



**Contributions to the Revised Draft of the Legally Binding Instrument (LBI)
prepared by the open-ended intergovernmental working group on transnational
corporations and other companies with respect to human rights**

October 2019

This document contains comments and suggestions based on our revision of the Revised Draft of the Legally Binding Instrument (hereinafter "revised draft" or "LBI") prepared by the open-ended intergovernmental working group on transnational corporations and other companies with respect to human rights

Following a general comment about the revised draft, we will proceed to specific comments on aspects that the instrument aims to regulate. First, we will refer to the legal framework related to international corporate responsibility. Second, we will address the need to adjust the language to encompass the responsibility of companies not only for their direct activities, but at every instance along the value chain. Third, we will cover the autonomous nature of environmental preservation. Fourth, we will comment on the regulation of processes for the establishment of corporate responsibility and victims' rights. Fifth, we will refer to the State's prevention duties. Sixth, we will address the jurisdiction applicable in cases of breach of the clauses of the Treaty. Finally, and seventh, we will address the consistency of the Treaty with international law.

General comments

The Preamble of the Revised Draft states that corporate activity has the capacity to contribute to sustainable development "through an increase in productivity." Although we are not unaware of the contributions that companies can make in order to achieve sustainable development, we believe that it is a big mistake to subject it to an "increase in productivity." The effective enjoyment of human rights cannot be subordinated to an increase in corporate productivity, nor does this necessarily mean that sustainable development will be achieved.

Preamble: "Acknowledging that all business enterprises have the capacity to foster the achievement of sustainable development ~~through an increased productivity,~~ inclusive economic growth and job creation that protects labor rights and environmental and health standards in accordance with relevant international standards and agreements".

1. Legal framework for international corporate responsibility

In the Revised Draft, Article 1 on "definitions" presents the concept of a human rights "violation or abuse," which encompasses, without differentiating them, both the responsibility of States and companies, which have a different status internationally.

From our perspective, it is important that the instrument distinguish between the two concepts. First, it is essential not to undermine the primary international responsibility of States to respect, protect, guarantee and promote human rights and fundamental freedoms, including protection from acts committed by companies.

Secondly, the novel contribution of the instrument and its applicability depends on regulating more specifically the specific responsibility of companies, which should not be confused with the responsibility of States. Companies' ultimate purpose is profit and they are not actors in multilateral spaces under international law. Companies do not negotiate treaties, on the contrary, they must submit to the jurisdiction of one or more States and the obligations that those States assume internationally. Within this framework, the concept of "violation" or "abuse" of human rights is more appropriate to define the mechanisms of companies' direct responsibility. This precision is key to making different articles of the LBI operational and applicable.

This conceptual differentiation should be applied to the successive articles of the Revised Draft. For example, article 5.2 defines the content of the obligation of prevention that companies have regarding their own activities. Although States must establish these obligations in each jurisdiction through laws and policies, it does not make sense to include the concept of "human rights violations, which refers to the international responsibility of the State. Corporate due diligence refers to *human rights violations* that could be committed by companies, without prejudice to the obligation of States to prevent *human rights violations*.

(New) Art. 1.2: "Human Rights violation" shall refer to State's international responsibility for failing to fulfill their primary obligation to respect, protect, fulfill and promote human rights and fundamental freedoms, including protection against human rights abuse by business enterprises and encompassing civil, political, economic, social and cultural rights.

(New) Art. 1.2 *bis*: "Human rights abuse" shall mean any harm committed by business enterprises through acts or omissions, against any person or group of persons, individually or collectively, that produces an impairment of their civil, political, economic, social and cultural rights, including environmental damage.

Art. 4.1.: "Victims of human rights violations **and abuses** shall be treated with humanity and respect for their dignity and human rights, and their safety, physical and psychological well-being and privacy shall be ensured"

Art. 4.14: "State Parties shall provide effective mechanisms for the enforcement of remedies for violations **and abuses** of human rights, including through prompt execution of national foreign judgments or awards, in accordance with the present (Legally binding instrument), domestic law and international legal obligations".

Art.5.1. State Parties **have an obligation to prevent human rights violations resulting from business activities and** shall therefore regulate their operations and activities whether in the home or host States. For this purpose, States shall ensure that their domestic legislation and public procurement procedures require all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and the environment and prevent human rights ~~violations or abuses~~.

