Mind the Gap Submission to the Open-ended intergovernmental working group on transnational corporation and other business enterprises with respect to human rights

Additional textual suggestions on the revised draft legally binding instrument

February 2020

Introduction

Mind the Gap is a four-year research project involving civil society organizations from around the world working on business and human rights, responsible business conduct and corporate accountability. The project advances research and analysis relevant to the treaty drafting process, including:

- In-depth study of select cases of protracted business-related human rights conflicts, with the goal of identifying harmful strategies that corporations are using to avoid responsibility, and specific governance gaps and barriers to justice in each case.
- Comprehensive investigation of corporate strategies for creating, maintaining and exploiting gaps and barriers to justice at national and international levels.
- Examination of successful and promising counter-strategies of human rights defenders and civil society organisations.

The project was presented at the 2018 and 2019 UN Forum on Business & Human Rights. The results and findings of the research project will be made publicly available in the course of 2020 on a dedicated website: www.mindthegap.ngo. Based on our research, we have formulated clear and distinct proposals for wording in the next draft of the Legally Binding Instrument (LBI).

In the tables below, we describe six harmful phenomena and governance gaps adversely affecting rights holders in business human rights cases; examples that evidence the need for new/adapted treaty provisions; and a reference to existing relevant treaty provisions that could address the harmful phenomenon. Each table is followed by a section describing the grounds for our new proposed wording (e.g. international/national law; state and business practice). Then a section with the proposed wording itself is presented. Finally, more information about the organisations signing this submission can be found.

Thank you for your hard work and consideration.

ACIDH, Al-Haq, ECCJ, PremiCongo, PODER and SOMO

1. STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION		
Description	**Examples**	**Relevant existing wording / provisions in the revised LBI**
Since the 1980s, "SLAPP" (Strategic Lawsuit Against Public Participation) has become a common term for lawsuits brought by companies against civil actors for the sole purpose of intimidating and silencing public opposition to, or criticism of, their activities. In these cases, the heart of the corporate plaintiff's claims – e.g. defamation or libel – is a secondary motivation; the primary motive is to intimidate, threaten or otherwise overwhelm the civil society actor with burdensome litigation proceedings. Actions provoking corporate SLAPP suits have included writing letters to the editor, circulating petitions, participating in a demonstration, commenting at public hearings, and filing complaints or lawsuits. SLAPP suits allow well-funded corporate plaintiffs to harass civil society actors with expensive, protracted and ultimately ill-founded litigation which is by definition abusive. SLAPP suits have a considerable "chilling effect" on public discourse and have been known to destroy civil society defendants without the means or funds to defend themselves by responding in court. In her SLAPPS Info Note, former UN Special Rapporteur to the rights to freedom of peaceful assembly and of association, Ms Ciampi, states: " SLAPPs have seen a significant increase worldwide, with certain legal frameworks proving to be particularly fertile ground for the proliferation of this phenomenon" and identifies the proliferation of SLAPPS in Ecuador, the Philippines, India and South Africa in particular.	• **Energy Transfer Partners v. Greenpeace, Banktrack** NGOs Greenpeace and Banktrack campaigned against the controversial U.S Dakota Access Pipeline by writing and organising public letters to the financial institutions supporting the pipeline. In August 2017 the NGOs were taken to court by Energy Transfer Partners, the company running the pipeline, which alleged that the NGOs had engaged in "racketeering" under the *Racketeer Influenced and Corruption Organizations Act*. The civil society defendants were drawn into a lengthy and expensive court case that used up a lot of their time and resources. Energy Transfer Partners dropped the litigation against Banktrack after almost a year of proceedings, but the suit against Greenpeace is ongoing.[1] • **Vinci Construction v. Sherpa** In 2015, French legal NGO, Sherpa, initiated proceedings against French construction multinational VINCI and its Qatari subsidiary, alleging that they were using forced and bonded labour in their Qatari operations. In response, VINCI initiated defamation proceedings against Sherpa and three individual VINCI employees, filing for damages of over 400,000 euros. The defamation proceedings lasted over two years, draining much of Sherpa's resources as well as putting the employees under psychological pressure. All of these SLAPP suits were ultimately dismissed.[2] • **Pilatus Bank v. Caruana Galizia** Daphne Caruana Galizia was an investigative journalist who focused on corruption stories in Malta. On her blog, she reported allegations that the Maltese Platus Bank was being used to launder money, that it secretly held documents related to the wife of the Maltese Prime Minister, and that it had ordered staff to conceal information from the Maltese financial authorities. Subsequently, Pilatus Bank filed a SLAPP suit against Caruana Galizia in the court of the U.S. state where her blog was registered.[3] The bank dropped the case after Caruana Galizia was killed by a car bomb in October 2017.[4]	**Article 4: Rights of Victims** § 9. State Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment, so that they are able to act free from threat, restriction and insecurity.

