

The Center for International Environmental Law welcomes and sincerely appreciates the work by the Chair-Rapporteur on the Draft Elements to address significant governance and accountability gaps with regards to corporate-related human rights abuses, and his commitment to ensure the adoption of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights (the treaty).

We request that you please note that in light of the limited time available to review the draft elements and the complex legal and factual elements that it entails, our comments here are necessarily preliminary, and we reserve the right to extend and elaborate on them over time.

We recognize the important and valuable effort that has gone into the creation of the Draft Elements for the treaty. CIEL strongly commends the clear purpose of the treaty, which is to “ensure civil, administrative and criminal liability of TNCs and OBEs regarding human rights violations or abuses” and “to include mechanisms to guarantee the access to justice and effective remedy”. We believe the draft could be strengthened by adding clarifications with respect to the primacy of human rights, the operationalization of extraterritorial obligations, the rights of information and public participation, the integration of a gender perspective and the right to access justice and effective remedy.

1. The Primacy of Human Rights

The primacy of human rights emanates from the Universal Declaration of Human Rights and the Charter of the United Nations, both established long before the adoption of hundreds of trade and investment treaties between States, which have established a complex system governing trade and investment practices globally.

Trade and investment treaties can affect a wide range of human rights and environmental harms, from provisions that support the harmonization of public interest laws to the lowest common denominator to measures that facilitate the privatization of essential public services. In addition, investment protections provide investors with broad rights to challenge public interest laws thus undermining States’ ability to protect human rights and the environment.

The treaty provides an opportunity for States to reaffirm and ensure that their human rights obligations, and the provisions of the treaty itself, will be adequately safeguarded and will be given precedence in relation to obligations under other international agreements, such as trade and investment treaties.

CIEL strongly appreciates the draft elements' clear elaboration of the fundamental principle of the primacy of human rights obligations over trade and investment agreements and state obligations related to this principle. The draft principles explicitly identify the duty of States to prepare human rights impact assessments prior to the conclusion of trade and investment agreements and to refrain from entering into such agreements where they conflict with the protection of human rights. However, the elements should clarify that all existing and future international agreements must be consistent with human rights obligations.

2. Extraterritorial Obligations

The treaty provides an important opportunity to affirm states' extra territorial obligations and identify the essential role that these obligations play in protecting, respecting, and fulfilling human rights obligations with respect to TNCs and OBEs. The draft elements explain that a fundamental purpose of creating the binding framework on TNCS is to "reaffirm that State Parties' obligations regarding the protection of human rights do not stop at their territorial borders."

Extraterritorial obligations are obligations that relate to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory and obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately and jointly through international cooperation, to realize human rights universally.

These obligations can be found in many sources of international law, including the UN Charter, the Universal Declaration of Human Rights and subsequent human rights treaties, customary international law, and the pronouncements and jurisprudence of international and regional human rights bodies and courts. The Maastricht Principles summarize and clarify these legal obligations, which States have already accepted under international law.

Effective operationalization of the extraterritorial obligation to protect under human rights law is critical to closing existing gaps of protection with regard to corporate accountability for human rights abuses.

States must take necessary measures to ensure that TNCs which they are in a position to regulate do not nullify or impair the enjoyment of human rights in any other State. States must also ensure the availability of effective mechanisms to provide for accountability in the discharge of their ETOs, extending to the ability of persons whose human rights are impaired by a TNC in a host State to enjoy the right to a prompt, accessible and effective remedy in the TNC's home States.

3. Public Access to Information and Participation

The treaty provides an important opportunity to affirm the importance of public information and participation. The fundamental right of freedom of expression encompasses the freedom to seek, receive and impart information. The right to freedom of information includes a right of access to information held by public authorities. The rights to freedom of expression and access to information are among the essential conditions for equal participation in political and public affairs and must be promoted and protected.

Where TNC-OBE activity could impair the enjoyment of human rights, affected persons must have enough information to be able to understand and discuss the situation fully, in order to make informed decisions on what action to take to prevent and address human rights abuse. Freedom of information is also a key component of transparent and accountable government, including during the creation of legislation and government decision-making related to TNCs as well as during ISDS processes. In this regard, the draft elements rightly highlight the duty of States to prepare human rights impact assessments prior to concluding trade and investment agreements.

The draft elements strongly support the right to information, by outlining key concepts of due diligence, including that states must require TNCs and OBEs to design, adopt and implement effective due diligence policies and processes. The elements also identify the essential components of a “vigilance plan.” Additionally, the elements acknowledge the fundamental importance of whistle blowers and human rights defenders, and the need for States to adopt adequate measures to guarantee their life, security and integrity. However, the elements should be clarified with respect to State obligations to provide access to information and public participation.

4. Integrating a Gender Perspective

The treaty is a fundamental opportunity to ensure the right of non-discrimination. The Draft Elements highlight the right to non-discrimination and the Convention on the Elimination of all Forms of Discrimination against Women.

In July 2017, CIEL and several of its partners sent a written contribution (in annex) to the Mission of Ecuador. The contribution highlights the key areas of recommendations that can help ensure a meaningful inclusion of a gender perspective in the Draft Elements of the treaty. These include requiring states and companies to conduct gender impact assessments that consider the different and disproportionate impacts on women that stem from corporate human rights abuses, such as violations of the right to food, water, and to a healthy environment; take all measures to prevent all forms of discrimination against women; ensure that women have access to participation in decision-making, compensation, and non-judicial grievance mechanism, and ensure that women have access to effective remedies. Including a gender perspective in the prospective treaty will address an essential dimension of human rights violations and help to ensure that States

effectively discharge their obligations to respect, protect and fulfill women's and girls' human rights.

5. Ensuring Access to Justice and Effective Remedy

The treaty provides an important opportunity to positively contribute to ensuring access to justice, which is essential for the protection of human rights. All people must have the ability to obtain redress for harms and to hold corporations accountable when their rights have been violated.

While we appreciate that Section 6 of the draft treaty elements includes reference to adopting national and international judicial and non-judicial mechanisms to address harms, these should not be a replacement for effective judicial systems at the national level. People harmed by the activities of transnational corporations must have the ability to seek remedy and hold the corporations accountable in courts in both the host State where the activities occurred, as well as, the State(s) in which the corporation has its headquarters or other substantial activities.

Further, we welcome the broad definition of jurisdiction as set forth in Section 7; this concept should be maintained in the treaty. As recognized, people who suffer harms as a result of the activities of TNCs or OBEs must be able to seek and obtain adequate remedy. However, this is often hindered by a number of factors including cost and practical barriers to accessing judicial mechanisms. As such a broad definition of jurisdiction is necessary so that affected people can seek redress: in the forum where the harm occurred; where the parent TNC is located; or where the parent TNC has a substantial presence. And, the decision to select one forum above the other should be determined by what the aggrieved party requests.

The treaty can help ensure that TNCs and OBEs are held accountable for their actions, including human rights violations, and that affected people are able to obtain adequate remedy for harms suffered. Ensuring adequate and responsive judicial mechanisms is essential and the best way to ensure that affected people have access to justice and TNCs and OBEs are accountable for their actions. Non-judicial mechanisms should serve to supplement and provide additional avenues to affected communities.

Non-judicial mechanisms

People and communities harmed by projects must have access to remedy and the ability to hold corporations accountable for human rights abuses. Thus, in addition to judicial remedies, non-judicial grievance mechanisms should be established to address harms.

