetar los derechos humanos. En este mismo párrafo es importante unificar los términos y referirse siempre a empresas transnacionales y aquellas con actividad transnacional.

Por otro lado, el establecimiento de obligaciones directas, tal y como se reconoce en el párrafo 11 del preámbulo, tiene como objetivo obligar a las empresas a establecer medidas preventivas pero también, y entendemos que sobre todo, establecer obligaciones y responsabilidades directas y concretas respecto de los derechos humanos, acompañadas de los necesarios mecanismos de implementación.

Apoyamos la propuesta de Egipto de eliminar mitigate y la propuesta de Egipto y Palestina de añadir violaciones. También apoyamos la propuesta de Egipto para 2.1d, y rechazamos la de China.

Además, con la preocupación de asegurar mejores resultados, la expresión “strengthen”, presente en el artículo 2.1.d, debe ser reemplazada por una semánticamente más fuerte como “guarantee”, que representaría un carácter más contundente para la prevención de las violaciones de derechos humanos perpetradas por las ETNs. En este mismo párrafo es

importante unificar los términos y referirse siempre a empresas transnacionales y aquellas con actividad transnacional.

Por fin, apoyamos la propuesta de Cuba e Irán para el 2.1.e y tenemos acuerdo igualmente con las propuestas de Palestina e Irán en el mismo punto.

Muchas gracias.

## **8. Corporate Accountability International and Friends of the Earth International**

Thank you, Mr. Chairman,

My name is Matthews Hlabane and I speak on behalf of Corporate Accountability International and Friends of the Earth International, members of the Global Campaign.

Before proceeding to the specific analysis of the article on scope, it is imperative to recall, once again, at the risk of being repetitive, that we are talking here about the mandate of this working group, established by Resolution 26/9. A mandate that was discussed and debated at length and at birth, and finally approved by the body that is the HR Council.

In 3.1, it is undeniable that with the wording of art. 3.1 "This LBI shall apply to all business activities, including business activities of a transnational character", added to art. 1.3, the text departs from the ORIGINAL mandate, as many delegations recalled during the last session. Therefore, as has already been said, it is necessary to harmonize throughout the future legally binding instrument the terms used when referring to TNCs and other companies of transnational character, and not to all types of companies. For all these reasons, we believe and fully agree with what has been proposed by Egypt and Pakistan for Article 3.1.

Even so, and given that a majority of states during the seventh session have agreed on the need to maintain the focus of this treaty on transnational companies and other companies with transnational activity, we urge states to seek a proposal that coincides with the aforementioned sense, which will allow us to adequately delimit the scope of application in accordance with the mandate of the Working Group.

In Article 3.2, we propose to standardize the text, replacing "business enterprises" with "transnational corporations and other business enterprises of transnational character". In the same article 3.2, we support the Palestinian proposal to replace the word "or" with "and", which we believe is essential to strengthening the provision.

In paragraph 3.3, there is another issue that seems to us to be very important. The phrase "binding on the State Parties of this (Legally Binding Instrument) to which a state is a party" creates unequal protection of the human rights of one state or another depending on the international standards it has ratified. Moreover, the expression will create a major legal problem because it ignores the reality of certain international norms that are binding on all UN member states. This is the case, for example, with certain conventions of the International Labour Organisation. Here we can use the example of ILO Convention 98 which is applicable to all member states of the organisation even if they have not yet ratified it.

Thus, we believe that the Palestinian proposal for article 3.3 comes closest to this objective.

## **9. CCR**

Thank you, Chair.

We note that the US Government's amendments to the first sentence of PP6 may prove useful in providing important additional specificity to the text, we support the position of some states to oppose the US recommendation for PP6 that removes reference to international humanitarian law. We support inclusion of international humanitarian law in this instrument given the significant number of people living under occupation that are subject to grave harms arising from business activities, such as Palestinians. We also oppose changes made to the changes suggested by the US to PP11.

We support position of Panama on para 1.3.

Thank you.

## 10. ESCR-Net

Estimado Sr. Presidente,

Mi nombre es María Carreño, de la Coordinadora Andina de Organizaciones Indígenas CAOI y hablo en nombre de la Red-DESC

En el preámbulo, apoyamos a Palestina y Cuba para que incluyan una referencia al derecho a la autodeterminación - esto es esencial para los derechos de los pueblos indígenas, no solo en mi comunidad en Colombia – sino también en Guatemala, Perú, Bolivia y México, donde somos capaces de tomar decisiones sobre nuestros territorios ancestrales y constituidos, pero nos violan el derecho a la libre determinación y tomas de decisiones. Que las empresas no nos impongan su desarrollo porque tenemos nuestra propia forma de desarrollo.

2) El preámbulo también debe articular la primacía de las obligaciones internacionales en materia de derechos humanos sobre todos los acuerdos comerciales, de inversión, financieros y de desarrollo.

3) Además, estamos de acuerdo con los cambios textuales propuestos por Palestina en el PP12 en el sentido de que los Estados tienen la obligación de garantizar un entorno propicio y seguro para proteger a las y los defensores de los derechos humanos en el contexto de los derechos humanos y las empresas.

También apoyamos firmemente la propuesta en el artículo PP12bis de reconocer que los y las defensoras de los derechos humanos, especialmente las mujeres indígenas, somos más a menudo objeto de ataques en el contexto de la defensa de los derechos frente a las actividades empresariales. Como CAOI y defensora de los derechos humanos, seguiré luchando por los territorios y mis pueblos ante las actividades empresariales que destruyan el territorio, el agua y el medio ambiente. Debería hacerlo sin tener que enfrentarme, como es mi caso, a las amenazas de seguridad y al desplazamiento que sufro al verme forzada a salir de mi comunidad en Puerto Carreño Vichada, Colombia. De igual manera, así como yo, muchos otros compañeros están en la misma situación.

4) Insistimos en que las definiciones del artículo 1 deben mantenerse y reforzarse como en el tercer borrador revisado y rechazamos por completo la sustitución de los abusos y las violaciones de los derechos humanos por el lenguaje mucho más débil como *impactos adversos sobre los derechos humanos*.

Muchas gracias.

## 11. Franciscans International and FIDH

Thank you Mister Chair, I am delivering this statement on behalf of FI and FIDH.

We won't repeat all the proposals we had made on the third revised draft last year. They are on record. But allow us to come back to some of the textual proposals made by States on this third draft.

In PP3, we support Mexico and Panama to keep the reference to the "UN Declaration on Human Rights Defenders", this would be consistent with Uruguay's proposal on Monday on article 6.8 quarter.

We are also favourable to the proposal for a change in article PP8 as supported by a number of States that reads "stressing that there should be no discrimination on grounds that are prohibited by IHRL".

We also support Panama's proposals to include child rights considerations in various parts of the preamble and more generally of the text.

We support Palestine's proposal in preambular paragraph 11bis and para 13 bis.

We reiterate our call on States to ensure inclusion of language related to environmental degradation and climate change throughout the future LBI, as these issues are inextricably linked to human rights. Not least since the adoption without votes against and very few abstentions of both HRC and GA resolutions recognizing the right to a healthy environment as a universal HR, show broad acceptance of the fact that environmental aspects are parts and parcel of IHRL.

