COMMENTS AND AMENDMENTS ON THE SECOND REVISED DRAFT OF THE LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS (published on the 06.08.2020)

Global Campaign to reclaim peoples sovereignty, dismantle corporate power and stop impunity / October 2020

1. INTRODUCTION

The second revised draft of the international legally binding instrument on transnational corporations (TNCs) and other business enterprises with regard to human rights was published in August 2020. It will serve as basis for the negotiation during the 6th session of the Open-ended Intergovernmental Working Group on TNCs and human rights (26-30 October 2020), which was created by the Resolution 26/9 of the UN Human Rights Council and mandated to negotiate and elaborate the legally binding instrument, in the form of a UN Treaty.

While we welcome specific positive changes in the second revised draft that were based on proposals from social movements and are essential to keep and defend, the member organizations of the Global Campaign continue to be concerned about key structural problems in the draft. The core problem is that the new draft doesn't reflect the purpose of the mandate created by Resolution 26/9 and thus, has strayed from the path of developing a strong and effective treaty. What we mean by a strong treaty is one capable of addressing the violations committed by TNCs, which in today's world remain largely unaddressed because of the gaps in international law in relation to these actors. In this context, let us recall that the purpose of Resolution 26/9 is: *"to regulate, in international human rights law, the activities of transnational corporations and other business enterprises",* knowing that other business enterprises *"denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law"*. This second revised draft still contains problematic aspects that could prevent the future instrument from achieving these purposes.

In fact, the current draft deviates from the mandate of the OEIGWG by further reducing the transnational character of the future treaty. The current draft, like the previous one, doesn't seem to be a draft primarily focused on TNCs anymore, but rather a general instrument focused on States' obligations in relation to businesses. This step backwards was pushed by some countries that have always rejected the Treaty process, as well as by the private sector, and embraced by the Presidency of the Working group, despite many countries calling for a treaty focused on TNCs in accordance with Resolution 26/9. In doing so, the current draft removes the focus from the core of the problem: the impunity of TNCs at the international level and throughout their global value chains, made possible by the complex structures of the transnational architecture that allows these entities to evade democratic and legal control. The implementation mechanisms provided by the current draft are without teeth, unlikely to be able to successfully address power asymmetries, regulate TNCs' activities, tackle the pillars of corporate impunity and, therefore, unlikely to guarantee full and effective access to justice for those affected. In other words, the focus, content and implementation mechanisms of the second revised draft do not include key elements that we consider imperative for the elaboration of the Treaty.

The Global Campaign reiterates its commitment to this historical process, defending the positive elements included in the current draft and struggling for the inclusion of critically important elements that are not currently reflected in the draft. The following pages reflect our main comments and proposals on the second revised draft. We request they will be taken into account in the next version of the draft treaty, as we consider them crucial for addressing the needs and expectations of the people and communities affected.

2. GENERAL COMMENTS

The Second Revised Draft does not include substantial changes compared to the previous one. Thus, the gaps that existed in the previous draft remain, and provide dangerous loopholes that TNCs will use to evade their responsibilities.

Generally speaking, this second revised draft still lacks strong mechanisms to guarantee the enforcement and effectiveness of the Treaty. In the current draft, all the responsibilities are on the shoulders of States, which

we know is insufficient. Indeed, through their complex legal and administrative structures and outsized economic and political power, TNCs find ways to bypass accountability in national jurisdictions. This is why the objective of this process should be to establish an international framework for TNCs, beyond States' obligations.

It is also important to consider that through their undue influence, private sectors lobbies do everything in their power to prevent or delay the adoption and/or weaken the content of any new national/regional/international laws that seek to regulate the activities of TNCs and that could hinder the profits of these entities. What's more, today TNCs are able to sue States before international arbitration courts through ISDS controversial mechanisms included in more than 3400 investments treaties. This is why we need an international binding instrument in the first place.

Considering this reality, to be effective and implemented, the Treaty must:

- establish **direct obligations for TNCs,** which could be easily created by transforming some provisions, for instance, of article 6; the obligations of TNCs are different and separate from States' obligations, and the need to include them is highlighted in each negotiation session by some states and many legal experts;
- establish the explicit possibility for a **direct application of the Treaty** by national judges;
- provide **strong mechanisms against corporate capture**, by strengthening the provision about undue influence of the private sector in article 6, and making it applicable to the whole Treaty;
- establish **an international court** that will be complementary to national courts. This Court will be key for cases of international character, such as environmental damages affecting multiple countries, or the activities of an individual TNC affecting people in multiple countries. Establishing such a court is crucial to effectively implementation of the Treaty and to ensure appropriate sanctions in the case of non-compliance.
- revert to the initial **scope focused on TNCs, as argued by many states' delegations, experts and civil society organizations**. The broadening of the scope to all business enterprises, without distinction, even those without transnational character, is a way of diluting the content of the future instrument, making it highly ineffective, and diverting the focus from TNCs impunity.
- clearly reaffirm the **primacy of international human rights law** over any other international legal instruments and, in particular, over trade and investment agreements
- complement the definition of a "business relationship" with an explicit reference to "**global value chains**".

Moreover, the Second Revised Draft should use accurate terminology to refer to the realities we need to change. For instance**,** the term "violations" has totally disappeared and been replaced everywhere by "abuses". The term "abuse" is confusing, establishing a hierarchy between States that would *violate* human rights and TNCs that may cause human rights *abuses*. This term is not in accordance with international human rights instruments. Even though is true that TNCs can commit abuses, it is also true and uncontestable that these entities often violate people and/or communities' human rights.

Finally, we reaffirm that the perspective that should prevail is always the one of those affected, not the perpetrator's, as already established in International Human Rights Law, for example with the Centrality of the Victim's Suffering doctrine, already largely developed in the Inter-American Human Rights System.

3. COMMENTS AND AMENDMENTS ON THE ARTICLES

Preamble

The Preamble of the Second revised draft still contains problematic issues that could obstruct the effectiveness of the future Treaty and compliance with Resolution 26/9:

- the term “abuses” should be replaced by “violations” in **§§8, 12, 13, 14 and 19.**
- the term “business enterprises” should be replaced by “transnational corporations and other business enterprises of transnational character” in **§§8, 11, 13, 15 and 19.**

Preamble §3 In the list of the international instruments mentioned in the preamble, the following should be added.

