



Response to the call by the Office of United Nations High Commissioner for Human Rights for comments on:

The Zero Draft of the Proposed Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises

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Preface

This submission has been prepared by the Facilitator of the Environmental Law Implementation Group working at the Irish Environmental Network, (IEN). The IEN is an umbrella organisation of some 30+ environmental non-Government organisations, (eNGOs) in Ireland.

The invaluable support of Mr Alan Doyle, solicitor, in the preparation of this submission is also acknowledged with our deepest appreciation.

The submission has been prepared in response to the call by the Office of United Nations High Commissioner for Human Rights for comments on:

The Zero Draft of the Proposed Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises

The overall submission has also been prepared by the ELIG Facilitator:

- Recalling our commitment to the protection of the environment, and
- Recalling our commitment to the important principles established in the UNECE Human Rights CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998. (The Aarhus Convention), and
- Mindful of the potential negative impact of business activities on Human Rights and the environment in both a domestic and international and transboundary context
- Mindful of the progressive inclusion of investor arbitration systems in new Trade agreements and the negative consequences of this for Human Rights and the Environment

It does not necessarily reflect the views of the network or pillar, or individual member groups.

Further detail or clarification can be sought from:

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Structure:

Our comments are divided below into two primary sections

- Part 1: “The Introduction and General Comments” addresses more general comments and over-arching considerations of concern and interest to us.
- Part 2 then deals with “Specific commentary on the draft zero text”.

Part 1. Introduction and General Comments

Comments and recommendations in respect of the consultation process

The proposal to develop a Zero draft for a “Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises” in response to Resolution 26/9¹ is a most welcome and timely development. While we naturally appreciate the importance of business and trade, and international trade, we are also conscious of how this can sometimes lead to serious trespass on Human Rights and the environment, and we are conscious of the difficulties for citizens and organisations concerned with Human Rights and environmental protection in responding to this.

We also very much welcome the very open and generous invitation by the Office of High Commissioner for Human Rights to make comments on this zero draft, and hope that our comments are found to be useful and constructive in this important process, as is our express intention.

Our comments are divided below into two primary sections more general comments and over-arching considerations of concern and interest to us, and then a section dealing with specific comments on the draft zero text.

While acknowledging the open nature of the invitation² to comment on the zero draft on the UNHRC webpage for this initiative, we submit respectfully that further steps to promote greater awareness of the consultation opportunity would have been helpful and appropriate. This is particularly in light of the fundamental purpose of the proposed convention which is to protect the Human Rights of people, and therefore the public clearly have an interest in such matters, and non-government organisations also.

Therefore, some further consideration on how greater awareness can be achieved on the opportunity to engage in this important process and be consulted, would be most welcome in the future. Additionally, consideration of how States and bodies involved in the process can assist in wider consultation on this matter might also be considered and encouraged appropriately.

¹ A/HRC/RES/26/9 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights
<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement>

² https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/Invitation_EN.pdf

We also submit respectfully that such future steps and proposals could also be argued to be consistent and appropriate in light of the initial approach to the proposed instrument in paragraph 5 of Resolution 26/9³ which states:

“Bearing in mind the progressive development of this issue,

.....

5. Recommends that the first meeting of the open-ended intergovernmental working group serve to collect inputs, including written inputs, from States and relevant stakeholders on possible principles, scope and elements of such an international legally binding instrument;”

and also in light of the approach mandated in the following further paragraphs of Resolution 26/9 which continue to:

“6. Affirms the importance of providing the open-ended intergovernmental working group with independent expertise and expert advice in order for it to fulfil its mandate;

7. Requests the United Nations High Commissioner for Human Rights to provide the open-ended intergovernmental working group with all the assistance necessary for the effective fulfilment of its mandate;”

We would welcome any opportunity to clarify our comments as necessary and to engaging further in the process of development of this convention.

Compatibility with other existing international instruments concerned with Human Rights, especially the UNECE Aarhus Convention.