Project-level grievance mechanisms can play an indispensable role in ensuring a responsible approach to projects by providing a way for TNCs or OBEs to reduce the risk of harm and mitigate adverse impacts that can threaten the sustainability of their investments and the projects being implemented. A well-functioning grievance

mechanism can serve as an early warning system regarding larger, systemic problems and indicate necessary changes to management and implementation so that changes are made before harms occur. The UN Guiding Principles on Business and Human Rights set forth criteria and best practices for effective grievance mechanisms. Any project-level or international grievance mechanism must be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning. It is imperative that communities have a way of obtaining remedy for harms suffered from projects. Additionally, in creating non-judicial grievance mechanisms steps should be taken to address the power imbalance between people and communities being harmed. Further, in creating these non-judicial mechanisms, States parties must take steps to reduce the impediment to remedy for communities. Additionally, States must recognize that project-level or other non-judicial grievance mechanisms may not be appropriate for addressing severe human rights abuses. In those instances, as well as in all others, affected people must have access to judicial mechanisms to seek adequate redress.

Further, non-judicial grievance mechanisms should not be a substitute for judicial mechanisms and should not impede people's ability to seek remedy through national or international judicial mechanisms. We support the statement made in Section 6: Access to Justice, effective remedy and guarantee of non-repetition, that while "*State Parties shall adopt adequate measures to ensure that non-judicial mechanisms [they] are not considered a substitute for judicial mechanisms in order to provide effective remedy to victims of violations or abuses of human rights committed by TNCs and OBEs.*" The treaty should make explicitly clear that affected people do not have to use non-judicial grievance mechanisms before using judicial mechanisms nor that they can use only one and not the other. To best ensure access to remedy, aggrieved people should have all available options open to them to seek redress and hold the TNC or OBE accountable for their human rights violations.

Additionally, with the establishment of the committee set forth in section 9 paragraph b.2 it should also be able to assess progress made regarding access to justice and should be able to make binding recommendations to ensure access to justice and effective remedy through both judicial and non-judicial mechanisms.

In conclusion, the Center for International Environmental Law extends its gratitude for your work on the creation of the Draft Elements and appreciates your consideration of these comments and clarifications as presented in the attached version of the draft. Any communication regarding this submission should be addressed to Layla Hughes <lhughes@ciel.org>.

Respectfully,

Layla Hughes
Carla García Zendejas
Center for International Environmental Law

**Recommended clarifications by the
Center for International Environmental Law (CIEL)
to the**

***ELEMENTS FOR THE DRAFT LEGALLY BINDING
INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND
OTHER BUSINESS ENTERPRISES WITH RESPECT TO
HUMAN RIGHTS***

***Chairmanship of the OEIGWG established by HRC Res.
A/HRC/RES/26/9 (29/09/2017)***

Introduction

The following document has been prepared in the framework of Resolution A/HRC/RES/26/9 (Resolution 26/9), “Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights”, which established an open-ended intergovernmental working group (OEIGWG), with the mandate to elaborate such instrument. According to operative paragraph 3 of resolution 26/9 the Human Rights Council decided that “the Chairperson-Rapporteur of the open-ended intergovernmental working group should prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group on the subject, taking into consideration the discussions held at its first two sessions.”

In this regard, the aim of this proposal is to reflect the inputs provided by States and other relevant stakeholders in the framework of the referred sessions, dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument, as well as during the intersessional period. This document should be considered as a basis for substantive negotiations to elaborate the instrument to regulate, in international human rights law, the activities of transnational corporations (TNCs) and other business enterprises (OBEs) during the third session of the OEIGWG, to be held from 23 to 27 October 2017.

In line with the spirit of transparency, inclusiveness and dynamism of the process, it is important to acknowledge the constructive participation of different actors in more than 200 bilateral and multilateral intersessional meetings in Geneva and in many different countries in the world, since the adoption of Resolution 26/9 on July 14, 2014.

**ELEMENTS FOR THE DRAFT LEGALLY BINDING
INSTRUMENT
ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS
ENTERPRISES WITH RESPECT TO HUMAN RIGHTS**

**1. General
framework**

1.1 Preamble

The preamble will include a specific reference to the legal mandate that led to the presentation of this document of elements as a fundamental step towards the implementation of the overarching mandate for the open-ended intergovernmental working group, established in Resolution 26/9, which is clearly: “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.

Additionally, a brief reference is introduced to the other circumstances that led to the establishment of the mandate referred above and to the commencement of the negotiation of the future instrument, particularly in relation to impacts related to TNCs and OBEs and human rights, and their legal challenges, as discussed in the two first sessions of the OEIGWG.

The content of the instrument may include the following:

- *General references to existing relevant international legal instruments (including inter alia: UN Charter, Universal Declaration of Human Rights, ICESCR and ICCPR, Vienna Declaration and Programme of Action);*
- *Reaffirmation of - and relationship with - the other Conventions (i.e. ILO Core Conventions, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Universal Declaration on the Rights of Indigenous Peoples, the Convention on the Rights of People with Disabilities, the UN Convention against Corruption, the Declaration on the Right to Development, etc.);*
- *Recognition of the **Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights;***
- *General background of the impacts of TNC and OBEs activities with respect to all human rights (including inter alia the right to development, the right to safe, clean, healthy and sustainable environment, the right to the highest attainable standard of health, the right to food, the right to water and sanitation, the right to work, the right to social security, the right to adequate housing, the right to non-discrimination, etc.), and its legal challenges;*

- *Reference to existing Norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights. E/CN.4/Sub.2/2003/12/Rev.2 (2003);*
- *Reaffirmation of the UN Guiding Principles on Business and Human Rights and other such principles and frameworks;*
- *Reminder of all relevant Resolutions and decisions adopted at the UNGA, HRC, Treaty bodies, ILO and other relevant intergovernmental organizations, including inter alia:*
 - *Resolution 56/83 and Document A/56/49 (Vol. I) Corr. 4 on Responsibility of States for Internationally Wrongful Acts;*
 - *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Document A/RES/60/147;*
 - *ILO Tripartite declaration of principles concerning multinational enterprises and social policy); and other relevant documents from other intergovernmental organizations;*
 - *Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1;*
 - *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UNGA Resolution 53/144;*
- *Reaffirmation of the Human Rights Council Resolution A/HRC/RES/26/9;*
- *Reaffirmation that State Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States, and that nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law;*
- *Reminder that International Organizations shall not adopt or promote any international norm or decision that could limit the achievement of the purpose and objectives of this legally binding instrument, as well as the capacity of the Parties to fulfill their obligations adopted herein. Such organizations include inter alia, the UN and their specialized agencies, funds and programs and other international and regional economic, finance and trade organizations.*

1.2 Principles

- *Reaffirmation of general principles and obligations (including inter alia):*
- *The universality, indivisibility, interdependence and inter-relationship of all human rights which therefore must be treated in a fair and equal manner, on the same footing and with the same emphasis.*
- *General obligation to respect, promote and protect all human rights and fundamental freedoms at the national and international level and conducted without conditions attached.*
- *Primary responsibility of the State to protect against human rights violations or abuses within their territory and/or jurisdiction, including extra-territorially, by third parties, including TNCs and OBEs.*
- *Responsibility of TNCs and OBEs to respect all human rights, regardless of their size, sector, operational context, ownership and structure.*
- *Recognition of the primacy of human rights obligations over trade and investment agreements.*
- *Responsibility of the State to elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations. Such obligations include those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security.(ETO Principle 17)*
- *Respect of the principles of sovereign equality and territorial integrity of States and non- intervention in the domestic affairs of other States.*
- *Observance of domestic laws, regulations and administrative practices.*
- *Recognition of the necessity of a special protection of the following human rights: inter alia, self-determination; access to justice; access to effective remedy, access to information, participation and inclusion and non-discrimination.*
- *Recognition of special protection to victims and particularly to indigenous peoples; women; girls and children; persons with disabilities; refugees, or any group considered vulnerable according to national, regional or international applicable regulations.*
- *Duty of the State Parties to prepare human rights impact assessments, with public participation, prior to the conclusion of international agreements, including trade and investment agreements and the creation of dispute resolution mechanisms, including to identify any potential inconsistency between preexisting human rights obligations and subsequent agreements, and to refrain from entering into such agreements where such inconsistencies are found to exist.*
- *Recognition of the right to informed participation in decisions which affect a person's human rights.*
- *Recognition of the responsibility of State for private acts if they fail to act with due diligence to prevent violations or abuses of rights or to investigate and punish acts of violence, and for providing compensation.*

- *General obligation of international cooperation.*

1.3.