> ***Amendment §3:*** *Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on Biological Diversity; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities; the Convention relating to the Status of Refugees; the Convention against Corruption, the Conventions and Recommendations of the International Labour Organization, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on Slavery, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, the Declaration on the Right of Peoples to Peace, the Declaration on the rights of peasants and other people working in rural areas, the four Geneva Conventions and their Optional Protocols, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; the Rome Statute of the International Criminal Court and other relevant international instruments approved at the international level in the human rights framework.*

Preamble §4: In this paragraph we propose to add the following rights concerned:

> *Reaffirming the fundamental human rights and the dignity and worth of the human person, in the equal rights of men and women,* ***in particular the instruments adopted regarding economic, social, cultural, civil, political and labour rights; the right to development, self-determination and a healthy environment; and all the collective rights of indigenous peoples, native communities and of peasants and other people working in rural areas, international humanitarian law,*** *and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations*

Preamble §12: The accountability of TNCs should apply regardless of whether the TNC has directly or indirectly committed the act. Finally, a reference to the global value chain should be added:

> ***Amendment §12:*** *…as well as by preventing or mitigating human rights* ~~***abuses***~~ ***violations*** *that are* ***committed all along its global value chains,*** *directly* ***and indirectly*** *linked to their operations, products or services by their business relationships…*

Preamble §19: This paragraph states that the future Treaty will *"clarify and facilitate the effective implementation of State obligations regarding the human rights abuses related to the business activities, and the responsibilities of business in that sense”*. The words “clarify and facilitate” weaken the text and should be deleted. Moreover, this paragraph mentions the “responsibilities of businesses”. The term “responsibility” should be replaced by “obligations” that will be detailed throughout the Treaty and not only vaguely mentioned in the Preamble. In the Preamble, the emphasis is placed on the primary obligation to respect, protect, fulfill and promote human rights, which lies exclusively with States. As has been stressed continually during the discussions of the Working Group, the obligation to respect human rights cannot be limited only to States. In order to comply with Resolution 26/9, it is necessary to specify in this part, and throughout the Treaty, the specific obligations of TNCs in the context of their activities.

> ***Amendment §19:*** *Desiring to* ~~***clarify and facilitate***~~ ***effectively implement*** *the obligations of States regarding business-related human rights* ~~***abuses***~~ ***violations*** *and the* ~~***responsibilities***~~ ***obligations*** **of TNCs and** *other business enterprises in that regard;*

Moreover, in order to strengthen the provisions of the preamble, we propose to add a paragraph that reaffirms the primacy of human rights over investment and trade agreements.

> ***Proposed new paragraph:*** *Reaffirming the primacy of International Human Rights Law over all other legal instruments, especially those related to trade and investment.*

We also suggest the addition of a paragraph relating to the obligations of TNCs with regard to their economic might and their decisive influence on the respect of human, labour and environmental rights:

> ***Proposed new paragraph:*** *Stressing the growing economic might of some business entities, in particular transnational corporations, and their particular responsibility and impact on human, labour and environmental rights.*

> ***Proposed new paragraph***: *Recalling that transnational corporations and other business enterprises of transnational character have obligations derived from international human rights law and that these obligations exist independently and in addition of the legal framework in force in the host and home States.*

It is also necessary to include a reference on the issue of corporate capture, inspired by the WHO Framework Convention on Tobacco Control (article 5.3):

> ***Proposed new paragraph:*** *Underlining that in setting and implementing their public policies related to the regulation of TNCs with regards to human rights, State Parties shall act to protect these policies from commercial and other vested interests, and from undue interference and influence by TNCs.*

Section I

Article 1. Definitions

1.1: Definition of victims: We propose to use the term "affected communities and individuals" instead of or in parallel with the term "victims". This term better underscores the protagonism of the people affected. Moreover, the term "substantial" should be deleted.

> ***Amendment 1.1:*** *"Victim/**Affected people and communities"** shall mean any persons or **communities ~~group~~** who individually or collectively have suffered harm, including physical or mental injury, emotional suffering, or economic loss, or **~~substantial~~** impairment of their human rights, through acts or omissions in the context of business activities **of transnational character**, that constitute human rights **~~abuse~~ violation**. The term "victim/**affected people and communities**" shall also include the immediate family members or dependents of the direct victim/**affected person**, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. A person shall be considered a victim**/affected** regardless of whether the perpetrator of the human rights **~~abuse~~ violation** is identified, apprehended, prosecuted, or convicted*

1.2: Definition of abuse: The removal of the term *violation*, as explained in the introduction of this document, can be understood as understating or diminishing the acts of TNCs and it is also not in conformity with internationally recognized human rights nomenclature. Therefore, the term abuse should be replaced by violation throughout the text.

> ***Amendment 1.2:*** Human rights **~~abuse"~~ violation** shall mean any harm committed by a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights.

1.3: Definition of business activities: Regarding the definition of *"business activities"*, it is important to maintain accordance with Resolution 26/9 which focuses on TNCs and other business enterprises (OBEs) of transnational character.

> ***Amendment 1.3: To the purpose of this (Legally Binding Instrument),*** *business activities" means any for profit economic or other activity undertaken by* ~~***a natural or legal person, including State-owned enterprises***~~ *transnational corporations* ***and*** *other business enterprises* ***of transnational character, undertaken by natural or legal persons, which can be private, public or mixed****,* ***as well as*** *joint ventures****,*** ~~***undertaken by a natural or legal person***~~*. This will include activities undertaken by electronic means.*

1.4: Definition of business activities of transnational character: In the sub-item *b* and *c,* the term "*substantial*" should be removed, since any activity and its effects within another State is considered transnational activity. Using that term reduces the responsibility of businesses by allowing a free interpretation of the substantial character of the transnational activity or its effects. Again, the use of terms for which the concept is not explicitly defined can lead to a loss of effectiveness of the instrument.

1.5: Definition of business relationship: The second revised draft goes back to the previous terminology of *"business relationship",* as requested by the Global Campaign, many other CSOs and some States. This change is important in order to prevent restrictive interpretations of the old concept of "contractual relationship". Although the nomenclature changes, the content was kept almost unchanged, with only the addition of activities performed by electronic means. In this context, it is necessary to strengthen this definition by: 1) linking it to other mechanisms which extend legal liability (not just due diligence) along the entire global value chain in question, including instruments able to balance the asymmetry regarding the burden of proof; and 2) defining the global value chains which are the pillars of the transnational architecture.

> ***Amendment 1.5:*** *"Business relationship" refers to any relationship between natural or legal persons to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State, including activities undertaken by electronic means.* ***The term 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 affected people and communities under this treaty. This "business relationship" is built upon the joint and several liability between the parent company of a TNC and all entities along their global value chain (as defined in this article), including private and public investors, including the International Economic and Financial Institutions (as defined below) and banks participating by investing in the production processes, for all of their activities.***
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> ***Proposed new paragraph 1.5bis:*** *For the purposes of this Treaty, "Joint and several liability" refers to the responsibility that exists between TNCs, all its subsidiaries and their global value chain, including the parent company and private and public investors, the International Economic and Financial Institutions (as defined below) and banks participating by investing in the production processes, for all of their activities.*
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> ***Proposed new paragraph 1.5bis2:*** *The "Global value chain" consists of a group of companies coordinated by a transnational corporation that contribute to the operations of the transnational corporation – from the provision of materials, services and funds to the delivery of products for the end user. The global value chain includes affiliates, contractors, subcontractors or suppliers with whom the transnational corporation carries on established business relations. The TNC may exercise influence over a global value chain company depending on the circumstances.*

Definition of international financial institutions (IFI): The IFIs have an undeniable impact on the enjoyment of human rights. The Global Campaign reiterates the need for the future treaty to include key actors such as the IFIs in the definitions.