1 Anti-SLAPP measures

1.1 Grounds for wording on Anti-SLAPP measures

So-called "anti-SLAPP" legislation protecting civil society actors from corporate SLAPP suits exists in a large number of states across Australia[5], Canada[6] and the U.S.[7] As of 2020, the European Commission has also begun preparing EU-level anti-SLAPP legislation.[8] Anti-SLAPP regulations can be derived from international and regional principles protecting freedom of expression and of speech, such as Art. 19 of the *International Covenant on Civil and Political Rights* and Art. 10 of the *European Convention on Human Rights*.

The UN Committee on Economic, Social and Cultural Rights developed States' obligation to protect individuals under their jurisdiction from interference by third parties in its *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights* in the context of Business Activities[9] by imposing a positive duty on States to create a legal framework that guarantees citizens' human rights.[10] It states,

> "The introduction by corporations of actions to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation's reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies" (para. 44).

A 2016 joint report by a former Special Rapporteur on the rights to freedom of peaceful assembly and of association and former Special Rapporteur on extrajudicial, summary or arbitrary executions[11] states: "Business entities commonly seek injunctions and other civil remedies against assembly organizers and participants on the basis, for example, of anti-harassment, trespass or defamation laws, sometimes referred to as strategic lawsuits against public participation. States have an obligation to ensure due process and to protect people from civil actions that lack merit"[12].

Another former UN Special Rapporteur to the rights to freedom of peaceful assembly and of association, Ms Ciampi made the following recommendations to States in her *SLAPPs Info Note*:

> "States should protect and facilitate the rights to freedom of expression, assembly and association to ensure that these rights are enjoyed by everyone by, inter alia, enacting anti-SLAPPs legislation, allowing an early dismissal (with an award of costs) of such suits and the use of measures to penalize abuse."[13]

Finally, in its *Guidance on National Action Plans on Business and Human Rights*, the UN Working Group on Business and Human Rights recommended that States enact anti-SLAPP legislation to ensure that human rights defenders do not incur civil liability for their activities.[14]

1.2 Inclusion of anti-SLAPP provisions in the LBI

Despite the existing Art. 4.9 of the draft treaty text, there is no clear provision or wording addressing the now well-known and harmful phenomenon of SLAPPs. Given the clear value and relevance of anti-SLAPP protections for business and human rights advocates, trade unionists, activists, academia, civil society organisations, individual citizens, as well as human rights defenders and victims of corporate human rights and environmental abuses, we believe the treaty text should contain clear and explicit wording elaborating the state duty to protect as a duty to pass anti-SLAPP legislation. We submit for your consideration the following wording, either to be added to Art. 4.9; or inserted as a new 4.10:

➔ **State Parties shall ensure effective legislative and judicial protection from frivolous Strategic Litigation Against Public Participation (SLAPP) lawsuits brought by corporate plaintiffs against civil society actors, including but not limited to NGOs, civil society groups, trade unions, citizens, journalists and human rights defenders, in order to protect the latters' right to free speech, association, petition and public communication from ill-founded judicial claims amounting to intimidation and harassment. Civil society actors shall be afforded a special motion to swiftly dismiss such frivolous SLAPP claims against them with award of costs and initiators of SLAPP actions shall be subject to penalties and sanction.**

