

Oral Statement by FIAN International during the 4th session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights: Statement on Articles 6, 7, and 13

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My name is Michael Nanz, I am from FIAN Switzerland and I speak in the name of FIAN International. We would like to briefly express our views on Articles 6, 7, and 13.

Concerning article 6 on the Statute of limitations, we support it as statute limitations can represent a barrier to access justice.

Concerning article 7 on Applicable law, we also fully support it. On the one hand, it corresponds to the definition of jurisdiction in a broad manner, and on the other hand, it strengthens the protection of victims as they can choose the law which is more favourable to them.

With regard to article 13 on Consistency with International law, we have major concerns how the Zero Draft deals with trade and investment agreements.

The discrepancy between the binding agreements and effective arbitration mechanisms in the area of trade and investment on one side and human rights law mainly based on voluntary regulations in the area of business and human rights on the other side is well known. This leads to situations where trade law trumps over human rights law when there exist contradictions. One of the biggest concerns for civil society is the fact that arbitration mechanisms can hinder States' capacity to comply with their human rights obligations under international law.

The draft at least recognizes this potential conflict. The formulation of article 13 attempts to build a bridge between those defending existing trade and investment agreements and those calling for the primacy of human rights. What we perceive as a compromise text results in fact in a weak protection of human rights and does not really contribute to overcoming the problem. We consider that the existing reference to international treaties in art. 13.3 should be eliminated and that the primacy of human rights should be affirmed, based on articles 103, 1 and 55 of the UN Charter.

Although article 13.6 aims at preventing the negative effect of arbitration mechanisms, the compromise text used is too ambiguous in order to be effective. We therefore propose to add the following text:

"When the use of arbitration mechanisms has the potential to impair or nullify States' capacity to meet their human rights obligations derived from international human rights law, the use of such mechanisms shall be excluded and the case shall be addressed to the formal justice systems of the involved States, following the rules of international law."

Article 13.6 as it stands will only have a real effect only on future trade and investment agreements. Therefore, we consider a para. should be added stating that, within a given period, existing trade and investment agreements shall be examined by means of Human Rights Impact Assessments whether they contradict the Convention, and if so, shall be adapted so as to comply with the Convention.

Thank you.