Proposed new paragraph 1.7: *IFIs include Inter-governmental organisations, the United Nations and its specialised agencies (International Monetary Fund, World Bank), the World Trade Organization (WTO), development, trade and investment banks, regional banks and other international financial institutions.*

Article 2. Statement of purpose

As clearly stated by Resolution 26/9, it is necessary to make the regulation of the activities of TNCs, within the framework of the provisions of the Binding Treaty, the main purpose. We propose that the first paragraph of this article reads as follows:

Proposed new paragraph 2.1.0: *To regulate the activities of transnational corporations and other business enterprises of transnational character within the framework of international human rights law.*

2.1.a: The second revised draft explicitly added, through article 2.1.a, that the purpose of the Treaty is to regulate the *"responsibilities of business enterprises in this regard"*. This is an improvement over the previous wording. However, in order to fully comply with the content of Resolution 26/9, which aims at "regulating the activities of TNCs and other business enterprises in international human rights law", it is necessary not just to mention that *"business enterprises"* have obligations, but also to list and forcefully establish them in the draft.

Amendment 2.1.a: *To* ~~***clarify and facilitate***~~ *effective****ly*** *implement****ation of*** *the obligation****s*** *of States to respect, protect and promote human rights in the context of business activities, as well as* ***listing and establishing*** *the* ~~*responsibilities*~~ ***obligations*** *of* ***transnational corporations and other*** *business enterprises* ***of transnational character*** *in this regard.*

2.1.b: In the paragraph on prevention, it is necessary to reiterate the importance of regulating TNC's by establishing direct and concrete obligations and responsibilities vis a vis human rights, accompanied by necessary implementation mechanisms.

Amendment 2.1.b: *To prevent the occurrence of human rights* ***violations*** ~~***abuses***~~ *in the context of business activities* ***by establishing concrete obligations to respect human rights for TNCs, in addition to States' obligations, and by creating effective and binding mechanisms of monitoring and enforceability.***

2.1.d: At last, with the concern of ensuring better results, the expression *"strengthen"*, present in article 2.1.d, should be replaced by one semantically stronger like *"guarantee"*, that would represent a more forceful character for the prevention of human rights violations perpetrated by TNCs. Moreover, the objective of promoting international cooperation is important and must be done in accordance with international human rights standards.

Amendment 2.1.d: *To facilitate and* ~~*strengthen*~~ ***guarantee*** *mutual legal assistance and international cooperation,* ***carried out in accordance with international human rights standards,*** *to prevent human rights* ~~*abuses*~~ ***violations*** *in the context of business activities and provide access to justice and effective remedy to victims of such* ~~*abuses*~~ ***violations.***

Article 3. Scope

3.1: With the formulation "*including particularly but not limited to those of a transnational character"*, article 3 departs from the mandate of the Working group (Resolution 26/9). Therefore, as already said, it is necessary to harmonize throughout the future legally binding instrument the terms used when referring to TNCs and other enterprises of transnational character. Otherwise, the coherence and efficiency of the Treaty will be compromised.

Amendment 3.1: *Unless stated otherwise, this (Legally Binding Instrument) shall apply* ~~***to all business activities, including but not limited to transnational corporation and other business enterprises that undertake business activities of a transnational character to***~~

transnational corporations and other business enterprises of transnational character, including their subsidiaries, branches, subcontractors, suppliers, and all other entities in their global value chains.

3.2: For this paragraph we propose the following amendment:

> ***Amendment 3.2:*** *Notwithstanding Art 3.1 above, when imposing* ~~***prevention***~~ *obligations on* ~~***business enterprises***~~ ***transnational corporations and other business enterprises of transnational character*** *under this (Legally Binding Instrument), State Parties may establish in their law, a non-discriminatory basis to differentiate how business enterprises discharge these obligations commensurate with their size, sector, operational context and the severity of impacts on human rights.*

3.3 Lastly, article 3.3 lists international instruments of Human Rights to define the rights covered by the Treaty. This list is restrictive and is not consistent with the international texts listed in the preamble, as already mentioned. The reference to "customary international law" is important as it will allow the Treaty to widen its scope in the future when new rights will be internationally recognized. This paragraph should also include, like the Zero Draft, a reference to more conducive rights recognized in domestic law, to protect also rights such as Rights of Nature that are recognized by certain States. Finally, "to which a state is party" should be removed, as it will create an unequal protection of human rights from one State to another depending on the treaty and ILO conventions they are party to. Here we can use the example of ILO Convention 198 which is applicable to all States even if they have not ratified it.

> ***Amendment 3.3:*** *This (Legally Binding Instrument) shall cover all* ~~***internationally recognized***~~ *human rights and fundamental freedoms,* ***in particular those*** *emanating from* ~~***the Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is a party***~~ ***the instruments mentioned in the Preamble [as amended by us] ,*** *customary international law or any more protective right as stated in article 14.3.*

Article 4. Rights of victims

The title of this article is incomplete since the article does not just include rights of the victims but also rights that belong to all individuals and communities threatened or affected by corporate harm, even if they have not yet been declared as victims. Therefore we propose changing the title to***: Rights of Affected Individuals and Communities/Right of victims.*** The respective changes should be included throughout the article, changing the word victims or adding the term affected individuals and communities.

4.2: The right to access information should be further elaborated to include stronger requirements for the disclosure of information in order to facilitate legal proceedings. In particular, affected communities and individuals should have access to information regarding the different legal entities linked to the parent company so as to facilitate the determination of liability.

> ***Amendment 4.2:*** *Without prejudice to the paragraph above,* ~~*victims*~~ ***affected individuals and communities*** *shall:*
>
> *c. be guaranteed the right to fair, adequate, effective, prompt and non-discriminatory access to justice and effective remedy in accordance with this (Legally Binding Instrument) and international law,* ~~*such*~~ *including* ~~*as*~~ *restitution, compensation, rehabilitation****,*** *satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration,* ***including covering expenses for relocation of victims, replacement of community facilities, and emergency and long-term health assistance. Victims shall be guaranteed the right for long-term monitoring of such remedies.***
>
> *f. be guaranteed access to information and legal aid relevant to pursue effective remedy;* ***This shall include information relative to all the different legal entities involved in the transnational business activity alleged to violate human rights, such as property titles, contracts, communications and other relevant documents. In 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."

Proposed new paragraph 4.2.h: *be guaranteed with access to independent technical advisory mechanisms that facilitate access to impartial evidence regarding the harm or risk of harm caused by companies;*

This amendment can also be included in article 7.2 taking into account that adequate information regarding business relationships, technical advisory mechanisms and related issues are necessary to guarantee a fair access to justice of affected individuals and communities against TNCs activities.

