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USING THE NEW INSTRUMENT TO PROTECT INDIGENOUS PEOPLES' RIGHTS AND ADDRESS THE HUMAN RIGHTS OBLIGATIONS OF PUBLIC SECTOR FINANCIAL INSTITUTIONS

The Indian Law Resource Center (Center) welcomes the opportunity to provide comments on the paper outlining the Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights. On September 29, 2017, the Chairperson-Rapporteur of the Open-ended Intergovernmental Working Group (Working Group) made public the paper, which aims to reflect all stakeholders' inputs and is intended to be considered as the basis for drafting this new instrument.

This submission provides our initial comments on the Elements with a focus on the instrument's content and scope. As stated in previous submissions, we strongly believe that the instrument must provide explicit protection of indigenous peoples' collective rights and must include public sector financial institutions within its scope.¹ The Guiding Principles on Business and Human Rights (Guiding Principles) do not address these issues.² Their inclusion in this instrument would fill this gap in international law and help improve the human rights performance of businesses that have a transnational character, particularly those receiving public financing and support.

Content: Indigenous Peoples and Their Collective Rights

The Chairperson-Rapporteur did include elements relating to indigenous peoples and their collective rights within this draft. As a matter of content, the paper calls not only for consideration of the "Universal Declaration on the Rights of Indigenous Peoples," but also for "special protection to victims and particularly to indigenous peoples."³

¹ See, Written submission by Indian Law Resource Center (July 2015), available at <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx>. See also, Written submission by Indian Law Resource Center (Oct. 2016), available at <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx>.

² See, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK, United Nations Office of the High Commissioner for Human Rights (United Nations, 2001).

³ Chairperson-Rapporteur of the Working Group, Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Sept. 29, 2017, p. 2, 3,

The Center welcomes the legal approach taken on this matter. However, we believe it can be enhanced by addressing indigenous peoples as collective rights-holders, rather than just as a vulnerable group or as human rights victims. As the Center has consistently stated, many of the human rights of indigenous peoples are held collectively by communities, tribes, nations, or peoples. Such rights include self-determination, self-government and indigenous ownership and control over lands and resources. We recommend that the instrument explicitly include indigenous peoples' collective rights among the protected rights, as well as appropriate protection measures for these rights.

This recommendation aims to ensure consistency with the principles, duties and obligations relating to human rights impact assessments that the paper itself upholds. Indeed, explicit reference to indigenous peoples' collective rights in the instrument will make it clear to States Parties that they must consider such rights when assessing the human rights impacts of businesses' proposed projects⁴ affecting the environment, lands and resources of indigenous peoples. In turn, this will help ensure the primacy of human rights obligations over trade and investment agreements.⁵ Failure to do so will likely lead to land-conflicts, pave the way for legal challenges against relevant state-issued permits, and undermine potential partnerships between indigenous peoples and businesses.

Scope: Public Sector Financial Institutions

The Chairperson-Rapporteur has endorsed the objective approach to the question of the instrument's scope. The Draft Elements states that "the objective scope... should cover all human rights violations or abuses resulting from the activities of TNCs and OBEs that have a transnational character."⁶ That is to say, the primary focus for implementation purposes is on "the activity undertaken by TNCs and OBEs, particularly if such activity has a transnational character,"⁷ rather than on the organizational status of the entity responsible for the rights violation(s) at issue.

The Center also welcomes this approach, but believes that the instrument must explicitly address the question of public financing. As stated in previous submissions, transnational

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCsOBEs.pdf>

⁴ Chairperson-Rapporteur of the Working Group, Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Sept. 29, 2017, p. 6, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCsOBEs.pdf> (stating that one of the "Obligation of States" is to "take all necessary and appropriate measures to ensure that TNC and Bes design, adopt and undertake human rights and environmental impact assessments...").

⁵ Chairperson-Rapporteur of the Working Group, Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Sept. 29, 2017, p. 4, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCsOBEs.pdf> (stating that one of the "Objectives" is "to reaffirm the primacy of human rights over trade and investments agreements and establish specific State obligations in this regard").

⁶ Chairperson-Rapporteur of the Working Group, Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Sept. 29, 2017, p. 4, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCsOBEs.pdf>

⁷ Chairperson-Rapporteur of the Working Group, Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Sept. 29, 2017, p. 4, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCsOBEs.pdf>

corporations very often resort to public financing for “development” projects taking place in developing countries. Very often these projects then result in serious human rights violations. In an attempt to prevent public sector financial institutions from committing human rights violations and harming people and their environment, civil society has worked to compel public sector financial institutions to create environmental and social “safeguard policies.” However, these policies are often inadequate to end the violations that result from these projects. The policies are created on an ad hoc basis by each institution, the standards and remedies are variable, and the policies lack the force of law, leaving enforcement to the discretion of the very institution that has committed the wrong. We strongly recommend that the instrument explicitly address public-financing and the bank-business nexus as one key site of business-related human rights violations.

This recommendation aims to ensure much-needed attention to the common yet complex transnational activities involving banks, states and businesses. Clarifying that the instrument’s legal standards apply to public sector financial institutions will ensure that private business actors and public sector lenders compete on the same level ground, adhere to the same legal standards, and are responsible for upholding the same set of human rights obligations. Failure to do so will perpetuate today’s lack of legal supervision of public financing-related human rights violations and would waste a unique opportunity to further develop international human rights law in this regard.