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The ball is in the EU's court: Opinion on the updated draft for a binding human rights instrument on transnational corporations and other business enterprises

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Position Paper

The ball is in the EU’s court

Opinion on the updated draft for a binding human rights instrument on transnational corporations and other business enterprises

September 2023

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1 The political process

In June 2014, the UN Human Rights Council adopted resolution 26-9, by which it decided to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises (OEIGWG). The purpose of the working group is to elaborate a binding international instrument that will regulate, in international human rights law, the activities of transnational corporations and other business enterprises. The OEIGWG will come together for the ninth round of negotiations from 23 to 27 October 2023. An updated draft prepared by the Ecuadorian Chair Rapporteur, dated 31 June 2023, will serve as the basis for discussion.

1.1 Background

For the instrument to have the desired effect – the closure of gaps in protection and accountability in connection with transnational business activity – at least some of the major "home" states of transnational corporations will have to be brought on board.

A large majority of the states that have engaged in the negotiating sessions thus far, though, are "host" rather than "home" states. Major industrialised countries – such as the United States of America, Canada, Australia, Switzerland, the United Kingdom, Japan and South Korea – do not support the process. The European Union (EU), too, has clearly conveyed its unwillingness to participate in the negotiations. In the past, the EU has justified this by saying that EU proposals regarding a more consensus-based approach and on overcoming divisions had not been sufficiently taken into account by Ecuador and South Africa, the initiators of Resolution 26/9, also pointing out that EU lacks a formal mandate to negotiate on this matter. The EU has also acknowledged, though, that it does not see any fundamental contradiction between the treaty process and the global consensus built around the UN Guiding Principles on Business and Human Rights (UNGPs), as long as the latter serve as the basis for further international law developments in the area of business and human rights.

Thus, the process has been carried forward for the past nine years primarily by civil society and Latin American and African states. Of late, though, industrialised states have begun to observe and comment on the negotiations more closely. In 2022, the USA actively participated in the negotiations, making it the first industrialised state from the Global North to do so.

1.2 Current situation

Eighth round of negotiations (24–28 October 2022)

The third revised draft instrument served as the basis for negotiation at the eighth session of the OEIGWG. This text that had already served this purpose in the seventh session,[1] so textual proposals submitted by states during that session were also on the table. A fourth draft had not been presented before the 2022 session, as originally planned, because the "Group of Friends of the Chair" (GoF), which the Chair had envisaged taking on this work, was unable to convene, as no African state stepped

[1] All of the documents related to the eight session can be found here: https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session8 (Accessed 12 Sep. 2023).

forward to represent the region in it. Thus, there were no intersessional negotiations or consultations and the process stalled. Azerbaijan, France, Indonesia, Portugal and Uruguay did agree to participate in the GoF – meaning that, other than the African States group, all of the UN regional groups were represented, and the Western European and other States group (WEOG) was actually disproportionately represented.

On 6 October 2022, the Ecuadorian Chair Rapporteur presented a set of “informal alternative proposals” addressing article 1 (Definitions) and articles 6–13 (Prevention, Access to remedy, Legal liability, Jurisdiction, Limitation periods, Applicable law, Mutual legal assistance and international cooperation). It was unclear who had assisted the Chair in the elaboration of these informal proposals; also unclear was the basis for the selection and revision of the individual articles. Thus, the delegates at the eighth session were presented with two very different documents with contradictory content to serve as the subject matter for negotiations: the third revised draft, including the outcome of the previous (seventh) round of negotiations, and Chair Rapporteur’s informal proposals. The negotiating states and non-state stakeholder observers at the process were taken aback by the latter, and largely rejected them.

States from all of the regions took part in the eighth session in 2022. More industrialised states gave general statements than had in the past, although many of these were fairly critical (EU, Germany Australia, Norway, United Kingdom, Switzerland, Japan, USA). In content, these statements were similar to those given in previous sessions, focussing largely on concerns and the formulation of conditions which would have to be met to make a more extensive engagement on the part of the state in question appear worthwhile. More specifically, the substance of the draft would have to be legally sound and implementable and be based on consensual standards. More favourably disposed statements came Portugal and France.

The steady increase in attention from industrialised states in the past few years indicates that the process, (in which these states originally did not want to engage at all) and the topic per se of the draft instrument have gained sufficient traction that ignoring them is no longer a tenable option.[2] Most striking in this respect were the EU’s comments on the draft, which were significantly more extensive than had been the case in previous years and specifically addressed several of the articles.

The most notable development, though, was that the USA formally participated in the negotiations during the session, as the first industrialised state from the Global North to do so. The USA made extensive (critical but constructive) proposals for changes. Nonetheless, the USA remains sceptical about the process and continues to favour the framework convention model.[3]

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2 S. Luthango, Sikho / Schulze, Meike (2023): Verhandlungen über ein verbindliches Abkommen zu Wirtschaft und Menschenrechten. SWP Aktuell, pp. 5-6. https://www.swp-berlin.org/publications/products/aktuell/2023A25_EU_Vertrag_WirtschaftMR_Web.pdf (Accessed 12 Sep. 2023).