Purpose

- *To create an international legally binding framework that aims to guarantee the respect, promotion and protection of human rights against violations or abuses resulting from the activities of TNCs and OBEs, in order to*
 - *ensure civil, administrative and criminal liability of TNCs and OBEs regarding human rights violations or abuses.*
- *include mechanisms to guarantee the access to justice and effective remedy for such human rights violations or abuses committed by TNCs and OBEs, including adequate remediation and guarantees of non-repetition, as well as the strengthening of international cooperation between all relevant actors.*
 - *include obligations to prevent such adverse human rights impacts.*
 - *reaffirm that State Parties' obligations regarding the protection of human rights do not stop at their territorial borders.*

1.4 Objectives

- *To facilitate the full implementation of the primary responsibility of the State, and to respect, promote and protect human rights and fundamental freedoms against human rights violations or abuses within their jurisdiction, including extra-territorially, committed by TNCs and OBEs.*
- *To ensure that the activities of TNCs and OBEs fully respect human rights.*
- *To include preventive measures for tackling business human rights violations or abuses.*
- *To ensure adequate access to justice for victims of human rights violations or abuses resulting from the activities of TNCs and OBEs.*
- *To establish or strengthen effective remedy mechanisms, at all levels, for victims of human rights violations or abuses perpetrated directly or indirectly by TNCs and OBEs.*
- *To strengthen international cooperation, including mutual legal assistance to tackle business enterprises human rights related violations or abuses.*
- *To reaffirm the primacy of human rights law over trade and investments agreements and establish specific State obligations in this regard.*

2. Scope of application

The scope of the legally binding instrument on TNCs and OBEs with respect to human rights was one of the four topics mandated to be discussed during the first two

sessions of the OEIGWG. From the constructive debate which took place, different interpretations of the relevant reference in Resolution 26/9 emerged and several proposals from States and other stakeholders were made with regard to both the objective and the subjective scope.

In this regard, based on the deliberations of the first two sessions, this proposal considers that the objective scope of the future legally binding instrument should cover all human rights violations or abuses resulting from the activities of TNCs and OBEs that have a transnational character, regardless of the mode of creation, control, ownership, size or structure.

With regard to the subjective scope, the present instrument does not require a legal definition of the TNCs and OBEs that are subject to its implementation, since the determinant factor is the *activity* undertaken by TNCs and OBEs, particularly if such activity has a transnational character.

The content of the instrument may include the following:

2.1 Protected rights

- *All internationally recognized human rights, taking into account their universal, indivisible, interrelated and interdependent nature, as reflected in all human rights treaties, as well as in other intergovernmental instruments related, inter alia, to labour rights, environment, corruption.*

2.2 Acts subject to its application

- *Violations or abuses of human rights resulting from any business activity that has a transnational character, including by firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.*

2.3 Actors subject to its application

- *States and organizations of regional economic integration.*
- *TNCs and OBEs.*
- *Natural persons.*

3. General Obligations

The principle of primary responsibility of States to protect against human rights violations or abuses within their territory and/or jurisdiction by third parties, including

private parties, implies that States have to take all necessary measures to attain such objective.

The reinforcement of the primary responsibility of States and the recognition of general obligations of TNCs and OBEs represents the core of an international legally binding instrument. In this regard, it is of utmost importance to promote adequate measures to ensure prompt and effective legal accountability and redress in cases involving human rights violations or abuses by TNCs and OBEs.

Similarly, throughout the overall process of Resolution 26/9, it has been highlighted that the negative impact on human rights resulting from transnational operations has transboundary outreach in all regions, as well as pre-existing loopholes that frustrate the effective guarantee of rights of victims. Therefore, the adoption of an international legally binding instrument which recognizes such general obligations could strengthen the international system, by establishing clear rules for States and other stakeholders involved in the prevention and protection of human rights, as well as in the redress of human rights violations or abuses.

The content of the instrument may include the following:

3.1 Obligations of States

- *States shall respect, promote and protect all human rights against violations or abuses within their jurisdiction, including extra-territorially, by third parties, particularly TNCs and OBEs, and guarantee access to remedy for victims of such violations or abuses.*
- *States shall take all necessary and appropriate measures to prevent, investigate, punish and redress such violations or abuses, including through legislative, administrative, adjudicative or judicial measures, to ensure TNCs and OBEs respect human rights throughout their activities.*
- *States shall take all necessary and appropriate measures to ensure access to justice and effective remedy for those affected by human rights violations or abuses of TNCs and OBEs.*
- *States shall adapt domestic legislation to the provisions of this instrument and enforcement measures to require business enterprises to respect human rights, and shall not conclude international agreements that hinder the adoption of such domestic legislation in their jurisdiction and extra-territorially.*
- *States shall take all necessary and appropriate measures to design, implement and follow up on national policies on human rights and TNCs and OBEs, taking into account the primacy of human rights over pecuniary or other interests of corporations.*
- *States shall take all necessary and appropriate measures to ensure that public procurement contracts are awarded to bidders that are committed to respecting human rights, without records of human rights violations or abuses, and that fully comply with all requirements as established in this instrument.*

- *States shall take all necessary and appropriate measures to ensure that human rights are considered in their legal and contractual engagements with TNCs and OBEs, and their implementation.*
- *States should adopt measures to ensure that TNCs and OBEs under their jurisdiction adopt adequate mechanisms to prevent and avoid human rights violations or abuses throughout their supply chains.*
- *State Parties shall take all necessary and appropriate measures to ensure that TNC and OBEs design, adopt and undertake human rights and environmental impact assessments that ensure meaningful, informed public participation, cover all areas of their operations, and report periodically on the steps taken to assess and address human rights and environmental impacts resulting from such operations.*
- *States shall adopt all necessary measures to include disclosure requirements for all TNCs and OBEs before registering or granting a permit of operation for TNCs and OBEs.*
- *States shall ensure that their conclusion and implementation of international agreements related to TNCs and OBEs (such as trade and investment agreements and instruments establishing dispute resolution mechanisms) and their activities to support TNCs and OBEs (such as providing financial and other export-related support), protect, respect and remedy human rights obligations.*
- *States shall ensure informed active, free and meaningful participation in decisions that affect a person's human rights.*
- *States must require and ensure timely public disclosure of all relevant documents and materials relating to any and all impacts on human rights and the environment*
- *States Parties shall conduct gender impacts assessments and shall take all necessary and appropriate measures to ensure that TNC and OBEs design, adopt and undertake gender impact assessments that cover all areas of their operations, and report periodically on the steps taken to assess and address human rights and environmental impacts resulting from such operations.*
- *States shall take all necessary measures to ensure the full and active participation of women, represented at least in equal proportions to men, in any relevant consultation, decision-making and remedial processes*

