



Contribution to the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

October 2019

In May, Pope Francis met a victim of the January 2019 Vale mine waste dam collapse in Brumadinho, Minas Gerais, Brazil, who shared his personal testimony. The Pope underlined: *“Attention for the safety and well-being of the people involved in mining operations as well as the respect for fundamental human rights of the members of the local communities and those who champion their causes are indeed non-negotiable principles. Mere corporate social responsibility is not sufficient.”*

In April, Archbishop Auza, Permanent Observer of the Holy See to the United Nations, addressed the UN General Assembly commemoration of the 100th anniversary of the International Labour Organization, stating: *“Rights and benefits should not be disposable. The Decent Work Agenda today is part and parcel of the global development agenda and it is universally applicable, regardless of countries’ economic, social or political status. Labour should have its legal and political framework based on just ethical principles that bear real political, legal and economic consequences.”*

In October, while global attention is focused on the Amazon fires, their causes and consequences for our common home and humanity, the Synod on the Amazon and integral ecology takes place in Rome.

This is a decisive moment for the process towards shaping a UN Treaty that can bring value to global efforts towards preventing adverse human rights effects of business activities and providing access to justice for affected people and communities. The nature and impacts of global business require action at multiple levels. The Treaty is urgently needed to help **address gaps and insufficiencies in the global legal framework**, which has not kept up with evolutions in the global economic and business reality, and to help redress the current imbalances between the rights and obligations of business. As organizations strongly involved at national level, we have experienced how national developments can be greatly strengthened by steps forward at global level on the Treaty. National legal measures already in place, or under development, also point to the types of provisions that the Treaty could help to extend worldwide, creating a level playing field for business, and improving the level of protection of human rights for all.

Rooted in our direct work with women and men, communities and workers negatively affected by business operations, their experiences and proposals, **CIDSE welcomes the revised text** for the international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (hereafter referred to as “the Treaty”) as a basis for negotiations. The structure is more coherent and the text more precise, reflecting a number of proposals and concerns raised. As such it provides a solid basis for further constructive debate, dialogue and improvement.

The Treaty should be able to make an effective contribution in the following ways:

PROTECT THE RIGHTS OF WORKERS AND COMMUNITIES, PREVENTING DISASTERS DUE TO CORPORATE NEGLIGENCE

*The **collapse of the Samarco dam**, managed by Vale and BHP Billiton Brasil Ltda, near Mariana, Brazil in November 2015, caused the deaths of 19 people and the worst environmental disaster in the country’s history, that to this day affects the livelihoods of people in the region. The Mariana disaster highlighted a huge gap in the international justice system – still today, many of the victims are waiting for justice domestically, while legal action has only just begun in the U.K. to determine the international responsibility of BHP Billiton. Four years later, the collapse of Vale’s nearby **Córrego do Feijão dam in Brumadinho**, caused the deaths of close to 300 workers and other people, and widespread pollution of the surrounding environment and major rivers. Vale S.A. did not take the necessary preventive measures to resolve the growing risk of rupture. The negligence of Vale S.A., not only relates to its own responsibility, but also the responsibility of its business partners, both direct and indirect,ⁱ including the German auditing company TÜV SÜD as well as European banks financing Vale.*

*The **French duty of vigilance law** applies to a company’s activities and that of its business relationships as defined by the law. Under French law, the concept of established business relationship covers all types of relations between professionals defined as stable, regular relationships, with or without contract.ⁱⁱ*