The proposed draft clearly builds on some of the existing frameworks which are concerned with the protection of Human Rights, and of course this is a fundamental success factor in enabling successful implementation of the convention in the future. However, further active consideration of how this new instrument might integrate with and work in a mutually complementary fashion, and build with and on other established international legal instruments concerned with Human Rights would also be most welcome. A broad interpretation of what instruments might be encompassed by that would also be most welcome. However, at the very least we would recommend very active consideration of ensuring the new instrument’s compatibility with the UNECE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998. (The Aarhus Convention). Between the Draft zero text and the Aarhus Convention text there are already clear and evident areas of overlap. These include in particular considerations in respect of access to information, and access to justice, and the necessary characteristics to make such access practical for victims.

As is further elaborated in the article by article commentary below, the fundamental recognition in Article 1 of the Aarhus Convention of the importance of a healthy environment as a Human Rights issue is an important consideration for us. The text of Article 1 of the Aarhus Convention provides:

“Article 1

OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

The most basic Human Right is without question the right to life. The healthy environment necessary to sustain life, therefore has to also be a human right, and we would welcome explicit acknowledgement of this in further iterations of the draft zero text. In protecting such rights it invariably follows that it is necessary to be able to protect the health of the environment. Therefore, proactive actions must also be covered by the proposed instrument, and we are concerned that the focus with the draft text is one of reaction, after the fact, and the damage or compromise to Human Rights has occurred. Remediation in an environmental context can involve decades, and in some cases may not even be possible, to the detriment of the associated Human Rights. Therefore avoidance and proactive actions must surely also be encompassed by the provisions of further iterations of the zero draft.

- We would therefore recommend as one of our most overarching recommendations that:
 - The right to a healthy Environment, and the right to protect it, are clarified and made explicit as Human Rights within the text of the zero draft.
 - This should be addressed in further iterations on the zero draft text in the preambles, ideally with reference to the Aarhus Convention, and also addressed in the operative part of further iterations on the zero draft text.

In that context, the Aarhus Convention also consequently recognises special *locus standi* or ‘standing’ for environmental non-government organisations, (eNGOs) who promote protection of the environment as their primary objective.

- We would therefore recommend as a further overarching recommendation that:
 - The right to a healthy Environment, and the right to protect it, are clarified and made explicit as Human Rights within the text of and following on the zero draft.
 - This should be addressed in further iterations on the zero draft text in the preambles, ideally with reference to the Aarhus Convention, and also addressed in the operative part of further iterations on the zero draft text.

Scope of the business organisations captured by the proposed instrument.

Of particular concern to us is the apparent focus on transnational corporations, (TNCs) in the zero draft, and the limitations to the definition proposed for this, and the very limited scope of the draft in respect of other business enterprises.

Need for a broader scope of business organisations captured by the convention:

- In our view we consider the scope of business organisations which fall to be considered under the proposed instrument needs to be much broader.

- In that regard we submit that there is scope for a much broader focus on other business enterprises arising from the mandate in Resolution 26/9.
- We are therefore unclear as to the rationale for the limitations of the zero draft in this regard.
- If we are wrong in our interpretation of the mandate, we would nonetheless call for further consideration of the scope of organisations captured, and for this to be raised within appropriate activities and fora associated within this overall initiative.
- In short, we would earnestly recommend any and all actions be taken to ensure the scope of the convention is sufficiently broad to be meaningful and practical and effective.
- Additionally, we are particularly conscious in this regard of the ability of business to structure and organise itself in such a way as to avoid a whole range of considerations across many spheres and regulatory considerations from tax to other liabilities or obligations. We would therefore urge vigilance and a broad and expansive approach within the draft text to ensure the effect of the proposed instrument cannot be easily evaded by the ingenuity of lawyers, acting to insulate their clients from its effects.

Need to capture organisations with State components to them also, and to focus on the characteristics of business activities and impacts in determining those covered by the convention.

In addition to concerns on the limitations of the definition of TNCs, and the potential in a number of respects to evade capture and effect under the proposed provisions, of further particular concern is the need to capture state bodies within the definition.

We submit that it might assist therefore to focus more on the characteristics and effect of activities undertaken, rather than the structures behind them ,as appears to be the case in the current zero draft focus on profit.