In that regard, we duly considered the proposal made by Panama for a PP14 bis and think the general idea to refer to the important link between this negotiation and international environmental agreements is positive. However, we would ask to consider the following rewording as to correspond better to the lived realities we face in our daily work and ensure policy coherence in compliance with IHRL.

Our proposal is:

(PP14 bis) Recognizing that regulating business activities in international human rights law is key to achieving the goals of key environmental treaties including, but not limited to, the UN Framework Convention on Climate Change, the Convention on Biological Diversity, the Convention to Combat Desertification, the Basel, Rotterdam and Stockholm Conventions and the Minamata Convention on Mercury;

Article 2

On article 2.1 b, we strongly support the proposal made by Panama and others to delete mitigate and stick to a purpose of the future LBI to prevent “the occurrence of human rights abuses in the context of business activities by effective mechanisms of monitoring and enforceability;” but we also suggest adding ‘violations’ so that it includes ‘human rights abuses and violations’.

Let us end with this, Mr Chair: in general and for the definitions, we think that it is fundamental to still use both terms of abuses and violations as it is essential to make clear that the instrument also applies to violations committed by the State or its agents in the context of business activities, in the future LBI.

Thank you for your attention.

## 12. International Trade Union Conference

IGWG 8<sup>th</sup> Session – Preamble – Art.3

Preamble

Thank you, Chairperson. I speak on behalf of the ITUC and the Global Union Federations.

Due to time constraints, we will not highlight all the amendments we suggested last year. However, we would emphasise the following:

*Proposed new PP5*

*Recalling that international labour standards provide States with the tools to implement their obligations concerning human rights at work and establish mechanisms for labour inspection and enforcement necessary to realize decent work for all.*

Then, we have a proposal for a new PP5. We strongly recommend the inclusion of a new paragraph to better articulate the scope of labour rights within the context of the Legally Binding Instrument. This paragraph would read as follows:

In relation to the personal scope of the Treaty envisaged in Article 3, we reiterate our support for the present formulation focusing the operational provisions of the LBI on cross-border activities of business enterprises while maintaining a broad scope, which includes transnational and other enterprises. We welcome this hybrid approach, which we believe will prevent that the form of an enterprise can be used to evade accountability in the implementation of the LBI. At the same time, this approach ensures that the LBI is clearly geared towards addressing business activities of a transnational character, which is where the normative gaps in international human rights law lie.

I have a comment regarding Article 3.3.

We had commented last year that any formulation that limits the coverage of fundamental ILO Core Conventions to those which a State has ratified would breach the principle of non-regression under international law due to the fact that the Declaration on Fundamental Principles and Rights at Work of 1998 requires ILO Member States to respect and promote the principles and rights contained in the ILO’s Core Conventions – which now include C155 and C187 on OSH - by virtue of its membership in the Organization, regardless of ratification.



While we certainly welcome the direct reference to the Declaration on Fundamental Principles and Rights in the 3rd revised draft, the language around Core ILO Conventions to which a State is a party still remains. As this formulation still causes some confusion, we would recommend re-ordering Article 3.3. We have some language for this and our proposal would read as follows:

#### Article 3.3

This Legally Binding Instrument shall cover all internationally recognized human rights and fundamental freedoms which the State Parties of this (Legally Binding Instrument) have ratified, including:

- a. those recognized in the Universal Declaration of Human Rights;
  - b. all core international human rights treaties;
  - c. ILO Conventions;
- as well as those to which they are otherwise bound, including,
- d. the ILO Declaration on Fundamental Principles and Rights at Work; and
  - e. customary international law.

Thank you, Chairperson.

**“Business activities of a transnational character”** means any business activity described in Article 1.3 above, when:

- a. It is undertaken in more than one jurisdiction or State; or
- b. It is undertaken in one State but a *significant* part of its preparation, planning, direction, control, design, processing, manufacturing, storage or distribution, takes place through any business relationship in another State or jurisdiction; or
- c. It is undertaken in one State but has a *significant* effect in another State or jurisdiction.

### 13. Centre Europe – Tiers monde (CETIM)

Gracias Sr. Presidente. Realizo esta intervención en nombre de CETIM y CAI, como miembros de la Campaña Global.

El año pasado presentamos contribuciones concretas

Con el fin de fortalecer las disposiciones del preámbulo, reiteramos el apoyo a la enmienda al párrafo 11 (11 bis) que ha sido propuesto por Palestina, en el año pasado, que reafirme la primacía de los derechos humanos sobre los acuerdos comerciales y de inversión. Ese debe ser un guía conductor y para interpretación de ese instrumento internacional. Conforme art 31 e segs de la Convención de Viena sobre Derecho de los Tratados de 1969. Lo que también debe componer el artículo 14 del futuro Tratado.

También sugerimos la adición de un párrafo relativo a las obligaciones de las ETNs en cuanto a su poder económico y su obligación de respeto de los derechos humanos, laborales y ambientales:

***Propuesta de nuevo párrafo:*** *Recalling that transnational corporations and other business enterprises of transnational character have obligations derived from international human rights law and that these obligations are different, exist independently and in addition of the legal framework in force in the host and home States.*

Nos gustaría apoyar nuevamente la propuesta de Bolivia en PP3 de añadir la Declaración de derechos campesinos, apoyada por Cuba, Panamá, Palestina y Sudafrica del año pasado. En ese mismo sentido, apoyamos igualmente la propuesta de Bolivia/Namibia/Sudafrica de hoy día en PP13 de añadir los campesinos

Reiteramos igualmente en PP4 bis la importancia de suprimir la expresión "en virtud del derecho interno del Estado", que podría ser un intento de limitarse a una disposición de la legislación nacional.

También resaltar la importancia de la propuesta de Palestina PP13 bis que hace mención a la emergencia climática.

Nos gustaría resaltar la propuesta en PP18 Bis-ter hecha por Camerón el año pasado: Es una posición muy importante que reconoce las "obligaciones" de las ETNs y no sólo la responsabilidad como habían propuesto antes México, Brasil y Chile, y ahora USA .

De cara a las propuestas presentadas hoy día,

quisieramos rechazar la enmienda al PP10 hecha por Brasil. No nos engañemos, sabemos muy bien que las ETNs tal y como actúan hoy en día, no contribuyen al desarrollo sostenible, todo lo contrario. Si no, nos encontraríamos aquí.

rechazamos igualmente la propuesta de USA de oponerse a la propuesta de Irán para el PP9. El principio de no-intervención es un pilar de la Carta de las Naciones, aunque sabemos que no siempre es respetado por los mismos Estados Unidos.

Rechazamos firmemente las enmiendas en PP11 de USA. Esos cambios debilitan el lenguaje del párrafo y utilizan conceptos jurídicos no conformes ni con la realidad concreta que resulta de las actividades de las ETNs, ni con erga omnes de los derechos humanos y ni con la eficacia horizontal entre los particulares. Una vez más, las ETNs cometen violación, no generan simples impactos.

Muchas Gracias,

**14. Joint statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide et Fraternité, CAFOD, Trocaire, Alboan and SIEMBRA**

Dear Mr. Chair,

I deliver this statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide et Fraternité, CAFOD, Trocaire, Alboan and SIEMBRA.