Art. 5.2. For the purpose of paragraph 1 of this Article, State Parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence as follows:

5.2 a. identify and assess any actual or potential human rights ~~violations or abuses~~ that may arise from their own business activities, or from their business relationships;

b. Take appropriate actions to prevent human rights ~~violations or abuses~~ in the context of its business activities, including those under their business relationships;

d. Communicate to stakeholders and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights ~~violations or abuse~~ that may arise from their activities, or from those under their business relationships.

5.3 e. Adopting and implementing enhanced human rights due diligence measures to prevent human rights ~~(violation or) abuses~~ in occupied or conflict-affected area, arising from business activities, or from business relationships, including with respect to their products and services.

Art.6.6. States Parties shall ensure that their domestic legislation provides for the liability of natural or legal person conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a business contractual relationship, from causing harm to third parties or the environment when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights ~~(violations or) abuses~~ in the conduct of business activities or as a consequence of their business relation, including those of transnational character, regardless of where the activity takes place.

Art. 7.1. Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violation or abuse of human rights covered under this (Legally binding instrument), shall vest in the courts of the States where: [...]

Art 8.2. Domestic statute of limitations for violations or abuses that do not constitute the most serious crimes of concern to the international community as a whole, including those time limitations applicable to civil claims and other procedures shall allow a reasonable period of time for the investigation and prosecution of the violation or abuses, particularly in cases where they ~~violations~~ occurred in another State.

Art. 9.2. All matters of substance regarding human rights law relevant to claims before the competent court may, in accordance with domestic law, be governed by the law of another State where:

- a. the acts or omissions that result in violation or abuses of human rights covered under this (Legally Binding Treaty) have occurred; or
- b. the victim is domiciled; or
- c. the natural or legal person alleged to have committed the acts or omissions that result in violation or abuses of human rights covered under this (Legally Binding Instrument) is domiciled.

Art. 10.6. State Parties shall provide legal assistance and other forms of cooperation in the pursuit of access to remedy for victims of human rights violations **and abuses** covered under this (Legally Binding Instrument).

2. Corporate responsibility and value chains

The restriction of liability to [their own] activities in the preamble may distort the meaning of specific clauses of the body of the Revised Draft, given that current production processes are characterized by segmentation and the formation of value chains that cover suppliers, distributors, subcontractors, customers and other modalities of business relationships. The Preamble of the Revised Draft should not restrict the scope of corporate responsibility for their impact on human rights only to their "own" activities. The wording in the body of the Revised Draft article is already broader than this language implies.

In turn, the conditioning of corporate responsibility with respect to activities that integrate the same value chain to the existence of a contractual bond is a criterion that does not respond to contemporary modalities of business ties, and generates for victims of abuse and violations an evidentiary burden that may prove to be difficult or impossible to comply with. In addition, the Guiding Principles on business and human rights, which are widely accepted internationally, use the term "business relationship" to refer to the assumptions of value chains between different business entities. This concept is broader and addresses more accurately the current complexity of business relationships in a globalized world. Therefore, we consider it necessary to replace the concept of "contractual relationship" with that of "business relationship" in the Revised Draft.

Preamble: "Underlining that all business enterprises, regardless of their size, sector, operational context, ownership and structure have the responsibility to respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their ~~own~~ activities and addressing such impacts when they occur, as well as by preventing or mitigating adverse human rights impacts that are ~~directly~~ linked to their operations,"

Art. 5.2. For the purpose of paragraph 1 of this Article, State Parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence as follows:

a. Identify and assess with meaningful participation of affected communities, ombudspersons, human rights defenders, credible independent experts and other concerned individuals or groups, any actual or potential human rights and environmental violations or abuses **that may arise from their own business relationships - whether contractual or not.**

b. Take appropriate actions to prevent human rights and environmental ~~violations or abuses~~ in the context of its business activities, including those **with whom they maintain business contractual** relationships.

c. Monitor the human rights and environmental impact of their business activities, including those **with whom they maintain business contractual** relationships;

d. Report publicly ~~Communicate to stakeholders~~ and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights ~~violations or abuse~~ or environmental harm that may arise from their activities, or from the activities of those with whom they maintain business contractual relationships.