2. IMPROPER OR INADEQUATE INDIGENOUS COMMUNITY ENGAGEMENT		
Description	**Examples**	**Relevant existing wording / provisions in the revised LBI**
Indigenous communities are some of the most impacted by business operations, given the value of the natural resources that exist in and on their lands. However indigenous communities are continuously denied proper consultation through which they may either consent to or reject a project, even though they have a recognised right to Free, Prior and Informed Consent	• **Vedanta's operations in Niyamgiri, India** In 2002, Vedanta Aluminium Limited began acquiring land inhabited by the Dongria Kondh indigenous community for a proposed refinery in Niyamgiri. The community relied on this land for sustenance. Indigenous inhabitants were not properly consulted and did not have access to the necessary relevant information, so they were not aware of the potential impacts of the mine until well after the land had been acquired by the company.[15] Furthermore, it has been reported that Vedanta's private security forces repeatedly intimidated those that protested against the development and pursued a "campaign of fear" in Niyamgiri.[16] A long legal battle has ensued, with property rights and economic development continuing to clash, even though the Indian Supreme Court decided in 2013 that Vedanta's mining activities could only be implemented if all local communities agreed.[17] • **Wanbao Mining operations in Letpadaung, Myanmar** In 2011, Wanbao Mining began operations in Letpadaung, originally presenting a comprehensive CSR plan including promises of employment and significant financial compensations for every family that would loose land. The company claimed that "every villager impacted by the project had a direct one-on-one discussion with the Myanmar Wanbao leadership."[18] CSO researchers found this not to be true, concluding that "the company claims are false, and that far from reaching all affected people, the consultations excluded many people affected by the land acquisition".[19] Internal company documents revealed that only 1,032 of the estimated 16,694 most highly impacted inhabitants were consulted.[20] The mine has consistently been associated with negative human rights impacts, including a series of forced evictions causing public protest and subsequent violent suppression.[21]	**Article 5: Prevention** § 3. Measures referred to under the immediately preceding paragraph shall include, but shall not be limited to: b. Carrying out meaningful consultations with groups whose human rights can potentially be affected by the business activities, and with other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas. **Consultations with indigenous peoples will be undertaken in accordance with the internationally agreed standards of free, prior and informed consultations, as applicable.**

2 Free Prior and Informed Consent

2.1 Grounds for wording to ensure Free Prior and Informed Consent (FPIC)

Free Prior Informed Consent (FPIC) is an international legal standard derived from *the United Nations Declaration on the Rights of Indigenous Peoples* (2007)[22], *the International Labour Organization Convention 169* (1989)[23] and the *Convention on Biological Diversity* (1993).[24]

FPIC is a specific right that pertains to indigenous peoples allowing them to give or withhold consent to a project that may affect them or their territories. In the event that they go give their consent, they are entitled to withdraw it at any stage. Furthermore, FPIC enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. This is also embedded within the universal right to self-determination.

The standard has been incorporated into national laws in countries such as Bolivia, and has begun to be taken up in standard-setting by international organisations such as the World Bank's International Finance Corporation and the International Council of Metals and Mining.[25] The Food and Agricultural Organization also operates under this principle.[26]

2.2 Inclusions of FPIC wording in the LBI

We submit for your consideration that, given its particularity as a distinct international standard, the issue of indigenous consultation requiring free, prior and informed consent in Art.5 be taken out of the existing Article 5(b) and placed in its own sub-article of 5(c) with wording to the following effect:

- ➔ **Business operations that significantly impact indigenous peoples and their land will only progress with their free, prior and informed consent and will be undertaken in accordance with the internationally agreed standard of free, prior and informed consent.**