**Human rights defenders** play a pivotal role in defending human rights and the environment, as recognised by the UN Declaration on Human Rights Defenders, the UNGPs, and the Working Group on Business and Human Rights. Among human rights and environmental defenders, women and indigenous people are particularly at risk of suffering violence, threats and retaliation when confronting corporate abuse.

We therefore strongly support keeping the reference to the “UN Declaration on Human Rights Defenders” in PP3, as supported by Mexico, Panama, and Costa Rica. In PP12

In PP12 – we reiterate the need to highlight the essential work that human rights and environmental defenders in protecting our human family and Common Home. In PP12, we support the suggestion by France and others’ last year, supported by Uruguay this afternoon, to reject the removal of the reference to human rights defenders.

In PP3, we also recommend adding a reference to the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, as suggested by Bolivia, Panama, South Africa, Palestine, Cuba.

In PP9, we support the proposition of Panama, Palestine, Uruguay, and Mexico – inter alia recognizing that in all actions concerning children, the **best interests of the child** shall be a primary consideration.

On PP14, we support the proposals made by various states to keep the reference to the gender perspective.

On PP11, we reject the US proposal to replace “obligations” with “responsibilities”. International law is not static, this would stunt innovations in international law essential to ensuring the protection of people and planet.

On Art 1.3, we reject the removal of state-owned enterprises proposed by a number of States.

Thank you chair.

## **15. FIAN**

Thank you Mr. Chair

States should add in the preamble the principle pursuant to article 55, 56 and 103 of the UN Charter, and already recognized in many constitutions worldwide, of the primacy of human rights. The following paragraph can be added in the preamble:

“Reaffirming the primacy of human rights obligations and obligations under the Charter of the United Nations over other international agreements”.

In PP. 3, the UNDROP should be included to reflect relevant international standards of international law adopted democratically by the General Assembly.

Mr. Chair: Due to technical problems we were not able submit on time our statement on Article 13 in the last session. Please allow us to read it now very shortly.

International cooperation, a key element of the UN Charter, is the cornerstone with which international organizations were born. Resolution 2625 of 1960 of the UN General Assembly has recognized international cooperation as a norm of *Ius Cogens*.

Regarding Art. 13.2. All sub-provisions under Art. 13.2 must be kept.

International cooperation is needed to face multiple crises our humanity is facing, which are connected with corporate behavior. In our work, an example are the violations caused to the rights to food, health, clean, healthy and sustainable environment and work by the agro-industrial food system. So, for example, the prevention of the impact of high hazardous pesticides requires cooperation between the states in which the companies involved in this business are based or have their assets needed to provide remedy.

We thank you.

## **J. Article 4, 5 and 14**

### **1. International Commission of Jurists**

Mr Chairperson,

The International Commission of Jurists reiterates its position in favour of adopting a broad scope including all business enterprises for the Legally Binding Instrument under discussion. Most companies are by definition incorporated under national law and are creatures of domestic law. Excluding these companies from the scope will severely undermine the potential effectiveness of the proposed instrument.

The definition of “victims” in Article 1 of the 3rd Revised draft, largely corresponds to accepted definitions in UN document, such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. But it should be further refined in two respects. First, a victim is defined by reference to a human rights abuse, a term usually taken to refer attributable to the conduct of a non state actor, such a business enterprise. Because in many cases of abuses by companies there is participation (in the modality of complicity or otherwise) by a state agent, it is important that the term “violation” is added here to account for situations of State involvement in the causing harm to the victim.

Secondly, the deletion of “persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” from the definition of “victims” weakens this definition in a manner inconsistent with international human rights standards set in art 2 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The ICJ joins other groups and States to ask for this part of the definition to be restated.

The ICJ recognizes the efforts to align article 4 with adopted language in existing UN instruments, but it also stresses that the draft needs much more alignment, always acknowledging the need to adapt and update them to the context of protecting rights in the context of business human rights abuse may require amendment. In this regard, the ICJ welcomes the changes operated in this article incorporating more clearly a gender perspective, collective reparations and age-sensitive approaches.

Paragraph (b) of 4.2 should be deleted as it overlaps with and effectively contradicts 4.1., which already guarantees all human rights for victims, whereas paragraph (b) unnecessarily only recognizes a few. This would signal an inappropriate expression of hierarchy among human rights, where certain rights are accorded or perceived to be accorded enhanced protected status, contrary to the principle of indivisibility and interrelatedness of human rights, affirmed by all States in the Vienna Declaration and Programme of action.

Article 5.2 contains protections for human rights defenders, which should be further strengthened by adding a specific reference to trade unionists as human rights defenders, which seems necessary on the face of persistent and growing risk of threats and attacks to unions and workers.

In addition, Art. 5 (2) should integrate “harassment and retaliation” at the end of the provision to protect victims, human rights and workers’ rights defenders against such conduct by businesses and States. The ICJ supports amendments in this regard proposed by Panama and South Africa.

Thank you.

## 2. **ActionAid**

Thank you, Mr. Chair. This statement is made on behalf of ActionAid and of members of the #Feminists4bindingtreaty.

We support the recommendation to add in article 4.1 after the word “abuses”, “and violations.” This is important with regard to the accountability of the State or its agents in the context of business activities. We would also like to oppose changes to the Article suggested by Brazil as it may limit the international standard of protection under this Article.

In Article 4.2 (b) we suggest to add “including” after “be guaranteed”, and add a reference to the right to a healthy, clean and sustainable environment.

We welcome the changes in Article 4.2. (c) in line with a broad understanding of the right to access to justice and to reparation, as outlined by the Inter-American Human Rights system, underlining that the listed forms of remedy are not limited. We also welcome the addition in Article 4.2. (c) the concept “gender-sensitive” access to justice.

In Article 5(2): We recommend this be amended to provide explicitly that States Parties’ measures to guarantee a safe and enabling environment for human rights defenders be ‘gender-responsive’, in addition to being adequate and effective. While women human rights defenders are exposed to similar risks as other defenders, they also face additional gender-specific threats and violence due to systemic and structural discrimination against women.

In line with our general position on the text, we recommend adding after “abuses”, “the term “violations” in article 5.3 as States should investigate both abuses committed by businesses and violations committed by the State itself or its agents in the context of business activities.

Thank you.

## 3. **Joint statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, and Alboan**

Mr. Chair,

I deliver this statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, and Alboan.

Mr Chair,

We welcome that Art 14 recognises the primacy of human rights over trade and investments. Yet, in its current wording, art 14 remains too vague, insofar as it does not specify how States should **practically** ensure that existing agreements do not violate human rights. We reiterate our suggestion from last year to introduce a human rights-based approach in the whole article

and to outline that human rights experts should have a central role in Investor-State Dispute Settlement Tribunals.

Civil society and people affected by corporate abuse have been denouncing for years the negative impact of some mechanisms of bilateral and multilateral agreements, such as Investor-State Dispute Settlement Tribunals, known as ISDS. ISDS are unfairly biased towards corporate actors and are used as a means by which corporations exercise undue influence on governments' policies. They have for too long provided avenues for powerful companies to undermine crucial measures to protect people and the planet.

We therefore reiterate our three suggestions from last year on article 14.5:

First, language should be added at the end of the article to ensure that all **existing** bilateral or multilateral agreements, including trade and investment agreements, shall be **interpreted and implemented** in a manner that does not undermine or restrict States capacities to fulfill their obligations under this LBI.