3.2 Obligations of Transnational Corporations and Other Business Enterprises

- *TNCs and OBEs, regardless of their size, sector, operational context, ownership and structure, shall comply with all applicable laws and respect internationally recognized human rights, wherever they operate, and throughout their supply chains.*
- *TNCs and OBEs shall prevent human rights impacts of their activities and provide redress when it has been so decided through legitimate judicial or non-judicial processes.*

- *TNCs and OBEs shall design, adopt and implement internal policies consistent with internationally recognized human rights standards (to allow risk identification and prevention of violations or abuses of human rights resulting directly or indirectly from their activity) and establish effective follow up and review mechanisms, to verify compliance throughout their operations.*
- *TNCs and OBEs shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights.*

3.3 Obligations of International Organizations

- *State Parties shall strive to ensure that international organizations, including international and regional economic, financial and trade institutions, in which they are Members, do not adopt or promote any international norm or decision that could harm the objectives of this legally binding instrument, or affect the capacity of the Parties to fulfill their obligations adopted herein.*

4. Preventive Measures

The prevention aspect has been long identified as an important pillar of the relationship between business and human rights, particularly in relation to the efforts undertaken at the national and international levels for a stronger engagement of the corporate sector in the identification and prevention of human rights violations or abuses. This concept, referred in some legal and non-legal frameworks as human rights due diligence comprises different policies, processes and measures that TNCs and OBEs need to undertake, as a minimum prudence, according to its capacities, to meet its responsibility to respect human rights. In this regard, the real added value of this section would be precisely to give a legally binding nature to the adoption of such measures or minimum standards by TNCs and OBEs

The content of the instrument may include the following:

- *States must take any necessary action, including the adoption of legislative and other necessary measures to prevent human rights violations committed by TNCs and OBEs.*
- *State Parties shall adopt legislative and other measures to require TNCs and OBEs to design, adopt and implement effective due diligence policies and processes, including codes of conduct, and to identify and address human rights impacts resulting from their activities. Such measures shall apply to all the TNCs and OBEs in their territory or jurisdiction, including subsidiaries and all other related enterprises throughout the supply chain. All concerned TNCs and OBEs shall adopt a “vigilance plan” consisting of due diligence procedures to prevent human rights violations or abuses, which shall include inter alia, the*

risk assessment, *including a gender impact analysis*, of human rights violations or abuses in order to facilitate their identification and analysis; a procedure of periodic evaluation of subsidiary enterprises throughout the supply chain in relation to their respect of human rights; actions aimed at risk reduction; an early warning system; a set of specific actions to immediately redress such violations or abuses; and a follow up mechanism of its implementation, notwithstanding other legal procedures, liabilities and remedies recognized in the present instrument.

- States shall promote adequate consultation processes with the informed and meaningful participation of all relevant actors *including women, and should be made public and accessible*.
 - States shall promote that everyone within their jurisdiction has access to information about this treaty in a language they can understand.
 - State Parties shall adopt adequate measures to provide TNCs and OBEs with relevant information about the obligations contained in this instrument.
 - States shall adopt adequate measures to ensure that TNCs and OBEs in their jurisdiction report periodically on the measures they have adopted to prevent the violations and abuses of human rights.
 - States shall take all necessary and appropriate measures to ensure that their agreements with TNCs and OBEs encompass internationally recognized human rights standards.

5. Legal liability

One of the core objectives in the process of elaboration of an international legally binding instrument is to put an end to impunity in cases of violations or abuses of human rights that occur in the activities performed by TNCs and OBEs. In this regard, States must take all necessary action, including the adoption of legislative and other necessary measures to regulate the legal liability of TNCs and OBEs in administrative, civil and criminal fields.

In this regard, States should strengthen administrative and civil penalties in cases of human rights violations or abuses carried out by TNCs and OBEs.

States which do not yet have regulations on criminal legal liability on legal persons are invited to adopt them in order to fight impunity and protect the rights of victims of violations of human rights perpetrated by TNCs and OBEs. Criminal legal liability must cover the acts of those responsible for the management and control of TNCs and OBEs.

Additionally, legal liability must also cover those natural persons who are or were in charge of the decision-making process in the business enterprise at the moment of the violation or abuse of human rights by such entity.

The content of the instrument may include the following:

- *State Parties shall adopt legislative and other measures in accordance with their national legal systems and principles, to establish and apply the legal liability of TNCs and OBEs under their territory or jurisdiction, including extra-territorially, for violations or abuses of human rights, resulting from their activities throughout their operations. Such liability may be criminal, civil and administrative, whether committed individually or collectively, and shall not be diminished through trade or investment protection measures and dispute resolution mechanisms.*
- *State Parties shall adopt legislative and other measures to establish the criminal liability or its equivalent of TNCs and OBEs subject to their jurisdiction, for criminal offences recognized as violations or abuses of human rights in their domestic legislation and in international applicable human rights instruments.*
- *State Parties shall adopt legislative and other measures to establish the criminal liability or its equivalent of TNCs and OBEs to attempt to commit any of the criminal offences recognized as violations or abuses of human rights in their domestic legislation and in international applicable human rights instruments; and to be complicit or participate in any of the said acts.*
- *State Parties shall adopt legislative and other measures to establish that criminal and civil liability of TNCs and OBEs for human rights violations or abuses from their activities and throughout their operations do not exclude criminal and civil liability of company members, regardless of their position, and shall be independent from the finding of individual or collective civil and criminal liability.*
- *State Parties shall adopt legislative and other measures to establish the direct civil liability of TNCs and OBEs under their jurisdiction, for human rights violations or abuses that occur throughout the activities of such TNCs and OBEs.*
- *States shall adopt legislative and other measures to establish civil liability of TNCs and OBEs based in their territory or jurisdiction, for participating in the planning, preparation, direction of or benefit from human rights violations or abuses caused by other TNCs and OBEs.*
- *State Parties shall adopt legislative and other adequate measures to ensure the applicability of effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions, to TNCs and OBEs found liable of criminal offences recognized under their jurisdiction.*
- *State Parties shall ensure that civil liability of TNCs and OBEs shall not be made contingent upon the finding of criminal liability or its equivalent from the same actor.*
- *States shall ensure that TNCs and OBEs with whom they have commercial contracts do not use immunities or privileges as shields against civil legal liability.*

- *State Parties shall adopt legislative and other adequate measures, including procedures and sanctions, to ensure administrative liability as additional measures for cases of violations or abuses of human rights perpetrated by TNCs and OBEs. Administrative remedies will be adequate, accessible, affordable, timely and effective. Under public procurement regimes, administrative sanctions may include the denial of awarding of public contracts to companies that have engaged in a conduct leading to a violation of a human right.*
- *State Parties shall be responsible for actions or omissions of TNCs and OBEs when the latter:*
 - *Act under the instruction or control or direction of a State Party and violate or abuse human rights in this process.*
 - *Perform activities entrusted to them under the State Party's legislation to exercise elements of governmental authority or delegation of political power or government authority, either by legal delegation or due to the absence or default of the official authorities, and in circumstances such as to call for the exercise of those elements of authority.*
 - *Perform activities that the State Party acknowledges and adopts as its own.*
- *State Parties shall be internationally responsible if they act in complicity with the harmful activities of TNCs and OBEs or the State does not apply due diligence to avoid the impacts of such actions.*
- *State Parties shall adopt legislative and other measures to implement due diligence procedures and promote decent work in all the operations and the supply chains of TNCs and OBEs under their ownership or control.*

6. Access to justice, effective remedy and guarantees of non-repetition

According to the Universal Declaration of Human Rights (articles 7, 8 and 10) “all are equal before the law and are entitled without any discrimination to equal protection of the law”; “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”, and “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. In real situations, however, inequality of arms is present and the big economic power of TNCs and OBEs and their influence on political and judicial officers, among other circumstances, may play a crucial role to limit the actions or to persuade the victims not to seek justice.

