

Subject: EEB submission to the Zero Draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

Brussels - 28 February 2019

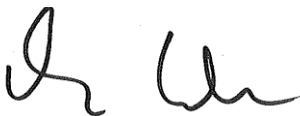
Dear Secretariat to Office of the United Nations High Commissioner for Human Rights,

With this letter, the European Environmental Bureau (EEB) would like to reply to the invitation to comment to the zero draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (A/HRC/40/48, para 91 (a)). You will find the EEB's submission annexed to this letter.

The EEB is Europe's largest network of environmental citizens' organisations. It brings together 153 civil society organisations from more than 30 European countries. We stand for sustainable development, environmental justice and participatory democracy.

Thank you for the opportunity to comment on the zero draft and in advance for your kind consideration of our submission. For any clarifications on the submission please contact Patrizia Heidegger, Global Policies Director, at patrizia.heidegger@eeb.org or Francesca Carlsson, Legal Officer, at francesca.carlsson@eeb.org.

Yours sincerely,



Jeremy Wates
Secretary General

Elements to include/strengthen in the Zero Draft:

1. **Climate Change:** Given the vast and potential ramifications of the effects of climate change on human rights and knowing that some economic activities of transnational corporations contribute to its damaging effects, the link between climate change and the impact it can have on human rights should be made. As such, a right to a healthy environment as a right to life and a basic human right should be clarified and made explicit within the text of the zero draft.
2. **Defenders:** It is regrettable that there is no mention of the need to protect Human Rights and Environmental defenders and journalists from abuse, harassment, criminalisation and harm. It is often thanks to the work of defenders and the media that victims are able to organise themselves to claim their rights. There should be dissuasive measures on corporations and governments that use methods to silence defenders. In fact, the text in Article 8 of the zero draft seems to lead towards the inclusion of rights of Human Rights and Environmental Defenders and then fails to do so. The EEB, therefore, strongly recommends the inclusion of a new paragraph 14 to Article 8, specifically on the need to protect Human Rights and Environmental Defenders.
3. **Access to Information:** The word “*appropriate*” in the first sentence in Article 8(4) “victims shall be guaranteed appropriate access to information relevant to the pursuit of remedies” should be deleted. Access will be granted according to national laws so the reference to “appropriate access” risks being abused to restricting access against the interest of victims.
4. **Public Participation:** The consultation requirements under Article 9 should be strengthened. It should be reminded in paragraph (2)(e) that impact assessments should be carried out with the participation of individuals and environmental and human rights groups. It is crucial to include their contributions to the findings of impact assessments. To do otherwise would also expose undertakings to the risk of violating human rights, including environmental rights. In the same way, paragraph (2)(g) of Article 9 should also specify in the first sentence that the consultations to be carried out with groups should include those groups whose environmental rights are potentially affected: “...meaningful consultations with groups whose human rights, *including environmental rights*, are potentially affected...”. Public participation is recognised as a fundamental requirement for environmental governance and sustainable development and therefore should be made explicit and strengthened in Article 9 which deals with the prevention of abuse.
5. **Access to Justice:** In order to truly have justice for victims, it is important that they are given the opportunity to ask the courts for injunctive measures, including relief. This has been shown to be an important aspect of effective justice in environmental claims, and indeed human rights cases too. As the text is now, there is no mention of injunctive measures, so a paragraph under Article 8 should be inserted on the right for victims to request injunctive measures before the courts. Moreover, the need
6. to ensure that the courts and tribunals be independent and impartial needs to be explicitly mentioned and strengthened throughout the text, especially in Article 8.

Positive elements of the draft that need to be kept and that provide added value to the Treaty:

1. **Article 4(2):** there is no restriction on the size of the “Business activities of a transnational character” or the annual turnover necessary for the undertakings covered by the Treaty which is welcomed. This definition is broad enough, if it is understood that State-owned undertakings are included in the definition, and therefore seems to encompass a wide range of company structures and practices that may be subject to liability for human rights abuses.
2. **Article 5:** Given the complex reach of jurisdiction for transnational companies and the human rights abuses that may occur in different territories, the breadth and flexibility in the scope of Art 5 on jurisdiction is welcome as it assures a wide opportunity for victims to bring their claims before courts. Moreover, the recognition that NGOs can have standing, and the possibility for collective claims in paragraph 3 is key to ensuring access to justice for victims. However, there is still the question as to whether, without the “lifting of the corporate veil”, this article could be used to its full potential. Without the possibility to “lift the veil”, it may be difficult to establish jurisdiction and hence will impact on the possibility for victims to have standing before the courts. As transnational corporations necessarily have a plural jurisdictional outreach, this should be complemented by equal opportunities for victims to bring claims.
3. **Article 7(2):** this article allows victims to bring claims before courts where it makes procedural sense, while the substance of the human rights abuse may be decided according to the law of another Party, as long as there can be jurisdiction in both. This provision is very welcome and provides true added value to all potential victims of human rights, including environmental abuses. Victims will in this way benefit from the more far-reaching human rights protections. Moreover, by allowing victims to choose the laws of another Party to address matters of substance, victims are able to keep court fees and costs at a minimum, while benefiting from a wide application of human rights.
4. **Article 9:** this Article on Prevention encourages Parties to adopt national legal obligations of due diligence on their transnational corporations, such as those that were introduced in France, which otherwise are more commonly soft requirements.
5. **Article 13(6) and (7):** In order to confront some of the imbalances of rights that have been created in trade and investment treaties, it is important to highlight that such agreements need to be consistent with this treaty and should be interpreted in the least restrictive way in favour of victims.