

27 February 2020

## FIAN International written contribution to the revised draft of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights

### **Introduction**

FIAN International, as a member of the Treaty Alliance, the Global Campaign for Peoples Sovereignty, to Dismantle Corporate Power and End Impunity, the Feminists for a Binding Treaty and of the ESCR-Net, as well as secretariat of the Global Network on the Right to Food and Nutrition and the Consortium on Extraterritorial Obligations, would like to express its support to this intergovernmental process of negotiations of an international legally binding instrument on transnational corporations (TNCs) and other business enterprises (OBEs) with respect to human rights (the “revised draft” or the “draft treaty” or the “instrument”). The revised treaty and its Optional Protocol mark an important step towards accomplishing the mandate of resolution 26/09 of 2013. FIAN supports an effective instrument that will improve access to justice for affected individuals and communities and strengthen TNC and OBE legal accountability for human rights violations and crimes.

To realize these objectives and improve the revised draft, the following comments identify additional changes that should be made.

### **General Remarks**

The revised draft contains important elements that would contribute to the adequate regulation of TNCs and OBEs in international human rights law. With the additional changes below, the treaty could serve as an important tool to address challenges such as the commoditization of life, the materialization of nature, the digitalization and the destruction of the climate and the environment, and the standardization of a corporate food regime – in other words, all those problems demanding a global solution.

Some of the most important and useful provisions are those that address transnational regulatory gaps, including the description of activities of transnational character in the article on scope, a broad concept on domicile in the article on adjudicative jurisdiction, and provisions in the articles on mutual assistance and cooperation. Furthermore, the creation of a Conference of States Parties and a Treaty Body pave the way for further development of international corporate law.

### **Effectiveness of treaty**

Some of the concepts are vague and others are subordinate the application of domestic law, which increases the risk that the treaty will be ineffective when affected communities use it to seek justice. For example, various articles of the revised draft treaty include phrases such as “in accordance with



domestic law.” Such phrases undermine the entire purpose of an international legally binding instrument, and run contrary to the Vienna Convention’s prescription that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>1</sup> Instead, a new clause should clarify the duty for States to incorporate the treaty under their laws or to adapt their national laws to the provisions of the treaty.

➤ **Proposal to ensure effectiveness of the treaty:**

Include a new article: *“Parties may not invoke their domestic law as justification for non-observance of the obligations in this instrument. If conflict between this instrument and a rule of domestic law is inevitable, the State must amend the latter as quickly as possible in order to bring it into line with its obligations under this instrument.”*

The references to domestic law should be removed (arts. 1.1, 4.10, 4.11, 4.12, 4.14, 4.16, 5.4, 6.7, 8.1, 9.2, 10).

**Peasants and other rural people**

When the revised draft refers to groups requiring special protection, it does not explicitly include peasants and other rural communities, despite the adoption by the UN General Assembly, during its 73<sup>rd</sup> session, of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (“The Declaration”) on the 17<sup>th</sup> of December 2018. Peasants and other rural people experience human rights abuses by TNCs in various ways including land-grabbing, environmental pollution, intimidation and harm to human rights and environmental defenders, and unfair and unsafe working conditions.<sup>2</sup> The Declaration provides that “States shall take all necessary measures to ensure that non-State actors that they are in a position to regulate, such as private individuals and organizations, and transnational corporations and other business enterprises, respect and strengthen the rights of peasants and other people working in rural areas.”<sup>3</sup> The Declaration also requires States to “protect peasants and other people working in rural areas against abuses by non-State actors, including by enforcing environmental laws that contribute, directly or indirectly, to the protection of the rights of peasants or other people working in rural areas.”<sup>4</sup> Given the significant human rights abuses committed by TNCs and OBEs and the Declaration’s requirement that States regulate corporations and enforce those laws to protect peasants and other people working in rural areas, the treaty should explicitly include a reference to these groups.

➤ **Proposal to include peasants:**

Include reference to peasants and other rural communities in preamble, and arts. 1.1 and 5.3(b).

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<sup>1</sup> Art. 27, Vienna Convention on the Law of Treaties.

<sup>2</sup> FIAN International, Analytical Briefings on Peasants’ Rights :

[http://www.fian.org/library/publication/publication\\_of\\_a\\_series\\_of\\_briefings\\_on\\_peasants\\_rights/](http://www.fian.org/library/publication/publication_of_a_series_of_briefings_on_peasants_rights/); The Global Network for the Right to Food and Nutrition (2016), A life without dignity – the price of your cup of tea: Abuses and violations of human rights in tea plantations in India, see:

[http://www.fian.org/fileadmin/media/publications\\_2016/Reports\\_and\\_guidelines/FFMReport\\_June\\_2016.pdf](http://www.fian.org/fileadmin/media/publications_2016/Reports_and_guidelines/FFMReport_June_2016.pdf); FIAN International (2012), The Human Rights Impact of Tree Plantations in Niassa Province, Mozambique, [http://www.fian.org/fileadmin/media/publications\\_2015/PR\\_-\\_2012.10.16\\_-\\_Tree\\_plantations\\_Niassa\\_Mozambique.pdf](http://www.fian.org/fileadmin/media/publications_2015/PR_-_2012.10.16_-_Tree_plantations_Niassa_Mozambique.pdf).