The barriers to access justice, as enumerated by the United Nations Development Program, UNDP (“Access to Justice, Practice note” 9 March 2004), include prohibitive costs of using the judicial system; abuse of authority and powers; weak enforcement of laws and implementation of orders and decrees; lack of de facto protection, especially for vulnerable group members; lack of adequate legal aid systems; formalistic and expensive legal procedures; avoidance of the legal system for economic reasons, fear, or a sense of futility of purpose.

Access to justice must include the existence of clear procedures and institutions which have the duty to provide effective remedy to the victims of TNCs and OBEs' violation or abuse of human rights, as a way to redress moral and material damages. In addition, these measures are called to deter TNCs and OBEs to repeat violations of human rights.

The proposed elements on this issue are the following:

- *State Parties shall adopt adequate measures to provide prompt, accessible and effective remedies, including judicial and non-judicial remedies, when a TNC or OBE is acting under their instructions, direction or control; or when a TNC or OBE is empowered to exercise elements of governmental authority and has acted in such capacity while committing the violation or abuse of human rights.*
- *State Parties shall guarantee access to justice and to effective remedies to every person and specially to indigenous peoples; women; girls and children; persons with disabilities; refugees; or any group considered vulnerable according to nationally, regionally or internationally applicable regulations, taking into account their specific reality, circumstances and culture. State parties shall meaningfully consult women in creating, designing, reforming and operating remedial mechanisms. Remedies should be responsive to the diverse experiences and expectations of women and vulnerable groups.*
- *State Parties shall adopt adequate measures to ensure that prompt, accessible and effective judicial remedies are provided when the harm resulting from violations or abuses of TNCs or OBEs under their jurisdiction implies criminal liability, notwithstanding the provision of judicial and/or non-judicial remedies for the harm related to other types of liability.*
- *State Parties shall adopt adequate measures to ensure that non-judicial mechanisms are not considered a substitute for judicial mechanisms in order to provide effective remedy to victims of violations or abuses of human rights committed by TNCs and OBEs.*
- *State Parties shall adopt adequate measures to ensure that any violation or abuse of human rights, irrespective of who may ultimately be the bearer of responsibility for the violation, gives rise to legal actions and opens the way for victims' claims for damages and remediation.*
- *State Parties shall adopt adequate mechanisms to reduce regulatory, procedural and financial obstacles which prevent victims from having access to effective remedy, including the enabling of human rights-related class actions and public interest litigation; the facilitation of access to relevant information and the collection of evidence abroad; the reversal of the burden of proof; the elimination of investor protections and investor state dispute resolution that allow TNCs and OBEs to undermine access to remedies; the adoption of protective measures to avoid the use of "chilling-effect" strategies by TNCs and OBEs to*

discourage individual or collective claims against them and the elimination of to the use of the doctrine of forum non conveniens as a bar to lawsuits involving TNC activity.

- *State Parties shall adopt adequate measures to guarantee the access to information about existing remedies, including judicial and non-judicial, for all relevant actors, in a language which they can understand.*
- *State Parties shall adopt adequate and effective remedy measures to guarantee, inter alia, a prompt, comprehensive and impartial investigation of the violation, as well as to guarantee compensation, reparation, restitution, rehabilitation, measures of satisfaction, and non-repetition.*
- *State Parties shall adopt adequate measures to guarantee that all victims of human rights violations or abuses committed by TNCs and OBEs have access to an independent and impartial judge to decide on their claim.*
- *State Parties shall adopt adequate measures to guarantee the life, security and integrity of victims, their representatives, witnesses, human rights defenders or whistle blowers, as well as proper assistance, including inter alia, legal, material and medical assistance, in the context of human rights violations or abuses resulting from the activities of TNCs and OBEs throughout their activities*
- *State Parties shall ensure that their legal systems guarantee the right to a fair trial, including the principle of equality of arms or its equivalent and the provision of legal aid, in proceedings concerning civil claims over which their domestic courts have jurisdiction, regarding human rights violations or abuses resulting from the activities of TNCs and OBEs.*
- *State Parties shall guarantee the avoidance of unnecessary delay in the disposition of cases.*
- *State Parties shall adopt adequate legal mechanisms to guarantee the access to information in the possession of the state, defendant or a third party, if such information is relevant to substantiating claims of human rights violations or abuses resulting from - and throughout - the activities of TNCs and OBEs under their jurisdiction. Exceptions must be clearly and narrowly drawn and must relate to a legitimate aim listed in the law; disclosure must threaten to cause substantial harm to that aim; and the harm to the aim must be greater than the public interest in having the information.*
 - *State Parties shall guarantee the prompt, fair and adequate restitution for violations or abuses of human rights caused by TNCs and OBEs as well as the environmental restoration of affected areas, including the respective expenses.*
 - *State Parties shall adopt adequate measures to guarantee the right to truth and non-repetition, in relation to human rights violations or abuses resulting from – and throughout – the activities of TNCs and OBEs.*

7. Jurisdiction

During the first and second session of the OEIGWG, there was a strong call to include elements regarding the need to have effective administration of justice and enforcement of judgments, considering the economic, historic and cultural circumstances of each State.

TNCs and OBEs “under the jurisdiction” of the State Party could be understood as any TNC and OBE which has its center of activity, is registered or domiciled, or is headquartered or has substantial activities in the State concerned, or whose parent or controlling company presents such a connection to the State concerned.

Particularly, it has been considered that the legally binding instrument has an enormous potential to avoid TNCs and other OBEs from making use of limitations established by territorial jurisdiction in order to escape from potential prosecution in the host States where they operate.

The inclusion of a broad concept of jurisdiction will also allow victims of such abuse by transnational corporations to have access to justice and obtain remediation through either the forum where the harm was caused, or the forum where the parent company is incorporated or where it has a substantial presence. Similarly, an instrument of this nature could allow the standardization of jurisdictional rules and human rights obligations, allowing victims to access prompt and effective access to justice.

Some elements that could be considered are:

- *State Parties shall adopt legislative and other adequate measures to ensure that their judiciaries are allowed to consider claims concerning human rights violations or abuses alleged to have been committed by TNCs and OBEs throughout their activities, including by firms, partnerships, corporations, companies, other associations, natural or legal persons, or any combination thereof, irrespective of the mode of creation or control or ownership, including their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.*
- *Adopt legislative measures to ensure their judiciaries can consider claims concerning violations or abuses committed by TNCs and OBEs under their jurisdiction or concerning victims within their jurisdiction and provide adequate remedy.*
- *Adopt legislative measures so that their judiciaries consider claims concerning violations or abuses committed by TNCs and OBEs and their subsidiaries throughout the supply chain domiciled outside their jurisdiction.*
- *A State has obligations to respect, protect and fulfil human rights in any of the following: a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law; b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of human rights, whether within or outside its territory; c)*

situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize human rights extraterritorially, in accordance with international law. (ETO Principle 9).

- *States must adopt and enforce measures to protect human rights through legal and other means, including diplomatic means, in each of the following circumstances: a) the harm or threat of harm originates or occurs on its territory; b) where the non-State actor has the nationality of the State concerned; c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned; d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory; e) where any conduct impairing human rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction. (ETO Principle 25).*

8. International Cooperation

Establishing mechanisms of international cooperation is a common issue in international law. On the matter of business and human rights, these mechanisms could promote and clarify rules on judicial cooperation, for example by including a list of actions which could encompass such elements as taking evidence, access to information and access and protection to witnesses.

