

**Corporate Accountability Working Group (CAWG) of the International Network for Economic, Social and Cultural Rights (ESCR-Net)**

**Submission to the United Nations’ Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (IGWG)**

**Second meeting of the IGWG at the Human Rights Council, October 24-28, 2016**

We,the undersigned members of the Corporate Accountability Working Group (CAWG) of the International Network for Economic, Social and Cultural Rights (ESCR-Net), jointly call upon the United Nations’ *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* (IGWG) to include the elements outlined in this statement within any draft materials the IGWG develops to outline the content of the forthcoming binding international instrument (Treaty). We also reaffirm our continuing commitment to support the important activities of the IGWG in the process towards developing and seeking adoption for the Treaty.

Over the course of the past two years CAWG has led a [worldwide consultation](https://www.escr-net.org/corporateaccountability/treatyinitiative) with over 150 civil society organisations (CSOs), including in-person consultations with our members and partners in Asia-Pacific, Africa and Latin America, and online consultations with civil society organisations (CSOs) from all regions.[[1]](#footnote-1) This submission is a reflection of the priorities that emerged out of these consultations.[[2]](#footnote-2) ESCR-Net is also actively engaged in the global [Treaty Alliance](http://www.treatymovement.com/), and supports the collective Alliance statements.

In this, our first submission for 2016 to the Open-Ended Intergovernmental Working Group (OEIWG) on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, we call on the OEIWG to consider the following recommendations.

1. **GENERAL RECOMMENDATIONS**

We strongly urge all States to take all possible measures to respect, protect and fulfill human rights in the context of the activities[[3]](#footnote-3) of transnational corporations and other business enterprises (TNC-OBE), including by actively engaging in good faith in processes to strengthen the international human rights framework in this area, especially through the activities of the IGWG.

We strongly urge the IGWG to make all accommodations possible to ensure representatives of persons whose enjoyment of human rights is impaired by TNC-OBE are integral partners in the processes of designing the Treaty, including supporting their involvement during IGWG negotiations. In this context, we call on the IGWG to ensure the Treaty responds to the real needs of people in society by facilitating the meaningful engagement of women, indigenous peoples, persons with disabilities, children, and other sections of society disproportionately or differently affected by TNC-OBE activity. Proactively sharing pertinent information related to the IGWG in languages relevant for affected persons will also support continued, constructive engagement by a broad cross-section of civil society.

1. **Specific RECOMMENDATIONS**

In addition to these general considerations, we respectfully make the following specific submissions in relation to the Treaty:

In this our first submission of 2016 to the IGWG, we recommend the Treaty reflect the realities of current TNC-OBE operations and their impact globally, the Treaty should **reaffirm the primacy of human rights obligations** (Section 2.1), **cover** **all human rights** (Section 2.2)and be **applicable to all TNC-OBE, but primarily address the activities of TNCs** (Section 2.3).

Contained in the second submission to the IGWG, we recommend the need to ensure an enabling environment for the enjoyment of human rights in practice, the Treaty should outline the framework requirements for **operationalizing the legal responsibilities of TNC-OBE to respect human rights** (Section 2.4) and for ensuring **access to information and participation** (Section 2.5), and should affirm States’ **extraterritorial obligations** (Section 2.6).

In our third submission to the IGWG we recommend that, in order to facilitate access to justice for persons whose human rights enjoyment is impaired by TNC-OBE activities, the Treaty should address legal and practical obstacles to redress through framework requirements regarding **access to justice** (Section 2.7) and protection of **human rights defenders** (Section 2.8).

In our fourth submission to the IGWG we recommend that specific consideration be given to the need for the Treaty to consider addressing the disproportionate influence of corporations on policy making by addressing the **prevalence of** ‘**corporate capture’** (Section 2.9), address the impacts of TNC-OBE activity from a **gender** perspective (Section 2.10) and consider the rights of **indigenous peoples** (Section 2.11), as well as strengthen effective oversight of TNC-OBE activities in **conflict and post-conflict situations** (Section 2.12).

* 1. **Reaffirm the Primacy of Human Rights Obligations**

The foundational principle of the primacy of human rights emanates from the Universal Declaration of Human Rights and the Charter of the United Nations, both established long before the creation of hundreds of trade and investment treaties between States, which have established a complex system governing trade and investment practices globally. These agreements have been subject to criticism from social movements, CSOs, human rights experts, UN Special Rapporteurs, academics, and others, who note that they are often negotiated secretly, entered into by States without necessary human rights assessment or safeguards in place, and driven by the interests of powerful corporations seeking to consolidate their profit and market share at the expense of human rights, decent work, sustainable and equitable economies, and environmental protection.