Need to ensure the effective of the proposed instrument is not neutralised in respect of various existing investor state dispute settlement mechanisms

Of crucial importance is that the new instrument needs to be able to operate in such a way as to provide a response to the issues that civil society has expressed such concern on in relation to investor state dispute settlement mechanisms and other such investor state arbitration systems. These are often more generally referred to as ISDS or ICS⁴ systems. These systems are becoming increasingly prevalent in new trade agreements, including ones with global reach and impact.

Of critical concern to us therefore, is how these concerns are reconciled with international law commitments and domestic law in the zero draft text. Given the limited time available to us, it would seem that Articles 13(3)- (7) of the zero draft appear to be concerned with these matters.

⁴ ISDS: Investor StateDispute Settlement or ICS: Investor Court System

The net effect of the draft zero text appears to be that both systems need to be able to live alongside each other, namely the ISDS/ICS style solutions of trade agreements and the obligations under the new instrument . However we have concerns in this regard.

It is of course welcome that Article 13(6) requires that future trade agreements do not contain provisions which conflict with the new convention. **However**, that may be largely too late in many instances. This is particularly so given the pace with which new trade agreements are being advanced, versus the time it is likely to take for this text of the new convention to be finalised, and for it then to be signed and ratified , and for it to have effect.

Additionally, the practicality of effectively implementing the obligations proposed in Article 13(7) in respect of existing trade agreements is of concern. Ultimately, it is the process or instrument with the sharpest teeth which is likely to prevail, and the one which States are most fearful of not complying with. In that regard we would urge further more robust consideration of the provisions in Art 13 (3) – (7) inclusive, and how the complying with the convention can be made very compelling for States.

The prospect of investors suing governments under ISDS style mechanisms, and using this as means to compensates claimants or to deter states from assisting claimants needs to be considered. In circumstances where claimants are successful against business – it would not seem just or morally correct that the same business can be compensated by a State. Further expert legal consideration of this would be welcome, and if it has been already addressed we would welcome that being shared with us.

How disputes between the effect of the convention and trade agreements will be resolved also needs further consideration.

In summary the **effect** of the convention cannot be subjugated and compromised by new or existing investor protection systems. Otherwise a very significant aspect of the new HR instrument will be neutralised. It is therefore not sufficient just to provide that both systems and instruments can operate in parallel. It may be that existing commitments to Human Rights and more compelling penalties for breach of this convention and failure to implement it need to be provided for in further iterations of the draft zero text. We do appreciate this is a difficult issue to reconcile, but it is one which is necessary for the new convention to address more robustly if it is to prevail in the contests which will invariably ensue between the effectiveness of competing instruments in the real world.

- We recommend therefore that the above concerns be addressed as a critical priority.

Consideration for an international court in respect of crimes and breaches of Human Rights

The extent to which matters should be pursued within the jurisdictions provided for in the text might be afforded further consideration. The matters can sometimes be very specialised and complex and may benefit from a court specialising in such matters at an international level.

Conclusion to General remarks

In light of the time and resource constraints pertaining to us in preparing a response to this consultation, we provide below some further brief comments in respect of the individual sections of the zero draft. We apologise for the very hurried nature of same, and the abrupt manner in which some of them are formulated, which is a function of the limited time we have had to respond, as we only learned of this consultation in the last few days. We would of course welcome an opportunity to clarify these and/or elaborate as necessary.

Of primary concern in the comments which follow are the need to address the above over-arching recommendations in respect of environmental considerations and responding to limitations in the convention as is currently proposed within the zero draft text, which will otherwise:

- drive discrimination in respect of the treatment of businesses,
- limit the potential protection and assertion of Human rights,
- drive “forum shopping” by Business organisations,
- drive the use of ingenious mechanisms to define and structure organisations in such a way as they can evade capture by the provisions of the convention.
- Result in a convention the effects of which will be neutralised by investor state dispute systems.

Part 2. Specific Commentary on the Draft Zero Text

In light of the time and resource constraints pertaining to us in preparing a response to this consultation, we provide below some further brief comments in respect of the individual sections of the zero draft. **We apologise most sincerely for the very hurried nature of same, and the very abrupt and perfunctory manner in which some of these have been offered. Please be assured this is simply a function of our time constraints, as we only belatedly learned of the consultation.** We would of course welcome an opportunity to clarify these and/or elaborate as necessary.

Art 1, Preamble.