Second, we advise States to add an additional letter to article 14.5 that would allow States to **revise and amend** trade and investment agreements that can negatively impact human rights.

Third, prior to concluding any **new** trade or investment agreements by State Parties, States Parties should be required to carry out comprehensive environmental and human rights impact assessments.

We believe Art 4.d should be strengthened by specifying that right-holders' right to access non-judicial grievance mechanisms should not infringe upon their right to seek remedy through the judicial System.

Therefore, we support the amendment to article 4.d proposed by Palestine last year.

In order to ensure victims have effective access to justice, we support amendments to 4f by Panama last year and Ecuador this morning, and we believe they could be merged.

In 5.2, we support the addition from Cameroon last year to ensure protection of victims from reprisals.

Thank you

#### 4. International Organisation of Employers

Thank you, Chairperson-Rapporteur. This intervention is a response to Articles 4, 5, and 14 of the Third Revised Draft Treaty.

Under Article 4, the rights of complainants in these cases should be limited to internationally recognized human rights. Going further afield, as some State parties have suggested, will distract from the focus of this treaty process.

The protection of complainants' rights should be balanced against the rights of the alleged defendants. Unfortunately, there is no mention of this balancing act in either this article or any section of the draft treaty. Indeed, there should be careful consideration given to the due process rights of the defendants, including the fundamental and universal tenet of the presumption of innocence.

Moreover, this article creates certain mechanisms for protecting complainants' rights that can lead to abuse and violate those rights of the alleged defendants. For example, allowing third parties to bring actions, as well as class actions, can lead to such abuses, subjecting the alleged defendants to costly and perhaps frivolous lawsuits, the claims of which may not accurately represent complainants' genuine concerns and serve as vehicles to only further the interests of interested third parties.

Article 5 requires States to provide for the judicial and executive elements to ensure that complainants' rights are effectively protected. This goes to the heart of why many other human rights treaties have failed: the lack of State capacity to deliver. Indeed, many States sign on to treaties with such obligations but cannot meet those obligations because of numerous structural factors, including lack of funding, weak rule of law, corruption, lack of political will, and so on. Neither this article nor the rest of this draft treaty provide an effective solution to this fundamental problem.

The bottom line is that any treaty – if finalized – is only as good as the States that ratify and implement it under local law. After all, under international law, the treaty cannot place direct obligations on private businesses, it can only place obligations on States parties, which in turn must regulate private businesses in their respective jurisdictions via local law.

We have heard a great deal in this session about the need to regulate business because, if unregulated, business will invariably cause or contribute to adverse impacts. Unfortunately, this view disregards the reality that businesses are regulated everywhere they operate. It also disregards the substantive work that has been done by business in this space under the UN Guiding Principles. As my colleagues and I have noted, no one is here to excuse bad actors. Instead, we wish to simply note that what is lacking in the treaty process is a meaningful engagement with the fundamental and threshold question of States' inability or unwillingness to enforce the treaty obligations. We sincerely hope that the Working Group will devote its attention to this important question, and business stands ready to engage in that analysis.

Given that my time is up, I thank the Chairperson and the Intergovernmental Working Group for their kind attention to these serious concerns of the international employer community.

Thank you.

## 5. FIAN

Thank you Mr. Chair.

We have comments on articles 4 and 14.

We recommend that Art. 4.2.f of the third revised draft on the right to access information should be further elaborated to include stronger requirements for the disclosure of information in order to facilitate legal proceedings. In particular, affected communities and individual should have access to information regarding the different legal entities linked to the parent company as to facilitate the determination of liability.

The right to access such information and its corresponding obligation for business enterprises and States to disclose such information should also be reflected in article 7 on access to remedy and article 6 on prevention.

It is noticed with regret that some important components of the rights of victims to access justice and effective remedies, which were in article 4.5 of the first draft, have since been deleted. It is therefore proposed to include additional components of reparation for victims under current article 4.2c, which better reflect the immediate and long-term measures which should be taken, and the importance for long-term monitoring of such remedies.

Our analysis of the cases of Brumadinho Dam Disaster and POSCO land grabbing have concretely shown the need to have such key components specifically added to reparations.

Effective remedies and reparation measures should take into account the differentiated impacts of human rights abuses on specific groups in order to respond adequately to these impacts and their particular needs. In order to guarantee this, it is important for the remedy process to be transparent, independent and count with the full participation of those affected. In addition, such processes should also consider harm that could appear in the future.

We shall be happy to provide our exact textual proposals for the Chair's consideration at a later stage.

On Article 14, we note that the international framework of trade and investment agreements is suffering from a crisis of legitimacy, which must be seen as a need to introduce new legal approaches that address the relationship between human rights and trade policies from a new paradigm. person. It is imperative to incorporate the principle of the primacy of human rights in this treaty, which leads to the immediate and unconditional enforceability of these rights as a rule and their conditioning as the exception, as recognized by different decisions of the Inter-American and European system.

On Article 14, we note that the international framework of trade and investment agreements is suffering from a crisis of legitimacy, which must be seen as a need to introduce new legal approaches that address the relationship between human rights and trade policies from a new paradigm. person. It is imperative to incorporate the principle of the primacy of human rights

in this treaty, which leads to the immediate and unconditional enforceability of these rights as a rule and their conditioning as the exception, as recognized by different decisions of the Inter-American and European system. Moreover, it is not uncommon for trade and investment treaties to include human rights clauses, nor is it alien for these forums to apply obligations of this nature, as in the Asbestos Case between Canada and the European Union in the WTO, or the Homonas Case between the United States and the European Union, among others.

## **6. International Trade Union Conference**

Article 4

Thank you, Chairperson. I speak on behalf of the ITUC and the Global Union Federations.

I have a comment on Article 4.2(c).

Article 4.2(c)

c. be guaranteed the right to fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice, individual or collective reparation and effective remedy in accordance with this (Legally Binding Instrument) and international law, such as restitution, compensation, reinstatement in employment, apology, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration;

We believe that the non-exhaustive list of remedies contained in this sub-paragraph should include apologies (both public and private) and, most importantly for us, reinstatement in employment.

Chair,

A significant challenge for workers exercising their right to freedom of association is the fear of discriminatory dismissal. In such cases, the remedy must be reinstatement, given that compensation alone may continue to contribute to an atmosphere of intimidation in the workplace.

Therefore, our recommendation is to include the terms reinstatement in employment and apology after the term compensation in the list as it stands now.

Thank you, Chair

## **7. Joint statement on behalf of CSI, de las Federaciones Sindicales Internacionales y la Campaña Global**

Artículo 4

Gracias, Presidente.

Mi nombre es Iván González y Hablo en nombre de la CSI, de las Federaciones Sindicales Internacionales y la Campaña Global

Tengo un comentario sobre el artículo 4.2(c).