<sup>3</sup> UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, Art. 2.5.

<sup>4</sup> Id. Art 18.5.



## **Preamble**

FIAN supports the revised treaty's reference to the universality, indivisibility, interdependence, and interrelation of human rights, the right to equal and effective access to justice and remedies, and the principle that all businesses must respect human rights, "irrespective of their size, sector, property and structure". We appreciate the explicit reference in the preamble to the distinctive and disproportionate impact of certain business-related human rights abuses on women and others and the reference to human rights defenders.

However, the text needs to be strengthened with respect to the primacy of human rights. While international trade and investment laws have developed through binding agreements that incorporate sanctions and create legal certainty, there are large gaps in the protection of the rights of victims of transnational business activities. The asymmetry between trade and investment agreements and international human rights law is one of the main elements obstructing access to justice and effective remedies for people whose rights are abused by TNCs and OBEs. It also undermines States' ability to comply with their human rights obligations, given the substantial financial liability they face within the framework of arbitration (e.g. Investor-State Dispute Settlement).<sup>5</sup> The treaty cannot ignore the current context in which the corporate sector is gaining, without any democratic legitimacy, increasing access to governance and decision-making processes, such as through platforms of interest groups (e.g., multistakeholder initiatives) and public-private partnerships.

The treaty's preamble should contribute to correcting these asymmetries in international law by establishing the primacy of human rights over commercial and investment rights as one of the fundamental principles of the text. In this regard, along with articles 55 and 56 of the Charter of the United Nations (paragraph 5), the preamble should include a reference to the primacy of human rights, pursuant to article 103 of the same Charter, which establishes that "in case of conflict between the obligations assumed by the Members of the United Nations under this Charter and their obligations under any other international agreement, the obligations imposed by this Charter shall prevail". The primacy of human rights is a principle already recognized in many constitutions in the world.

### ➤ **Proposal to include primacy of human rights:**

Add new line in preamble: "**Reaffirming the primacy of human rights obligations and obligations under the Charter of the United Nations over all international agreements, including trade, investment, finance, taxation, environmental protection, development cooperation and security obligations.**"

### **Principle of *in dubio pro persona***

Because the objective of the treaty is to put an end to the barriers to access to justice and to the effective remedy by individuals or communities that have suffered damages in the context of

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<sup>5</sup> See, e.g., *Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007) (acknowledging water as a public interest but declining to address human rights arguments, and awarding nearly four hundred million dollars to the investor); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 6, 2016) (awarding the company over one billion dollars, based entirely on the expected profits of a gold mine that had not yet started to produce, and notwithstanding the risks to the environment and the Indigenous Peoples in the Imataca National Forest Reserve).



transnational economic activities, it is necessary to include the principle *in dubio pro persona*. This principle will ensure that the rights of the people and affected communities will always take precedence in the implementation of the legally binding instrument or the standards developed at the national level. This principle is similar to the principles *in dubio pro reo* or *in dubio pro operario* that exist under criminal law and labor law, which are applied to the impacts of transnational corporations and other commercial enterprises.

➤ **Proposal to include the principle of *in dubio pro persona*:**

Add a new line in the preamble as follows: ***“Guaranteeing that if there is any doubt about the implementation of the Convention, people and communities that have been or are affected or threatened by the activities of transnational corporations and other commercial companies will enjoy the widest protection of their rights.”***

**A gender perspective**

Women, especially those from rural areas, are disproportionately affected by the activities of transnational corporations and other companies and face greater barriers and risks when trying to access justice. The treaty must do more to integrate an intersectional feminist perspective that addresses the specific impact of corporate abuse on women and historically marginalized communities, guaranteeing the protection of their rights, access to justice and reparation.

➤ **Proposal to include effective remedy and non discrimination:**

Amend the preamble as follows: ***“Upholding the right of every person to have effective and participatory ~~equal~~ access to justice in case of violations of international human rights law or international humanitarian law, including the rights to an effective remedy, equality and non-discrimination before courts and tribunals, and to a fair trial”***

➤ **Proposal to support a gender sensitive lens:**

Amend the preamble to include a new sentence as follows: ***“Recognizing that an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations, is essential to prevent and remedy business-related human rights violations and abuses against women and girls”***

**Article 1: Definitions**

The use of the term “contractual relationships” in paragraph 4 can potentially be interpreted in a very restrictive manner, taking into consideration the common use of the term “contract” in legal terms. This has an impact when defining the duty holders, the parameters of effective human rights due diligence and the determination of liability along the value chain or in the context of economic groups or holdings.