Trade and investment treaties also facilitate privatization of health, transport, water, energy and other basic services and infrastructure development, which are areas of central importance for States to meet their obligations to respect, protect and fulfill human rights obligations. Transferring the building, operation and ownership of physical and social infrastructure to the private sector can subordinate the delivery of these services to corporate profit interests, rather than ensuring their conformity with human rights, as has been widely noted, for example, in the privatization of water services across the world.

Further, critiques of investor-state dispute settlement (ISDS) focus on: the extremely broad view taken by ISDS tribunals regarding the scope of provisions that investors seek to enforce, therefore impacting on many areas relevant to the enjoyment of human rights; the perceived or actual lack of consistency, transparency and impartiality of ISDS decisions; and the direct undermining of States’ obligations to protect human rights, the environment, or promote equitable development, through the favoring of investor privileges over human rights.

The current binding trade and investment framework can be contrasted with the very weak international enforcement mechanisms for compelling States to comply with their human rights obligations. In light of this asymmetry, with its serious implications for people whose enjoyment of human rights is impaired by TNC-OBE, the Treaty provides the opportunity for States to reaffirm and ensure that their human rights obligations, and the provisions of the Treaty itself, will be adequately safeguarded and will be given precedence in relation to obligations under trade and investment treaties.

**Key Recommendation: States must reaffirm the primacy of human rights, as guaranteed by their pre-existing obligations to respect, protect and fulfill human rights, in the context of negotiation, interpretation and dispute resolution of trade and investment treaties.**

**States must refrain from being party to such agreements where the provisions interfere with the ability to meet their human rights obligations. In this context, before signing trade or investment agreements, States must make full and proper assessment of the impact of implementing these agreements on the realization of human rights in their country (including, among other issues, in connection with the privatization of public health, transport, infrastructure, energy and other services).**

* 1. **Human Rights are Interrelated, Interdependent and Indivisible**

All human rights are interrelated, interdependent and indivisible. Further, the realization of human rights is dependent on the maintenance of a safe, clean, healthy and sustainable environment. To ensure a meaningful international regulatory response to the extensive human rights impairment connected with TNC-OBE activity, the scope of the Treaty should be determined above all else with reference to the needs of the rights holders. As the activities of TNC-OBE can and do directly or indirectly impact the full range of human rights, drawing a distinction within international human rights law that results in some internationally recognized human rights being given protection and others not would be an arbitrary and unacceptable division from the perspective of affected people and communities, and is contrary to the interrelated, interdependent and indivisible nature of human rights.

**Key Recommendation: The Treaty should cover the full range of interrelated, interdependent and indivisible human rights (i.e. civil, cultural, economic, political and social rights), and recognize that human rights enjoyment is dependent on the maintenance of a safe, clean, healthy and sustainable environment.**

* 1. **The Treaty Should Apply to All Transnational Corporations and Other Business Enterprises**

Inconsistent, inadequate and/or unimplemented regulatory approaches within and across national and regional legal systems continue to expose individuals and communities to human rights abuses, and often undermine the ability to access effective remedies. Corporate operations with a ‘transnational character’ (TNCs) pose especially difficult regulatory challenges due to their cross-border operations and presence in several jurisdictions, and therefore represent the largest corporate accountability gap in the international human rights legal framework.

While each State remains the sovereign authority to regulate conduct within their territory and jurisdiction, a principle justification for establishing new international human rights instruments is to address gaps in the human rights system and to provide clarity to each State on their obligations for realizing human rights. For example, while there is still great progress to be made in realizing women’s human rights in all countries, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) sets out uniform standards as agreed by States, thereby building broad consistency in relation to the legal obligations across all States. Likewise, the Treaty provides the opportunity for States to agree on a binding framework that facilitates a consistent approach to regulate the activities of TNC-OBE. If the Treaty addresses only some business enterprises, and not those registered and/or operating in only one State (including State-owned enterprises), this would leave gaps in the human rights system, and maintain inconsistencies in the way each State forms and implements laws to regulate TNC-OBE. Moreover, if the Treaty were to leave out some types of corporations this may create perverse incentives for corporate groups to structure their operations in way that would avoid coverage under the Treaty.

Further, it is clear from existing research and extensive consultation with civil society that it is of little consequence to those individuals and communities whose human rights are infringed if the entity responsible for violating their human rights operates in more than one country. In this context, the primary concern is that human rights impairment that occurs in connection with TNC-OBE activity must be adequately remedied and be prevented from reoccurring. Therefore, the Treaty offers the opportunity to ensure that the regulation of corporate conduct adequately corresponds to reality and provides a practical response to human rights abuses by TNC-OBE.