As indicated above – the right to a healthy environment and the right to protect it should be reflected in the preambles as well as the locus standi of eNGOs.

In that regard it is proposed that additional recitals be included as follows:

“Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,”

“Recognising that a Healthy environment and the right to protect it are basic Human Rights, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations, and the special role that non-governmental organisations whose primary objective is the promotion of protection of the environment have in this regard ”

In that context the preambles may also wish to reflect and include the following:

Recalling principle I of the Stockholm Declaration on the Human Environment,

Recalling also principle 10 of the Rio Declaration on Environment and Development,

Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals,

Recalling the European Charter on Environment and Health adopted at the First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989,

Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development

Recalling also the UNECE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998, The Aarhus Convention,

2. In the context of the impact of Climate Change on Human Rights and Global Justice considerations it is also recommended that the Paris Climate Accord be recalled in the preamble, we would additionally of course recommend that be affirmed but appreciate the current sensitivities in that regard. We would therefore recommend the following be inserted:

“Recalling the UNFCCC Paris Climate Accord

Affirming the need for all States to work progressively and urgently on the matter of Climate Change as a major factor impacting on Human Rights globally”

Article 2, Statement of Purpose

Paragraphs 1 (a) and 1(b) to be amended to:

- Include other business enterprises, and organisations and bodies whose activities impact upon Human Rights in any capacity, and this needs to include organisations and bodies of a domestic nature.

Activities do not need to be of a transnational nature in order for them to impact upon Human Rights. Therefore paragraph 1 (b) in particular is too narrow in this regard and needs not to be limited to transnational consideration.

Art 3, Scope.

- In relation to paragraph 1:
 - The Convention should apply to **alleged** human rights violations, not merely to violations,
 - It should not be limited to transnational corporations – see comments on Article 2 above.
- In relation to paragraph 2
 - The Convention **should not be limited to rights recognised** under domestic law, international law should apply. Otherwise obligations will be circumvented.

To limit the convention as is currently proposed this part of the zero draft text will otherwise drive discrimination in respect of the treatment of businesses, limit the potential protection and assertion of Human rights, drive “forum shopping” by Business organisations, and the use of ingenious mechanisms to define and structure organisations in such a way as they can evade capture by the provisions of the convention.

Art 4. Definitions.

- Para 1. Definition of Victim:
 - The term “Victims” presupposes a finding that a complaint is well founded. ‘Complainant’ might be a more neutral word.
 - The definition also needs to encompass and reflect the rights and standing of eNGOs
 - The definition also needs to encompass those acting to avoid harm or impingement of their rights occurring in the first instance. As drafted, the only possibility covered seems to be for action ‘after the fact’, as the focus is on the ‘harm having been suffered. In the context and in light of our earlier opening comments – this is not an appropriate or an acceptable limitation.
- The definition section also needs to include a definition of eNGOs, which should reflect their role in protecting the environment and the linkage to Human Rights. So for example:
 - “Environmental non-Government Organisations” shall simply mean organisations whose primary purpose is the protection of the environment.”
 - The rights of eNGOs shall pertain regardless of whether it has any formal or legal status in the States involved, and cannot be limited by definitions pertaining in domestic law, which might otherwise exclude their effectiveness.
- Para 2. “business activities of a transnational character”
 - ‘For profit’ activity should be replaced with ‘for reward’.
 - Some businesses do not aim for profit but they are businesses nonetheless. For instance, they may just aim to remunerate their chief executive with all the profits, and he may just happen to own all the shares in the company. There is no profit, but the business still generates an income for its owner.
 - The definition of “business activities of a transnational character” should **include** consideration of activities operated “for reward”, as above. But also it should **not** be limited to consideration of this, as that would serve to possibly exclude State and semi-state or Public Private Partnerships and other such configurations. It may be useful to explicitly acknowledge they are covered.
 - The Key consideration in the definition should be – the conduct of business activities which impact or have the potential to impact upon Human Rights
- There is a need for further definition to encompass the wider business enterprises.

- The definition section also needs to include a definition capturing all business enterprises whose activities may not be of a transnational character, but which :
 - may have transnational boundary impacts on the Human Rights of individuals in another country,
 - and/or which may have impacts or potential impacts on Human Rights within the country of origin.
 - All such considerations need to be addressed.
- The definition should also include those with a State dimension to them and should also therefore not be limited to “for profit”. Organisations with state dimensions should be explicitly included.