The term “business relationships” would more accurately characterize the scope of human rights due diligence responsibilities as elaborated by Treaty Bodies, Special Procedures, and the UNGPs. Human rights due diligence should be required not only for the company’s own activities but also the activities of other entities “directly linked to its operations, product or services by its business



relationships,<sup>6</sup> other entities over which it has influence (including subsidiaries), and the company's business partners (including suppliers and financiers).<sup>7</sup> Human rights due diligence shall apply to activities beyond the first tier in the supply chain and even when control is exercised beyond contractual relationships, for example due to the influence of a controlling company far located in the supply chain but able to determine the conduct of its suppliers, for example due to the corporate culture<sup>8</sup>.

Although the definition of "contractual relationships" is broad, the general understanding of the term "contract" and the reference to "any other structure or contractual relationship as provided under the domestic law of the State" could unnecessarily restrict the scope of relationships to those which are recognized as contracts under domestic law, omitting a broader range of business relationships and limiting human rights due diligence responsibilities and liability to the first tier of the supply chain.

The use of the term "contractual relationships" is a key issue because it acts in concert with a victim's ability to access information and the burden of proof to necessary to establish liability, contradicting the principle of "equality of arms" in the legal process. More specifically, because the burden of proof to show liability traditionally rests on the victim, and because information about the relationships and activities that take place between corporations is difficult for victims to uncover, it is extremely challenging for affected communities and individuals to identify the responsible parties and establish liability. This key problem should be addressed through changes in the right of victims to access information (arts. 4 and 5) and in defining liability (art. 7). See recommendations on respective articles, below.

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<sup>6</sup> Guiding Principles on Business and Human Rights, See Principle 17 a), available at: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf)

<sup>7</sup> The Committee on Economic, Social and Cultural Rights in its General Comment no 24 on business activities define the scope of human rights due diligence includes " entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors)"; General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, para. 33, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQclMOuuG4TpS9jwlhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbw6ujlnCawQrJx3hlK8Odk6DUwG3Y>

<sup>8</sup> See e.g. A/HRC/30/35 para 69 (c) ("All businesses' human rights policies and procedures and the systems to implement them should integrate measures reaching beyond the first tier in supply chains and include clear guidelines and indicators to assist those operating at the lower tiers and in the informal economy to identify human rights violations, including contemporary forms of slavery, and ensure compliance with international human rights standards.")



➤ **Proposal to change “contractual” to “contractual and other business”:**

In Article 1.4, replace “Contractual” with “Business”: “*Contractual and other **Business** relationship*” refers to any relationship between natural or legal persons to conduct business activities, including - but not limited to - those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State. **The term contractual or business relationship shall not be restricted to the signing parts of specific contracts or other formal proof and should be interpreted in the most protective manner for the alleged victims under this treaty**

Note: “contractual” should also be changed to “business” when referenced throughout the document, in arts. 1.4, 3.2, 5.2, 5.3, 6.6, and 7.2.

In addition, the definition of victims in Article 1 should cover situations where human rights abuses or violations are an imminent risk, to ensure that the treaty supports the prevention of human rights abuses and violations.

➤ **Proposal to include people under immediate threat of human rights violations or abuses:**

In Article 1.1, amend to read as follows: “*Victims*” shall mean any persons or group of persons who individually or collectively have suffered or have alleged to have suffered human rights violation or abuse as defined in Article 1 paragraph 2 below. **Where necessary to prevent human rights violations or abuses, the rights of victims shall also include the rights of people who are at risk of suffering irreparable harm. Victims include, but are not limited to, women, children, persons with disabilities, indigenous peoples, migrants, refugees, internal displaced persons, and peasants and other rural communities.** ~~Where appropriate, and in accordance with domestic law.~~ The term “victim” also includes the immediate family or dependents of the direct victim.

However, FIAN recommends that throughout the treaty, the term “rights holders” be used instead of “victims.”

In addition, as discussed in our general remarks, the reference “in accordance with domestic law” should be eliminated and a reference to peasants and other rural communities should be included in article 1.1.

## **Article 2: Statement of Purpose**

As recognized by affected communities, civil society organizations, academics, UN committees and experts, women and other marginalized people experience adverse impacts of business activities differently and disproportionately, and may also face additional barriers in seeking access to effective remedies. However, as the Working Group on the issues of human rights and transnational corporations and other business enterprises noted, “neither States nor business enterprises have paid adequate attention to gender equality in discharging their respective obligations and responsibilities under the Guiding Principles.” The treaty should reinforce the principle of non-discrimination.



➤ **Proposal to ensure non-discrimination:**

Amend article 2.1 as follows: “The purpose of this (Legally Binding Instrument) is: a. To strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities **for all, without discrimination of any kind as to race, colour, sex, gender identity, sexual orientation, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, disability, age and/or other status**”

### Article 3

FIAN agrees in general with the article on scope, but considers that since investments are often the frame in which corporations abuse of human rights, these should be included in article 2.b.