1. The text has evolved in its **scope of application**: the Treaty would now apply to **all business activities**, with a particular emphasis on transnational activity. International law already states that the State’s duty is to protect against human rights abuses in the context of all business activities. This is also consistent with the growing momentum at national level in legislation concerning human rights due diligence. At the same time, the emphasis on **transnational activity** of enterprises remains important, as experience shows that this is where we face the biggest challenges and accountability gaps: complex business structures, jurisdictional restraints, divergent legal systems and levels of enforcement resulting in corporations being able to avoid legal liability.
2. The text on prevention in this draft of the treaty is more coherent with the **UN Guiding Principles on Business & Human Rights**, aligning with the latter’s definition of human rights due diligence. This includes particular attention to **occupied and conflict-affected areas** (Articles 5.3b, 5.3e, 14.3), as conflict-affected areas present heightened risks of business involvement in human rights abuses.ⁱⁱⁱ This demonstrates how the development and adoption of this binding instrument would also complement and greatly strengthen the impact of existing actions that governments and businesses have taken to implement the UN Guiding Principles.
3. However, Article 5 of the revised draft on prevention limits the **due diligence process** to an enterprise’s **contractual relationships**, representing a significant step backwards from existing standards concerning business relationships. It is important that the Treaty does not create perverse incentives for businesses to dispense with formal contracts with their suppliers. According to the UN Guiding Principles, human rights due diligence should cover all types of business involvement in negative human rights impacts: causation, contribution and direct links to its operations, products and services. The 2018 **OECD Due Diligence Guidance for Responsible Business Conduct**

affirms this standard by recommending that enterprises “develop and implement plans to seek to prevent or mitigate actual or potential adverse impacts on Responsible Business Conduct issues which are directly linked to the enterprise’s operations, products or services by **business relationships**.”^{iv} This language so far is only present in the revised text’s Preamble.

4. Liability of business enterprises should not be limited to contractual relationships either. **Administrative liability** – such as fines, the temporary exclusion from public procurement, external trade promotion or subsidies – is needed when companies fail to comply with human rights due diligence requirements, not only in cases with criminal offenses. With respect to **civil liability**, the Treaty should follow the principle of the French duty of vigilance law that covers established **business relationships**, which do not necessarily require direct contractual relationships. The French law is more effective, as it prevents corporations from evading liability by inventing more complex supply chain structures without direct contractual relationships. Other countries are also developing this type of legislation. As CIDSE we see this as very helpful, and believe that this approach should be included in the Treaty as a global threshold.
5. A crucial development in the text is the increased references to the disproportionate and particular impact of business activity on **women**. In relation to human rights due diligence, this should be further developed by articulating the requirement for meaningful participation of potentially affected women, women’s organizations, women human rights defenders and gender experts in all stages of human rights due diligence.^v

- Article 5.3d on **prevention** should not be limited to contractual relationships, but cover all human rights impacts that corporations may cause, contribute to or be directly linked to through their operations, products or services.
- Art. 6.6. on **liability** should explicitly refer to all **business relationships**, including those related to supply, export, services, insurance, finance and investment; rather than only contractual relationships. Liability should also apply when abuses result from the failure to **comply with due diligence requirements**. **Administrative liability** is needed for offenses other than criminal offenses.

AVOID CONFLICTS BY GUARANTEEING THE RIGHT TO CONSENT OF INDIGENOUS AND AFFECTED PEOPLES

*A mining project by Transworld Energy and Minerals, a subsidiary of the Australian company MRC, in the Xolobeni community of South Africa would have necessitated the removal of about 70 households from a farming community. It would have disrupted the social fabric of the community and been a traumatic disruption of residents’ connection to the land and to their ancestors. On an environmental level, the mining would have devastated water supply, air quality, grassland, and marine ecosystems. After 15 years of contestation by mining-affected communities claiming their **Right to Say No**, in November 2018 a judgment in Pretoria High Court determined that mining companies must comply with the Interim Protection of Informal Land Rights Act before they can have mining rights under the MPRDA, the mining law. Because of South Africa’s apartheid and colonial past, IPILRA requires community consent before any deprivation of land rights.*^{vi}

6. The text now recognizes the internationally accepted right of **Free, Prior, and Informed Consent** (FPIC). Importantly, the preamble mentions the UN Declaration on the Rights of Indigenous Peoples. At a time in which indigenous peoples are coming under increasing pressure from business activities affecting their lands, health and livelihoods, they and other affected communities must be at the forefront of decision-making processes that determine the type of development that can take place on their land. The normative framework of FPIC consists of a series of legal international instruments including the UN Declaration on the Rights

of Indigenous Peoples, the International Labour Organization Convention 169, and the Convention on Biological Diversity, as well as national laws.^{vii} It is important and welcome that the text highlights the need to give special attention to those facing heightened risks of violations of human rights violations, and important to note that they are often most marginalized from decisions affecting their lives, including mechanisms for Free, Prior and Informed Consent.