Art.6.6. States Parties shall ensure that their domestic legislation provides for the liability of natural or legal person conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a **business contractual relationships**, from causing harm to third parties or the environment when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights ~~(violations or)~~ abuses in the conduct of their business activities **or as a consequence of their business relations**, including those of transnational character, regardless of where the activity takes place.

3. Autonomous character of the environment

Various International Treaties¹, enforcement bodies² and domestic regulations³ recognize the right to the environment as autonomous, indivisible and interdependent with other human rights. Multiple human rights protection systems recognize the right to a healthy environment as a right in itself. Likewise, they recognize that multiple human rights are vulnerable to degradation.

In this regard, the Inter-American Court of Human Rights, in its Advisory Opinion No. 23, recognized the existence of an irrefutable relationship between the protection of the environment and the realization of other human rights. The Inter-American Court stated that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights and recognized “the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights.”⁴

In terms of the independent character of the right to environment, it has considered “important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such

¹ Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, Doc. UN A / CONF.48 / 14 / Rev.1; Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, Doc. UN NCONP.151 / 26 / Rev.1 (Vol. 1); art. 11 of the Additional Protocol to the American Convention on Human Rights.

² Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, Doc. ONU A/HRC/22/43, para. 10.

³ The constitutions of the following States enshrine the right to a healthy environment: (1) Constitution of the Argentine Nation, art. 41; (2) Political Constitution of the State of Bolivia, art. 33; (3) Constitution of the Federative Republic of Brazil, art. 225; (4) Political Constitution of the Republic of Chile, art. 19; (5) Political Constitution of Colombia, art. 79; (6) Political Constitution of Costa Rica, art. fifty; (7) Constitution of the Republic of Ecuador, art. 14; (8) Constitution of the Republic of El Salvador, art. 117; (9) Political Constitution of the Republic of Guatemala, art. 97; (10) Political Constitution of the United Mexican States, art. 4; (11) Political Constitution of Nicaragua, art. 60; (12) Political Constitution of the Republic of Panama, arts. 118 and 119; (13) National Constitution of the Republic of Paraguay, art. 7; (14) Political Constitution of Peru, art. 2; (15) Constitution of the Dominican Republic, arts. 66 and 67, and (16) Constitution of the Bolivarian Republic of Venezuela, art. 127.

⁴ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017 on “Environment and Human Rights”, para. 47.

as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.”⁵

These antecedents must be contemplated in people's recognized rights and the obligations that the Revised Draft imposes on States and companies. In particular, it seems important to us to allow for people to initiate complaints for environmental damage, without having to prove the particular links between this damage and the abuse of other rights.

In turn, as part of State Parties' duties to ensure an internal legal regime that provides an adequate and comprehensive system of legal responsibility, they must also take into account cases of damage to the environment resulting from corporate activity.

Art.5.1. State Parties have an obligation to prevent human rights violations resulting from business activities and shall therefore regulate their operations and activities whether in the home or host States. For this purpose, States shall ensure that their domestic legislation and public procurement procedures requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights **and the environment** and prevent human rights ~~violations or~~ abuses.

Art. 5.2. For the purpose of paragraph 1 of this Article, State Parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence as follows:

a. Identify and assess with meaningful participation of affected communities, ombudspersons, human rights defenders, credible independent experts and other concerned individuals or groups, any actual or potential human rights ~~violations or~~ abuses **and environmental harm** that may arise from their own business relationships - whether contractual or not.

b. Take appropriate actions to prevent human rights ~~violations or~~ abuses **and environmental harm** in the context of its business activities, including those with whom they maintain business contractual relationships.

c. Monitor the human rights **and environmental** impact of their business activities, including those with whom they maintain business contractual relationships;

d. Report publicly ~~Communicate to stakeholders~~ and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights ~~violations or~~ abuse **or environmental harm** that may arise from their activities, or from the activities of those with whom they maintain business contractual relationships.