➤ **Proposal for article 2.b**

b. It is undertaken in one State through any contractual relationship but a substantial part of its **investments**, preparation, planning, direction, control, designing, processing or manufacturing takes place in another State; or

### Article 4: Rights of Victims

FIAN welcomes the provisions addressing the procedural, financial, cultural, practical and many other types of barriers which people face when they try to access justice, such as the provisions on substantive gender equality (4.4), legal assistance (4.12), the protection of human rights defenders and those who promote and defend the environment (4.9 and 4.15). However, several provisions should be clarified or improved.

#### **Access to justice for women**

Remedies must address the unequal gendered power relations in the context of business activities that abuse human rights. Women and women human rights defenders often face gender-specific violence, stigma, reprisals and job insecurity for reporting business-related abuses. The multiple and/or intersecting forms of discrimination experienced by women from marginalized groups must also be acknowledged and addressed. All justice systems, both formal and quasi-judicial systems, should be secure, affordable and physically accessible to women, and are adapted and appropriate to the needs of women including those who face multiple and/or intersecting forms of discrimination.

➤ **Proposal to ensure gender responsive access to justice:**

Amend Article 4.5 as follows: “*Victims shall have the right to fair, effective, prompt, and non-discriminatory* **and gender-responsive** access to justice and adequate, effective and prompt



*remedies in accordance with this instrument and international law. Such remedies shall include, but shall not be limited to [ ]”*

### **Access to information**

Victims face barriers in access to justice because of legal requirements to prove a link between the damage caused and the conduct of the chain of companies alleged to be involved in causing the harm. This is especially difficult for those companies that are not directly operating where the affected communities live, but rather when those operating are their subsidiaries, sub-contractors, investors or other linked companies. We therefore recommend that article 4.6 be modified to include stronger requirements for the disclosure of information that can facilitate legal procedures, especially when the crime has been committed by controlling companies not directly operating in the domicile of the victims. The provision should explicitly mention victims’ right to access comprehensive information about the different companies forming the respective economic group or network, TNCs or holdings, and their legal relationships (e.g. land titles, contracts, codes of conduct and other documents reflecting the corporate culture, communications by corporate powerful decision makers that can determine the conduct of the material perpetrator and other relevant documents) involved in the transnational business activities that have allegedly threatened or harmed their human rights. The treaty should additionally require that if such information is unavailable, the judges of domestic courts will apply a rebuttable presumption of control, whereby the court would presume sufficient links between the different companies involved unless the companies can prove to the contrary. The justification for this rebuttable presumption is to ensure equality of arms in the judicial process, based on the fact that the companies are the holders of the information, while victims regularly face hurdles to access that information, therefore not being able to bring their argument to court. Such information allows the competent judges to declare the joint responsibility of all involved companies, to ensure adequate remedy for the affected communities or individuals. The inclusion of a joint and strict responsibility has also a preventive function along the value chain, business or contractual relationships.

In addition, article 4.6 is too limited as it pertains only to remedy. Thus, access to information must also be strengthened in Article 5 on prevention.

#### **➤ Proposal to improve access to information:**

***In Article 4.6, add a new sentence: “Victims shall be guaranteed access to information relevant to the pursuit of remedies. This shall include information relative to all the different legal entities involved in the transnational business activity alleged to harm human rights, such as property titles, contracts, communications and other relevant documents. In the case of the unavailability of such information, courts shall apply a rebuttable presumption of control of the controlling or parent companies. Such information shall serve for the adjudicator to determine the joint and several liability of the involved companies, according to the findings of the civil or administrative procedure.”***

### **Conflict with ISDS**

Because of the inability of international arbitration and other non-judicial mechanisms related to international trade and investment to adequately deal with cases that address human rights concerns, the treaty should clarify the importance of human rights competence in this regard.





Since often corporate abuses affect groups or communities, to ensure procedural efficiency it is relevant that recourse mechanisms available are both, collective and individual, including for example popular and class actions.

➤ **Proposal to strengthen access to justice in trade and investment related disputes:**

Article 4.8 should be amended as follows: “**Victims shall be guaranteed the right to submit claims, including those of collective nature, to the courts and State-based non-judicial grievance mechanisms, having competence in human rights law, including labor, environmental, and other social, cultural and economic rights as well as, constitutional and administrative law of the State Parties. Where a claim is submitted by a person on behalf of victims, this shall be with their consent, unless that person can justify acting on their behalf. State Parties shall provide their domestic judicial and other competent authorities with the necessary jurisdiction in accordance with this (Legally Binding Instrument), as applicable, in order to allow for victim’s access to adequate, timely and effective remedies.**”

➤ **Proposal to address access to justice barriers caused by the burden of proof**

Replace Article 4.16 with new sentence: “**Courts shall require a rebuttable presumption of control by the home or controlling companies over companies with which they have business relationships and which are alleged to have caused human rights abuses.**”

Alternatively, amend Article 4.16 as follows: “Subject to domestic law, courts asserting jurisdiction under this (Legally Binding Instrument) ~~may~~ **shall** require, where needed, reversal of the burden of proof for the purpose of fulfilling the victim’s access to justice and remedies.”

