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The Potential of a Binding Treaty on Business and Human Rights to Address Access to Remedy for Corporate-Related Human Rights Abuses

To the Ecuadorian Mission to Geneva,

In June 2014, the Human Rights Council adopted resolution 26/9, which established an Open-Ended Intergovernmental Working Group (OEIWG) on Transnational Corporations and Other Business Enterprises with Respect to Human Rights to elaborate an international legally binding instrument to “regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”ⁱ

The first two sessions of the OEIWG focused on the potential scope, nature, and form of the proposed treaty on business and human rights. As requested in HRC Res. 26/9, the Chairperson-Rapporteur of the OEIWG is expected to prepare draft elements for substantive negotiations for the upcoming 2017 session.

Since the adoption of Res. 26/9, an unprecedented amount of civil society and impacted communities and individuals have participated in the treaty process, all providing inputs into the specific issues that the proposed treaty should address.ⁱⁱ These proposals range broadly both in relation to subject matter and specificity, with some groups going as far as to provide draft language on specific issues.

As the global community awaits the release of draft elements of a binding treaty on business and human rights, the below signed organizations urge the Government of Ecuador, as the Chairperson-Rapporteur of the OEIWG, to consider the following recommendations.

The process for elaborating and negotiating a binding treaty on business and human rights should be conducted in a transparent and consultative manner.

Any internationally binding treaty on business and human rights should be promulgated in a transparent and consultative manner. It is critical for the legitimacy of the proposed treaty that the broad range of rights-holders potentially impacted by the treaty be fully and equitably consulted with during the drafting process. Consultation should take into consideration the situation of stakeholders who may be disempowered, at risk, or historically disadvantaged, and should take fully into account language, culture, geography, and gender.

The process of elaborating and negotiating the elements of a binding treaty should also develop in a transparent manner. While Res. 26/9 lays out a preliminary timeline for the development of draft elements, the OEIWG should elaborate and publish terms of reference for the treaty process and a timeline for the further development of draft elements and negotiations. Additionally, any drafts of the treaty should be published with ample time for all stakeholder to review before consultation processes take place, allowing them to more fully and effectively partake in treaty negotiations.

The treaty should seek to address the most pressing gaps in protecting against and remedying business-related human rights abuses.

The promulgation of an internationally binding treaty on business and human rights presents a great opportunity to address the multitude of issues relating to human rights in the context of economic activity. We believe that the treaty should focus on practical measures that will address the most pressing accountability gaps.

Any internationally-binding treaty on business and human rights should focus on the most persistent governance, protection, and accountability gaps. This includes promoting regulation to prevent corporate-related human rights abuses, such as by requiring mandatory due diligence, transparency, and community and/or worker engagement, and improving access to remedy when such abuses occur. In order for the treaty to have optimal transformative impact and garner widespread State support, it should focus on concrete measures to improve corporate legal accountability and the protection of fundamental rights at the national level. It should also be endowed with an appropriate and effective international oversight body.

Remedy and accountability for human rights abuses should be a key focus of the proposed treaty.

The proposed treaty provides an opportunity to drive meaningful change to enhance prevention, enforcement, and access to remedy for corporate-related human rights abuses. To do so, eliminating barriers to accountability and remedies must be the centerpiece of the proposed treaty.

The treaty is well situated to constructively address such barriers by requiring States to implement measures that would reduce obstacles to accessing courts and obtaining meaningful judicial remedies. In particular, the treaty should include measures that ensure rules on jurisdiction and *forum non conveniens* cannot be used to defeat remedies for individuals and communities where a corporation should be subject to jurisdiction in multiple legal systems. Likewise, the treaty should ensure the corporate veil and the notion of corporate “separateness” are not used to insulate corporations from liability for the harms caused by their subsidiaries. It should also be used to clarify the subordination of investment treaty provisions to human rights obligations. These are problems the treaty is well equipped to address.

The nature of modern business activities and global value chains raise significant challenges related to the promotion and protection of human rights. The solutions to these problems can only be achieved through collaboration across jurisdictions, making an international binding treaty on business and human rights an ideal medium to address issues of accessing effective remedy for cross-border corporate-related human rights abuses.

Conclusion

The right to an effective remedy is a bedrock of international human rights law. Yet, for victims of business related human rights abuses, remedy is rarely realized. As the international binding treaty on business and human rights negotiations shift to substantive discussions around legal elements and draft language, the undersigned organizations urge the Government of Ecuador, as the Chairperson-Rapporteur of the OEIWG, to keep in mind the most significant governance gaps and focus on specific measures that will improve corporate accountability. We further urge that the negotiation process moving forward is conducted in a consultative and transparent manner.

We look forward to reviewing the draft elements, and continuing to participate in meaningful discussions during future treaty negotiations.

Respectfully,

European Coalition for Corporate Justice
International Corporate Accountability Roundtable
Human Rights Watch

ⁱ U.N. Doc. A/HRC/RES/26/9 (July 2014).

ⁱⁱ See, for example, ESCR-Net & FIDH, *Ten Key Proposals for the Treaty* (2016); Markus Krajewski, *Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a UN Treaty on Transnational Corporations, Other Business and Human Rights* (2017); Daniel Blackburn, *Removing Barriers to Justice: How a Treaty on Business and Human Rights Could Improve Access to Remedy for Victims*, SOMO, Bread for the World, CIDSE, ITUC, ITF, ForUM, and Friends of the Earth Europe (2017).