A new paragraph on precautionary measures should be added:

Proposed new paragraph 4.4: *Affected individuals and communities shall have the right to request State parties adopt precautionary measures related to serious or urgent situations that present a risk of irreparable harm pending the resolution of a case* ***as, for instance in cases of risks of environmental harm.***

Article 5. Protection of Victims

We would like to propose some amendments, as well as two new paragraphs, in order to strengthen the provisions of this important article:

Amendment 5.1: *State Parties shall protect victims, their representatives, families****, communities*** *and witnesses from any unlawful interference with their human rights and fundamental freedoms, including prior, during and after they have instituted any proceedings to seek access to effective remedy.*

Amendment 5.2 : *State Parties shall take adequate and effective measures to guarantee* ***all rights of ~~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 exercise their human rights free from any threat, intimidation, violence or insecurity.* ***This obligation requires taking into account their international obligations in the field of human rights, and their constitutional principles.***

Proposed new paragraph 5.4: *States parties shall ensure emergency response mechanisms in case of disasters caused by the action of transnational corporations and other business enterprises of transnational character.*

Article 6. Prevention

The article on prevention is an article where direct obligations should be imposed on TNCs, in addition to and separated from the obligations listed for States.

6.1 This article should explicitly include the obligation to repair human rights violations and should include the entities in the economic groups and value chains of the TNCs.

Amendment 6.1*: State Parties shall regulate effectively the activities of* ***transnational corporations and other business enterprises of transnational character ~~all business enterprises~~*** *domiciled within their territory or jurisdiction****~~, including those of a transnational character~~****. For this purpose States shall take all necessary legal and policy measures to ensure that* ***~~business enterprises, including but not limited to~~*** *transnational corporations and other business enterprises* ***of transnational character*** *, within their territory or jurisdiction, or otherwise under their control, respect all internationally recognized human rights and prevent,* ***repair*** *and mitigate human rights* ***~~abuses~~ violations***

throughout their operations, ***including through their business relationships and global value chain****.*

Proposed new paragraph 6.1.bis*: In order to comply with their obligations to respect, protect and fulfill the rights of this instrument, States parties shall adapt their administrative law to prevent the authorization of business activities of transnational character that would not meet the standards of human rights protection provided in this Legally Binding Instrument. States shall adopt higher standards in their own business relationships, in particular but not limited to public contracts, public-private partnership services and not enter into any type of collaboration with transnational corporations and other business enterprises of transnational character condemned for human rights violations.*

6.2 This article could be reformulated to be imposed directly on TNCs, without the need of passing a national law. It should include an obligation to publish a mapping of the possible risks, i.e the companies should publish explicitly the list of activities, countries and individual projects that are identified as posing risks to human rights and the environment. It should not only include the duty to "take appropriate measures" but also the duty to "implement effectively", as many companies already have due diligence procedures, but only on paper. This obligation of effective implementation should fall on the parent or outsourcing companies and they should be responsible for this effective implementation throughout their whole global value chain and their business relationships as defined in article 1.5. In **6.2b**, it is necessary to make a distinction: TNCs should "prevent and mitigate" risks, and "prevent" human rights violations, not mitigate them. This wording, consistent with General Comment 24 of the ESCR Committee, would mean a step forward in the implementation of obligation of due diligence. Moreover, in **6.2.c**) the monitoring of the effectiveness of the measures should not be done by the companies themselves (or not only by them). That is why we propose to add a new provision on States duties to control the due diligence measures undertaken by transnational corporations (see 6.4).

Proposed new paragraph 6.2 pre: *Transnational corporations and other business enterprises of transnational character shall not take any measures that present a real risk of undermining and violating human rights. They shall identify and prevent human rights violations and risks of violations throughout their operations, including through their business relationships.*

Amendment 6.2bis: ~~*For the purpose of Article 6.1, State Parties shall require*~~ ***Transnational corporations and other business enterprises of transnational character shall*** *undertake human rights due diligence proportionate to their size, risk of* ~~***severe***~~ *human rights impacts and the nature and context of their operations, as follows:*

a. Identify and assess any actual or potential human rights ***violations*** ~~*abuses*~~ *that may arise from their own business activities, or from their business relationships* ***and publish the results of this assessment, including a list of activities, countries of operations and individual projects that are identified among their operations as posing risks to human rights and the environment****;*
b. Take ***and implement effectively*** *appropriate measures to prevent* ***human rights violations, prevent*** *and mitigate effectively* ~~***the identified actual or potential***~~ ***risks of*** *human rights* ***violations****, including in their business relationships;*
c. Monitor the ***implementation and*** *effectiveness of their measures to prevent,* ***repair*** *and mitigate human rights* ***violations****, including in their business relationships;*
d. Communicate regularly and in an accessible manner, ***through participatory mechanisms,*** *to* ***the public and to other*** *stakeholders, particularly to affected or potentially affected persons, to account for how they will address, through* ***the effective implementation of*** *their policies and measures, any actual or potential human rights* ***violations*** *that may arise from their activities including in their business relationships.*

Proposed new paragraph 6.2 bis2: *Failure to comply with due diligence duties under this article shall result in commensurate liability, administrative sanctions such as exclusions from public procurement and compensation in accordance with the articles of this convention.*

6.3: The words “but not limited to” have been suppressed, introducing a restriction of what is considered as due diligence. This is problematic as companies usually take due diligence as a ticking box exercise.

> ***Amendment 6.3.a and .b:*** *State Parties shall ensure that human rights due diligence measures undertaken by* ***transnational corporations and other*** *business enterprises* ***of transnational character*** *under Article 6.2 shall include* ***but not be limited to****:*
> *a. Undertaking regular environmental and human rights impact assessments e****x ante and ex post*** *throughout their operations,* ***including in their business relationships and global value chains****;*
> ~~*c. Conducting meaningful consultations with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, while giving special attention to those facing heightened risks of business-related human rights violations, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas;*~~
> ~~*d. Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent;*~~
> ~~***f. Integrating human rights due diligence requirements in contracts regarding their business relationships and making provision for capacity building or financial contributions, as appropriate***~~ ***Making publicly available and in an accessible manner all ex ante and ex post documents related to the human rights and environmental impacts of their projects and operations, long time before any consultations with individuals or communities are organised, and cooperating to the fullest extent needed with the State entities in charge of organising theses consultations;***

As amended above, the paragraphs 6.3.c and 6.3.d should be deleted from here and moved from here into a new paragraph 6.3.bis as the consultations should be organised by States and not by TNCs. Moreover, article 6.3.c includes an obligation to conduct meaningful consultations, which is not sufficient to guarantee respect for the right to participate in the decision-making of the populations concerned. Therefore, it is necessary to add the term “mandatory”.

In this article, we welcome the fact that the term “consultation” has been replaced by “consent”. But, as already said, the protection of the right to free, prior and informed consent is a duty of the States, and the consultations should not be organised by the companies themselves. Besides the right to free, prior and informed consent should be extended beyond indigenous communities, and understood as:

- the right to be previously informed about the risks related to the activity before the business install itself
- the right to be protected from any pressure or harassment and be able to freely express concerns and demands about a project or company ;
- the right to say no, i.e. a veto right against the installation of a new company or project if they consider it will not benefit to the local people, and poses risks to their rights. This new paragraph would read as follow:

> ***Proposed new paragraph 6.3 bis*** *: States shall guarantee the right to consultation by :*
> *a. Conducting* ***mandatory and*** *meaningful consultations with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, while giving special attention to those facing heightened risks of business-related human rights violations, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas;*
> *b. Ensuring that consultations with indigenous peoples****, peasants and other concerned populations*** *are undertaken in accordance with the internationally agreed standards of free, prior, informed* ***and continued*** *consent;*

6.4: This paragraph has been modified and now states that “*States Parties may provide incentives and adopt other measures to facilitate compliance with requirements under this Article by small and medium sized business enterprises conducting business activities*”. The role of the State is not to “provide incentives” but

to guarantee that companies comply with these requirements. Some small and medium enterprises are in the global value chain of bigger companies on which they are dependent, and their capacity to respect human rights, especially workers' rights, and environmental norms are hindered by the conditions imposed on them by TNCs. This paragraph needs to be reworded accordingly.