### **Precautionary Measures**

Victims face a critical challenge in avoiding additional and potentially irreparable harm while they seek protection for their human rights with their authorities or during the judicial processes. Article 4 should provide victims with a right to demand precautionary measures pending the outcome of a case. In this respect, the IGWG could take inspiration from the precautionary measures provided by the Inter-American Human Rights system, which can require States to “take immediate injunctive measures in serious and urgent cases, and whenever necessary [...] to prevent irreparable harm to persons”.<sup>9</sup>

➤ **Proposal for precautionary measures:**

Insert new provision in Article 4: “**Victims shall have the right to request State parties to adopt precautionary measures relative to serious or urgent situations that present a risk of irreparable harm pending the resolution of a case.**”

## **Article 5: Prevention**

Often, the damages caused by TNCs and OBEs are irreparable. For this reason, prevention is one of the fundamental pillars of the treaty. Given the ineffectiveness of voluntary systems to adequately support prevention, especially in cases in which profits could be diminished and therefore contrary

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<sup>9</sup> See Rules of Procedure of the Inter-American Commission on Human Rights, art. 25 (approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2, 2011).



to the fundamental purpose of the commercial legal entity, the binding instrument presents an important opportunity to establish clear guidelines to advance the protection of human rights.

However, most of the text is dedicated to corporate human rights due diligence, and these obligations should be strengthened. Additionally, the treaty should include other measures to provide individuals and communities the necessary tools to protect their rights and prevent future violations and ensure that their administrative law is improved according to this aim.

### **Obligation of prevention for state activities**

In many cases, human rights violations occur in the context of economic activities of public or mixed companies, such as in the mining or extractive sectors.<sup>10</sup> The treaty should affirm the State's duty to uphold human rights when conducting business activities, including through State-owned enterprises, the design and implementation of public policies such as those related to trade, investment, development, or procurement, and State regulation/oversight of economic activities, such as concessions for natural resource extraction. The treaty should require States, before and while conducting business activities, to conduct human rights, environmental, and gender impact assessments with meaningful, substantive consultations (and consent where required to recognize the rights of indigenous peoples) and to provide judicial review for the State's alleged failure to conduct such assessments and consultations.

#### ➤ **Proposal to address state obligation of prevention:**

Include new provision under Article 5: "States Parties shall take all necessary steps, including through the incorporation of specific provisions in their administrative law and through human rights, gender, and environmental impact assessments, to respect and protect against human rights in the context of business activities that the State Party is engaged in, supports, or shapes. This includes - but is not limited to - State-owned enterprises or State-controlled business activities, State engagement in business activities with companies or other States, State regulatory oversight, or political or financial support."

### **Strengthen human rights due diligence**

Due diligence assessment must include adequate consultations with affected rights holders. Given the challenges that victims face in access to information discussed above, corporate due diligence should include disclosures about the businesses comprising their contractual and business relationships, which includes all those involved in their value chain, and make this information public and easy to access. The assessments by corporations must include gender-disaggregated data, environmental impacts, and be made public.

In addition, the corporations' duty of prevention should exist throughout the supply chain, which means in their contractual and business relationships, to keep a consistent language.

#### ➤ **Proposal to strengthen consultations:**

Amend Article 5.2(a) as follows: "*Identify and assess **with the meaningful, continued and substantive participation of affected and/or potentially affected communities, ombudspersons, human rights defenders, credible independent experts and others** any actual*

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<sup>10</sup> See the written contribution coordinated by FIAN International for the Universal Periodic Review of China: China's Extraterritorial Obligations vis-a-vis the Rights to Adequate Food and Nutrition of Fishers in the Philippines, Indonesia, and Sri Lanka, 31st Session of the UPR, November 2018.



or potential human rights violations or abuses that may arise from their own business activities, or from their contractual **business** relationships.”

➤ **Proposal to ensure prevention throughout the supply chain:**

Amend Article 5.2(b) as follows: “Take appropriate actions to prevent human rights violations or abuses in the context of its business activities, ~~including those under their contractual relationships~~ **including those by companies in their contractual and business relationships.**”

➤ **Proposals to strengthen gender, access to information and FPIC**

Amend Article 5.2(d) as follows: **Report publicly** ~~Communicate to stakeholders~~ and account for the policies and measures adopted to identify, assess, prevent, and monitor any actual or potential human rights violations ~~or~~ **and environmental harm** that arise from their activities, or from those under their **business** ~~contractual~~ relationships.

Article 5.3(a) should be amended as follows: ‘Undertaking environmental and human rights impact assessments, **incorporating an explicit gender analysis and the collection of disaggregated data**, in relation to its **business** activities and those under their **business** ~~contractual~~ relationships, integrating the results of such assessments into relevant internal functions and processes, and taking appropriate actions.’”

