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الاتحاد الأفريقي African Commission on Human & Peoples' Rights		UNIÃO AFRICANA Commission Africaine des Droits de l'Homme & des Peuples
<small>31 Bijilo Annex Layout, Kombo North District, Western Region, P. O. Box 673, Banjul, The Gambia; Tel: (220) 4410505 / 4410506; Fax: (220) 4410504; E-mail: au-banjul@africa-union.org; Web www.achpr.org</small>		

Advisory note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises (legally binding instrument)

Background

In many African countries economic cooperation with transnational corporations (TNCs) constitutes a source of revenue representing a substantial part of foreign direct investment which, if managed in a viable, sustainable and transparent manner respectful of human and peoples' rights, can contribute to socio-economic development. However, violations and abuses of the environmental, land and other socio-economic and collective rights of the people of Africa by transnational corporations, including the threats posed to the defenders of these rights, are widespread. Such violations include dispossession of land and displacement of communities; weak or poorly beneficial terms of concession; environmental degradation and poor labour rights protection; lack of transparency in respect of royalties paid and profits made and avoidance of taxes, which result in illicit financial flows.

The African Commission on Human and Peoples' Rights (African Commission) has the mandate under Article 45 (1) (a) of the African Charter on Human and Peoples' Rights (African Charter), to promote human and peoples' rights through undertaking studies and research on African problems in the field of human and peoples' rights, to disseminate information, and should the case arise, give its views or make recommendations to governments.

This Advisory Note was developed by the African Commission, through its Working Group on Extractive Industries, Environment and Human Rights in Africa, in order to assist the Africa Group in Geneva to navigate its way through the technical and human rights considerations in the present ongoing process in the United Nations for a Binding Instrument on Business and Human Rights. In doing so, it draws on its mandate to *inter alia* examine the impact of extractive industries in Africa within the context of the African Charter and to undertake research on the violations of human and peoples' rights by non-state actors in Africa and their potential liability for such violations. It further draws on the existing standards and principles at the African and global levels, including those established by the African Commission, the IFF report

of the AU, the African Mining Vision and the UN Guiding Principles on Business and Human Rights.

It is important to note that while the current legal regime is relevant, it remains inadequate to address not only the major power imbalance between TNCs and States but also the imbalance between the scope of obligation of TNCs and the gravity of the impact of their operations and the scale of power they wield. These gaps can only be rectified through a binding international framework, which is applicable across jurisdictions, and taking into account the interests of the most vulnerable.

It is within this context that the WGEI presents the following guiding principles and proposals to the African Group, to help inform their engagement when giving input and direction to the Binding Instrument.

General Principles:

Some of the core principles which should inform discussions include the following:

1. Indivisibility and interdependence of rights: All rights are indivisible and interdependent, in that all human rights, including civil, cultural, economic, political and social rights have equal status, and cannot be positioned in a hierarchical order. Denial of one right invariably impedes enjoyment of other rights, and the fulfilment of one right often depends, wholly or in part, upon the fulfilment of others.
2. Non-discrimination and equality: All individuals are equal as human beings and by virtue of the inherent dignity of each human person. No one, therefore, should suffer discrimination on the basis of race, colour, ethnicity, gender, age, language, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status as established by human rights standards.
3. Sovereignty and ownership: States have, in accordance with the principle of State sovereignty over natural resources, the main responsibility for ensuring natural resources stewardship with, and in the exclusive interest of, the people. In this regard pursuant to Article 21 of the African Charter on Human and Peoples' Rights, there is a duty on States to eliminate all forms of foreign economic exploitation, particularly that practiced by international monopolies. The rights of the people of the State as a whole may not detract from the specific rights of affected people who are directly impacted by the activities of TNCs to benefit from the exploitation and development of resources.
4. Transparency and accountability: In order to ensure good governance and rule of law, there is a need for transparency, to ensure that people have access to information to promote their rights and to hold TNCs, States and other role players accountable for breaches of human rights. Following best practices, there is a need for reporting and disclosure by TNCs of the terms of their

operations, the process of the conduct of social, human rights and environmental impact assessment for their operations and compliance with financial, labour, human rights and environmental standards. As part of the requirement for transparency and accountability, there is a need for establishing an internationally regulated monitoring, inspection and certification framework for ensuring compliance with and triggering the application of administrative, civil and criminal sanctions for breaches.

5. Consultation and participation: All people have the right to effective and genuine consultation and substantive and rigorous participation in decision-making processes that affect their lives and well-being. Rights-based approaches require a high degree of participation by communities, civil society and all affected persons.
6. Protection of vulnerable groups: Women, children, the elderly, persons with disabilities, indigenous peoples, rural populations, among others, are often more susceptible to harm from TNCs, and deserve special protection of the full spectrum of their human rights through legislative and other measures at national and international levels.
7. Sustainable development: Central to sustainable development on the continent is the use of resources to meet human development goals while simultaneously sustaining the ability of natural systems to provide the natural resources and ecosystem services upon which the economy and society depend and without compromising the ability of future generations to do the same.

Guidance on key areas of the Revised Draft Binding Instrument:

Article 3: Scope of the business enterprises to be covered

In order to overcome one of the main areas of contestation currently impeding the adoption of the binding instrument, it is proposed that there would be no harm in the Binding Instrument applying to all business enterprises. While, in general, national law exists which would apply to national corporations, recognition of a general obligation for all business enterprises to respect human rights in the operative text of the Binding Instrument would avoid different treatment of companies and ensure equal protection of affected people regardless of the character of the business activity.