3. NON-DISCLOSURE OF SUPPLY CHAIN INFORMATION		
Description	**Examples**	**Relevant existing wording / provisions in the revised LBI**
Lead firms at the top of supply chains often do not properly map or do not publicly disclose who their suppliers are or where they are source from. Without such supply chain information, specifically information regarding the names and locations of suppliers, advocates are left unable to hold lead firms and parent companies to account for harms that take place in the supply chain; it becomes difficult to assess the due diligence measures taken. Supply chain disclosure enables civil society to assist companies in fulfilling their due diligence responsibilities by identifying how the lead firm/parent company can exert pressure and use its influence to improve conditions in the supply chain.	• **Global Mica Mining** Mica mining has been associated with violations of children's rights. There is a high risk of child labour in the industry, and there were 7 child deaths in 2 months in India in 2016[27]. Investigations reveal that electronics and automobile companies that participated in the Responsible Minerals Initiative (RMI), which includes more than 360 members, were largely unaware of the source of the mica present in their products, because the companies they source from were not able to provide them with the information either.[28] • **Textile Transparency** Since 2005, Nike and Adidas have been publishing their supplier factory information, and other brands have followed. Some brands that closely guarded factory names as "competitive information" have now released this data. In 2013, fashion group H&M—which, according to a company representative, used to keep its supplier factories list locked in a safe in Stockholm—became the first fashion brand to publish the names and addresses of its supplier factories. Other companies followed suit in 2016, with big companies like C&A, Esprit, Marks and Spencer, and Gap Inc. also publishing information about their suppliers.[29]	**Article 5: Prevention** § 3. Measures referred to under the immediately preceding paragraph shall include, but shall not be limited to: c. Reporting publicly and periodically on financial and non-financial matters, including policies, risks, outcomes and indicators on human rights, environment and labour standards

3 Corporate and supply chain transparency

3.1 Grounds for wording to ensure corporate and supply chain transparency

In some jurisdictions, such as the United States[30], it is possible to obtain important information about a company's supply chain through information requests to the government. In some jurisdictions, this data can be purchased from the government or from companies responsible for managing import/export data. This data is valuable as it enables business and human rights advocates to trace the supply chains of companies in their jurisdiction to see where the company is sourcing from, and where (and subsequently how) its products are made. It can then enable them to hold the company to account and assist with its due diligence efforts.

The release of supply chain information is now considered best practice in the textile and garment sector, with major brands and labels voluntarily releasing this information for accountability purposes.[31] Evidence of a willingness to map supply chains, gather information, and increase transparency counters the argument that to do so is unfeasible or uncompetitive for business.

The treaty should set the mapping, sharing and disclosure of supply chain information as a common international standard, which would have a real practical effect in improving global due diligence efforts through both prevention and redress, and would create a level playing field to overcome the competitive disadvantage of front-running companies disclosing their supply chain information voluntarily.

3.2 Inclusion of wording to ensure corporate and supply chain transparency in the LBI

We therefore respectfully submit for your consideration that into the aforementioned Article 3 a new subsection be inserted to read:

➔ **c. The disclosure of information regarding corporate structure and ownership of subsidiaries; as well as the disclosure of up-to-date information detailing the company's supply chain.**

4. NON-AVAILABILITY OF GROUP CLAIMS		
Description	**Examples**	**Relevant existing wording / provisions in the revised LBI**
Victims in jurisdictions that do not allow group claims (also known as class actions or collective redress measures), are in a far more precarious position in terms of defending their rights legally and seeking remedy. The financial costs and risks of litigation for an individual against a typically well-resourced corporate defendant are often prohibitively high, and include lawyers' fees, court costs, and expert evidence; as well as the risk of financial ruin in the event of loss due to the typical application of the loser pays principle. In situations of mass harm, individual victims have to bring their own, individual and competing claims, meaning less efficient use of state resources.	• **South Africa 2018** Through a collective claim, 100,000 miners achieve a $400 million settlement against six mining companies for silicosis poisoning caused by their working conditions.[32] • **Australia 2018** Through a collective claim, 1905 asylum seekers and refugees detained in offshore centres achieve a $70 million settlement against the Australian government and the corporate contractors managing the facilities. Another two class-actions representing another 1200 people are currently underway.[33] • **United Kingdom 2015** Through a collective claim, 15,600 Nigerian villagers achieve a £55 million settlement against Shell for oil spills resulting from its business operations in the Niger Delta.[34]	***From Zero Draft 16.7.2018:** **Article 8: Rights of Victims** State Parties shall guarantee the right of victims, individually **or as a group**, to present claims to their Courts, and shall provide their domestic judicial and other competent authorities with the necessary jurisdiction in accordance with this Convention in order to allow for victim's access to adequate, timely and effective remedies.