Article 5.3(b) should be amended as follows: Consultations with indigenous **peoples and local communities** will be undertaken in accordance with the internationally agreed standards of free, prior and informed ~~consultations~~, **consent**, as applicable.

Amend Article 5.3(c) as follows: “Reporting publicly and periodically on, **and make easily accessible**, financial and non-financial matters, including policies, risks, outcomes and indicators on human rights, environment and labour standards concerning the conduct of their business activities, including those of their **business** relationships **comprising the value chain**”.

### **Corporate Capture**

The treaty addresses the important issue of corporate capture. Increasing participation of the business sector in policy-making spaces and the fueling of ‘multistakeholder’ initiatives has been accompanied by a corresponding weakening of human rights standards and enforcement.<sup>11</sup> Corporate capture, undue corporate influence, and conflicts of interest also undermine democracy and peoples’ sovereignty because corporations are unelected entities defending, by nature and mandate, private interests (or private profit) in their powerful influence over decisions that impact people’s lives, with negative consequences in particular for the most marginalized groups. We therefore welcome art. 5.5 of the revised draft. However, the article should be strengthened by recognizing the various mechanisms through which corporate capture can take place.

➤ **Proposal to protect against corporate capture:**

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<sup>11</sup> See, e.g., Nicoletta Dentico and Karolin Seitz, *Philanthrocapitalism in global health and nutrition: analysis and implications*, Bischöfliches Hilfswerk MISEREOR/Brot für die Welt/Health Innovation in Practice/Global Policy Forum/medico international, October 2018  
[https://www.globalpolicy.org/images/pdfs/Philanthrocapitalism\\_DiscussionPaper\\_10-2018.pdf](https://www.globalpolicy.org/images/pdfs/Philanthrocapitalism_DiscussionPaper_10-2018.pdf)



Article 5.5 should be amended as follows: “*In setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument), State Parties shall act to protect these policies, **legal processes, and government bodies** from commercial and other vested interests of persons conducting business activities, including those of transnational character, in accordance with domestic law.*”

### **The need to integrate the results of human rights due diligence**

Ongoing integration of the lessons learned from due diligence is essential to preventing further human rights abuses. Thus, the treaty should also require businesses to integrate the results of their human rights due diligence into their policies and procedures.

#### ➤ **Proposal to ensure integration:**

Include additional article 5.6(e) as follows: “**Integrate outcomes of human rights due diligence, government human rights impact assessments, and independent assessments of business policies and procedures into policies and procedures, and report on such integration publicly and periodically.**”

### **Addressing the burden on SMEs**

The provision of incentives by the state to SMEs could erode the state budget, undermining its ability to uphold human rights. Although we appreciate that the treaty recognizes that all businesses must respect human rights, the treaty can allow for differential treatment without providing incentives or other measures to facilitate compliance.<sup>12</sup>

#### ➤ **Proposal to ensure SMEs respect human rights:**

Replace Article 5.6 with the following: “States Parties may **consider the size of the enterprise, the risk of human rights impacts, and the nature and context of a company’s operations** ~~provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens~~ **on small and medium enterprises.**”

Alternatively, delete article 5.6 and amend article 5.1 as follows: “State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction, **taking into account the size of the enterprise, the risk of human rights impacts, and the nature and context of its operations.** For this purpose States shall ensure that their domestic legislation requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses.”

#### ➤ **Proposal to require precautionary measures:**

Include new paragraph under Article 5: “*States shall apply precautionary measures that are necessary to prevent violations and abuses of rights in the context of business activities.*”

## **Article 6: Legal liability**

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<sup>12</sup> See, e.g., UNGP 14.



One of the gaps in national and international law obstructing access to justice and effective remedy is the absence of clear rules governing legal liability for damage caused by TNCs and OBEs.<sup>13</sup> FIAN therefore welcomes the clear language of article 6.1, requiring States to ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character. However, the specific references to administrative, civil, and criminal liability should be included, as in the previous draft.

In addition, the reference to specific criminal offenses could be interpreted narrowly, to indicate that other offenses do not require a comprehensive system of liability, such as the violation of economic, social, and cultural rights. Furthermore, the specific list of offenses could be interpreted to suggest that no other offenses should be met with criminal liability under domestic law. Therefore, it is important that the treaty clarifies the necessity of imposing liability for a broad range of human rights violations (including economic, social and cultural rights) and that it require States to continue to develop criminal liability beyond the specific offenses that are listed.