Artículo 4.2(c)

c. tener garantizado el derecho a un acceso justo, adecuado, efectivo, rápido, no discriminatorio, apropiado y que tenga en cuenta las cuestiones de género a la justicia, a la reparación individual o colectiva y a un recurso efectivo de conformidad con el presente (Instrumento Jurídicamente Vinculante) y con el derecho internacional, tales como la restitución, la indemnización, la reincorporación al puesto de trabajo, las disculpas, la rehabilitación, la reparación, la satisfacción, las garantías de no repetición, el requerimiento judicial, la remediación ambiental y la restauración ecológica;

Creemos que la lista no exhaustiva de remedios contenida en este subapartado debería incluir las disculpas (tanto públicas como privadas) y, lo que es más importante para nosotros, la reincorporación laboral.

Presidente,

Un reto importante para los trabajadores que ejercen su derecho a la libertad de asociación es el temor al despido discriminatorio. En estos casos, el remedio debe ser la reincorporación dado que la indemnización por sí sola puede seguir contribuyendo a una atmósfera de intimidación en el lugar de trabajo

Por lo tanto, nuestra recomendación es incluir los términos reincorporación en el puesto de trabajo y disculpas después del término indemnización en la lista tal y como está ahora.

Gracias, Presidente.

## 8. Friends of the Earth International

### Artículo 5

Thank you, Mr. Chair. My name is Jill McArdle from Friends of the Earth Europe, and I am speaking on behalf of Friends of the Earth International, member of the Global Campaign

Article 5 is on protection of witnesses from any unlawful interference prior, during and after they have instituted proceedings.

There is a court case ongoing under the French duty of vigilance law against the European TNC Total for land grabbing in Uganda.

Affected people faced harassment and threats after they traveled to France for a court hearing on that case, and continue to face threats three years later.

No person bringing a case against a European transnational corporation should face such threats.

So, We reaffirm that Article 5 is of crucial importance for the people and communities affected by human rights violations committed by transnational corporations and that it is essential that these articles use language that reflect reality - therefore we support Cameroon, South Africa and Palestine to include the word "communities", in the first paragraph of Article 5, as well as the term "violations".

With respect to **article 5.2**, we would like to reiterate our concrete textual proposals from last year:

*States Parties shall take adequate and effective measures to guarantee all rights, including a safe and enabling environment, for persons, groups and organizations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity. This obligation requires taking into account their international obligations in the field of human rights.*

*State Parties shall take adequate and effective measures including, but are not limited to, legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any persons who seek to exercise their right to peacefully protest against and denounce abuses and violations linked to corporate activity; refraining from restrictive laws and establishing specific measures to protect against any form of criminalization and obstruction to their work.*

We also consider important the changes proposed by Palestine to **5.3**, which adds the word violations and eliminates the reference to domestic law. In the same sense, the addition by Cameroon is appropriate:

*5.3 bis. States parties shall ensure emergency response mechanisms in case of disasters caused by the action of transnational corporations and other business enterprises of transnational character. (Cameroon)*

In conclusion we reiterate that the protection of victims and affected communities, as defined in Article 5, is vital to ensure that victims and affected communities can secure access to redress and justice for the abuses and violations committed against them, in light of the intensification of attacks against victims and affected communities seeking accountability and justice.



## 9. Joint statement on behalf of the Transnational Institute and the Global Campaign

Gracias Sr. Presidente, mi nombre es Adoración Guamán, hablo en nombre del Transnational Institute y la campaña global.

Como ya hemos reiterado, consideramos que el Borrador 3 es el único documento representativo de las negociaciones entre Estados y legítimo para servir de base en esta 8ª sesión. El documento presentado por el Presidente no debe ser considerado y por tanto rechazamos la propuesta de México de su inclusión. En este sentido me voy a referir en exclusiva al Borrador 3 y en concreto al artículo 14.

El artículo 14 es uno de los pilares fundamentales del Tratado que aquí negociamos y que, según los propios términos de la Resolución 26/9, tienen como propósito regular las actividades de las empresas transnacionales y otras empresas en el derecho internacional de los derechos humanos.

A efectos de asegurar la eficacia de este tratado y de las obligaciones y derechos que contiene, es fundamental reafirmar su primacía respecto de otros compromisos que los Estados puedan adoptar, y muy en particular frente a los compromisos en materia de comercio e inversión. Desde la Campaña Global recordamos que el deber de los Estados de respetar, promover y garantizar los derechos humanos requiere, sin posibilidad de excusa, el reconocimiento de la primacía de estos, sin que sean aceptables aquellas interpretaciones o actuaciones estatales que los supediten, por ejemplo, a la promoción del comercio o a la protección de los inversores extranjeros.

Esta es una cuestión que fue subrayada en el Documento de Elementos que ha servido como base para estas negociaciones. Así, ya en el año 2017 se acordó que el futuro tratado contendría la afirmación de la primacía del derecho internacional de los derechos humanos frente a los tratados de comercio e inversión y que se establecerían específicas obligaciones en este sentido. Este debe ser sin duda el contenido del artículo 14.5 del borrador que aquí negociamos.

La realidad nos demuestra que es urgente explicitar y garantizar esta primacía. Queremos recordar que las demandas inversor-Estado se han multiplicado en las últimas dos décadas: de un total de 6 casos conocidos en 1996, hemos llegado a 1190 demandas de Empresas transnacionales frente a Estados. En una mayoría abrumadora de ocasiones, las demandas han tenido una orientación Norte-Sur, reconociendo indemnizaciones millonarias para las empresas que han provocado una grave disminución de la capacidad estatal de proteger, promover y respetar los derechos humanos y conformando una “arquitectura jurídica de impunidad” que permite a las transnacionales eludir sus responsabilidades, incluyendo las condenas determinadas por sentencias firmes en jurisdicciones nacionales y perpetuando la indefensión de las personas y comunidades afectadas.

De entre los numerosos casos que evidencian la necesidad de establecer la primacía de los derechos humanos y de la naturaleza sobre las obligaciones derivadas de los acuerdos de comercio e inversión destaca, sin lugar a dudas, el Caso Chevron. Desde la Campaña queremos recordar este asunto para subrayar la crítica situación de las miles de víctimas a las que se les sigue privando de su derecho a la reparación. Como bien saben, Chevron fue condenada por una sentencia de 14 de febrero de 2011 que fue ratificada en apelación por la Sala Única de la Corte Provincial de Sucumbíos, el 3 de enero de 2012. La sentencia devenida firme condenó a Chevron-Texaco al pago de una indemnización de 9.500 millones de dólares en concepto de reparación de la catástrofe ambiental y humana que provocaron sus actividades durante los 40 años en los que explotó los recursos petroleros en la Amazonía Ecuatoriana. Su legalidad fue confirmada por la Corte Nacional del Ecuador en 2013 y su constitucionalidad por la Corte Constitucional en 2018. A pesar de los reiterados intentos de la representación letrada de las víctimas para ejecutar la sentencia, tanto en Ecuador como en otros países donde Chevron tiene activos, hasta el momento la empresa sigue ignorando la condena.

En lugar de cumplir con lo establecido en la sentencia firme, Chevron lleva décadas utilizando la vía del arbitraje internacional de inversiones para forzar una anulación de la misma por una vía totalmente ajena a los principios fundamentales del Estado de Derecho.