4 Availability of group claims

4.1 Grounds for wording to ensure the availability of group claims

Group claims have consistently been identified by both international and regional human rights institutions and bodies as a key tool of redress in scenarios involving abuse by business entities, as expressed by the UN High Commissioner for Human Rights in his report to the UN Human Rights Council in 2016.[35] The Committee of Ministers of the Council of Europe also adopted *Recommendation CM/Rec* in 2016[36], endorsing the use of group claims as means to further the implementation of the UNGPs, which was in turn endorsed by the Council of the European Union in its conclusions on business and human rights.[37]

In addition to the jurisdictions mentioned in the examples above, group claims are permitted in a diverse range of other states including India, Mexico, China, Indonesia and Brazil. The European Union is in the process of finalising inter-state collective redress measures for European consumers.[38]

4.2 Inclusions wording to ensure the availability of group claims in the LBI

Given the effectiveness of group actions for reducing barriers to justice for victims; as well as the acceptance of such measures amongst states, we respectfully submit for your consideration that the wording from the previous Zero Draft be re-included into the current draft as well as strengthened to make the availability of group claims an obligation for State parties.

We propose that new Article 8 include wording to the effect:

- ➔ **State parties shall guarantee victims access to group claim mechanisms for all forms of harm arising from business activities.**

5. RESTRICTIVE LIABILITY RULES		
Description	**Examples**	**Relevant existing wording / provisions in the revised LBI**
A key problem facing victims in typical business and human rights cases are the restrictive liability rules that shield powerful parent, buying and investing companies from liability for harm occurring in their corporate groups and value chains, including from relationships such as subsidiaries and suppliers which may not be underpinned by a contractual relationship.	• **Western brands in Rana Plaza** The 2013 Dhaka factory collapse killed over 1,100 workers, who were producing primarily for Western lead firms.[39] Western lead firms reportedly claimed that they did not know that their products were being produced in the Rana Plaza factory and that there were no contracts underpinning the supply relationship, so no responsibility for them to contribute to remedy for the victims. CSOs have argued that even if the brands did not know, they could and should have known, given the continuous stream of reports about safety risks in Bangladeshi factories, and that the brands contributed to the creation of an environment that ultimately led to the deaths and maiming of thousands of individuals.[40] It took a lot of campaigning to get the brands to contribute to a compensation fund for the victims, but liability has been lacking to date. • **Vedanta** In the leading British case on parent company liability, it was found that Vedanta could be liable for the harm caused by its subsidiary not by virtue of a contractual relationship, but by one of control and knowledge.[41] The judgment in Vedanta provides important insights for the proposed LBI.[42]	**Article 6: Legal Liability** § 6. States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person **with whom it has a contractual relationships**, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.

5 Liability beyond contractual relationships

5.1 Grounds for wording to ensure liability beyond contractual relationships to include situations of control, influence and foreseeability

Limiting the scope of a company's due diligence to activities "under their contractual relationships" is overly restrictive. Potentially and alarmingly, this wording may also fail to cover subsidiaries if the parent/subsidiary relationship is not deemed by a court to be contractual (but rather a matter of company law).[43] Furthermore, it fails to cover important relationships such as suppliers, buyers and investors two or more tiers removed from the company.

The UNGPs extend a company's responsibility to respect human rights beyond the adverse impacts of its own activities to also include "business relationships". Furthermore, they clarify that if companies cause or contribute to adverse human rights impacts - through their acts or omissions, by themselves, together with or via a third party - they are responsible for (contributing to) remediating the harm.

We advise that the future LBI stay in line with this logic and, at a minimum, recognise both causing and contribution as grounds for liability. In the UK, jurisprudence regarding parent company liability has developed, and liability has been based on the actual control of, or ability to control, the functions of another entity[44], which has the potential to go beyond a subsidiary; and thereby captures relationships of factual control or dominance not underpinned by contract.

We note that in the EU competition law there is a judicial presumption that a parent company has control over its subsidiaries.[45] Non-contractual elements such as control and "economic dependence" are useful for determining the relationship for liability purposes.