➤ **Proposal to include reference to administrative, civil, and criminal liability:**

Amend Article 6.1 as follows: “*State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of **administrative, civil, and criminal** legal liability for human rights violations or abuses in the context of business activities, including those of transnational character.*”

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<sup>13</sup> FIAN International, Case Mubende in Uganda, Case el Hatillo in Colombia, Case Guarani Kaiowa in Brazil, Case Sawhoyamaya in Paraguay, for more information access: <http://www.fian.org/what-we-do/case-work/>; See Case Las Pavas in Colombia at: <http://www.fian.org/es/nuestro-trabajo/casos/colombia-las-pavas/>; See Parallel Report by The Ugandan National Coalition on ESCR c / o HURINET-Uganda, p. xxii, 9 and 23, and Parallel Report by FIAN International to Committee on Economic, Social and Cultural Rights. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCSS%2fUGA%2f20412&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCSS%2fUGA%2f20412&Lang=en); See Parallel Report by FIAN International for the CESCR review of Norway in 2013 on the human rights impact of Norwegian pension fund investments: [http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/NOR/INT\\_CESCR\\_NGO\\_NOR\\_15162\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/NOR/INT_CESCR_NGO_NOR_15162_E.pdf); Concluding observations on the fifth periodic report of Norway (2013), CESCR, U.N Docs. E/C.12/NOR/CO/5 [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fNOR%2fCO%2f5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fNOR%2fCO%2f5&Lang=en); The Global Network for the Right to Food and Nutrition (2016). A life without dignity - the price of your cup of tea: Abuses and violations of human rights in tea plantations in India, see: [http://www.fian.org/fileadmin/media/publications\\_2016/Reports\\_and\\_guidelines/FFMReport\\_June\\_2016.pdf](http://www.fian.org/fileadmin/media/publications_2016/Reports_and_guidelines/FFMReport_June_2016.pdf)



➤ **Proposal to ensure that the list of crimes is not exhaustive:**

Amend chapeaux of clause 6.7 as follows: “Subject to their domestic law, State parties shall **at least** ensure that their domestic legislation provides criminal, civil **and** administrative liability of legal persons for the following criminal offences, **without prejudice of other crimes stipulated in the national law: [points a-k]. The current list is not of exhaustive. States shall individually or jointly advance their corporative criminal law to ensure that the diverse human rights, including economic, social cultural and environmental rights are protected criminal law.**”

➤ **Proposal to ensure development of civil and administrative liability and liability for economic, social, and cultural rights:**

Amend article 6.9 as follows: “State Parties shall **also** provide measures under domestic law to establish **administrative and civil legal liability for acts that are not considered criminal offenses. State Parties shall also develop their criminal liability law to include acts that go beyond traditional criminal offenses to include violations of a full range of human rights, including economic, social, cultural and environmental rights.**”

**Administrative liability**

The treaty should more explicitly elaborate the obligation to impose administrative responsibility, which is a state responsibility that is key to the prevention and redress of abuses committed by transnational corporations and other business enterprises. States should not grant public contracts to companies that have abused human rights, and suspend or cancel licenses and impose fines to effectively deter human rights abuses in corporate activities that are regulated by States. The treaty should also explicitly require States to impose liability on companies that do not comply with human rights due diligence or cause harm. This should especially happen regarding activities in the frame of state contracts or concessions, public-private partnerships and activities in which the state has the obligation to supervise to ensure the public health (e.g. distribution of medicaments, distribution and marketing of food, commercialization of toxic substances) requirements.

➤ **Proposal to strengthen administrative liability and ensure compliance with human rights due diligence:**

“States shall impose administrative liability to protect, respect, and fulfill human rights in the context of business activities that are regulated by States. Such liability shall include, but is not limited to, the denial of public contracts, the cancellation of licenses or permits, and the imposition of meaningful fines on companies that have abused human rights. States shall also impose liability for the failure of companies to comply with prevention measures, including human rights due diligence.”

However, while companies should be held liable for failing to comply with prevention measures, compliance with such measures shall not excuse a company from liability for human rights abuses.

➤ **Proposal to clarify the role of compliance with prevention:** Liability shall be based on the duty of care and shall not be determined solely on the question of whether a company has complied with prevention measures. Nothing in this treaty shall be interpreted to reduce more protective standards on corporate liability or tort law already existing in national legislation.

**Strict liability**



Liability should not be limited to specific situations in which the risk is foreseeable. Companies must be held liable for their human rights abuses even when they have not acted negligently. Strict liability is appropriate in cases where businesses are engaged in hazardous or inherently dangerous industry that poses a potential threat to the health and safety of the persons working for the company as well as others who are affected by the activities of the company.

➤ **Proposal to include a clause on strict liability:**

Insert new article: “States shall hold corporations liable for activities that are hazardous or inherently dangerous, without regard to the company’s negligence. The clauses in this treaty shall be applied without prejudice of already existing regulation on strict liability in the national law”

### **Civil liability**

In some states, as for example in Germany, human rights are not a legal category to determine tort or civil liability. Therefore, states that cannot apply human rights in their tort law shall be obliged to advance in this sense, guarantying that judges in civil jurisdiction can also protect human rights vis-à-vis corporate harm.

➤ **Proposal to enable civil liability**

Include a new paragraph in article 7: **States shall ensure that human rights are recognized as a legal category for the allocation of corporate liability in the national civil or tort law.**

### **Article 7: Adjudicative Jurisdiction**

Given the challenges that rights holders face in accessing justice in the case of human rights abuses, they should be enabled to select the jurisdiction where their claims will be heard.