Art. 6.1. State Parties shall ensure that their domestic law, in accordance with this Treaty and International Law, provides for a comprehensive and adequate system of criminal, civil and administrative legal liability of both natural and legal persons for committing or contributing to human rights violation or abuses and environmental harm in the context of business activities, including those of transnational character at home or host State.

Art. 6.6. States Parties shall ensure that their domestic legislation provides for the liability of natural or legal person conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a business ~~contractual~~ relationship, from causing harm to third parties **or the environment** when the

⁵ Ibid, para. 62.

former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights ~~(violations or)~~ abuses in the conduct of their business activities or as a consequence of their business relations, including those of transnational character, regardless of where the activity takes place.

4. Regulation of processes to establish corporate responsibility

4.A. Enable complaints from national human rights institutions, such as public defenders.

The Revised Draft of the Treaty establishes the duty to guarantee victims the right to file claims before the courts and to initiate a case before non-judicial mechanisms. Due to the power of companies and the asymmetry of power with respect to the victims and the communities, this right generally requires that positive measures be taken to accompany the victims.

These measures include ensuring that national human rights institutions and other bodies responsible for the defense and protection of individual or collective rights have autonomy, resources and legitimacy to file complaints. In particular, public defender's offices should enjoy independence and functional autonomy and fulfill the role of guaranteeing access to justice and comprehensive legal assistance in individual and collective cases, especially those in vulnerable situations, in several countries. Consumer rights defense bodies can also play an important role in the application of this LBI.

Art.4.8. Victims, as well as relevant institutions and organizations, shall be guaranteed the right to submit claims to the courts and State-based non-judicial grievance mechanisms of the State Parties, without prejudice to the judicial standing of monitoring institutions and other public agencies charged with the protection of human rights. Where a claim is submitted by a person on behalf of victims, this shall be with their consent, unless that person or institution can justify acting on their behalf. State Parties shall provide their domestic judicial and other competent authorities with the necessary jurisdiction in accordance with this (Legally Binding Instrument), as applicable, in order to allow for victim's access to adequate, timely and effective remedies.

4.B. Legal costs of the complaint process

In addition to measures taken to guarantee access to effective reparation for victims in the face of the violation or abuse of their human rights or damage to the environment, they must be assured that the costs of the process will not be an obstacle to exercising their right to justice. This is the reason why the exemption from the payment of legal costs in favor of victims must be established as a rule in all cases, and not only in cases of proven economic insufficiency as stated in the current version of the Revised Draft. If not, civil society organizations that promote the enforcement of human rights could be dissuaded to seek for because of the economic risk.

The basis for this protection is even greater if one considers the disparity of resources--economic, education and information, among others--that usually exists between the individuals who decide to sue a large company for abuse of their human rights and the company itself. It is important to keep in mind that, currently, in the vast majority of cases, the lawsuits that are initiated against corporations are not ruled in favor of the victims, for reasons

that have to do with the aforementioned disparity of resources, as well as corporate capture processes of the State and the justice systems. In that regard, it is necessary to regulate the procedures for submitting complaints in line with the current art. 4 (9) of the Revised Draft, which imposes the obligation on the States to “*guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment.*”

Art. 4.12.e. In no case shall victims that have been granted the appropriate remedy to redress the violation or abuse, be required to reimburse any legal expenses of the other party to the claim. In the event that the claim failed to obtain appropriate redress or relief as a remedy, the alleged victim shall only be liable for the legal expenses of the other party if it is proved beyond doubt that it was a reckless and groundless litigation. Under no circumstances shall the alleged victim be charged for legal expenses when there is lack or insufficiency of economic resources.

4.C. Reversal of the burden of proof

The asymmetry of power between victims and companies also manifests disproportionately in the duty to provide evidence in a judicial process, in particular with regard to access to information, given that a considerable part of the evidentiary process is based on reports, planning documents, business plans, internal policies, contracts and other internal documents of the companies.

To guarantee the right of access to justice in cases of corporate violations of human rights, it is necessary to address the inequality that exists when regulating the burden of proof, keeping it in the hands of those who are in a better position to produce it. In particular, in the analysis of art. 6 (6) the principle of reversal of the burden of proof is applicable when it is necessary to establish whether or not the controlling company carried out sufficient controls or oversight of any activity that caused the breach, or when it anticipated or should have foreseen the risks of violation of human rights.