- Article 5.3b should refer to the internationally agreed standard of **Free, Prior and Informed Consent**, not *consultations*.

SECURE THE NECESSARY SPACE FOR WOMEN AND MEN DEFENDING HUMAN RIGHTS AND THE ENVIRONMENT

*In 2018, tens of thousands of people had to evacuate their homes in **Colombia** after heavy floods at **Hidroituango**, the country's largest **hydroelectric dam project**, built by the *Empresas Públicas de Medellín* in the Cauca River basin, its electricity destined for the large mining companies with concessions in the region. The project has international finance from German, Belgian and Swedish banks. Many locals in the region long opposed the project, which has disrupted agriculture and fishing since the license was granted in 2009. The project also threatens historical memory, as the reservoir would forever conceal the remains and fate of missing persons, victims of the conflict. Local organizations have suffered from numerous cases of violence against their leaders, including threats, attacks and two murders. 2018 was the most violent year for those defending human rights, land and environmental rights in Colombia, with 805 acts of aggression, including 155 killings. Indigenous and Afro-descendant leaders are particularly vulnerable, while attacks against women defenders increased by over 60%. Women defenders face gendered and sexualized attacks, including smear campaigns; sexual assault, and harassment of their children.^{viii}*

*Also in 2018, 24 **Latin American states** concluded the legally binding **Escazú treaty**, which promises strict measures to protect land rights and environmental activists against threats and physical violence. The treaty states, among other things, that conservationists have the right to 'life, personal integrity, freedom of speech, peaceful manifestation and freedom of movement'. The agreement enshrines the rights of access to information, participation in decision-making and access to justice in environmental matters, in line with Principle 10 of the Rio Declaration on Environment and Development (1992). In Europe, the same principle is enshrined in the Aarhus Convention (2001).^{ix}*

7. Articles 4.9 and 4.15 enhance the recognition of the role of human rights and environmental defenders, essential to the implementation of the Sustainable Development Goals and Agenda 2030. However, in a context of increasing threats, more concrete responses are necessary. The mention of **environmental aspects** (also in Art. 1.2) is essential, as many of our partner organizations experience threats while working to ensure protection of human rights related to the environment, as illustrated above by the Hidroituango dam case.

- **Adequate and effective measures** to protect defenders should be further specified, for example adopting legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any person who seeks to exercise his or her right to peacefully protest against and denounce abuses linked to corporate activity; refraining from restrictive laws and establishing specific measures to protect against any form of criminalization and obstruction to their work, including gender-specific violence; and fully, promptly and independently investigating and punishing attacks and intimidation of human rights defenders. The specific threats and harms experienced by **women** human rights defenders should be further elaborated in Article 4.9. Article 5.3b on **prevention** should include special attention to those defending human rights and the environment, and 5.3a should include **assessments** of gendered impacts.

STRENGTHEN INTERNATIONAL COOPERATION TO ENSURE ACCESS TO JUSTICE, CLOSING GAPS OF IMPUNITY

*The Belgian company ETEX/Eternit was a shareholder of five asbestos product factories in India between 1989 and 2001. In 1998, Belgium introduced a ban on asbestos, and ETEX/Eternit subsequently sold its Indian subsidiary. Workers at the **Kymore, Madhya Pradesh asbestos fibre cement factory** face risks of exposure, and some former workers and their family members have reported symptoms of asbestos-related diseases, which can take between 15 and 40 years to manifest. Communities that live near the Kymore factory also face risks of exposure from sources including asbestos waste dump. Children face a great risk, with playing fields on grounds under which asbestos waste lies placing them at risk of exposure. Allegedly, there is no information of the negative health effects of asbestos in those areas, and insufficient or non adequately equipped medical centres at or near the factory to diagnose and treat asbestos-related diseases. Since April 2017, an Asbestos fund in Belgium has been processing victims' claims and granting compensation connected with asbestos-related diseases and exposure, but only domestically. Some victims of the asbestos pollution in Kymore, such as former workers or those living near the factory, have allegedly been offered compensation, however others have not. Some workers are allegedly afraid of reporting exposure to asbestos or the health effects for fear of job losses or other adverse actions.^x*