Para ello, Chevron ha demandado al Ecuador en tres ocasiones (Chevron I en 2004; Chevron II en 2006 y Chevron III en 2009) ante un mecanismo de protección de los derechos del inversor extranjero a efectos de impedir la ejecución de la sentencia firme. El tercer laudo, adoptado en el año 2018 por un tribunal de arbitraje aceptó los argumentos de la empresa, ordenando al Estado de Ecuador la eliminación de la “ejecutabilidad” de la sentencia de Lago Agrio. El laudo incluye además el mandato a Ecuador de medidas inmediatas para impedir que se inste el cumplimiento de parte de dicha sentencia, por cualquier medio; también le mandata notificar el contenido del laudo a cualquier Estado, incluyendo su poder judicial, donde los demandantes de Lago Agrio estén intentando o puedan intentar en el presente o en el futuro la ejecución o el reconocimiento de cualquier parte de la sentencia de Lago Agrio.

Evidentemente esto supone la violación del derecho de las afectadas por la empresa a recibir reparación (además de una completa subversión del Estado de Derecho, del principio de jerarquía normativa y de la división de poderes). Con este laudo se evidencia como, de facto, en la actualidad existe una primacía contraria a la que aquí demandamos (contraria a la lógica de los derechos humanos), supeditándose los derechos humanos al cumplimiento de las obligaciones derivadas de la protección de los derechos de los inversores extranjeros, las corporaciones transnacionales.

Para que esto no ocurra, es imprescindible dotar al derecho internacional de los derechos humanos de un instrumento donde se incluya la primacía de los derechos humanos y de los instrumentos que los regulan sobre los acuerdos de comercio e inversión. En este sentido, y en línea con Palestina, proponemos la siguiente redacción para el artículo 14.5:

Todos los acuerdos bilaterales o multilaterales existentes, incluidos los acuerdos regionales o subregionales, sobre cuestiones relacionadas con el contenido de este Instrumento y sus protocolos, incluidos los acuerdos comerciales y de inversión, se revisarán, adaptarán e implementarán de manera que no impidan ni restrinjan la capacidad para cumplir con las obligaciones establecidas en virtud de este Instrumento y sus protocolos, si los hubiere, así como otros tratados e instrumentos pertinentes de derechos humanos y derecho humanitario.

En su intervención, Estados Unidos ha señalado que este artículo no es compatible dado que las partes pueden no alcanzar un acuerdo respecto a la interpretación. Desde la Campaña Global, consideramos que si un tratado de comercio e inversión deviene contrario a las obligaciones derivadas de la ratificación del presente Instrumento, el Estado debería denunciarlo.

Lo mismo debe establecerse para cualquier tratado de comercio e inversión que pueda negociarse a partir de la adopción del presente Instrumento.

Gracias Sr. Presidente

## **K. Articles 15-24**

### **1. Joint statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenaktion, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Alboan**

Mr. Chair,

I deliver this statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenaktion, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Alboan.

In 2019, the collapse of tailing dams in Brumadinho, Brazil, took the lives of many of my friends and family, and contaminated earth and water, also threatening the lives of future generations. The dam was operated by Brazilian multinational Vale. The collapse was made possible by fake certifications by the German company TUV SUD.

We, communities affected by large multinational corporations are in a hurry because we are dying. We don't want to die. We need the international community to hold accountable those who are contaminating our water, air and soils and taking the lives of our brothers and sisters, and ensure proper reparation.

Yet, I have sometimes the impression many States in this room are closer to the interests of businesses than those of the people in the Global South. We refuse to be the sacrificed population that allows rich countries to live in abundance.

Mr Chair, we are still waiting for justice. I am still waiting for justice.

We need to create international parameters and criteria to regulate the operations of multinationals effectively and to ensure that victims can directly access justice. For this, the provisions in article 15 must be significantly improved.

For this, the Committee, established in Article 15, should be equipped with more functions than those mentioned in Art. 15.4. The parenthesis in Art. 15.4.e. should be deleted to enable the Committee to request the Secretary-General to undertake studies on specific issues related to the Legally Binding Instrument on his own behalf.

The Committee should also be equipped with an individual complaint mechanism to investigate cases of human rights abuses indicated by affected people or civil society groups. Moreover, the establishment of an international court of justice, before which those affected can sue the companies and/or States involved in the case of infringements and the exhaustion of national legal protection possibilities, should be pursued further.

The Committee in Art 15 should have the capacity to receive communications and complaints, and to make recommendations on specific cases. Receiving input from affected people and communities would allow for important feedback on the implementation of the instrument, in view of future improvements. Moreover, the establishment of an international court of justice, before which those affected can sue the companies and/or States involved in the case of infringements and the exhaustion of national legal protection possibilities, should be pursued further. Such mechanism should adopt an approach that is both gender sensitive and responds to the particular needs of women, children, Indigenous and quilombolas Peoples.

Dear States, I call on you to fulfil your responsibility as a State and to protect your people.

Thank you

## **2. Global Inter-parliamentary Network**

Thank you, Mr. Chairman.

Firstly, a big thank you to you for according me chance to add a word to the subject currently under discussion.

I'm Sydney Mushanga a Member of Parliament in the National Assembly of Zambia, I'm here as a Member of the Global Inter-parliamentary Network in support of the Binding Treaty.

This is my first time to participate in the binding treaty and if not the first Member of Parliament participating for the first time from the Southern Part of Africa.

Mr Chairman I have been around from that start of the 8th Session on Monday. As I watch the deliberations, I must state that, I have learnt a lot from you all, I recognize and appreciate the incredible work you have been doing in the past 8 years. A very remarkable job to all the participants in here and all those who have participated in the last 8 years.

Sir, For Zambia, a strong and effective Binding Treaty is fundamental in upholding our human rights and respect for the environment.

Although companies operating in Zambia are covered by domestic legislation, the local subsidiaries of big Transnational Corporations enjoy impunity when it comes to violating human rights or destroying the environment, because of the lack of binding regulations at the international level.

It is therefore important to note that while the current legal regime is relevant, it remains inadequate to address not only the major power imbalance between Transnational Corporations and host Countries but also the imbalance between the scope of obligations of Transnational Corporations and the gravity of the impact of their operations.

Apart from advancing national and regional legislation, there is a need for global regulations that can hold the different entities of the Transnational Corporations accountable, regardless of where the violations occur and that's the purpose I'm participating in the 8th Session here in Geneva.

Negotiations towards the establishment of a binding Treaty to regulate Transnational Corporations should be expedited and the process should be transparent to allow all States to actively participate. I invite and urge this session to hear and address the demands of all states equally. The voices coming from Africa should resonate as much as any other.

Sir, the 54 states in Africa have spoken and their language and submissions are very clear.

In this front, I invite Members of Parliament and all leaders, through their parliamentary functions to take a leading role and participate in all progressive legislations aimed at transforming our lives.

I am in full support of the stance and position taken by the African states at this UN negotiations. I commend the governments of the African continent for standing with the people through the construction of UN binding regulations to make Transnational Corporations accountable.

Mr Chairman and everyone in this assembly, I wish you well as you go back to your various countries and I thank all of you for the contributions during this Process.

The fight continues.

### **3. FIAN**

Thank you Mr. Chair.

We have comments on articles 15 and 16.

Regarding article 15 on Institutional Agreements, given the existing weak enforcement of international human rights law, we strongly call for the strengthening of the functions, purposes and competencies of the Committee. For the same reason, we are still highly concerned by Brazil's suggestion formulated last year to delete this article, which does not, in any way, contribute to the protection of affected communities and individuals.