~~Art.4.16 Subject to domestic law,~~ Courts asserting jurisdiction under this (Legally Binding Instrument) may require reversal of the burden of proof, for the purpose of fulfilling the victim’s access to justice and remedies. This rule shall be especially applicable to assess the liability of business companies regarding the harm caused by legal or natural persons with whom it maintains business relationships, in which case businesses shall be responsible for proving lack of sufficient control or supervision or impossibility to have foreseen risks to human rights.

4.D. Wide-scope guarantees of non-repetition:

The Revised Draft of the Treaty establishes in article 4 a series of rights that victims derive from the violation or abuse of their human rights or the environment. The text establishes the duty of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for the victims among those rights.

In our experience, we have observed that the violation and abuse of human rights caused by corporate activity tend to have negative impacts that exceed the victim and reach collective dimensions. In this regard and to prevent new cases of violation or abuse of human rights, we

see it as a positive measure that the Draft establishes that guarantees of non-repetition reach the victims and the people affected or who may be affected.

Art. 5. Victims shall have the right to fair, effective, prompt and non-discriminatory access to justice and adequate, effective and prompt remedies in accordance with this instrument and international law. Such remedies shall include, but shall not be limited to:
a. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims and other affected or potentially affected persons or communities;

5. Duties of prevention

The duties of prevention can be strengthened in the text, particularly through the provision of stricter duties of the State in cases of public procurement; greater concern regarding duties of transparency and access to information; the strengthening of prevention measures regarding gender equality and labor rights; participation and consultation with civil society, particularly compliance with consolidated standards of consultation with indigenous peoples; and the inclusion of a subsection on abusive tax practices.

5.1 Due diligence in public procurement procedures

On the one hand, we consider it essential that the Revised Draft of the Treaty expressly determines that States are responsible for the actions of the companies that carry out activities of public interest or on behalf of the State in public procurement procedures. That has consequences even for prevention duties.

Art.5.1. State Parties have an obligation to prevent human rights violations resulting from business activities and shall therefore regulate their operations and activities whether in the home or host States. For this purpose, States shall ensure that their domestic legislation **and public procurement procedures** requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and the environment and prevent human rights ~~violations or~~ abuses.

5.2 Gender and labor impact assessments

At the same time, the States Parties must adopt necessary measures so that the obligation to carry out studies of prior and subsequent impacts of their activities that take into account the impact especially on gender equality and labor rights is incorporated as part of companies' duty of due diligence. In particular, we believe it is useful to incorporate an express mention of the impact on labor rights that TNCs can generate to prevent them from pursuing a reduction in their labor costs by benefiting from weaker legal systems.

5.3.a: Companies have an obligation to (1) undertake environmental, gender, labor and human rights prior and post impact assessments as mandatory due diligence in relation to its activities and those with whom they maintain business relationships, (2) report public on these assessments, (3) integrate the results of such assessments into relevant internal functions and processes, and taking appropriate actions;

5.3. Free, prior and informed consent of indigenous peoples

The right to prior, free and informed consultation under the terms of ILO Convention No. 169 on Indigenous and Tribal Peoples (article 6) is widely accepted as a minimum global standard.

The United Nations Declaration on the Rights of Indigenous Peoples has emphasized that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” (article 19). General Comment No. 24 of the Committee on Economic, Social and Cultural Rights on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities established that “In exercising human rights due diligence, businesses should consult and cooperate in good faith with the indigenous peoples concerned through indigenous peoples’ own representative institutions in order to obtain their free, prior and informed consent before the commencement of activities. Such consultations should allow for identification of the potentially negative impact of the activities and of the measures to mitigate and compensate for such impact. They should also lead to design mechanisms for sharing the benefits derived from the activities, since companies are bound by their duty to respect indigenous rights to establish mechanisms that ensure that indigenous peoples share in the benefits generated by the activities developed on their traditional territories.”⁶

However, in some cases there is not only an obligation to conduct substantial consultations or guarantee indigenous participation in accordance with these norms, but, given the rights at stake and the magnitude of the possible impact, the express consent of indigenous peoples is required. This right to prior, free and informed consent for indigenous peoples has been recognized by the United Nations Declaration on the Rights of Indigenous Peoples expressly for relocation measures and for the storage or disposal of hazardous materials in the territories of indigenous peoples (articles 10 and 29.2).⁷