8. Articles 7 and 9 clarify the possibilities for **jurisdiction and applicable law**. It is extremely important that people affected have a choice in which jurisdiction they bring their claims. This is a serious answer to the known legal obstacles caused by complex corporate structures and relationships, and an important step towards closing the gap of impunity and avoidance of liability, as illustrated above by the Kymore asbestos fibre cement factory case. Applicable law should be the one most protective for affected people. An explicit reference to **extraterritorial obligations** would strengthen legal certainty and reflect well the shared responsibility of host and home States in our global, interdependent world.
9. We highlight the importance of provisions on **access to information** (Articles 4.7 and 10.1), such as on corporate structures and activities which is often in the possession of corporations, that can substantiate claims of victims and be crucial to determine the role of corporations in human rights abuses. The revised draft also maintains **reversal of the burden of proof** (Article 4.16), which is a crucial measure in the context of huge power and resource asymmetries between corporations and affected communities. However, **derogations** subject to domestic law could severely weaken the effectiveness of this measure, as certain existing laws may precisely represent obstacles to justice. We welcome the recognition of the need for special provisions to ensure gender equality and equal access to justice (Article 4.4).

- People affected should have a **choice of jurisdiction** in which to bring their claims, and **applicable law should be the one most protective** for those affected.
- In the context of huge power and resource asymmetries between corporations and affected communities, the provision on **reversal of the burden of proof** should not be unduly limited by existing domestic law which may represent an obstacle to justice.

ENSURE TRADE AND INVESTMENT CAN SERVE TO SUPPORT THE ENJOYMENT OF HUMAN RIGHTS AND A HEALTHY CLIMATE AND ENVIRONMENT, RATHER THAN INFRINGE UPON THEM

*Large areas of the **Amazon region** suffer from illegal deforestation, land grabbing and slave labor, due to cattle raising, large-scale farming and mining operations. Conflicts between governments, rural communities, indigenous groups, and ranchers over land rights have been exacerbated by global demand for beef, soya, sugar, ethanol, timber or minerals. The situation of human rights and environmental defenders has dramatically worsened. The “Agreement in Principle” on a **trade***

agreement between the EU and Mercosur was published in June 2019, before the Sustainability Impact Assessment was available. The agreement would expand Mercosur exports of beef, soy, sugar cane and ethanol, and thereby aggravate human rights violations, deforestation of the Amazon and climate change. The chapter on sustainable development is ineffective and would not prevent such harm, as it is excluded from the dispute settlement mechanism and the possibility of sanctions.

In Indonesia, trade and investment agreements with Australia, the European Union, and Singapore are under discussion. These agreements could increase demand for the export of palm oil, while business operations are leading to biodiversity loss, contributing to climate change, creating conflicts with communities, and are marked by human and labor rights violations. In 2018, the Indonesian Constitutional Court ruled that issues of trade, economy and investment fall under Article 11 of the Constitution which states: “The President in making other international agreements which have a broad and fundamental consequences for the lives of the people related to the burden of state finances, and / or require changes or the formation of laws, must be approved by the House of Representatives.” However, there is not yet a sufficient legal basis requiring comprehensive impact assessments relating to the economy, social, environment and human rights, before giving approval.^{xi}

10. Trade and investment agreements are reinforcing a power and legal imbalance, including privileged access for corporate actors to arbitration tribunals through the Investor-State Dispute Settlement Mechanism, allowing corporations to drive decisions on national regulation on labor rights, health and environmental standards, while communities whose rights have been abused struggle to have access to justice. Article 12.6 of the revised text improves the requirement that **other relevant agreements by States must be compatible with human rights obligations** under the Treaty. However, it fails to clearly establish the primacy of human rights over trade and investment rules. Moreover, CIDSE supports the call to abolish Investor-State Dispute Settlement mechanisms. The treaty should clarify that as long as ISDS exists, it must respect the primacy of human rights over investors’ interests.