3 For a brief discussion of this, see Luthango / Schulze (2023), p. 7; In greater depth: Methven O’Brien, Claire / Jolyon Ford (2017): Empty Rituals or Workable Models? Towards a Business and Human Rights Treaty. https://ssrn.com/abstract=3206479; Methven O'Brien, Claire (2020): Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention. American Journal of International Law 114, pp. 186-191.

Developments since the eighth round of negotiations

At the end of the eighth round of negotiations, Cameroon announced its willingness to represent the group of African States in the GoF. This body met with the Ecuadorian Chair Rapporteur a number of times in the first half of 2023 to coordinate intersessional negotiations, which took the form of regional consultations. The plan was for each UN regional group to hold two consultations to consolidate proposals for textual changes from the region, and to arrive at a document merging the informal proposals of the Chair and the third revised draft. Consultations (only one in one region, two in the others) were held in all of the regions except for Africa. Their outcomes have been incorporated into the up-dated draft presented by the Chair on 31 July 2023.

As this was going on in first half of 2023, the EU asked its member states what their stance toward the process was, presenting them with three options for future EU engagement:

1. Continue to observe and provide critical input to the process without an EU negotiation mandate;
2. Enter negotiations based on the current draft;[4]
3. Enter negotiations based on an alternative draft to be presented by the EU.

The results of this opinion-forming process have not been made public. It is likely, though, that a majority of the EU states indicated that they were in favour of entering the negotiations, and unlikely that a clear majority emerged on the question of whether the current OEIGWG draft or an alternative EU draft should serve as the basis for negotiations. It is worth noting that a possible entry into negotiations is not envisaged until after the adoption of the EU Corporate Sustainability Due Diligence Directive (CSDDD) – meaning that that the EU would not join the negotiations until their tenth round, at the earliest. As far as the German Institute for Human Rights is aware, Germany has not taken a position in the opinion forming process on future EU engagement.

2 Summary assessment of updated draft

In essence, the draft presented in late July 2023 is a combination of the third revised draft with the informal proposals presented by the Chair in October 2022 that also incorporates changes proposed in the seventh and eighth round of negotiations and in the regional consultations held in 2023.

With this current draft, the Chair Rapporteur has once again taken a substantial step in the direction of the states of the Global North. The draft addresses many of the issues that the EU and others have raised over the last years. For instance, while the previous drafts built to some extent on the UNGPs – the internationally accepted framework on business and human rights – the current draft takes this even further. The draft has also been tightened up significantly. The language in many passages is more precise, resolving some ambiguity as to legal meaning. In addition, states parties have a greater degree of flexibility on multiple points under the latest draft, which should facilitate its acceptance and boost its implementability. This is true, for

[4] The third revised draft was the most recent draft when the EU requested opinions.

example, regarding the language allowing proportionality-based differentiation in levels of obligations and regarding the choice of implementation of a civil, criminal or administrative liability.

The concessions to the positions of industrialised states of the Global North were introduced largely without these states having proposed such changes in the context of formal negotiations – with the exception of the USA. Thus, one can assume that the Chair was trying to create the best possible conditions for a formal entry into negotiations on the part of the industrialised states of the Global North. The EU and its member states should not let this opportunity pass them by. They should send a clear signal to the Chair that an EU negotiation mandate is firmly planned and will be issued upon the adoption of the CSDDD.

The concessions to industrialised states bring with them a considerable lowering of the level of protection for rights-holders (detailed examples are presented in the following sections). This weakening of protection – in some respects to below the level of the UNGPs – should not be simply accepted.

The Chair's gambit, if that is what these concessions are, will only succeed if the industrialised states, realising that the changes correspond largely to what they have been asking for, begin to engage constructively in the negotiation process. Otherwise, the Chair will have presented a version of the draft instrument that accords rights-holders a level of protection below that of the internationally established standards for no reason, a draft instrument that had previously been seen as very promising from the perspective of rights-holders.

3 Removal of references to climate and environment (article 1)

Unlike the third revised draft, this latest draft does not explicitly mention the relatively "new" human right to a safe, clean, healthy and sustainable environment. The definition of "adverse human rights impact" now covers only "a person's ability to enjoy an internationally recognized human right" (cf. third draft, art. 1.2: "… enjoyment of internationally recognized human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment").

It is true that the third draft had drawn criticism for a lack of specificity of the obligations relating to the environment set out in certain provisions (article 1.2, article 4.2 (c) and article 6.4 (a) and 6.4. (e)). However, the deletion of all reference to environment-related obligations, starting with the definition of "adverse human rights impact" in article 1 (references in the preamble and article 6 have also been removed), narrows the scope of the prospective convention and will limit its effectiveness in view of the interrelations between environment-related and human rights-related obligations.