> ***Proposed new paragraph 6.4****: States parties shall designate a competent authority with allocated responsibilities and adequate financial and human resources to monitor the effectiveness of the due diligence measures undertaken by business enterprises as well as their effective implementation.*
>
> ***Proposed new paragraph 6.4.bis:*** *States parties shall ensure that parent and outsourcing business enterprises give all the necessary technical and financial means to the legal persons with whom they have business relationships and/or within their global value chain for them to be able to effectively implement the due diligence measures identified in 6.2 and 6.3. Complying with this duty of effective implementation remains the responsibility of the parent or outsourcing company.*
>
> ***Proposed new paragraph 6.4.2bis:*** *States parties shall provide mechanism for financial guarantees to communities for activities with a high potential of damage to human rights, to be made immediately available in case of harm.*

6.7: This paragraph refers to the mechanisms of undue influence of private interests on public policies. However, this subject should not be included in article 6, but rather in a separate article, in order to cover the full extent of the Treaty. This separate article on undue influence could also cover other general obligations of States under this Treaty and its implementation. In this article, the content of paragraph 6.7 should be formulated as follows:

> *In setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument),* ***as well as international norms and agreements,*** *State Parties shall act to protect these policies,* ***laws, policymaking processes, government and regulatory bodies, judicial institutions and intergovernmental institutions from undue influence of commercial and other vested interests of the private sector,*** ~~***of persons conducting business activities, including those of transnational character, in accordance with domestic law.***~~ ***Moreover****,* ***transnational corporations and other business enterprises of transnational character shall be bound by their obligations under this Treaty and shall refrain from obstructing its implementation by States Parties to this instrument, whether home states, host States or States affected by the activities of TNCs.***

Finally, we propose to complement this article on prevention with provisions establishing duties for international financial institutions, and States acting within these institutions.

> ***Proposed new paragraph 6.8:*** *International financial institutions shall identify and prevent human rights violations by any entity they support financially. They shall not give any form of financial support (such as loans, subsidies, guarantees) to business enterprises, including through their business relationships, if they know or should have known that the operations of those entities present risks for human rights and the environment. Any conduct of these institutions and their managers that contravenes these duties stands to be corrected by suitable disciplinary, administrative or other measures including the possibility of affected people or communities seeking compensation and reparations from the concerned International Financial Institutions.*
>
> ***Proposed new paragraph 6.9:*** *When participating in decision-making processes or any other action as member of International Financial Institutions, States shall do so in accordance with the States Parties' obligations established by the current (Legally Binding Instrument). They shall take all steps at their disposal to ensure that the institutions or the agreement concerned does not contribute to violations of human rights caused by transnational corporations and other business enterprises of transnational character, including in their business relationships.*

Article 7. Access to Remedy

We welcome the inclusion of article 7.5 preventing the use of the doctrine of forum non conveniens. We, however, propose deleting the term "legitimate", which is vague and open for interpretation, and rather make reference to the grounds for jurisdiction laid down in article 9, in particular art. 9.3, which defines the conditions under which forum non conveniens shall not be used.

With regards this paragraph on the reversal of the burden of proof, we believe that the current revision has been weakened. Although we understand that this matter is subject to different legal systems, courts should be given the power to order the reversal of the burden of proof to ensure that this burden is transferred from those affected to the defendant. This is a way to ensure equality of arms in the judicial process, eliminating the barriers that exist for accessing to justice. For those legal regimes where the reversal of the burden of proof is not possible, the legally binding instrument should strongly encourage the enactment of amendment of laws to allow for this provision in order to fulfil victims' right to access remedies.

In light of the above, and in order to strengthen this article, we propose the following amendments:

> ***Amendment 7.1** : States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary jurisdiction in accordance with this (Legally Binding Instrument) to enable ~~victims~~' **affected individuals and communities'** access **to due process of law,** adequate, timely and effective remedy. **The use and access to non-judicial mechanisms shall not compromise the rights-holders' access to judicial mechanisms.***
>
> ***Amendment 7.2 :** State Parties shall ~~ensure that their domestic laws~~ **take the legal measures necessary to eliminate barriers and** facilitate access to information, including through international cooperation, as set out in this (Legally Binding Instrument), and enable courts to allow proceedings in appropriate cases. **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."** (Propose to include here if not included in 4.2.f)*
>
> ***Amendment 7.3.** State Parties shall provide adequate and effective legal assistance to victims throughout the legal process, including by:*
> ***a.** Making information available to victims of their rights and the status of their claims, **which includes having language interpretation and translation assistance or equipment in other languages or mother tongues; according to article 4.2.f** [as amended by us, or 7.2 depending on the place where the former amendment is included]*
>
> ***Proposed new paragraphs 7.3.f, g and h:***
> *f. Ensuring a fair and impartial system of assessment and quantification of damages, independent from the influence of the entities that caused them*
> *g. Lifting the corporate veil within their jurisdictions*
> *h. Providing mechanisms for the reversal of the burden of proof in favour of those affected, when needed to ensure equality of arms*
>
> ***Amendment 7.5 :** State Parties shall ensure that the doctrine of forum non conveniens is not used by their courts to dismiss **~~legitimate~~** judicial proceedings brought by victims, **in accordance with article 9.3.***
>
> ***Amendment 7.6** : State Parties shall ensure that the **~~may, consistent with the rule of law requirements, enact or amend laws to reverse the~~** burden of proof is on the defendant to ensure equality of arms in the judicial process **~~in appropriate cases to fulfil the victims' right to access to remedy.~~***
>
> ***Proposed new paragraph 7.8:** **We propose to include an article with the principle of in dubio pro persona:** States shall guarantee that if there is any doubt about the implementation of the LBI, people and communities that have been or are affected or*

threatened by the activities of transnational corporations and other business enterprises of transnational character will enjoy the widest protection of their rights.

Proposed new paragraph 7.9: **We propose to include an article to include precautionary measures:** *States shall make available mechanisms to allow affected communities and persons to demand precautionary measures to prevent harm.* [1]

Article 8. Legal Liability

8.1: This paragraph should explicitly state the need for administrative, civil and criminal regimes of liability. Criminal liability is necessary since civil convictions are not sufficient and do not act as a deterrent.

