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**GENERAL ASSEMBLY
HUMAN RIGHTS COUNCIL**
*Third session of the Intergovernmental
Working Group on Transnational
Corporations and other business enterprises
with respect to human rights
(23-27 October 2017)*

COMMENTS BY THE CETIM ON THE ELEMENTS FOR THE DRAFT LEGALLY BINDING INTERNATIONAL INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS, PRESENTED TO THE INTERGOVERNMENTAL WORKING GROUP OF THE HUMAN RIGHTS COUNCIL BY ITS CHAIR¹

We welcome the work carried out by the chair of the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, which presented elements for a draft of a binding instrument. While the document constitutes a good basis of discussion for the work of the aforementioned Working Group, we wish to make several comments on the subject.

Regarding Point 1, General Framework

For us, the reminder of the primacy of obligations concerning human rights over trade and investment agreements is essential.

Just as essential is the remark that in international law human rights are less protected than the economic rights of transnational corporations (TNCs).

Regarding the general obligation, formulated at Point 1.2 (Principles), to respect, promote and protect all human rights, we suggest adding the obligation to fulfill. This obligation to fulfill is already established by the United Nations human rights bodies.

We make the same suggestion regarding Points 1.3 (Purpose), 1.4 (Objectives) and 3.1 (Obligations of States), to add to the obligations to respect, promote and protect human rights the obligation to fulfill.

Regarding Point 2, Scope of Application

The Chair, in its proposed elements, considers that it is not necessary to define TNCs because it is their activities and the transnational character that matter in the implementation of the future instrument. However, we are not of this opinion: a broad and clear definition of TNCs must appear in this instrument lest it be weakened. Moreover, Point 2.2 (Acts subject to its

¹ These comments were drafted in collaboration with Professor Gilles Lhuillier.

application) constitutes a good basis for this definition. It could possibly be complemented by the definition given by the ECOSOC² and the UNCTAD.³

It seems to us necessary that the part of this future instrument concerning its scope of application provide a direct application of the instrument in its clear and sufficient provisions. This direct application must be vertical regarding states parties and horizontal regarding TNCs. It is only thus that the victims will always be able to avail themselves of this instrument in case of violations of their human rights.

Regarding Point 3, General Obligations

Regarding Point 3.2 (Obligations of TNCs and Other Business Enterprises), we suggest adding an obligation for these entities to protect human rights in the framework of their value chain (affiliates, sub-contractors, suppliers, etc.).

Regarding Point 4, Preventive Measures

We support the proposal contained in Point 4 requiring TNCs to create and implement a plan of vigilance. In fact, such a plan of vigilance is a precious tool for preventing human rights violations, and in this regard, the Working Group could draw inspiration from the modalities recently adopted by France.

Regarding Point 5, Legal Liability

To complement the elements proposed by the Chair of the Working Group, we would add more explicitly that the lack of the obligation of vigilance, including the plan of vigilance, engages the civil responsibility of TNCs (legal persons) and their management (natural persons).

Regarding Point 6, Access to Justice, Effective Remedy and Guarantees of Non-Repetition

In line with the proposals made by the Chair and in support of the proposal concerning access to legal aid, we propose that the bodies entrusted with implementing the future treaty (see below) administer a fund for this aid that could be provisioned by contributions from states and TNCs. This fund would allow the creation of an international legal aid service to take into account specific difficulties of access to justice for the victims of TNCs, with the support of the NGOs and human rights defenders.

Regarding Point 7, Jurisdiction

We welcome the Chair's proposal concerning the jurisdiction of states for violations committed throughout the supply chain of a given TNC, even when its affiliates constituting this chain are outside their jurisdiction.

To assure a real jurisdiction by states over these violations, we would like to introduce here a reminder of the direct applicability of the future treaty so that its application will be possible without enabling legislation in domestic law.

Regarding Point 9, Mechanisms for Promotion, Implementation and Monitoring

We are favorable to most of the proposals made by the Chair on this point. We are proposing an architecture for the bodies entrusted with the promotion and implementation of the treaty: an international committee entrusted with putting in place and overseeing the mediation procedures between alleged victims and TNCs could be set up. Should this mediation fail, a

² Cf. E/1990/94.

³ <http://unctad.org/en/Pages/DIAE/Transnational-corporations-%28TNC%29.aspx>

future international court for TNCs and human rights would be automatically seized. Under the aegis of this court, international arbitrage tribunals could be set up. The procedure of these tribunals could be organized in accordance with the those provided for by the Geneva European Convention on International Commercial Arbitration of 21 April 1961 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.

We also propose the creation of an international monitoring center on TNCs, charged with evaluating, investigating and controlling the activities and practices of TNCs. This center would have the power to issue recommendations.

It should be noted that the access to these future bodies shall be automatically possible for the victims of TNCs and / or their representatives.

Regarding Point 10, General Provisions

As does the Chair, we would like to see included again in this point the primacy of human rights and of the future treaty over other legal obligations concerning trade and investment.

To reinforce this clause, we propose that the treaty contain a democratic conditionality clause. This clause would subordinate the execution of investment accords to ratification of the treaty by states. The benefit of economic rights accorded by a state to a TNC of another state would thus be conditioned on the respect of human rights by these same entities, for the state of origin would thus be the guarantor by virtue of the obligations deriving from the treaty incumbent upon it.