Intervention Anne van Schaik, Friends of the Earth on session VI: scope of the treaty: ‘Open debate on different approaches and criteria for the future definition of the scope of the international legally binding instrument’

- Joining others to thank Ecuador for organisation of the week and to be asked to speak on this panel.

- I also want to say how pleased I am to see many States participating in this meeting, and would particularly thank the European Union and their member states. Many European NGOs have stated repeatedly that the EU is needed in this important process and we are pleased to see that finally we are seeing our region and the European countries in this room where they need to be.

- I am looking forward to hearing the different points of views and arguments of the States, including the EU, on this issue, and hope there will be a rich debate after the panel that will serve as a basis for building the elements of the treaty text.

- Probably every panellist feels this way about their panel, but I actually do believe that this is one of the most important panels of the week, as the issue of scope of the treaty has been contentious since the adaptation of the resolution, and even been presented by some states as a reason for them not to intervene in the 1st IGWG.

- It is interesting to note that views on definitions of scope can vary according to the type of law that is being introduced. Take my region, which is the European Union, which has been insisting on the fact that the treaty needs to include all businesses. I have to say in all honesty that the European NGOs were a bit surprised by the EU position here at the UN. Here the EU is insisting heavily on the need to cover all enterprises, while at home, the scope used for European laws is much narrowly defined. The French duty of care for example will be, if adopted, only applicable to companies with over 5000 employees. The EU Non Financial reporting Initiative will be only applicable for companies with over 500 employees.

- Our opinion as FoEI of what the treaty should cover is this: The proposed Treaty should prioritize TNCs, and apply to all their subsidiaries and business relationships, as well as to all the companies in their global supply chains, including subcontractors and financiers, and eventually to all companies that perpetrate, or are complicit in Human Rights violations. Because indeed to a victim of corporate abuse it is not that relevant if their rights are being violated by a national company or a TNC.

- So even though the treaty should be applicable for all companies, we feel that the priority should clearly be with TNCs and their subsidiaries and business relationships along the supply chain because of the following reasons:

A. Many transnational corporations are richer and more powerful than the states trying to regulate them. This is also preventing many national states from passing laws that would control their activities, and is thereby corrupting the judicial institutions of some countries. For decades, they have successfully managed to block the emergence of binding regulation through heavy lobbying and corporate capture of key decision-making processes. As a result businesses are rarely held to account and communities and the environment continue to pay the price.

So this creates legal gaps and that is where an international treaty is needed.

B. Many TNCs can easily pack up and relocate to another country, thereby organizing their local insolvency, leaving victims without any lack of redress. Why should the TNC enjoy the profits made by all its subsidiaries in each country, and never be held responsible when it comes to repair the damage caused precisely in the search for these benefits? There is an inconsistency and an injustice that offends us all and must be at the heart of the future treaty.
C. TNCs argue they cannot control their whole supply chain because they have subcontractors. But it is their role to reduce their supply chain to a “manageable” size. A treaty would make them accountable for the activities of their whole supply chain and would help counter the endless delocalisation and internationalization of production.

D. This complex structure of TNCs requires the creation of specific instruments and obligations to put an end to their impunity. TNCs keep on creating new and complex business relationships in their supply chain to dilute their responsibilities. Therefore the treaty needs to cover the whole supply chain, not only subsidiaries and subcontractors, but also their financiers. Yesterday my colleague from Walhi-Friends of the Earth Indonesia spoke here of the role of the EU and US financiers of palm oil company Wilmar. Wilmar has been deforesting and grabbing land in Indonesia, Nigeria and Uganda for many years, and despite many publications and campaigns by groups like mine EU and US financiers keep providing financial services to them. We think it is very important that the treaty is also applicable to these financiers, as they have been knowingly and willingly financing destruction for decades, despite their voluntary policies.

E. Most important however is that foreign investors are the only profiteers by the investment protection under ISDS. They are the only ones to initiate a claim. Either they win—or the state does not loose. In the trade and investment regime, it is apparently acceptable that the benefits are only accessible for the lucky few.

Now if I were a country or even an employer or business association saying a treaty that only applies to TNCs is unacceptable I would feel highly uncomfortable. You might ask why? Well, the reason would be that I know that it is precisely these TNCs who have access to the tax deals and ISDS arbitration mechanism through bilateral tax and investment agreements. I mean, how inconsistent can you get?

So again, there is a clear gap in the international legal architecture. TNCs are currently not directly obliged by legally binding rules to respect Human Rights and cannot be held accountable as juridical persons for Human Rights violations. So obviously, the Treaty should establish the civil and criminal responsibility of TNCs and their executives in order to close the current gap in international law.

Lastly, I want to tell everyone in the room and those involved in the process to not shy away from this discussion. Don’t set pre-conditions for this discussion, but share your concerns and ideas freely. These past days we have seen an overwhelming amount of testimonies by affected people, mentioning of cases involving TNCs doing the most terrible things. This treaty is their hope for change. Please don’t deny them this opportunity!