This would also mean that the application of the Binding Instrument would be less skewed in its application predominantly to States in the Global North, which would increase consensus towards adoption of the Legally Binding Instrument. One further benefit of this approach is that because business enterprises work through subsidiaries, agencies and representatives at the national level, failure to include national companies within the ambit of this Binding Instrument may result in disparity of the standards applied to business enterprises in different States, which is one of the problems that this Instrument is aimed at avoiding.

It is proposed that the definition of business enterprises be wide enough to encompass the activities of multilateral development banks undertaken with business enterprises in emerging markets and developing economies.

Direct obligations on business enterprises

While it is the duty and primary responsibility of States to protect human rights and ensure that companies do not violate them, it is also the responsibility of business enterprises, as entities whose operations carry major social, economic and environmental impacts, to put in place measures that ensure respect for human rights and to contribute positively to the realization of the right to development. This obligation arises from the recognition that lack of such obligations and accompanying measures may result in the creation of a human rights vacuum in which such entities operate without observing human rights. At the very least this requires that business enterprises must respect human rights and prevent human rights harms from occurring. This was firmly established in the UN Guiding Principles on Business and Human Rights as the “duty of care” or the “do no harm” principle.

Under the African Charter, obligations of business enterprises towards rights holders have a clear legislative basis. Article 27 of the African Charter provides for the duties of individuals and its sub-provision 2 lays down the obligation to exercise rights ‘with due regard to the rights of others’. Clearly, if this obligation can be imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies.

The State Reporting Guidelines on Articles 21 and 24 of the African Charter, adopted by the African Commission on this basis elaborates the obligations of business enterprises as including not only the duty to respect human rights, but also sets out direct and indirect negative obligations as well as certain positive obligations on business enterprises, particularly in relation to transparency, the duty to adequately inform and substantively consult with affected people, and to contribute to development needs of host communities who bear the costs of externalities from the operation of companies.

The WGEI therefore proposes that the Binding Instrument should go further than the very minimum, and also envision promotion and fulfilment of certain human rights obligations by business enterprises. In this regard the adoption of sustainable and ethical business practices should not be voluntary, but should be a binding duty on business enterprises. These obligations on business enterprises should be recognised in the operative section of the Legally Binding Instrument and not only in the Preamble.

Small/medium-sized enterprise (SMEs) should not be excluded from the human rights obligations imposed on business enterprises. This is because victims of corporate abuse experience these impacts the same way, whether the perpetrator is a

large or small/medium-sized enterprise. Further, in understanding that business enterprises work through subsidiaries, agencies, representatives and so forth which may be small or medium sized, all of these entities should be held accountable for human rights violations. Nevertheless, the point must be taken that larger corporations, with their larger impacts, may reasonably be subject to greater obligations.

Applicable law and jurisdiction

The principle of “separation of corporate identity” and *forum non conveniens*, when applied together, very often serve business enterprises in avoiding liability in the parent company’s home state for the damages caused in other countries, resulting in double standards being applied in relation to developing countries.

In order to ensure that business enterprises do not escape liability on the basis of the principle of *forum non conveniens* the Binding Instrument must make specific provision for ensuring that home state courts where the business enterprise is domiciled to avoid declining jurisdiction on this basis. To the extent that the TNCs are subject to comply with the laws of the country where they are domiciled in relation to revenues and other benefits accrued to them from the operation of their subsidiaries, they should bear the responsibilities that result from the operation of their subsidiaries in another jurisdiction as well. Furthermore, the Binding Instrument should also take into account the possibility of accessing justice in a third state where the victims may be domiciled after the violation has taken place. In order to address concerns about “forum shopping”, provisions to curb such practices should be incorporated, whereby the treaty can provide that a case that is being handled in one jurisdiction should not be the basis for seeking remedy in another jurisdiction, rather than adopting more restrictive jurisdictional provisions.

Host states, due to jurisdictional and other challenges are often not in a position to hold business enterprises accountable, which would necessitate that jurisdiction should be extended to business enterprises’ home states and states where the victims are domiciled in order to prevent an accountability vacuum.

Competent regional courts as an avenue for accessing judicial remedies must also be recognized in the Legally Binding Instrument.

In terms of the applicable law, a set of criteria should be established in the Legally Binding Instrument to assist with determining the applicable law and/or venue, between that of the State where the harm occurred or where the business enterprise is domiciled.

Treaty oversight body or mechanism

Whereas the proposed monitoring mechanism established by the Legally Binding Instrument may take one of many forms, the WGEI is of the view that such a mechanism should at a minimum have the following competencies:

- The process of nominating members of the mechanism should be specific and transparent. This will ensure that there is no conflict of interest and bias in the members selected;
- The mechanism should be given the power to hear complaints from peoples and groups of people;
- The mechanism should be able to request information from business enterprises as well as the State and its agencies. This should include on-site investigative missions and gathering information beyond the regular reports provided;
- The mechanism should be permitted to request implicated business enterprises to appear before it;
- The mechanism should be able to make a determination of the types of remedies that are due to victims.

Complementary national level internationally regulated inspection framework

To buttress the monitoring and enforcement framework, the African group may also consider proposing the establishment at the level of states parties to the treaty of an internationally regulated monitoring, inspection and certification framework for ensuring compliance with the established standards and reporting to the treaty monitoring body.

Solomon Ayele Dersso (PhD)

Chairperson of the WGEI