Besides, this draft legally binding instrument was accompanied in previous sessions by a draft Optional Protocol providing for an individual complaint mechanism, similar to other existing Optional Protocols. Therefore, we recommend for an Optional Protocol to be part of these negotiations and be adopted jointly with this LBI.

Regarding article 15.7, we support the proposal of Bolivia, South Africa, Palestine, Egypt, Namibia, Kenya to include the expressions "peasants and other people working in rural areas", this, because it has been widely demonstrated that this is a representatively disadvantaged group and that requires special protection as established by the UNDROP and as has been highlighted by courts such as the African Court in the case of the Oigiek community for the case of people who work the land, and in the case of *Bistrović v. Croatia* of the year 2007 in which peasants are recognized as subjects of special protection.

We also welcome the inclusion of "peasants and other people working in rural areas" in article 16.4.

With regard to Article 16 regarding Implementation: Article 6.8 relative to the protection of preventive measures from undue influence from commercial and other vested is a crucial provision and should actually be mainstreamed throughout the legally binding instrument. The corporate capture of policy and decision-making spaces is one of the main obstacles for implementation, explaining the weakness of corporate accountability. We therefore strongly support again Palestine's proposal (16.5 bis) for this provision to be included in article 16 on implementation.

We additionally require for an additional paragraph under this article that provides for the direct applicability of the present (Legally binding instrument) in cases of legislative negligence for its implementation. The direct applicability of human rights treaties already exists under some legal systems and should be made available for other legal systems (for

example in the case of the constitutional block in a number of Latin American Countries) in the case mentioned above of negligence by competent authorities to take the necessary legislative measures for its implementation.

Finally, we support Palestine's textual proposal in Art. 16.4, namely explicitly referring to conflict-affected areas, including situations of occupation.

Thank you Mr. Chair.

#### 4. **Joint statement on behalf of Feminists4binding**

Thank you, Mr. Chair. This statement is made on behalf of #Feminists4bindingtreaty.

In accordance with CEDAW Article 7 (requiring States Parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, ensure to women, on equal terms with men, the right to participation in public and political life) and mirroring the UN's own gender-parity strategy, gender balance in the monitoring of the treaty implementation can and should be achieved, rather than considered.

We also note that gender balance among human rights treaty bodies experts is still far from being a reality. For instance:

- 72% of experts in the Committee on Economic, Social and Cultural Rights are men;
- 86% of the Committee on Migrant Workers are men;
- 70% of experts in the Committee on Enforced Disappearances are men; and
- 70% of experts in the Committee against Torture are men.

In addition to ensuring gender balance of Committee members, the Committee created under the Treaty should foresee gender expertise as a criterion to be considered in the selection of experts, given the highly gendered dimension of business-related human rights abuses.

Therefore, in article 15a, we recommend, after "recognized competence in the field of human rights, public international law or other relevant fields" adding "and shall have gender expertise."

In article 15b, we recommend adding, after "the differences among legal systems," the words "*gender expertise, and ensuring a*". So the provision will read: "The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution, the differences among legal systems, *gender expertise, and ensuring a* gender balanced representation."

Last, we also note our support for Palestine's proposal for Article 16.4.

Thank you.

#### 5. **Joint statement on behalf of IOE and USCIB**

Thank you, Chair. I speak on behalf of IOE and USCIB and this intervention is a response to Articles 15 to 24 of the Third Revised Draft Treaty as well as concluding remarks.

Regarding **article 16 on Implementation**, our view concerning the scope remains unchanged. The news proposals from the seventh session from various States want to divert the intended scope of the treaty to be now applicable only to translational companies and keep "local business registered in terms of relevant domestic law" out of it. A differentiated approach should be omitted in this part.

Let me express here again the fact that the corporate responsibility to respect is a standard of conduct for **all enterprises** as expressed in the UNGPs. Keeping domestic business outside the scope of this treaty would create a two-speed approach but most importantly would apply only to a small minority of business activity. Indeed approximately 95 per cent of the world's workers are employed by purely domestic entities and most human rights deficits arise in the domestic economy, which is often part of the "informal" economy, and thus beyond regulatory enforcement.

That being said, for issues of prevention, such as in particular HRDD or reporting requirement, a specific clause would be needed to give State Parties the possibility to exclude micro, **small and medium-sized enterprises (MSMEs)** from legally binding due diligence obligations with the aim of not causing undue additional administrative burdens and respecting their constraints. MSMEs are the heart of our economies but they are also the one with most challenges to survive in these difficult times. As part of the State's duty to protect, this draft treaty should ensure that States provide the necessary support, capacity-building, guidance and awareness raising to companies, in particular MSMEs to further implement the UNGPs. Despite all business good will, business alone will not be able to make a lasting different, State's action and support is key.

Turning **to article 20 on the Entry into Force**. What is the threshold for such a treaty to come into force? Given that the treaty would be between multiple States to become operative, this would require a large number of ratifications before coming into force and being effective.

Chair, allow me now to provide some concluding remarks on behalf of the business community:

On Monday afternoon, one panelist eloquently responded that life is complex. Yes, life is complex but it is precisely the role of this working group to provide clear guidelines for national legislators to make sure the treaty provides, when ratified, legal clarity and can be implementable to business, which are with States the main subjects of this treaty. This is currently not the case.

Chair, while we acknowledge that this is an inter-governmental process, we have always insisted on the crucial need for the business representatives **to have the opportunity to take part of the actual drafting**.

IOE, USCIB, Employer Organisations, business and the private sector at large have been since day one strongly committed to advance human rights and responsible business conduct. This commitment has not and will not change.

Let me reaffirm in this Forum that IOE was among the first Organisation to endorse the UNGPs in 2011 and many companies did not wait the UNGPs to act responsibly.

Solid results have been achieved. To name only one, according to the ILO Uzbekistan has succeeded in eradicating systemic forced labour and systemic child labour during the 2021 cotton production cycle thanks to a joint effort between the private sector, civil society and the government. Effective change on the ground is possible when everyone is listened and taken into account.

The business community welcomed the Chair's proposals as a first step in the good direction, but a lot remains to be done to move the negotiations constructively forward. Unfortunately, both the third draft treaty and the Chair's proposals continue to raise serious concerns for the business community as they are not yet a suitable basis to reach a balanced outcome based on consensus.

We continue also to see that major contested aspects regarding both the process and the content persist. Also, we continue to see greater States' disengagement and concern due to great uncertainty, subjective language and open definitions, creating great legal uncertainty that would make the instrument unimplementable.

Most of the text proposals made during this eighth session and the seventh session distance the draft treaty even more from the process-based approach of the UN Guiding Principles, making it less implementable and potentially jeopardizing any possible consensus-building even more.

The Business community remains committed to advancing human rights and responsible business conduct, including in this treaty process. Yet, important changes are necessary to reach a balanced outcome for all.

Thank you.

## **6. Global Interparliamentary Network**

Señor Presidente,

Soy Lilian Galan, parlamentaria de Uruguay, y hablo aquí como miembro de la Red Global Interparlamentaria, el GIN, que engloba más de 200 parlamentarios de más de 20 países. Nosotros seguimos comprometidos con la expansión de nuestra red por todos los continentes para garantizar la aprobación de un tratado vinculante fuerte y que acabe con la impunidad de las empresas transnacionales.