5.2 Inclusion of wording to ensure liability beyond contractual relationships to include situations of control, influence and foreseeability in the LBI

In order to build on the logic offered by the UNGPs and be in line with developing liability jurisprudence to make sure that subsidiaries and other important relationships of control, influence and foreseeability are covered in the liability regime, we respectfully submit the following elements for consideration in the review of new Art. 6:

➔ **1 - Legal liability of a natural or legal person conducting business activities, including those of transnational character, for its failure to prevent, or prevent other natural or legal person(s), with whom it has a business relationship, from causing or contributing by means of acts or omissions a human rights violation or abuse against third parties rights or the environment when the former:**

a. has the ability to control, or to exercise decisive influence over the relevant entity that caused or contributed to the violation or abuse, OR

b. should have foreseen the risks of human rights violations or abuses in line with the Prevention Article of the LBI

2. - A rebuttable presumption of effective control where there is dominant influence of a company or other forms of so called 'negative control' such as power to veto (e.g.: in parent-subsidiary relations)

6. PLEADING FORUM NON CONVENIENS DOCTRINE		
Description	**Examples**	**Relevant existing wording / provisions in the revised LBI**
In judicial cases, victims are often denied access to courts in the jurisdiction where the parent company allegedly responsible for the harm is domiciled, by virtue of the application of the forum non conveniens doctrine. The doctrine holds that the courts of the place where the harm occurred are the "most appropriate forum" for the case, despite the existence of a connection to a controlling, influential and responsible parent company in the "home" jurisdiction. Victims from the Global South are typically denied access to the courts where the parent company is based and must bring their claims in host states where the rule of law is weaker and where proceedings can be exceptionally long. Moreover, the host state assets of a parent company responsible for harm in the host country can be sold, making them unavailable to victims as potential remedies.	• **Union Carbide and Bhopal disaster in India** The 1984 mass gas leak in Bhopal, India was the biggest industrial disaster in history killing over 2,000 people in one night, and injuring over 200,000. Indian victims brought lawsuits against the U.S.-based Union Carbide they held responsible for the leak, However, the court accepted the company's plea of the *forum non conveniens* doctrine, and required that the cases be heard in India despite widespread concerns that the Indian judicial system would not be able to cope with such a complex case. These concerns were raised by the Chief Justice of the Supreme Court of India, who stated that due, amongst other things, to the serious backlog of cases in the Indian courts, the victims' only chance of receiving a fair and proper remedy would be for the case to be heard in the U.S.[46] Victims had to wait until 2002 for all the cases related to the leak to be heard, and achieved meagre settlements in comparison with what they would likely have been awarded by a U.S. court. • **Amazonian tribespeople against Texaco/Chevron** Chevron's (formerly Texaco) dumping of toxic waste into Amazonian rivers and lakes in Ecuador over the course of a number of decades caused massive environmental and health impacts. After the plaintiff affected individuals filed the case against Texaco in the U.S. where Texaco was based, the court applied the *forum non conveniens* doctrine and required that the case be heard in Ecuador. The Supreme Court of Ecuador subsequently found Chevron liable for billions of dollars in damages[47]. Despite the ruling of Ecuador's highest court, California-based Chevron refused to pay, and because the company claims it no longer has assets in Ecuador, the ruling is unenforceable. • **Canadian companies building illegal settlements in Occupied West Bank** The Israeli government hired Canadian companies Greenpark and Green Mountain to construct houses in the Israeli-occupied West Bank. Palestinian affected individual plaintiffs brought a civil suit against the companies in Canada under the Fourth Geneva Convention for assisting war crimes (forceful displacement and settlement). The judges applied the *forum non conveniens* doctrine, and required that the case had to be heard in Israel[48].	**Article 7: Adjudicative Jurisdiction** § 1. Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument), shall vest in the courts of the State where: a. such acts or omissions occurred; or b. the victims are domiciled; or c. the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled. § 2. A natural or legal person conducting business activities of a transnational character, including through their contractual relationships, is considered domiciled at the place where it has its: a. place of incorporation; or b. statutory seat; or c. central administration; or d. substantial business interests

6 Forum non conveniens

6.1 Grounds for wording to dispel the forum non conveniens doctrine

The current wording of the draft LBI allows for cases to be brought before courts in both the home (where the parent company is based) and host (where the harm occurred) states. On the face of it, the provisions thereby still allows home state courts to apply the *forum non conveniens* doctrine to push business and human rights cases out of their jurisdiction and into the courts of the host state where the harm occurred (and where judicial resources are typically lower; and where corporate assets can easily be sold making rulings effectively unenforceable).