Art 5, Jurisdiction.

Paragraph 1 implies there is a choice for the jurisdiction which operates. But it fails to clarify who determines the jurisdiction, and how. It is also too limiting in its consideration of the relevant jurisdictions, to where the activity occurred or the domicile etc of those involved. The proposal as drafted will drive regulatory shopping and drive down standards with a view to attracting business investment.

- **The text should therefore make clear that the choice of jurisdiction rests with the complainant /victim alleging it has suffered harm, and the choices need to be broadened and practically enabled or facilitated. In other words factors cannot be allowed to operate to constrain the choice.**
- Thus, where the State of establishment of the company provides effective judicial protection and the State where the wrong is perpetrated does not, the victim has a remedy in the State of establishment. In the contrary case, the victim cannot be denied a remedy simply because the company is established in a State that does not provide effective protection.
- Also the place of domicile should include all 4 options in para 2, and it should be open to the complainant to choose.
- It should also explicitly include additionally allow them consider in their choice on jurisdiction, the jurisdiction in which the impacts have occurred. As, the activity may occur in one jurisdiction which is enjoying the benefits of it, but the impacts, may be suffered elsewhere. This is particularly the case with environmental impacts, impacting on Human Rights.
- It should be made clear that the State parties do not have the right to choose one of these – if they can choose 1 out of 4, different choices by different States would leave some complainants without a forum.
- The Access to Justice provisions also need to operate in such a way and be consistent in their effect across states, so that this does not operate to effectively constrain the choice of jurisdiction by the victim/complainant.

Art 6, Statute of Limitations

- The text should be amended to add that the conduct of court proceedings and their pursuit shall not be such as to be oppressive to the individual/victim/complainant.
- Conducting court proceedings at a speed which demands well resourced litigators, and which necessitates large and complex volumes of information to be accessed and analysed can be oppressive and an insignificant undertaking and the statute of limitations needs to be cognisant of this and reflect a supportive approach to complainants.
- The statute of limitations also needs to recognise that it may take time for effects or impacts to be realised or properly understood. This is often the case in relation to environmental harm impacting on human rights including on human health or the environment generally.
- Thus statute of limitations cannot be allowed to operate relative to the time consent was granted for the activities or the investment made etc, but can only consider if the victim/complainant acted within a reasonable time of the impacts being known to them, and them having a reasonable opportunity to consider and prepare their claim, with regard to the complexity and volume of information
- The statute of limitations therefore and more generally needs to be broadly stated, including the requirement for flexibility and interpretation in the public interest, and to provide for wide access to justice.
- Explicit recognition of the need for wide access to justice and no limit to the statute of limitations on activities impacting upon climate change would be most welcome.

Art 7, Applicable Law

- The company (we use the term “company” to encompass all entities which we proposed above should be captured by the proposed convention) - should be obliged to:
 - respect the human rights standards applicable in the State of its domicile, and
 - the State where it operates, **and**
 - **the state in which the impacts of its activities have been suffered, or may be suffered.**
- Thus, a company should not be able to avoid standards by establishing itself in a State where protection is weak, and should not be able to avoid strict standards in its home State by operating in a State with weak standards.
- A key factor in trans-national corporations’ site location choices is to base themselves where worker or environmental or other protections are weak.
- The Convention should apply to a company operating in a non-participating State if the State in which it is domiciled is a party; and to a company operating in a participating State if the State of its domicile is not a party. Again, this is to avoid companies that try to circumvent the rules by locating an operating or holding subsidiary in a place where protection does not apply.

Art 8, Rights of victims.