Amendment 8.1: *State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of* ***civil, administrative and criminal*** *legal liability of legal and natural persons conducting business activities* ***of transnational character*** *domiciled or operating within their territory or jurisdiction, or otherwise under their control, for human rights* ***violations*** *that may arise from their own business activities****, including those of transnational character,*** *or from their business relationships.*

Proposed new paragraph 8.1.bis: *States Parties shall hold liable, even for their complicity, collaboration, instigation, incitement or concealment, the International Financial Institutions that have provided any kind of financial support to transnational corporations and other business enterprises of transnational character responsible for human rights violations, including through their business relationships and global value chains.*

8.5: We also welcome the addition of a gender perspective in article 8.5, but it should also mention other vulnerable groups that, given their peculiarities, lack the proper protection.

Amendment 8.5. *States Parties shall adopt measures necessary to ensure that their domestic law provides for adequate, prompt, effective****, and gender responsive*** *reparations to the victims of human rights* ***violations*** *in the context of business activities****, including those of a transnational character****, in line with applicable international standards for reparations to the victims of human rights violations****. These reparations should be adequate to the victims needs and vulnerabilities, such as gender, race, sexual orientation.*** *Where a legal or natural person conducting business activities* ***of transnational character*** *is found liable for reparation to a victim of a human rights* ***abuse violation****, such person shall provide reparation to the victim or compensate the State, if that State has already provided reparation to the victim for the human rights* ***abuse violation*** *resulting from acts or omissions for which that legal or natural person conducting business activities* ***of transnational character*** *is responsible.*

8.6: This paragraph is an important place to explicitly articulate the direct obligations of corporations: it must specify that TNCs are required to reserve funds in case there is the necessity of compensation. This is a way of guaranteeing that TNCs can be held accountable and are able to compensate the people affected by their activities.

Amendment 8.6: ***State Parties may require legal or natural persons conducting in business activities in their territory or jurisdiction, including those of a transnational character,*** ***Transnational corporations and other business enterprises of transnational character, intended as legal or natural persons, shall*** *establish and maintain financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation* ***and judicial costs.***

8.7: This provision remains difficult to interpret. A provision in article 8.7 should be added to cover the liability of TNCs for their failure to prevent violations arising from their own activities. Furthermore, it is very difficult to prove the links of control or supervision between different companies or entities; instead a

1 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.

provision about presumption of control of parent companies and about the reversal of the burden of proof should be added.

Furthermore, the addition of "*but failed to put adequate measures to prevent the abuse*" is problematic as it can be used by TNCs and other business enterprises of transnational character to escape from their liability. Moreover, it creates confusion as it contradicts the welcomed addition of **article 8.8** "*Human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability...*".

8.8: The sentence about the competent authority should be deleted as its implementation can be very problematic: it risks focusing the debates in court on what exactly are the due diligence standards and how they should be interpreted, rather than focusing on the violations or risks of violations. For more clarity, we propose the following amendments for these two paragraphs:

> ***Amendment 8.7****: States Parties shall ensure that their domestic law provides for the liability of legal or natural or legal persons conducting business activities* ***of transnational character~~, including those of transnational character,~~ for their failure to prevent human rights violations caused by their own activities, and*** *for their failure to prevent another* ***~~legal or natural person~~ company*** *with whom it has a business relationship* ***and/or within their global value chain****, from causing or contributing to human rights* ***violations ~~abuses~~****, **~~when the former legally or factually controls or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or~~ or when*** *it should have foreseen risks of human rights* ***violations ~~abuses~~*** *in the conduct of their business activities~~, including those of transnational character,~~ or in their business relationships* ***and/or global value chain, ~~but failed to put adequate measures to prevent the abuse.~~***
>
> ***In addition, States Parties shall ensure that their domestic legislation provides for a rebuttal 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. In the conditions defined above, any transnational corporations and other business enterprises of transnational character will be found liable for the damages caused by the activities of the entities in its global value chain or with which it has a business relationships.***
>
> ***Amendment 8.8****: Human rights due diligence shall not automatically absolve a legal or natural person conducting business activities* ***of transnational character*** *from liability for causing or contributing to human rights* ***~~abuses~~ violations*** *or failing to prevent such* ***~~abuses~~ violations*** *by a natural or legal person conducting business activities* ***of transnational character*** *as laid down in Article 8.7.* ***~~The court or other competent authority will decide the liability of such entities after an examination of compliance with applicable human rights due diligence standards.~~***

A key provision is missing in article 8: one establishing several and joint liability for the different companies that participate in violating human rights. This would complement new article 9.4 about connected claims.

> ***Proposed new paragraph 8.8bis:*** *The parent and outsourcing companies assume several and joint liability with their subsidiaries and the legal persons with whom they have business relationships and/or which are part of their global value chain regarding the obligations established in this (Legally Binding Instrument). The obligation to assume this liability shall be directly applied by judges in cases in which the existing legal framework in force in the home and/or host states or in the states in which the affected persons or communities are based is not adequate for the implementation of this (Legally Binding Instrument).*

The wording of **article 8.9** has improved, focusing more clearly on criminal liability, and adding "or functionally equivalent liability" for an easier adoption by countries that have different regimes of criminal liability. The previous list of crimes, which was very restricted, has been suppressed. The Treaty also opens the way for States Parties do "individually or jointly advance their criminal law": although it is good to incentive State cooperation in this matter, it would have been better for the Treaty to set an ambitious

criminal liability regime applicable to all States. Moreover, the article should include a reference to international criminal and humanitarian law besides international human rights law.

Finally, **article 8.11** has been improved by adding "omissions" that can also lead to criminal liability for attempt, participation or complicity in a criminal offense.

Article 9. Adjudicative Jurisdiction

9.1: First of all, as already commented on the previous draft, we consider that this paragraph should include an explicit reference to the global value chains of TNCs, to be sure that it will be possible to bring legal claims in the home country of the parent or outsourcing company.

In article 9.1.a, "victims are domiciled" has been replaced by "the human rights abuse occurred". In many cases, the country where the victims are domiciled is the same as the country where the violation occurred, and the latter is the common rule applied for the choice of jurisdiction. However, there can be cases, for instance of migrant workers, where the domicile of the victim is in another country than where their rights have been violated; in this case, being able to bring a complaint in their country of domicile can facilitate their access to justice, even if the violation has occurred in another country. So this criteria should be reintroduced.

> ***Amendment 9.1:*** *Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where:*
> *a. the human rights* ~~*abuse*~~ ***violation*** *occurred* ***or risks to occur****; or*
> *b.* ***the victims' domicile****; or*
> *c. an act or omission contributing to the human rights* ~~*abuse*~~ ***violation or risk of violation*** *occurred; or*
> *d. the legal or natural persons* ***conducting business activities of transnational character*** *alleged to have committed,* ***including through their business relationships and global value chain****, such acts or omissions in the context of business activities are domiciled; or*
> *e.* ***the companies that have business relationships with the transnational corporation alleged to have committed such acts or omissions in the context of business activities, are domiciled.***

9.2: In article 9.2.d, the replacement of "substantial business interests" by "principal place of business" is a clear restriction in the definition of the domiciles of transnational corporations and business activities of transnational character. "Substantial business interests" should thus be re-introduced, or at least "principal place of business" should be put in plural, to cover the main countries where transnational corporations concentrate their activities and assets. For the same reason, we think "including through their business relationships" should be moved after "domiciled".