➤ **Proposal to strengthen access to justice:**

Article 7.1 should be amended as follows: “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, **upon the claimant’s choice**, vest in the courts of the State where. . .”

### **Forum non conveniens:**

The doctrine of *forum non conveniens* has been applied by some legal systems whereby the courts of a State refuse to take jurisdiction arguing that other courts would represent a more adequate forum. This doctrine has proven to impede access to justice in many cases.<sup>14</sup> The proposed provision should seek to limit the use of such a legal doctrine for cases of transnational corporate human rights abuses, at least in those countries where the corporations alleged to be involved have their assets or other substantial interests, which can serve to remedy the affected communities or individuals.

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<sup>14</sup> See, e.g., *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (affirming dismissal of Ecuadorian plaintiffs claims based on *forum non conveniens*). See also, *Recherches Internationales Quebec (Petitioner) v. Cambior Inc. L. (Respondent) and Home Insurance and Golder Associates LTEE (C0-Respondents)*, Quebec Superior Court, August 14, 1998.



- **Proposal for *forum non conveniens*:** “A court shall not decline its jurisdiction to hear a case on the basis that there is another court that also has jurisdiction, especially when the alleged perpetrator has assets or substantial interests under the jurisdiction of the state of the court receiving the specific complaint.”

***Forum Necessitatis:***

It is essential to include a provision establishing the application of *forum necessitatis* for cases brought to courts by victims of transnational activities of TNCs and OBEs, as proposed by certain States and participants during the 4<sup>th</sup> IGWG. This principle already exists in various regional and domestic legal systems, to avoid a denial of justice and guarantee the right to access justice.<sup>15</sup> The inclusion of *forum necessitatis* would ensure that a State would have jurisdiction in cases where States closely connected to the case have denied jurisdiction.

- **Proposal for *forum necessitatis*:** “In order to avert a denial of justice when no other court is available or the claimant cannot reasonably be expected to have access to justice or access to remedy for abuses of human rights, the courts of any State shall have jurisdiction over a dispute involving human rights abuses.”
- **Proposal to include a clause on universal jurisdiction:** “Where applicable under international law, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to crimes.”

## **Article 10: Mutual legal assistance**

The bases upon which a party can refuse recognition and implementation of a judgment of another party or mutual legal assistance are too broad.

- **Proposal to support recognition and enforcement of judgments:** Amend Article 10.10(c) as follows: ““where the judgement is likely to prejudice the sovereignty security, ordre public or other essential interests of the Party in which its recognition is sought.”
- **Proposal to support mutual legal assistance:** Delete second part of Article 10.11 as follows: “Mutual legal assistance under this article may be refused by a State Party if the violation to which the request relates is not covered by this Convention or if it would be contrary to the legal system of the requested State Party.”

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<sup>15</sup> See, e.g., Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, art. 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, art. 50; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, art. 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, art. 146; 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, 21 March 2006, A/RES/60/147, paras. 4-5. See generally, Nwapi, Chilenye. “Jurisdiction by necessity and the regulation of the transnational corporate actor.” *Utrecht J. Int'l & Eur. L.*30 (2014): 24. <https://www.utrechtjournal.org/articles/10.5334/ujel.cb/>





## **Article 12: Consistency with International Law**

FIAN supports Article 12.3, which ensures the validity of domestic legislation or other international agreements that are more protective of human rights.

FIAN also supports article 12.6, as it requires other bilateral and international agreements to be compatible and interpreted in accordance with obligations under the treaty.

### ➤ **Proposal to strengthen the primacy of human rights:**

Article 12.6 should be amended as follows: “States Parties agree that any bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, shall be compatible **comply** and shall be interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols.”

This article could also take inspiration from article 28 of UNDROP: “The human rights and fundamental freedoms of all, without discrimination of any kind, shall be respected in the exercise of the rights enunciated in the present Declaration. The exercise of the rights set forth in the present Declaration shall be subject only to such limitations as are determined by law and that are compliant with international human rights obligations. Any such limitations shall be non-discriminatory and necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”

## **Article. 13 Institutional Arrangements**

In order to ensure that institutions created by the binding instrument are independent of any vested interest or conflict of interest in their funding and can work in an adequate way, and taking into consideration the current challenges faced by treaty bodies, the binding instrument should already agree on the manner to finance this work. We propose the IGWG to discuss on the possibility to impose an international tax for corporations with capital over a specific amount, which would be channelized by the UN to this aim.

### ➤ **Proposed paragraph to advance discussions on the funding of the institutions created under the binding instrument**

Add new paragraph 13.7: ***States parties will impose an international tax to corporations with a capital over an amount of .....dollars, to guarantee the functioning of the institutions created by this binding treaty.***

***Before the tax is implemented, only state parties will be in charge of financing the funding of these institutions, through the general UN budget. The Conference of States Parties shall define and establish the relevant provisions for the functioning of the fund during its first session.***

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