Dear chairperson,

My name is Lia Polotzek, speaking on behalf of Friends of the Earth International, member of the Global Campaign as well as the Treaty Alliance in Germany.

Prevention is one of the central concepts in order to ensure that transnational corporations are not engaged in human rights violations and environmental destruction. In order to achieve this aim, however, it is necessary to have a strong sanctioning mechanism. Whereas the Zero Draft stated that failure to comply with due diligence duties shall result in commensurate liability, the revised draft does not include this provision anymore. The French loi sur le devoir de vigilance purposefully states that when harm occurs, the company can be liable and will have to compensate for the harm that proper fulfilment of the obligations would have avoided. It also provides legal mechanisms and financial penalties before any violation occurs. It is necessary for a legally binding instrument to employ a similar approach as without sanctions, it remains fully unclear how to ensure that transnational corporations actually take up preventive measures.

Furthermore, the revised draft also does not spell out that preventive measures must be effectively implemented as well as evaluated. Yet, the evaluation of measures constitutes a crucial part of human rights due diligence, which is also in line with the UN Guiding Principles on Business and Human Rights.

In this sense, these legal mechanisms attached to this duty of prevention should be detailed in article 6 and include the reversal of the burden of the proof creating a presumption of liability: in case a violation occurs, the corporation should be the one proving that its preventive measures were appropriate and correctly implemented.

The revised draft now mentions Indigenous Peoples’ rights specifically. Nonetheless, the text only talks about free, prior and informed consultation instead of consent. This wording needs to be changed in order to ensure that no watering down of international standards occurs and that Indigenous Peoples’ right to say no is fully respected. It should also apply to peasants and other concerned populations.

We welcome that the revised draft not only talks about human rights but also about environmental risk assessments. In line with the language of the OECD, a prospective legally binding instrument should not only lay down the concept of human rights due diligence but also elaborate on environmental due diligence as a measure of prevention.

In Germany, five weeks ago civil society started a campaign on a national law that would impose a duty of care in terms of human rights as well as environmental due diligence on German corporations as well as including liability . A broad coalition consisting of more than 70 organisations, including unions, development and human rights as well as environmental organizations is formed advocating for a national law to be passed in this legislature that combines prevention and liability. The same approach should be followed for an international legally binding instrument.

Thank you, Mr. chairperson.