> ***Amendment 9.2.d (option 1):*** *... Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal person conducting business activities* ***of a transnational character****,* ~~*including through their business relationships*~~*, is considered domiciled,* ***including through their business relationships or global value chain,*** *at the place where it has its:*
> *a. place of incorporation; or*
> *b. statutory seat; or*
> *c. central administration; or*
> d. ~~*principal place of business; or*~~ ***substantial business interests***

> ***Amendment 9.2.d (option 2):*** *...*
> *a.* ***patrimony; or***
> *b. place of incorporation; or*
> *c. statutory seat; or*
> *d. central administration; or*
> *e. principal place****s*** *of business;* ~~*or*~~

9.3 and 9.4: We welcome the introduction of articles 9.3 about the prohibition of forum non conveniens, 9.4 about connected claims and 9.5 about forum necessitatis. That said, they should be strengthened to ensure their effectiveness. Paragraph 9.3 should refer to all the provisions in article 9 (covering the definition of the domicile of a transnational corporation, as well as the provisions on connected claims and forum necessitatis), and not only article 9.1, otherwise there will be significant loopholes.

> ***Amendment 9.3:*** *Where victims choose to bring a claim in a court as per* ***this*** *Article* ~~***9.1***~~*, jurisdiction shall be obligatory and therefore that court shall not decline it on the basis of forum non conveniens.*

Moreover, we welcome the new provision 9.4 about connected claims, which will allow, for instance, the possibility of judging a parent company and its subsidiary operating abroad before the same court. This is a first important step to then establish their joint liability. This provision should be improved by adding the following paragraphs:

> ***Proposed new paragraph 9.4.bis:*** *Claims are closely connected in the sense of paragraph 9.4.a if: i. it is efficient to hear and determine them together; and ii. the defendants are related*
>
> ***Proposed new paragraph 9.4.bis2****: Defendants are related in the sense of paragraph 9.4.b, in particular if at the time the cause of action arose:*
> *i. they formed part of the same corporate group;*
> *ii. one defendant had business relationships with another defendant or controlled it directly or indirectly ;*
> *iii. one defendant directed the litigious acts of another defendant; or*
> *iv. they took part in a concerted manner in the activity giving rise to the cause of action.*

9.5: Although it is not explicitly mentioned, this paragraph introduces forum necessitatis which was also one of our demands, and is thus very welcome. However, the wording needs to be improved to better define this notion and ensure the effectiveness of this provision.

> ***Amendment 9.5: In order to avert a denial of justice****, courts shall have jurisdiction over claims against legal or natural persons* ***of transnational character*** *not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection to the State Party concerned.*
>
> ***Proposed new paragraph 9.6:*** *A denial of justice in the sense of paragraph 9.5.a occurs if the court decides to hear all interested parties, and after taking account of reliable public sources of information, concludes that:*
> ***i.*** *no other court is available; or*
> ***ii.*** *the claimant cannot reasonably be expected to access another court.*
> *A sufficiently close connection in the sense of paragraph 9.5.a consists in particular in:*
> *the presence of the claimant;*
> ***i.*** *the nationality of the claimant or the defendant. If the defendant is a legal person, its nationality is defined as the country where it has its registered office therein, or if it is controlled directly or indirectly by nationals of this country, or by legal persons having their registered office in this country;*
> ***ii.*** *the presence of assets of the defendant, including through its business relationships;*
> ***iii.*** *some activity of the defendant, including business activities of transnational character and through its business relationships;*
> ***iv.*** *a civil claim based on an act giving rise to criminal proceedings in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings.*

A clause should also be included establishing that private arbitration structures, such as investor-state dispute settlement mechanisms (ISDS) -- which are biased towards the interests of transnational corporations -- cannot be competent to deal with any dispute that has human rights implications.

Proposed new paragraph 9.7: *States Parties shall not enter into any agreement that gives international investor-State arbitration bodies (ISDS) jurisdiction over any dispute that involves human rights implications.*

In addition, we propose to incorporate universal jurisdiction for crimes against humanity and violations of jus cogens.

Proposed new paragraph 9.8: *Where applicable under international law, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction for crimes against peremptory norms of international law and crimes against humanity caused by business activities of transnational character.*

Article 10. Statute of Limitations

10.1: We propose to delete the reference to the most serious crimes and to add a reference to labour rights and environmental norms.

Amendment 10.1: *The State Parties to the present (Legally Binding Instrument) undertake to adopt any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of all violations of international* ***human rights law, Labour rights, Environmental norms and international humanitarian law****.*

10.2: The notion of reasonable time remains far too vague to guarantee adequate protection for affected communities and individuals. We propose following amendment:

Amendment 10.2: *Domestic statutes of limitations applicable to civil claims or to violations that do not constitute the most serious crimes of concern to the international community as a whole shall allow* ~~***a reasonable period of time***~~ ***a fair and adequate*** *period of time for the investigation and commencement of prosecution or other legal proceedings, particularly in cases where the violations occurred in another State or when the harm may be identifiable only after a long period of time.*

Article 11. Applicable Law

Article 11 does not allow for a clear resolution of conflicts between different national legislations or between international human rights law and trade and investment law for example.

It should be explicitly stated that the choice of applicable law should be the choice of affected communities and persons and/or the law most protective of victims' rights. In this sense, the addition of "*upon the request of the victim*" is welcomed but not sufficient as it is not guaranteed that the court will accept this request. We also welcome the fact that the reference to domestic law has been deleted from article 11.2.

Amendment 11.2: *Notwithstanding Art. 9.1, all matters of substance regarding human rights law relevant to claims before the competent court* ~~*may*~~ ***shall,*** *upon the request of the victim of a business-related human rights abuse or its representatives* ***and/or if another law better protects the victims' rights****, be governed by the law of another State where:*
a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or
b) the natural or legal person ***conducting business activities of transnational character*** *alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled****, including through its business relationships and global value chain****.*

Moreover, we don't understand the deletion of article 11.3, as it is important to stress that national laws that are more protective or beneficial to affected communities and individuals must prevail. It should thus be reintroduced.

> ***Proposed new paragraph 11.3:*** *The (Legally Binding Instrument) does not prejudge a greater recognition and protection of any rights of victims that may be provided under applicable domestic law.*

Finally, we propose the addition of the following paragraph:

> ***Proposed new paragraph 11.4:*** *The choice of applicable law shall always be in accordance with the provisions regarding the primacy of human rights over trade and investment agreements and the ones that better protect the rights of the affected communities and people.*

Article 12. Mutual Legal Assistance and International Judicial Cooperation

12.3.a.xi, 12.3.b and 12.4: The references to national legislation in these paragraphs reduce the scope of this article and should be deleted.