**Key Recommendation: The Treaty should ensure that the regulation of TNC-OBE activity reflects the existing conditions and lived experiences of people globally, requiring States to, among other things:**

**a) Address in detail the particularly complex regulatory challenges posed by TNCs, including in relation to subsidiary companies, supply chains, and all other business enterprises otherwise associated with their operations, products or services through their business relationships; and**

**b) Reaffirm that States have obligations to respect, protect and fulfill human rights in connection with the activities of all TNC-OBE, including those registered and/or operating in one State.**

**Signatories from the ESCR-Net Corporate Accountability Working Group**

Above Ground (Canada)

Accountability Counsel (USA)

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|  | Action Contre Impunitie Pour Les Droits Humains |

African Resources Watch (AfreWatch)  (DRC)

Al-Haq (Palestine)

Alternative ASEAN Network on Burma

Arab NGO Network for Development (Lebanon)

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|  | [Asian Forum for Human Rights and Development](https://www.forum-asia.org/wp) (Thailand)  Asian Indigenous Peoples' Pact (Thailand)  Asia Pacific Forum on Women, Law and Development (Thailand) |

Asociacion Pro Derechos Humanos (Peru)

Association for Women's Rights in Development

Association of Environmental Lawyers of Liberia - Green Advocates

Center for Constitutional Rights (USA)

Center for International Environmental Law (USA)

Centre for Applied Legal Studies (South Africa)

Centre for Human Rights and Development (Mongolia)

Centro de Derechos Humanos de la Montaña Tlachinollan (Mexico)

Centro de Estudios Legales y Sociales (Argentina)

Centro Mexicano de Derecho Ambiental A.C (Mexico)

Chiadzwa Community Development Trust (Zimbabwe)

Citizen News Service (India)

Citizens for Justice (Malawi)

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|  | Comite Ambiental en Defensa de la Vida (Colombia) | |
|  | Conectas Direitos Humanos (Brazil) | |
|  | Confederación Campesina Del Peru |

Consejo de Pueblos Wuxhtaj (Guatemala)

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| --- | --- |
|  | Coordinadora Andina de Organizaciones Indígenas (Peru) |

Corporate Accountability International  (USA)

Defend Job Philippines

The Democracy Center (Bolivia)

Desarrollo, Educación Y Cultura Autogestionarios, Equipo Pueblo A.C. (Mexico)

Due Process of Law Foundation (USA)

Equitable Cambodia

Fédération internationale des droits de l'Homme (France)

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|  | Foro Ciudadano de Participación por la Justicia y los Derechos Humanos (Argentina) |

Global Initiative for Economic, Social and Cultural Rights (GI-ESCR)

Habi Center for Environmental Rights (Egypt)

Human Rights Law Network (India)

Human Rights Law Resource Centre (Australia)

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|  | Inclusive Development International (USA) |

International Accountability Project (USA)

International Commission of Jurists

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|  | Justiça Global (Brazil) |

Kenya Human Rights Commission

Legal Resource Centre (South Africa)

MiningWatch Canada

Movement for the Survival of the Ogoni People (Nigeria)

Narasha Community Development Group (Kenya)

National Center for Advocacy Studies (India)

National Economic and Social Rights Initiative (USA)

National Fisheries Solidarity Organization (India)

Natural Resources Alliance of Kenya

Network Movement for Justice and Development (Sierra Leone)

Observatorio Ciudadano (Chile)

Organización Fraternal Negra Hondureña (Honduras)

Otros Mundos Chiapas (Mexico)

Posco Pratirodh Sangram Samiti (India)

Project on Organizing, Development, Education and Research (Mexico)

Proyecto de Derechos Económicos, Sociales y Culturales (Mexico)

Red Internacional de Derechos Humanos (Switzerland)

Rights and Accountability in Development (UK)

Sahmakum Teang Tnaut (Cambodia)

Tebtebba Foundation (Philippines)

Terra de Direitos (Brazil)

Video Volunteers (India)

Zimbabwe Environmental Law Association

1. For more information, see ESCR-Net and FIDH Treaty Initiative: <https://www.escr-net.org/corporate-accountability/treaty-initiative/materials>. [↑](#footnote-ref-1)
2. Access collective regional CSO statements from Asia-Pacific, Africa and Latin America Treaty Initiative

   consultations at: <https://www.escr-net.org/corporateaccountability/treatyinitiative>. [↑](#footnote-ref-2)
3. The term ‘activity’ in this submission refers to all parts of TNC-OBE operations, including but not limited to policies, practices, products and business relationships. [↑](#footnote-ref-3)