- Art 8.1
 - Rights should include the formulation ‘fair, effective, ... and at a cost that is not prohibitively expensive,’ drawn from the Article 9(4) of the Aarhus Convention which provides for ALL of the following characteristics :

“9(4).the procedures referred to shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.”
 - Add a definition that a cost will be regarded as prohibitively expensive if it cannot be met out of the disposable income of the complainant.
 - Add that complainants shall be entitled to certainty in relation to costs before they commence proceedings.
 - Add that it is not sufficient that States provide for legal assistance, as it should be open to complainants to pursue a claim whose consideration is fair and equitable, and this necessarily involves an equality of arms.
 - Further consideration is necessary in relation to providing for effective injunctive relief in order to enable claimants seek and secure injunctions in order to limit the damage being caused while legal proceedings are advanced and progress.
- Art 8.2,
 - It is suggested that it might be helpful to split the adequacy of remedies at the end of para 2 into a separate preceding para, and provide that Remedies shall be adequate and effective to, so far as reasonably practicable, restore the victim to the position in which he / she / they would have been had the breach of rights complained of not occurred.
- Art 8.4
 - The word “appropriate” is used in relation to the access to information obligations. It is welcome that this is used to signal that which is necessary to pursue their claim or remedy, and that State parties and Courts shall not rely on domestic rules to limit same. However the first sentence might be considered in isolation so the first and second sentences might be joined by a conjunctive “and” or linked by “Therefore”. Alternatively this could be reworded as follows to make it stronger, and to also remove unduly – as it allows for subjective interpretation:
 - “Victims shall be guaranteed ~~appropriate~~ access to information relevant to the pursuit of remedies. **Therefore** State parties shall ensure that their domestic laws and Courts do not ~~unduly~~ limit such right, and facilitate access to information through international

- cooperation, as set out in this Convention, and in line with confidentiality rules under domestic law.”
- Additionally the final clause about interpretation of confidentiality obligations under national law needs to be explicitly balanced with a test of public interest with the balance of interest being in favour of the claimant. The following addition may suffice in that regard:
 - “The aforementioned grounds for refusal on confidentiality grounds shall be interpreted in a restrictive way, taking into account the public interest served by disclosure, and/or the interest of the claimants Human Rights. It may also take into account whether the information requested relates to emissions into the environment and the potential for further harm to be avoided or minimised and a precautionary approach should be adopted in the best interests of the public.”
 - Add that: Regulation (EU) 2016/679 (General Data Protection Regulation) shall not operate to restrict access to information constraining claims under this convention and to the exclusion of the public interest test provided for in the above comment.
- Art 8.5
 - Sub-para (d) provides an assurance that claimants will not be required to “reimburse legal expenses of the other party to the claim” – this should be changed to exclude “any and all expenses” so it is clearly not limited to legal expenses, as they might seek compensation or other expert expenses etc.
 - Add sub-para (e) to ensure that Court procedures are not used by Respondents to frustrate the exercise of the rights guaranteed by this Convention, and that Respondents who misuse Court procedures with this object or effect are subject to effective punitive and dissuasive sanctions.
 - Add sub-para (f) to
 - allow for claimants to select their own legal teams and experts so they are not limited to any selection available under state legal aid,
 - allow for them to be able to recover the costs if they are successful in their claim, or if it is in the interests of justice to do so, or if the claim is in the public interest. This is to allow claimants engage with legal teams and experts on a “no foal no fee basis” and provide for equality of arms so they are not restricted by the requirement to be able to pay for their own team, or for such teams to have to operate in a way which is unsustainable financially.
 - Art 8.6
 - Reformulate to say: The cost of commencing and pursuing proceedings shall not be so great as to deter a reasonable complainant from doing so. The State where the proceedings are brought shall assist complainants by waiving costs, and by providing legal aid where either of these measures is reasonably required and by providing the possibility for claimants to recover their costs as proposed in 8(5) above.
 - Add that a State may require the complainant to show a reasonable basis for his / her / their case before granting any such relief. The cost of establishing

such a reasonable basis shall not, however, be so great as to itself constitute a deterrent to the complainant.

- Art 8.7
 - The basis for the equitable and appropriate funding of distribution of the fund is not addressed and needs to be clarified. The extent of the fund should not operate to limit the obligations of states to support claimants.
- Art 8.11
 - This section needs to explicitly require a broad scope of interpretation of what constitutes actions which may deter claimants,
 - It also needs to encompass direct and indirect harassment or any discriminatory or aggressive action
 - It also needs to explicitly include actions by contractors or agents engaged or associated directly or indirectly by the company or entity involved, or their family members.
 - It also needs to require that States provide for, and implement dissuasive penalties in relation to actions which may deter claimants/victims.