> ***Amendment 12.3.a.xi:*** ~~***Any other type of assistance that is not contrary to the domestic law of the requested State Party.***~~
>
> ***Amendment 12.3.b:*** *International judicial cooperation under this (Legally Binding Instrument) is understood to include, inter alia: effective service of judicial documents; and provision of judicial comity* ~~***consistent with domestic law.***~~
>
> ***Amendment 12.4:*** *In criminal cases covered under this (Legally Binding Instrument)* ~~***, and without prejudice to the domestic law of the involved State Parties***~~

12.9.c: The use of ‘*‘ordre public"* as possibility of denial of a trial devaluates the primacy of human rights, the need to counter impunity and maintains a very vague margin of objection by the States concerned. It should therefore be amended like follows:

> ***Amendment 12.9.c:*** *where the judgement is manifestly contrary to the* ~~***ordre public***~~ ***sovereignty*** *of the Party in which its recognition is sought.*

Article 14. Consistency with international law and principles

In this new version of the draft, it was added that trade and investment agreements have to be compatible with the obligations of this Treaty. This is an improvement that we welcome. In order to further strengthen the provisions of the future Treaty, we propose the following amendments:

> ***Amendment 14.5:*** *States Parties shall ensure that:*
> ***a****: any existing bilateral or multilateral agreements****, private-public partnerships and contracts****, […] shall be interpreted and implemented in a manner that will not undermine or limit their capacity to fulfil their obligations under this LBI and its protocols, as well as other relevant human rights conventions and instruments.*
>
> *b. Any new bilateral or multilateral trade and investment agreements shall be compatible with the* ***human rights obligations of States’ parties and of transnational corporation and other***

business enterprises of transnational character *under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.*

Section II

Article 15. Institutional Arrangements

The Committee remains a very fragile mechanism, as in the previous Draft.

It is essential to have a clear definition of the criteria for the choice of possible candidates appointed by the States to compose the Committee, which should explicitly exclude individuals linked to the business sector.

In addition to national courts, it is necessary to establish an International Court to receive individual and collective complaints.

Article 15 should include the possibility of lodging complaints against TNCs and making the Committee's recommendations binding. In this sense, we propose adding the following provisions:

> ***Proposed new paragraph 15.4.a.bis****: The Committee receives and considers complaints submitted by victims and affected communities concerning the activities of transnational corporations that act in contradiction to this legally binding instrument.*
>
> ***Proposed new paragraph 15.4.a.2bis****: States Parties recognize the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Treaty.*
>
> ***Proposed new paragraph 15.4.b.bis****: The decisions rendered by the Committee shall be binding and shall be followed by action by transnational corporations and other business enterprises of transnational character, States Parties and related organizations (such as a special fund for victims, administrative sanctions for the companies concerned by the decisions, etc.).*

In addition, the Committee should guide States in their strategies for regulating TNC activities on preventing human rights violations.

> ***Proposed new paragraph 15.4.c.bis****: The Committee may also make recommendations to States parties to guide them in their strategies to regulate transnational corporations' activities in order to prevent human rights violations. For this purpose, the latter may be assisted by independent experts and professionals in the fields in question.*

It is also necessary to create a fund that would be financed by a tax imposed on TNCs.

> ***Amendment 15.7****: States Parties shall establish an International Fund for Victims covered under this (Legally Binding Instrument),* ***funded by transnational corporations through an international tax, to provide for*** *legal and financial aid to victims. This Fund shall be established at most after (X) years of the entry into force of this (Legally Binding Instrument). 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 Parties shall define and establish the relevant provisions for the functioning of the Fund.*

The Global Campaign believes that without the establishment of an independent international treaty implementation mechanism, whose decisions must be followed, it will not be possible to end TNC impunity and to ensure access to justice for affected communities and individuals. This mechanism may be set up in parallel and be complementary to the Committee proposed in this article. We propose a new chapter within article 15:

International monitoring and enforcement mechanisms

1. The UN Treaty Bodies on Human Rights and other UN related complaint mechanisms shall be competent to directly receive complaints against TNCs and International Economic and Financial Institutions. They shall forward these to the International Court on TNCs, as instituted below.

2. Conflicts between TNCs and States involving human rights issues shall not be appealed to international arbitration tribunals on trade and investment. The bodies that have jurisdiction to solve these conflicts are: international, national and regional jurisdictions, and mechanisms for monitoring and enforcement, acting in a complementary manner.

3. To guarantee the implementation of the obligations set out by this Treaty, an International Court on Transnational Corporations and human rights is established. The Court has the competence to receive, investigate and judge complaints against TNCs for violations of the rights concerned and the obligations established in this Treaty.

4. The Court protects the interests of the individuals and communities who are affected by the operations of TNCs, which includes ensuring full reparation for them and imposing sanctions on TNCs and their managers.

5. The Court's rulings and sanctions are enforceable and legally binding.

6. The International Court shall function in accordance with the annexed Statute of the present Treaty.

7. An International Monitoring Centre on Transnational Corporations and human rights is created. It will be responsible for evaluating, investigating and inspecting TNCs' activities and practices. The Centre shall issue recommendations based on its findings.

8. The Centre is managed collectively by States, social movements, affected communities and other civil society organizations.

Article 16. Implementation

This article should protect the implementation process from the undue influence of corporations.

> ***Proposed new paragraph 16.6:*** *In implementing this LBI, States parties shall protect public policies and decision-making spaces from the undue interference and influence of commercial and other vested interests.*

Article 18. Settlement of disputes

Any dispute between two or more State Parties shall be resolved either by negotiation or in transparent judicial mechanisms such as the International Court of Justice, or similar regional bodies, and not through an arbitration mechanism. The current drafting of the article open the doors to the possibility that arbitration tribunals be competent to deal with disputes. The arbitration model can be problematic, raising issues relating to arbitrators' impartiality and independence, secrecy of proceedings and lack of predictability and consistency. Therefore, we suggest the following changes:

> ***Amendment 18.1:*** *If a dispute arises between two or more State Parties about the interpretation or application of this (Legally Binding Instrument), they shall seek a solution by negotiation or by any other means of dispute* ~~***settlement acceptable to the parties to the dispute***~~ ***in international or regional judicial mechanisms.***

Moreover, the sentence in paragraph 18.2.b should be deleted and replaced:

> ***Amendment 18.2.b:*** ~~***Arbitration in accordance with the procedure and organization mutually agreed by both State Parties.***~~ ***Submission of the dispute to another international or regional judicial mechanism.***

Finally, in order to be consistent with our comment and proposal, paragraph 18.3 should also be deleted :

Amendment 18.3: ~~***If the State Parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of this article, the dispute may be submitted only to the International Court of Justice,unless the State Parties agree otherwise.***~~

Article 23. Denunciation

It is not usual to include a denunciation clause in a human rights treaty. Indeed, this is not a patent or a trade agreement that is necessarily limited in time. As the UN Committee on Economic, Social and Cultural Rights says so well, "human rights are timeless and are the expression of the fundamental prerogatives of the human person".

In our opinion, article 23 is not relevant, especially since article 21 gives the States parties the possibility to amend the treaty in question in accordance with developments in the years to come.

For this reason, we propose the deletion of article 23.

Amendment 23: ~~*A State Party may denounce the present (Legally Binding Instrument) by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.*~~