The Inter-American Court of Human Rights also indicated that “in the case of large-scale development or investment projects that would have a major impact in territories of Indigenous People, the State has a duty, not only to consult with [them], but also to obtain their free, prior, and informed consent, according to their customs and traditions.”⁸ The United Nations Committee on the Elimination of Racial Discrimination also expressed this position in its General Recommendation No. 23 on indigenous peoples, in 1997: “4. The Committee calls in particular upon States parties to: (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.”⁹

⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on the obligations of States under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, para. 17

⁷ Inter-American Court, Case of the Saramaka People vs. Suriname Judgment of November 28, 2007, para. 134

⁸ Article 10: “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”

Article 29.2: “States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.”

⁹ United Nations Committee on the Elimination of Racial Discrimination, General Recommendation No. 23 on Indigenous Peoples, A/52/18, Annex V; CERD/C/51/Misc.13/Rev.4, para. 4(d) (1997), p. 4.d)

With regard to the exploitation of natural resources in indigenous territories, CERD has emphasized the need for free, prior and informed consent: "As to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured."¹⁰

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples warned that "the nature of the consultation procedure and its purpose are also determined by the nature of the law or the interest at stake for the indigenous peoples concerned and the intended effect of the proposed measure."¹¹

[The Special Rapporteur] has emphasized "[t]he importance of achieving [free, prior and informed] consent varies depending on the circumstance and the indigenous people's interests at stake. A significant direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, the presumption may harden into a prohibition of the measure or project in the absence of indigenous consent."¹²

In addition to these criteria, the Special Rapporteur said that "in those situations where an investment activity or project has significant impacts that would endanger the physical or cultural well-being of an indigenous community, the State should not authorize continuing the activity without the consent of the affected community."¹³

Thus, to the circumstances in which the United Nations Declaration on the Rights of Indigenous Peoples requires free, prior and informed consent (and not just consultation), "the Special Rapporteur would add those relating to the establishment of projects for extraction of natural resources on the lands of indigenous peoples and other situations in which the projects could have an important social or cultural impact on the lives of the indigenous peoples concerned"¹⁴

Art. 5.3.b. Carrying out meaningful consultations with groups whose human rights can potentially be affected by the business activities, and with other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas. Consultations with indigenous peoples will be undertaken in accordance with

¹⁰ United Nations Committee for the Elimination of Racial Discrimination, Concluding Observations, Ecuador, CERD/C/62/CO/2, June 2, 2003, para. 16

¹¹ Report of the Special Rapporteur on the rights of indigenous peoples, August 10, 2011, A/66/288, p. 83.

¹² Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Promotion and protection of all human, civil, political, economic, social and cultural rights, including the right to development, A/HRC/12/34, July 15, 2009, para. 47 and Report of the Special Rapporteur on the rights of indigenous peoples, August 10, 2011, A/66/288, p. 83.

¹³ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur, A/HRC/12/34/Add.6, October 5, 2009, p. 39

¹⁴ Report of the Special Rapporteur on the rights of indigenous peoples, August 10, 2011, A/66/288, p. 84.

the internationally agreed standards of free, prior and informed consultations, as applicable. No relocation, storage or disposal of hazardous materials on indigenous peoples' territory nor large-scale development or investment that may have a greater impact within their territories shall take place without the free, prior and informed consent of the indigenous peoples concerned.

5.4 Tax evasion and avoidance

Finally, transnational corporations (TNC) engage in practices that consist of the subdivision of their organizational structure in various companies based in different countries with the objective of reducing their costs. Taxes are among the costs that TNCs aim to reduce. In this regard, they have developed “fiscal optimization” strategies to pay the lowest possible amount of taxes through, among other tools, the fixing of the prices of transfer of products between subsidiaries of the same transnational company. This practice refers to the fictitious price (higher or lower than the market value) of purchase and sale of rights, services and goods agreed upon by two related companies, generally located in different countries, which they declare before the tax agencies of the States. TNCs, through this manipulation known as “transfer prices,” seek to ensure that their income is taxed in countries with lower taxes and not in countries where their economic activity and value creation are taking place¹⁵.