As it stands, the wording should be clarified and clearer language used in order to prevent the application of the *forum non conveniens* doctrine from depriving victims of remedy, as some commentators have already argued.[49] Such an approach would be consistent with emerging state practice, as the relatively recent harmonization of EU private international law implies the forum *non conveniens* doctrine is effectively not available for pleading within the EU.[50]

6.2 Inclusion of Wording to Dispel the Forum non Conveniens Doctrine

We therefore respectfully submit for your consideration the inclusion of new subsection (3) in Art. 7:

- ➔ **The forum non conveniens doctrine should not be used as grounds for preventing rights holders/victims from pursuing judicial action against a legal person in the jurisdiction where that legal person is domiciled.**

About the organisations

Action Contre l'Impunité pour les Droits Humains (ACIDH), based in the DRC, works in the area of justice, since its creation it has assigned the following objectives: In the long term, to end impunity for human rights violations in the DRC; In the medium term, to influence the reform of the judicial institutions in the DRC with a view to better protection of human rights; and lastly, in the short term, to influence public opinion in order to obtain political and judicial officials' repression of violating human rights.

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, West Bank. Established in 1979 to protect and promote human rights and the rule of law in the Occupied Palestinian Territory (OPT), the organisation has special consultative status with the United Nations Economic and Social Council. Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. www.alhaq.org

The European Coalition for Corporate Justice (ECCJ) brings together over 350 organisations from across the EU, UK and Switzerland working on business and human rights. The ECCJ was a driving force behind the passage of the EU Non-Financial Reporting Directive, and is now leading the momentum in the drive binding human rights due diligence measures, with enhanced access to judicial remedy, at EU level. www.corporatejustice.org

La Protection des Ecorégions de Miombo au Congo (PremiCongo) is a non-governmental development organisation based in Lubumbashi, in the Province of Katanga in the Democratic Republic of Congo (DRC). Its mission is to contribute to the establishment of sustainable governance of the miombo woodlands of Katanga, forests which constitute an important reservoir of biodiversity and a vital space for the more than ten million inhabitants who inhabit this part of the DRC. www.premicongo.org

The Project on Organizing, Development, Education, and Research (PODER) is a regional not-for-profit, non-governmental organization. Its mission is to improve corporate transparency and accountability in Latin America from a human rights perspective and to strengthen civil society stakeholders of corporations as long-term accountability guarantors. www.projectpoder.org

The Centre for Research on Multinational Corporations (SOMO) is a critical, independent, not-for-profit knowledge centre on multinationals. Through its hosting of OECD Watch, participated in the drafting of the OECD Guidelines on Due Diligence. Through its hosting of the Dutch Responsible Business Conduct Platform, the organisation has also been a key contributor to the national policy process leading to the passage of the Dutch Child Labour Due Diligence Law; and is also closely involved in an initiative to extend and enhance that law to all environmental and human rights abuses. www.somo.nl

Endnotes

[1] https://earthrights.org/case/energy-transfer-partners-v-greenpeace-banktrack-et-al/#documentsff69-1a905f26-f4b6
[2] https://www.asso-sherpa.org/legal-action-vinci-qatar-vinci-institutes-defamation-proceedings-claiming-exorbitant-damages-sherpa-organisation-employees, https://www.asso-sherpa.org/slapps-brought-by-vinci-against-sherpa-a-new-victory
[3] https://www.theguardian.com/world/2018/feb/02/daphne-caruana-galizia-was-being-sued-defamation-at-time-of-her-murder
[4] https://www.theguardian.com/world/2017/oct/16/malta-car-bomb-kills-panama-papers-journalist
[5] In the Australian Capital Territory http://classic.austlii.edu.au/au/legis/act/consol_act/poppa2008360/
[6] In the states of British Columbia https://www.cbc.ca/news/canada/british-columbia/legislature-passes-anti-slapp-1.5049927, Ontario https://www.ola.org/en/legislative-business/bills/parliament-41/session-1/bill-52, and Quebec https://lawinquebec.com/anti-slapp-part-i-a-look-at-quebec-developments/ .
[7] Over thirty U.S states have anti-SLAPP legislation in place.
[8] https://www.business-humanrights.org/en/27-ngos-call-on-european-commissioner-to-include-all-parties-impacted-by-slapps-in-new-eu-legislation
[9] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en
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