International cooperation could also assist the courts and tribunals hearing a case with transnational elements to secure the enforcement of a judgement through preventive measures, such as the seizure and freezing of assets located in the jurisdiction of another State different to the one hearing the claim, or by avoiding the relocation of a company immersed in such procedures. It could also complement States' efforts to comply with their international human rights obligations by overcoming the challenges in such cases.

The proposed elements are:

- *State Parties shall mutually cooperate to prevent, investigate, punish and redress violations or abuses of human rights, and to ensure access to justice and effective remedy for those affected by adverse human rights impacts of TNCs and OBEs under their jurisdiction.*
- *To achieve this, State Parties shall, inter alia:*
 - *Adopt adequate measures to facilitate the necessary mutual legal assistance and exchange of information for the prompt identification,*

prosecution and enforcement of relevant judicial orders in cases of human rights violations or abuses committed by - or with the participation of - TNCs or OBEs under their jurisdiction, including to guarantee the speedy and proper treatment of the received request for the mutual legal assistance.

- *Adopt adequate measures for the coordination of judicial actions, including transfer of proceedings, when necessary, to avoid repetition.*
- *Adopt adequate measures to enable and facilitate the request and lending of mutual assistance to carry out joint or coordinated cross-border investigations, when necessary, or the collection of evidence of use in claims proceedings, access to witnesses, experts, and all other documents or objects necessary for the prosecution or investigation of the case.*
- *Adopt all necessary measures to allow and safeguard the participation of victims and witnesses in all stages of the investigation and adjudication of the case, as well as their representatives and defenders.*
- *Adopt adequate measures to ensure the recognition of foreign judgments that are enforceable in the State of origin and are no longer subject to review processes, except when the judgment was obtained by fraud or when the defendant was not given reasonable notice and a fair opportunity to present his case.*
- *Adopt adequate measures to ensure that foreign judgments are recognized and enforceable in each State Party as soon as the formalities required in that State have been complied with.*
- *State Parties shall strive to negotiate and adopt bilateral or multilateral cooperation agreements to enable their judicial bodies and other relevant State agencies to request legal assistance from relevant counterparts in other States with regards to judicial proceedings arising from business-related human rights violations*

9. Mechanisms for promotion, implementation and monitoring

Throughout the process of Res. 26/9, there has been much emphasis on the need to have adequate mechanisms at the national and international levels. Therefore, this binding instrument should take into consideration the role of national institutions in charge of the promotion and protection of human rights, as well as international judicial and/or non-judicial mechanisms, including treaty bodies and their experience from monitoring other international instruments on human rights.

Moreover, the existence of national and international mechanisms can strengthen the joint efforts of stakeholders to ensure prompt and effective accountability and redress as well as achieve good practices and tackle the challenges in the framework of the instrument.

Some elements that could be considered are:

- a) National Level:
 - *State Parties shall adopt adequate measures to ~~establish~~ ensure that national courts are available and can ensure the promotion, implementation and monitoring of this instrument. Additionally, State Parties should establish processes for ensuring that existing human rights institutions have these functions and the capacity to carry them out.. If State Parties do not have national human rights institutions, they should develop them in order to provide more opportunity for remedy to impacted communities.*
 - *To this end State Parties should also consider, inter alia, Ombudsperson institutions or National Human Rights Institutions.*

- b) International level:
 - *State Parties shall decide what international judicial and non-judicial mechanisms should be established for the promotion, implementation and monitoring of the instrument, and the following options could be considered:*
 - b.1. Judicial mechanisms
 - *State Parties may decide that international judicial mechanisms should be established, for instance, an International Court on Transnational Corporations and Human Rights.*
 - *State Parties may also decide to strengthen existing international judicial mechanisms and propose, for instance, special chambers on Transnational Corporations and Human Rights in existing international or regional Courts.*

 - b.2. Non-judicial mechanisms:
 - *State Parties may decide to establish a Committee on the issue of Business and Human Rights, which will have, among others, the following duties:*
 - *Examining the progress made by State Parties in achieving the realization of the obligations undertaken in the present instrument.*
 - *Assess, investigate and monitor the conduct and operations of TNCs.*
 - *Conduct country visits in accordance to its mandate.*
 - *Examine the periodical reports according to its mandate.*
 - *Receive and examine communications according to its mandate.*

The Committee shall consist of eighteen experts of high moral standing and recognized trajectory in the field covered by this Instrument. The members of the Committee shall be elected by State

Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, gender balance as well as to the main different legal systems.

10. General provisions

Some elements that could be considered are:

- *Signature and ratification, acceptance, approval or accession*
- *Entry into force*
- *Follow-up*
- *Clause establishing the primacy of this instrument over other obligations from the trade and investment legal regimes*
- *Clause on dispute settlement mechanism(s) on the interpretation and implementation of this instrument*
- *Denunciation*
- *Depository and language*

July 12, 2017

VIA email: onuginebra@mrrree.gov.ec; lgespinosa@yahoo.com

Mr. Luis Espinosa Salas, Counsellor
Permanent Mission of Ecuador to the United Nations Office and other International Organizations
in Geneva
Rue de Lausanne 80-82 (4th floor)
1202 Geneva

Dear Mr. Espinosa Salas,

The Center of International Environmental Law (CIEL) is a non-profit organization with offices in Washington, D.C. and Geneva, which uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL pursues its mission through legal research and advocacy, education, and training, with a focus on connecting global challenges to the experiences of communities on the ground. In the process, we build and maintain lasting partnerships with communities and non-profit organizations around the world.

CIEL commends Ecuador, South Africa, and the other nations that have contributed to the significant progress in the two meetings of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. In support of your mandate at the next meeting, to prepare and articulate conceptual and structural elements for the draft of a legally binding instrument, CIEL offers the following insights and recommendations.

CIEL and its partners are nearing completion of a four-year project that takes place in South Africa, India, and Kenya, where mining, oil exploration, and other large scale development projects continue to have a particular impact on women's rights to water, food, and a healthy environment.¹

Although these rights have gained recognition at the UN and with many of its member states, governments are failing to effectively protect, guaranty and implement these rights; consequently citizens are unable to enforce them.² Our work demonstrates the importance of the need to

¹ Both ENDS, ActionAid, Dhaatri, CIEL, Keystone Foundation, *Project summary: Upholding Human Rights: bridging the gender-environment divide* (2015).
<http://www.bothends.org/en/Publications/document/146/Upholding-Human-Rights---Bridging-the-gender--environment-divide>.

² Both ENDS, ActionAid, CIEL, Dhaatri, Keystone Foundation *Coal mining disrupts people's livelihoods in Mui Basin, Kenya*, p. 1 (2015).
http://www.bothends.org/uploaded_files/inlineitem/151123_HR_Kenya_def.pdf

improve the implementation of internationally recognized human rights to the benefit of local communities, and women in particular. An international legally binding instrument to regulate the activities of transnational corporations and other business enterprises (“TNC treaty”), within an international human rights framework, should include specific language to protect these rights.