The OECD created, at the request of the G20, the Base Erosion and Profit Shifting (BEPS) initiative. In its analysis, the OECD estimated annual corporate tax losses of USD 240 billion due to multinational companies' tax evasion practices. Various UN bodies consider elusive and evasive practices of paying taxes as an obstacle to the full exercise of human rights. The Committee on Economic, Social and Cultural Rights considered that States Parties "should also encourage business actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts of the States in which they operate to fully realize the Covenant rights — for instance by resorting to tax evasion or tax avoidance strategies in the countries concerned." Among the abusive practices of transnational corporations, the Committee mentioned transfer pricing practices, understanding that “[l]owering the rates of corporate tax solely with a view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights. As such, this practice is inconsistent with the duties of the States parties to the Covenant." The Committee noted that excessive protection for bank secrecy and permissive rules on corporate tax are some of the policies that encourage these behaviors by companies (General Comment 24 CDESC¹⁶):

Article 5.7 (new article): State Parties should prevent business companies from evading tax payments. To combat abusive tax practices of TNCs, States must combat transfer pricing practices, intensify international cooperation in tax matters and avoid excessive protection of bank secrecy.

6. Applicable Jurisdiction

¹⁵ The fight against tax evasion and avoidance. BEPS 2.0: What the OECD BEPS has achieved and what real reform should look like. Independent Commission for the Reform of International Corporate Taxation (ICRICT):

¹⁶CESR General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. E/C.12/GC24

The LBI would benefit from a clearer regulation of certain aspects regarding the applicable jurisdiction in cases of violation or abuse of human rights or damage to the environment.

On the one hand, it is important to include the principle of *forum non conveniens*, which determines that a court cannot ignore its jurisdiction to hear in a case on the assumption that another court of another State also has jurisdiction, according to the rules of art.7.1. It is imperative that the Revised Draft also incorporates a *forum necessitatis* clause. This clause refers to the possibility that a court, with connection to the violation or abuse of human rights or the environment, agrees to take a case with the objective of avoiding a denial of justice toward the victim, even when there is another court that has grounds for the case to be settled there.

For the purposes of the LBI, a *forum necessitatis* clause confers the victim the possibility to request that the court of a State with connection to the case exercise its jurisdiction in the event that he or she reasonably considers that there is no other court available, accessible or capable of offering an effective judicial remedy. As the Ontario Court of Appeals has ruled: “[t]he forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace ‘forum of last resort’ cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.”¹⁷

Article 7.4 (new article): A court shall not decline its jurisdiction to hear a case on the basis that there is another Court that also has jurisdiction according to the article 7 (1) adjudicative jurisdiction criteria.

Article 7.5 (new article): In order to avert a denial of justice when no other court is available or the claimant cannot reasonably be expected to have access to another court or access to remedy, the courts of any State with a connection to the dispute shall have jurisdiction. The connection may consist in the presence of the claimant in the State, the claimant or defendant’s nationality, the presence of assets of the defendant, the defendant’s activity in the State party or other circumstances.

7. Consistency with international law

Investment, trade and cooperation treaties, among other international treaties, can have enormous impacts on the full validity of human rights, fundamental freedoms and the environment. The LBI must establish that, prior to the ratification of any international agreement, an assessment of its impact on human and environmental rights must be carried out. Once the treaty enters into force, States must carry out evaluations of existing international agreements and review those that violate current obligations in human rights and environmental protection treaties, as well as the rights and obligations regulated in this LBI.

Article 12.7 (new article): Before signing any new international agreements, States parties shall conduct human rights impact assessment, carried out by independent and multi-stakeholder bodies, to prevent the undermining of the States obligations and victims’ rights

¹⁷ The Ontario Court of Appeal, *Van Breda v Village Resorts Ltd* (2010), 98 OR (3d) 721, para. 100

under this (LBI). Once this (LBI) enters into force, States shall implement a human rights impact assessment over the currently in-force agreements, carried by independent and multi-stakeholder bodies. If the assessment finds that these agreements undermine States obligations or victims' rights under this (LBI), those agreements should be reviewed.