➤ **A specific clause on the primacy of human rights obligations, notably in trade and investment agreements,^{xii}** would better clarify this relationship, adding to regulatory certainty and a stable legal environment. Such a clause should, *inter alia*, require human rights and sustainability impact assessments prior to the start of trade negotiations, and a clear obligation to secure the primacy of human rights obligations in Investor-State Dispute Settlement (ISDS) mechanisms, as long as they exist.

ENFORCEMENT

11. Enforcement mechanisms will be crucial to the success of the Treaty. Resourcing a range of international, regional and national entities, including National Human Rights Institutions and labour tribunals, as well as stepping up monitoring systems will be an important part of making progress. **International action** is necessary to address important acknowledged gaps and help to strengthen national judicial systems. The competences attributed to the Committee may be too weak to arbitrate the known international challenges and conflicts, as compared to potential international judicial mechanisms such as an international court. **A balanced articulation** between the national, regional and international levels of action will be needed for the Treaty to work effectively in practice.
12. The revised draft states that “**all business enterprises**, regardless of their size, sector, operational context, ownership and structure have the responsibility to respect all human rights.” We believe that the “**shall**” terminology of the zero draft represented a stronger clarification of **business obligations**, building upon the second pillar of the UN Guiding Principles and international law.

- The Committee should have the capacity to receive communications and complaints, and to make recommendations on specific cases. Receiving input from affected people and communities would allow for important feedback on the implementation of the instrument, in view of future improvements.

We call on all States to consider the revised draft and to **formulate constructive proposals for further elaboration** at the 5th IGWG session. We believe that it is essential to move forward the negotiations on the text for the Treaty, making significant advances in line with the urgency of numerous situations. The ultimate benchmark must be the potential of the Treaty's provisions and their effective implementation to help put a stop to corporate-related human rights abuses.

We call on States **to constructively engage**, with a spirit of determination and a sense of responsibility for the common good, to advance **until the “mandate to elaborate an international legally binding instrument” established by UN Human Rights Council Resolution 26/9 is fulfilled**. As Catholic development agencies actively involved in the development of policies and laws on business and human rights, we will continue to offer advice and support to our own governments and other members of the Human Rights Council to help them to meet this important objective.

ⁱ [Joint Letter by Civil Society Groups to Companies Linked to the Activities of Vale S.A.](#), February 2019.

ⁱⁱ [French corporate duty of vigilance law: Frequently Asked Questions](#), European Coalition for Corporate Justice, 2017.

ⁱⁱⁱ [Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory](#), UN Working Group on the issue of human rights and transnational corporations and other business enterprises, 2014.

^{iv} [Due Diligence Guidance for Responsible Business Conduct](#), OECD, 2018, 3.2.

^v [Gender dimensions of the Guiding Principles on Business and Human Rights](#), UN Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/41/43 para. 45(d), May 2019.

^{vi} [Historic Court Case on the Right to Say No to Mining](#), Amadiba Crisis Committee, 2018; [Mantashe appeals against Xolobeni right to say no to mining](#), Karibu, September 2019.

^{vii} [Free, Prior and Informed Consent](#), Food and Agricultural Organization of the United Nations.

^{viii} [Water, bossen en bergen kunnen zichzelf niet beschermen. Iemand moet het voor hen doen](#), *Mondiaal Nieuws* (Broederlijk Delen), 2018; [Colombia: International statement condemning attacks and threats against Afro-Colombian and indigenous leaders](#), European organizations and networks, May 2019; *Global Analysis 2018*, Frontline Defenders.

^{ix} [Wat doet Europa voor de veiligheid van activisten in Latijns-Amerika?](#), Broederlijk Delen, 2018.

^x [Communication to the Government of India](#), UN Working Group on the issue of human rights and transnational corporations and other business enterprises, March 2019.

^{xi} [Statement on the Court Verdict concerning the International Treaty Law](#), Indonesia for Global Justice, November 2018.

^{xii} [Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights](#), Prof. Markus Krajewski, University of Erlangen-Nürnberg, March 2017.