I. Rights to water, food and healthy environment: gender dimensions

The Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights both recognize the right to an adequate standard of living, which includes the right to water and the right to feed oneself with dignity. The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) specifically provides for the right to “adequate water” and recognizes the right of women in rural areas to enjoy adequate living conditions, particularly in relation to sanitation and water supply.³ Water needs to be sufficient in quantity, acceptable in quality, safe, physically accessible and affordable for all.⁴ In addition, there is “strong evidence of converging trends towards greater uniformity and certainty”⁵ in the procedural and substantive human rights obligations relating to the environment, including the state’s obligation to “adopt legal and institutional frameworks that protect against, and respond to, environmental harm that may or does interfere with the enjoyment of human rights.”⁶

The rights to water, food, and a healthy environment have an important gender dimension. Because of the disproportionate role that they play in domestic and caregiving responsibilities, women are more affected by the absence of water.⁷ Carrying heavy loads of water, wood, coal as well as their children over long distances can lead to severe and chronic physiological problems for women. In addition, female farmers are responsible for cultivating and harvesting more than 50% of the world’s food.⁸ These heavy workloads keep young women from going to school.⁹ In

³ ActionAid, *Living next to the mine; women’s struggles in mining affected communities*, p. 21 (31 January 2017),

<http://www.actionaid.org/south-africa/publications/living-next-mine-womens-struggles-mining-affected-communities>.

⁴ UNDESE, *Water for Life Decade – Human Right to Water* (29 May 2014),

http://www.un.org/waterforlifedecade/human_right_to_water.shtml.

⁵ Knox, John, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, para. 27, A/HRC/25/53 (30 December 2013).

⁶ *Id.* para. 47.

⁷ Both ENDS, ActionAid, Dhaatri, Keystone Foundation, Forest People Program, *Coal mining threatens people’s access to water in Mpumalanga, South Africa*, p. 2 (2016),

<http://www.bothends.org/en/Publications/document/175/Coal-mining-threatens-people-s-access-to-water-in-Mpumalanga,-South-Africa>; De Schutter, Olivier, *Report submitted by the Special Rapporteur on the right to food; Women’s rights and the right to food*, para. 3, A/HRC/22/50 (24 December 2012); De Albuquerque, Catarina, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation; Integrating non-discrimination and equality into the post-2015 development agenda for water, sanitation and hygiene*, paras. 27 & 33, A/67/270 (8 August 2012); De Albuquerque, Catarina, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation on her mission to Kenya (22–28 July 2014)*, paras. 78-79, A/HRC/30/39/Add.2 (6 July 2015).

Heller, Léo, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation*, para. 15, A/HRC/33/49 (27 July 2016).

⁸ Erver, Hilal, *Report of the Special Rapporteur on the right to food*, para. 5, A/HRC/31/51 (14 December 2015).

addition, women and girls face particular barriers in accessing water and sanitation, both within the household and when accessing community and public facilities.¹⁰ “Cultural, social, economic and biological differences between women and men consistently lead to unequal opportunities for women in the enjoyment of the human rights to water and sanitation, with devastating consequences for the enjoyment of other human rights and gender equality more generally.”¹¹

Therefore, when Transnational Corporations (TNCs) and Other Business Enterprises (OBEs) hinder communities’ access to water or food by preventing access to and polluting land and water sources during mineral extraction or oil exploration¹² or through the mismanagement of public water and sanitation services concessions,¹³ women are particularly affected.

Large-scale development and mining activities may also result in denying people’s access to land and water by virtue of forced resettlement, which has a direct impact on sources of livelihood.¹⁴ Mining activities and the chemical processes involved in extraction are also likely to pollute water sources that can threaten human health.¹⁵ For instance, until 2010, the Silobela Township in Carolina, South Africa enjoyed easy access to clean water through pipelines. Due to mining activities in the area, the tapped water became contaminated. Many people became sick and were advised by their doctors to stop using the tap water; unfortunately residents in the area who were unemployed were unable to afford to buy water. Consequently, community members had to walk long distances to collect water from schools in the area that had not been affected by the contamination. This type of pollution has a particular effect on women because collection of water is a time consuming and physically harmful task, mostly carried out by women and young girls.¹⁶

Recommendation:¹⁷ The TNC treaty should address the disproportionate impact to women of violations of the right to water, food, and a healthy environment by requiring, through legislation, that state and non-state actors analyze the impacts of planned activities, including both actions and omissions, on women and girls. The analysis should address both gender specific aspects of generic human rights violations and gender specific impacts of seemingly gender-neutral policies.

⁹ ActionAid, *supra* note 3, at 14; De Albuquerque (2012), *supra* note 7, para. 67; De Albuquerque, Catarina, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation; Common violations of the human rights to water and sanitation*, para. 62, A/HRC/27/55 (30 June 2014).

¹⁰ De Albuquerque (2012), *supra* note 7, para. 67.

¹¹ Heller, *supra* note 7, para. 1.

¹² ActionAid, *supra* note 3.

¹³ Krajewski, Markus, *Ensuring the primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights*, p.11 (CIDSE 2017) <http://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html>; Murphy, Sharmila, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over Privatization*, Berkeley Journal for International Law 31-89 (2013).

¹⁴ Erver, Hilal, *Report of the Special Rapporteur on the right to food, Access to justice and the right to food: the way forward*, para. 40, A/HRC/28/65 (12 January 2014).

¹⁵ Both ENDS, et al., *supra* note 2; De Albuquerque, Catarina, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation*, para. 78, A/69/213, (31 July 2014).

¹⁶ UNDESE, *Water for Life Decade – Gender and Water* (23 October 2014). <http://www.un.org/waterforlifedecade/gender.shtml>.

¹⁷ See, generally, Meyersfeld, Bonita, *Business, Human Rights, and Gender*, in Deva, Surya, and David Bilchitz, eds., *Human rights obligations of business: beyond the corporate responsibility to respect?* (Cambridge University Press, 2013).

This analysis should pay particular attention to sector-specific considerations that have distinct impacts on women's human rights and to the identification of potential unintended consequences.

In particular, the treaty should require state and non-state actors to determine whether their proposed activities would create, encourage, reinforce or exacerbate existing gender-based inequities within the state, community, and family.

The treaty should also require state and non-state actors to conduct the analysis of impacts to women and girls in a meaningful and timely manner, integrate and act upon the findings of this analysis, communicate how impacts to women are addressed, and identify specific goals or targets to achieve equality for women in human rights.

II. Underlying societal discrimination

The Convention on the Elimination of All Forms of Discrimination against Women requires states to eliminate discrimination against women by any person, organization, or enterprise. Despite this, broad societal forms of discrimination underlie the heightened burdens women bear with respect to food and water. These burdens stem from discriminatory laws, social norms, and customs that lead to gender inequality and a lack of social, economic and political power.¹⁸ Consequently, women face unequal access to productive resources such as land and to economic opportunities; an unequal bargaining position, unequal gendered division of labor and gender-based violence within households; marginalization from decision-making spheres at all levels; and legal barriers that prevent women from gaining food and water security.¹⁹ Thus, hunger and poverty affect women disproportionately, as women account for 70% of the world's hungry.²⁰

Recommendation: The TNC treaty should require states to prohibit all forms of discrimination against women. This includes requiring states to take active measures to prosecute and punish private actors who commit rights violations. The treaty should make clear that the state obligation to prohibit discrimination against women relates to any act or omission of a state, within or beyond its territory, that has effects on the enjoyment of women to equality and to all human rights outside of that state's territory.