El GIN valora el proceso que se va realizando a partir de la resolución 26/9 de 2014 que dio lugar a que en esta sesión estemos discutiendo el 3º borrador revisado. Reafirmamos, como han dicho muchos estados y organizaciones de la sociedad civil, que el 3º borrador revisado es el único documento legítimo para negociaciones, porque es el único que resulta de 8 años de negociaciones democráticamente llevadas por todos los Estados que decidieran participar. De democracia entendemos mucho nosotras parlamentarias, señor presidente. Acuerdos aprobados por consenso, como las conclusiones y recomendaciones de la última sesión, basados en el espíritu de la resolución 26/9, deben ser respetados.

Los parlamentarios, que somos democráticamente elegidos por nuestros pueblos, queremos expresar nuestro firme compromiso de terminar con las impunidades de las empresas transnacionales en el derecho internacional con un instrumento vinculante que determine la primacía de los derechos humanos, evitando así que por este vacío legal sufran nuestros pueblos y países, y se permita a las ETNs evadir las normativas nacionales y también demandar a los Estados en tribunales de arbitraje de inversiones que privatizan la aplicación de la ley y menoscaban la obligación de los Estados de proteger los derechos humanos, como fue en el caso de la demanda de la tabacalera Philip Morris contra Uruguay.

Urgimos por un mecanismo de planteo de quejas o hasta una Corte, una vez que el Comité, previsto en art. 15 y otros, presenta standards rebajados en comparación con otros mecanismos en sistemas de protección internacionales de derechos humanos.

Asimismo, reafirmamos que el tratado vinculante que resulte de este proceso debe ser claro al establecer obligaciones directas de cumplimiento de derechos humanos a las empresas transnacionales diferenciadas e independientes de las obligaciones de los Estados.

Por ultimo, como defensores de la soberanía de los pueblos, reafirmamos nuestro compromiso de defender los derechos humanos, y por lo tanto seguir luchando por derrotar la impunidad corporativa a través de un Tratado Jurídicamente Vinculante.

Gracias Señor Presidente

## **7. Friends of the Earth International**

Gracias señor Presidente.

Mi nombre es Juliette Renaud, hablo en nombre de Amigos de la Tierra Francia y Amigos de la Tierra Internacional, miembros de la Campaña Global.

Me voy a referir al artículo 15, manteniendo la necesidad de establecer, como garantía de la eficacia de este tratado, un Tribunal Internacional sobre Empresas Transnacionales y Derechos Humanos, en complemento del rol de las cortes nacionales.

Este Tribunal es necesario y perfectamente posible:

- Primero, no es la primera vez que se discute esta cuestión. Lo propuso Australia en 1947 en el ECOSOC y lo propuso Francia en el debate respecto de la Corte Penal Internacional. En aquella ocasión la propuesta de Francia que habría otorgado a la CPI jurisdicción no solo sobre personas físicas, sino también sobre personas jurídicas. Como es bien sabido, no hubo consenso en aquel momento porque un amplio número de países todavía no reconocían la responsabilidad penal de las personas jurídicas. Sin embargo, con el paso de los años, esto está cambiando rápidamente;

- Segundo, ya existen Tribunales con jurisdicción sobre personas jurídicas, como el Tribunal Internacional del Derecho del Mar; existen incluso propuestas avanzadas de textos

concretos, como la elaborada por distintas académicas y titulada: Tribunal Mundial de Derechos Humanos, al que se le atribuye jurisdicción sobre las Entidades empresariales.

Además, una de las razones que consideramos fundamentales para sostener la necesidad de un Tribunal es la asimetría normativa. En el marco normativo del derecho comercial, los Tratados bilaterales de Inversión en concreto, existen instrumentos que aun sin serlo, actúan de facto como tribunales asegurando la total aplicabilidad de estos tratados, cuya eficacia está muy por encima de los tratados de derechos humanos.

Además, es importante recordar que la propuesta de Tribunal de la Campaña Global fue incluida en el “Documento de elementos” de 2017, donde se incluyó como propuesta la creación de una Corte Internacional sobre Empresas Transnacionales y Derechos Humanos o establecer una sala especial sobre Empresas Transnacionales en cortes internacionales o regionales ya existentes. En la misma línea, en 2016, el anterior Presidente del Grupo de trabajo abogó por la creación de una "Corte Mundial de Empresas y Derechos Humanos". Todo esto ha desaparecido del texto actual, dejando el futuro tratado sin garantías reales para su aplicación.

Desde la Campaña Global publicamos un “Documento de elementos” que analiza y expone la idea de como funcionaría este Tribunal, cuáles serían sus competencias, su jurisdicción, y cuáles serían los mecanismos de acceso a reparación para las personas y comunidades afectadas. Además, en nuestro documento se recoge el funcionamiento del Centro internacional de monitoreo de las transnacionales que acompañe y complemente el funcionamiento del Tribunal internacional.

Sin tiempo para desarrollar su contenido, voy a destacar dos puntos clave:

- La actuación del Tribunal se rige por el principio de complementariedad de las jurisdicciones nacionales, quedando igualmente claro en el texto que el Tribunal actuará si el Estado o los Estados concernidos no actúan convenientemente.

- El tribunal tendrá jurisdicción sobre las transnacionales como personas jurídicas, así como sobre las personas físicas que las dirigen para proteger los derechos humanos y la naturaleza según el ámbito material establecido en Tratado frente a las violaciones cometidas por las empresas transnacionales y el conjunto de entidades que conforman sus cadenas globales de producción, ya ocurran en los territorios de los Estados Parte del Tratado Vinculante o en los territorios donde estas entidades realizan sus actividades.

Por todas estas razones, porque el derecho internacional debe dotarse de dispositivos que garanticen su eficacia frente a los poderes públicos y privados, la Campaña ha propuesto un Tribunal para permitir que las personas y comunidades afectadas tengan acceso a una instancia judicial internacional que garantice su derecho al acceso a la justicia y a la reparación.

Muchas gracias

## 8. International Trade Union Confederation

### Article 15

Thank you, Chairperson. I speak on behalf of the global trade union organisations I mentioned in my opening intervention on Monday.

For the global labour movement, Article 15 falls below our expectations – enforcement is absolutely key. Indeed, since the outset, we’ve been calling for a complementary international mechanism to oversee compliance with the Legally Binding Instrument. However, we think that, as a minimum, the functions and powers of the Committee – which we certainly support - should be strengthened by, among other things, having the ability to hear individual complaints. Therefore, we have two formulations for a possible new Article 15.4.

The first formulation is:

**States Parties recognise the competence of the Committee to receive and consider communications and complaints from individuals, communities, or their representatives concerning human rights abuses by business enterprises contrary to the**



**provisions of the LBI and violations by a State Party of any of the rights set forth in the LBI.**

And the second option:

**State Parties recognise the competence of the Committee to receive and consider communications from or on behalf of individuals or groups of individuals or their representatives who claim to be victims of a violation by a State Party of the provisions of the LBI or victims of human rights abuses by business enterprises contrary to the provisions of the LBI.**

Thank you, Chairperson.

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