Art 9, Prevention

- Art 9.1
 - Add after “the size, nature, context of and risk associated with the business activities” the following: “, and also the characteristics of the activity and the environmental sensitivities in the domain of influence of the activity and the human and environmental receptors susceptible to the impacts of the activity”
- Art 9.2.e.
 - It is not clear whether “Undertaking assessments of the environmental and human rights impacts of its activities”, is required both before such activities are authorised or commenced, and after they have commenced. It should be required as part of any authorisation, before they are commenced if no authorisation is involved, and also be required on an ongoing basis.
- Art 9.2.g
 - Add an extra para to (g): “Giving effect to all measures that are reasonably required to prevent any actual or potential human rights violations identified in any assessment or consultation.
- Art 9.2.(i)
 - Add an extra para to (i): “Giving effect to all measures that are reasonably required to prevent any actual or potential human rights violations identified in any assessment conducted on the activity.
- Art 9.4
 - It should be made clear that it is the company that is liable, not merely the State.

Art 10, Legal Liability

- Art 10.1,
 - Change “may be held” to “are held”
- Art 10.3
 - Delete “for reparation to a victim”: whenever the company is liable, it should reimburse the State if the State has already made reparation.
- Art 10.5,
 - Repeat previous reference to right to restitution (restitution in integrum.)
- Art 10.6,
 - Para a to c contain too many ways to potentially avoid liability. It might be helpful to reformulate along the following lines: “wherever they exercise control over the operations, or engage a third party in circumstances where it is reasonably foreseeable that the third party will carry on the operations, or cause the operations to be carried on by a third party, or could reasonable have foreseen the impact of the operations.”
- Art 10.8,
 - Should not be limited to transnational activities – the nature of the activities and their potential or actual impacts is what should be considered here.
- Art 10.10 ,
 - “...dissuasive criminal or non-criminal sanctions..” should be: “...dissuasive criminal and non-criminal sanctions..”

Art 11, Mutual Legal Assistance

- Art 11.3
 - The indicative list needs to an additional item include seizure of assets in circumstances where an organisation is trying to avoid payment of compensation for claims made against them in another jurisdiction. In short, the system should operate in a similar way to the way investors can secure access to assets of a State held outside the State if the state is refusing to compensate them following an ISDS style claim. Indeed the approach should be more robust and effective in the instances covered under the proposed convention.
 - It is noted that this might be considered to be covered under 11(3) (i) but we are concerned that this might be compromised by the caveat in respect of domestic law provided for in 11(3) (l)
- Broader consideration of transboundary impacts is required throughout, and potential impacts additionally need to be sufficient to warrant the level of mutual co-operation envisaged.

Art 12, International Cooperation

- Add a new Article 12(2) which provides for the requirement for co-operation between Parties to include measures to ensure that funds necessary to remediate and/or compensate claimants or cover expenses can be secured and drawn from the assets

of the organisations involved where these are held in other States, or from parent organisations.

- This is to avoid situations where assets are placed out of reach of the states involved, and is to reflect the similar approach to securing compensation or claims won in investor arbitration systems employed by corporations.

Art 13, Consistency with international law

Of crucial importance is that the new instrument needs to be able to operate in such a way as to provide a response to the issues that civil society has expressed such concern on in relation to investor state dispute settlement mechanisms and other such investor state arbitration systems. These are often more generally referred to as ISDS or ICS⁵ systems. These systems are becoming increasingly prevalent in new trade agreements, including ones with global reach and impact.

Of critical concern to us therefore, is how these concerns are reconciled with international law commitments and domestic law in the zero draft text. Given the limited time available to us, it would seem that Articles 13(3)- (7) of the zero draft appear to be concerned with these matters.

The net effect of the draft zero text appears to be that both systems need to be able to live alongside each other, namely the ISDS/ICS style solutions of trade agreements and the obligations under the new instrument . However we have concerns in this regard.

It is of course welcome that Article 13(6) requires that future trade agreements do not contain provisions which conflict with the new convention. **However**, that may be largely too late in many instances. This is particularly so given the pace with which new trade agreements are being advanced, versus the time it is likely to take for this text of the new convention to be finalised, and for it then to be signed and ratified , and for it to have effect.

