## Written contribution: Zero draft a good starting point towards the historic opportunity for a binding treaty on business and human rights

to the fourth session of the “open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 14-19 October 2018, Room XX, Palais des Nations

Verein Sudwind Entwicklungspolitik (Südwind Austria), Laudongasse 40, A-1080 Vienna, Austria

represented by
Mr. Stefan Grasgruber-Kerl, stefan.grasgruber-kerl@suedwind.at , +4369910040079

Mr. Matthias Haberl, matthias.haberl@suedwind.at

By e-mail to igwg-tncs@ohchr.org

Südwind and the wider “Treaty Alliance Austria”, a coalition of NGOs and trade unions, welcome the start of the discussion about the content of the long-awaited legally binding international instrument at the fourth session of the Working Group. The “Zero Draft”, published by the chair and rapporteur of the IGWG, will be a constructive basis for fruitful discussion. The draft addresses important issues to meet the global challenge of global human rights abuses by the activities of transnational corporations and other business enterprises.

In September 2012 so nearly exactly 6 years ago 254 workers lost their lives and another 55 were injured in the Ali Enterprises Fire Inferno in Karachi, Pakistan sewing our clothes we are wearing daily. In April 2013 in an even more tragic catastrophe 1135 mainly women workers were killed and over 2400 injured when the Rana Plaza building collapsed in Dhaka, Bangladesh. Till today the corporations that produced their clothes in these factories could not be held accountable. Coming from this daily work as human rights NGOs on workers rights violations in the international garment industry and human rights violations by so-called free trade agreements and as trade unions on workers and human rights as well as the ILO conventions we know that it is high time for a binding treaty to hold corporations accountable to human rights.

Building on the "Elements Paper" on the third IGWG session in 2017 and subsequent consultations in 2018, the structure, consistency and focus of the “Zero Draft” text are a major step forward, reflecting a number of proposals and also concerns raised. In this light it is a solid basis for further constructive debate and dialogue.

Therefore we call on all states - in particular the EU and Austria, that is currently holding the presidency of the EU-Council and will hopefully be elected as new member of the UNHRC today Friday 12th October - to support and constructively engage in this and upcoming sessions of the IGWG.

We welcome the following positive aspects of the zero draft:

1. Complementarity with the UN Guiding Principles on Business and Human Rights: The “Zero Draft” includes important ways to strengthen preventive mechanisms, crucial for avoiding future environmental and human disasters due to corporate negligence or willful disregard for standards of safety and the rights of people at risk. The text reinforces and strengthens the four-step due diligence approach of the UN Guiding Principles on Business & Human Rights by giving it a legally binding nature via national legislation in Article 9.2.

2. Focus on improving access to remedy with an emphasis on victims’ rights: We welcome a broad definition of jurisdiction and of applicable law in Article 5.1 and 7.2. respectively. The definition of the companies’ domicile in Article 5.2 as the “statutory seat, or central administration, or substantial business interest, or subsidiary, agency, instrumentality, branch, representative office or the like”. The choice of the victim on jurisdiction and applicable law is a big step to ensure victims' rights.

3. Legal liability across the value chain: Corporate accountability for human rights abuses in the international value and supply chain is one of the main challenges of globalization. Article 9.2 constitutes an important step in this direction, by covering “activities of the business’s subsidiaries and entities under their direct or indirect control or directly linked to its operations, products or services”. This could be further strengthened by including business relationships related to supply, export, services, insurance, finance and investment. We welcome the connection between due diligence and liability as recognized in Article 9.4., as well as the inclusion in the “Zero Draft” of the reversal of the burden of proof (Article 10) in the context of huge power and resource asymmetries between corporations and affected communities. It could become a legal basis for victims to oppose the corporate veil and ensure parent company responsibility. The boundaries of civil, criminal and administrative, personal and collective liability need further discussion to provide greater legal certainty. Especially supply chains in the garment, electronics or raw material supply chains are so complex that the liability across the value chain is of utmost importance.

At the same time, we identify the need for improvements in the following areas:
1. Primacy of human rights in trade and investment policies: Trade and investment agreements are reinforcing a power and legal imbalance, giving corporate actors privileged access to private arbitration tribunals through the Investor-State Dispute Settlement Mechanism, allowing corporations to drive decisions on national regulation of labor rights, health and environmental standards, while communities whose rights have been abused struggle to have access to justice. The importance of this issue and the value the treaty could bring in helping to avoid such conflicts is recognized in Article 13.6. However, the “no derogation” rule in Article 13.3 could be understood as continuing to allow those agreements to have some restrictive effect on the state duty to protect human rights. A specific clause on the primacy of human rights obligations over other obligations in trade and investment agreements is recommended to clarify this relationship, adding to regulatory certainty and a stable legal environment.

2. Protection of human rights defenders: In our daily work defending workers and trade unionists in global supply chains of garments, IT as well as tropical fruits we must defend the human rights of human rights defenders. There’s an urgent need to reinforce states’ obligation to protect human rights defenders working in the context of business activities. We call for legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any person who seeks to exercise their human right to peacefully protest against and denounce abuses linked to corporate activity. Furthermore we call on states to refrain from restrictive laws and establish specific measures to protect human rights defenders against any form of criminalization and obstruction to their work, including gender-specific violence against women human rights defenders. We also ask that children and youth as well as trade unionists and NGOs, as human rights defenders be protected and empowered and that attacks and intimidation of human rights defenders be fully, promptly and independently investigated and punished.

3. Enforcement mechanisms need to be stronger: Enforcement mechanisms will be crucial to the success of the treaty: Using the resources of a range of international, regional and national entities, including national human rights institutions and labour tribunals, as well as stepping up monitoring systems will be an important part of making progress. International action is necessary to address important and acknowledged gaps and to help to strengthen national judicial systems. In this light, the “no derogation” rule in Article 13.3 could severely weaken the effectiveness of the treaty, as certain existing laws may represent obstacles to justice. Institutional provisions in Article 14 and the optional protocol must be seriously reviewed: while we welcome the establishment of a complaints mechanism, the attributed competences may be too weak to arbitrate known international challenges and conflicts, as compared to potential international judicial mechanisms such as an international court. We therefore recommend a more balanced approach between the national, regional and international levels of action for the treaty to work effectively in practice.

Growing support from states, civil society and European Parliament

There's a large global movement and increased support among states, academia, civil society organizations and especially the European Parliament - reinforced by its new resolution of 4th October - to address the global challenge of human rights abuses by transnational corporate activities through a global binding instrument on business and human rights.

We call on all states to face up to this challenge by formulating constructive proposals for further elaboration at the fourth IGWG session. We believe that a focus on substantive issues is necessary to move the negotiations on the text for the treaty forward. This debate is necessary to face these challenges of globalization and help to put a stop to corporate-related human rights abuses.

We urge all member states - and especially the European Union and our country Austria, that is currently holding the presidency of the EU-Council - to use this historic opportunity to discuss and support the UN treaty in a constructive and open spirit until the “mandate to elaborate an international legally binding instrument” established by UN Human Rights Council Resolution 26/9 is fulfilled and such instrument is in force.