III. Participation in decision-making, compensation, and non-judicial grievance mechanisms

Article 25(a) of the International Covenant on Civil and Political Rights provides for the right to participate in public affairs and article 14(2)(a) of CEDAW specifies that women living in rural areas have the right to "participate in the elaboration and implementation of development planning at all levels." However, women are often left out of the consultation processes with the state or TNCs and OBEs during development projects.²¹ Social norms legitimize this exclusion.²²

¹⁸ Ziegler, Jean, (2003) *Report of the Special Rapporteur on the right to food*, para. 13 A/58/330, (28 August 2003); Erver, Hilal, (2014) *Interim report of the Special Rapporteur on the right to food*, para. 29, A/69/275 (7 August 2014).

¹⁹ De Schutter, *supra* note 7, paras. 2 and 32; Erver, *supra* note 14, para. 30. Ziegler, *supra* note 18, para. 22; Erver, *supra* note 8, paras. 13 & 17.

²⁰ Erver, *supra* note 8, para. 4.

²¹ *Id.*, para. 6; ActionAid, *supra* note 3, p. 3.

Women therefore have few or no options to engage in decision-making about how to improve their access to food, water and sanitation, or a healthy environment. In Kenya, women are “barred from effective participation in decision-making over developments that concern the land that belongs to their households and community.”²³ Similarly, as Lindiwe Matshiane, who lives in Tokologo in Middelburg, Mpumalanga, South Africa, only a few meters away from the Coal Shanduka mine, explains, “Many people in my area are suffering from illnesses such as tuberculosis, asthma and bronchitis, leading to an increase in women’s unpaid care work. Our women are not consulted at all, or are unable to attend meetings where decisions are made due to their heavy role as caretakers.”²⁴

In addition, the government may not consult the local communities at all as part of the decision-making process. After the Kenyan government awarded a coal mining concession to the Chinese company Jung’u and its subsidiary Fenxi Mining Industry Ltd in the Mui Basin, the government decided to expropriate the land of local communities without the community’s consent.²⁵

Often, the government and TNCs entirely exclude the community from negotiations about compensation. For example, when the Kenyan government awarded the concession for the Mui Basin mine, the local communities were not involved in the negotiations to determine their relocation and resettlement or the compensation for their loss of land.²⁶ Notwithstanding the lack of inclusion in decision-making, when the government and TNCs do consult community members regarding compensation for lost land, very often only the men are involved.²⁷

Furthermore, when the government or TNCs do compensate communities, the compensation is unlikely to be sufficient. For example, in South Africa, a state grant provided as compensation due to water contamination and the existence of barriers to water caused by a mine was insufficient to cover the expense of accessing alternative water sources.²⁸

Additionally, TNCs and OBEs often exclude women from participation in non-judicial grievance mechanisms.²⁹

Recommendation: The TNC treaty should obligate states to enact national legislation requiring the full and active participation of women, represented at least in equal proportions to men, in any relevant consultation, decision-making and remedial processes.

IV. Access to judicial remedies

Article 15 of CEDAW provides that women and men must have equality before the law and

²² Erver, *supra* note 18, para. 45.

²³ Both ENDS, et al., *supra* note 2, p. 1.

²⁴ Both ENDS et al., *supra* note 1, p. 1.

²⁵ Both ENDS, et al., *supra* note 2, p. 1.

²⁶ *Id.*

²⁷ Both ENDS, et al., *supra* note 1, p. 1.

²⁸ ActionAid, *supra* note 3, p. 20.

²⁹ Working Group on Human Rights and Transnational Companies and Other Business Enterprises, *Report on the ‘Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience’ Expert Working Group held in Toronto in 2013*, p. 15, A/HRC/26/25/Add.3 (28 April 2014).

benefit from equal protection under the law. In addition, although the right to food was once viewed as a “positive right,” it is gradually being recognized as a justiciable right.³⁰ Yet, many states remain reluctant to recognize the right to food or to elevate this basic right to a constitutional level. At present, there are few examples of cases whereby national courts have actually issued rulings on to the right to food.³¹

Women face barriers accessing justice in many countries, due to their marginalized position in society, a lack of information and knowledge about their legal rights, discriminatory domestic laws, and fear of retribution when they seek effective remedy.³² In many countries, women are not recognized as juridical equals, which prevents them from fully realizing their right to food, water, and a healthy environment.³³

Some jurisdictions have enacted laws that shield business from being held accountable for human rights violations and make it difficult for victims to obtain an effective remedy.³⁴ Thus, when women’s rights to water, food and a healthy environment are violated either by a TNC’s conduct or lack of due diligence, women are unable to access effective remedies.³⁵

Women also face significant barriers to accessing justice due to a lack of information and knowledge about their rights and the ways to claim their protection, including a fear of retribution or ostracism if they do.³⁶ In addition, women in remote areas have difficulty reaching the cities where courts are located, due to the time, expenses, and care-giving responsibilities they have. As a result, women tend to be denied access to justice more often than men, and are also more likely to be denied justice altogether.³⁷

Further exacerbating the challenges women already face in getting access to remedies for violations of their rights to food, water, and a healthy environment is the proliferation of trade and investment agreements with investor-state dispute settlement provisions.

These provisions have enabled corporations to challenge government decisions and regulations that protect the environment, demanding either revision or compensation for lost profits. Owing to the significant financial liability when losing a suit filed by an investor, states may be reluctant to protect women’s rights to water and food when they are party to these agreements.

This is often called the “chilling effect” of trade and investment treaties. For example, ISDS tribunals might obstruct the freedom of states to implement laws regulating the provision of public services, such as water and sanitation services, when these sectors have been privatized.³⁸ Yet the very absence of government regulations in the area of services such as water is often the cause of violations of the right to those services.³⁹

³⁰ Erver, *supra* note 14, para. 13.

³¹ *Id.* paras 26-27.

³² *Id.*, para. 13; Committee on the Elimination of Discrimination against Women, *General Recommendation on Women’s Access to Justice*, paras. 3, 8, & 21, CEDAW/C/GC/33 (23 July 2015).

³³ Zigler, *supra* note 18, para. 22.

³⁴ Erver, *supra* note 14, paras. 44 & 54.

³⁵ CEDAW, *supra* note 34, paras. 21-22; FAO, *Non-judicial grievance mechanisms in land-related disputes in Sierra Leone*, p.16 (FAO Legal Papers, No. 99, 2016).

³⁶ CEDAW, *supra* note 34, paras. 10 & 22.

³⁷ Erver, *supra* note 14, para. 33.

³⁸ Krajewski, *supra* note 13, pp. 11-12; Murphy, *supra* note 13.

³⁹ De Albuquerque, *supra* note 9, paras 27.

Recommendation: The treaty should require states to ensure that women have access to an effective grievance mechanisms and remedies, including by removing obstacles to women’s access to justice and by requiring remedies to be gender sensitive and distributed on the basis of non-discrimination.

The treaty should also obligate states to ensure effective compensation for damages to property, environmental damages, and any human rights violations that can be attributed to the conduct or lack of due diligence by TNCs or OBEs. “Damages” should include, but not be limited to, the deprivation of access to clean water sources and a healthy environment and the right to feed oneself with dignity.

The treaty should emphasize that State Parties have an obligation to provide access to justice and reparation, preferably through the courts, for rights violations in the context of business activities, whether the harm to victims occurs on the territory of the State Party concerned or outside its territory.

We thank you for the opportunity to provide this input with the goal of enhancing the treaty. We sincerely hope you will incorporate our suggested recommendations. Please do not hesitate to contact us through Layla Hughes at lhughes@ciel.org should you have any comments or questions regarding this submission.

Sincerely,

Layla Hughes
Carla García Zendejas
Center for International Environmental Law

Partner organizations

Danielle Hirsch
Both ENDS

Maria van der Heide
ActionAid

Snehlata Nath
Keystone Foundation

Bhanumathi Kalluri
Dhaatri Trust