Additionally, the practicality of effectively implementing the obligations proposed in Article 13(7) in respect of existing trade agreements is of concern. Ultimately, it is the process or instrument with the sharpest teeth which is likely to prevail, and the one which States are most fearful of not complying with. In that regard we would urge further more robust consideration of the provisions in Art 13 (3) – (7) inclusive, and how the complying with the convention can be made very compelling for States.

The prospect of investors suing governments under ISDS style mechanisms, and using this as means to compensates claimants or to deter states from assisting claimants needs to be considered. In circumstances where claimants are successful against business – it would not seem just or morally correct that the same business can be compensated by a State. Further expert legal consideration of this would be welcome, and if it has been already addressed we would welcome that being shared with us.

How disputes between the effect of the convention and trade agreements will be resolved also needs further consideration.

⁵ ISDS: Investor StateDispute Settlement or ICS: Investor Court System

In summary the **effect and utility** of the convention cannot be subjugated and compromised by new or existing investor protection systems. Otherwise a very significant aspect of the new HR instrument will be neutralised. It is therefore not sufficient just to provide that both systems and instruments can operate in parallel. **It may be that existing commitments to Human Rights and more compelling penalties for breach of this convention and failure to implement it need to be provided for in further iterations of the draft zero text.** We do appreciate this is a difficult issue to reconcile, but it is one which is necessary for the new convention to address more robustly if it is to prevail in the contests which will invariably ensue between the effectiveness of competing instruments in the real world.

- We recommend therefore that the above concerns be addressed as a critical priority.

Art 14, Institutional Arrangements

- Art 14.1
 - eNGOs and NGOs should have representation on the committee
- Art 14.1 (c)
 - the ballot should not be secret
 - It should be open to eNGOs and NGOs to also nominate committee members
 - State Bodies should consult on the execution of their vote
- Art 14.1 (e)
 - It should not be open to the State Party who nominated a no-longer active member of the committee to replace them – the selection process should be followed to replace the committee member.
- Art 14.1 (f)
 - Some consideration is needed on limitations of tenure of committee members, and the possibility of over-riding that in exceptional circumstances

- Art 14.4, Committee of the Parties
 - It is not clear what effect the “General comments on the understanding ...of the convention” will have, and what legal and other guidance the Committee should reflect and consider in any such interpretation.
 - It should be made clear that the stakeholders who may provide reports and information shall include any non-governmental organisation established in any State Party, regardless of whether it has any formal or legal status in that State.
 - Stakeholders should be able to complain, but complaint by individuals may swamp the Committee, and it doesn’t seem to have a clear role in investigating complaints.
 - On the other hand, States should not be able to frustrate NGO complaints by setting up procedural and technical barriers to deny NGOs standing.
 - It is not clear what effect the “General comments on the understanding ...of the convention” will have, and what legal and other guidance the Committee should reflect and consider in any such interpretation.

Conference of State Parties

- It should be explicitly stated that decision making at the CoP should be by consensus, and the text in respect of paragraph 14(5) should adjusted to reflect this additional stipulation.

Art 15, Final Provisions

Implementation

- Art 15.2
 - In communicating on the matter of how the convention is implemented – the communication shall be specific and precise in respect of the measures implemented or relied upon, and provide links to the relevant legislative sections at a granular level and to relevant policy documentation, and where appropriate relevant reports, and guidance for citizens. This is so compliance with the convention can be properly navigated and understood and evaluated.
- Art 15.5
 - Specific mention should be included here in respect of implementing the convention with respect to the effects of climate change, and in respect of claims seeking to avoid further negative impacts to climate change given the associated impingement on Human Rights.

Amendments

- The majority proposed of two thirds for making amendments is of concern as a block could act to emasculate the convention. Further consideration should be afforded to the risk of this and protocols in other similar conventions.
- Decision making should be by consensus.
- No structure, such as the EU should be entitled to vote as a block, the individual parties to the convention must exercise their votes in an individual capacity, and provide their credentials in order to do so.

Conclusion

We thank the Commissioner and their office for this opportunity to comment once again and for the consideration of our remarks. We look forward to learning more of the further development of this most welcome instrument.