It is not clear why the reference to environment-related obligations was dropped. China did call for its removal during the negotiations, but that proposal was rejected by several states. It is possible that it seemed logical to the Chair Rapporteur to omit specific mention of these obligations on the grounds that a right to a safe, clean,

healthy and sustainable environment received political recognition in October of 2021 (i.e., after the release of the third draft). The Chair may have felt that the new, streamlined wording “a person’s ability to enjoy an internationally recognized human right” would be understood to cover obligations relating to this right. However, thus far the right to a healthy and sustainable environment has only been recognised in resolutions, i.e., politically: it is not binding under international law.[5] A convention on transnational corporations and other business entities could be the first international instrument to enshrine the right to a safe, clean, healthy and sustainable environment in an international treaty.[6]

A number of the other references to the climate and the environment were removed when the latest draft was drawn up as well, for instance, from some of the recitals and articles 4 and 6. With a view to arriving at a concrete definition of the draft instrument’s material scope, one might actually welcome the focus on human rights obligations in this stage of the negotiations, particularly as environmental due diligence is only just now becoming established and defined internationally. However, the importance of corporate environmental and climate due diligence obligations will almost certainly increase over the coming years: the treaty process should not lag behind these international developments in the wake of Paris Agreement.

4 Changes to due diligence obligations (articles 1, 6 and 8)

Corporate due diligence obligations, previously defined in article 6 (cf. third draft, article 6.3), are now defined in article 1.8. This change in the location of the provision does not, in principle, effect on its binding force in any way. However, in terms of the composition of legal instruments, it is unusual, at the very least, to find the content of “human rights due diligence”, one of the central pillars of the draft instrument, moved up to the article laying out the definitions of terms. This new placement also raises two questions: how does article 1.8 (defining due diligence obligations) tie in with article 6.4 (on measures to be taken)? And what exactly is the relationship between due diligence obligations and liability questions?

4.1 Remedial action no longer part of due diligence

Taking remedial action vis-à-vis rights-holders affected by adverse human rights impacts arising from corporate activity does not form part of corporate due diligence obligations according to article 1.8 of the current draft. This applies with respect both to complaints management at the enterprise level and to reparations for harms sustained.

It is possible that the absence of this aspect resulted from an endeavour to model the language of the draft on that of the UNGPs, which address remedial action in the third, rather than the second pillar. Welcome though alignment with the UNGPs certainly is,

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5 See Deutsches Institut für Menschenrechte (2021): Stellungnahme: Internationale Anerkennung eines Menschenrechts auf eine sichere, saubere, gesunde und nachhaltige Umwelt, https://nbn-resolving.org/urn:nbn:de:0168-ssoar-75932-9

6 Similar efforts to enshrine the right to a healthy and sustainable environment are being made in the negotiations on an instrument on the implementation of the right to development, for more on this see the documentation of the May 2023 session of the relevant working group: https://www.ohchr.org/en/events/events/2023/24th-session-working-group-right-development (Accessed 24 Sep. 2023).

it is imperative that efforts to remedy and make good on harm suffered, as a central aspect of corporate due diligence obligations, should be reincorporated into the draft.

Textual proposal

revision of article 1.8: … identify, prevent, mitigate, **REMEDIATE** and account for how they address …
revision of article 1.8 (b): …taking appropriate measures to prevent and mitigate **AND REMEDIATE** such adverse human rights impacts;
Insertion of subparagraph 1.8 (e): (e) **WHERE BUSINESS ENTERPRISES IDENTIFY THAT THEY HAVE CAUSED OR CONTRIBUTED TO ADVERSE IMPACTS, THEY SHOULD PROVIDE FOR OR COOPERATE IN THEIR REMEDIATION THROUGH LEGITITMATE PROCESSES** (cf. UNGP 22).

Germany's Supply Chain Act (Lieferkettensorgfaltspflichtengesetz, LkSG) also provides for the inclusion of remedial action in the due diligence obligations of enterprises (section 3 (1)),[7] and the European Commission's Proposal for a Corporate Sustainability Due Diligence Directive (CSDD Proposal) contains a similar provision.[8] Thus the latest draft instrument falls short of the benchmark established in a law that is already in force in Germany and being aimed at by the EU, and it does so in an area that is of central importance from the standpoint of rights-holders. As the negotiation process continues, the Federal Government and the EU should therefore work towards bringing the draft instrument up to the level of the Supply Chain Act and the CSDD Proposal in this respect.

Article 1.9 of the latest draft defines "remedy" as the restoration of a victim of a human rights abuse to the status quo ante, or "as nearly as is possible in the circumstances". It goes on to define an "effective remedy" as one involving reparations that are "adequate, effective and prompt" and as being "gender and age responsive", adding that effective remedies can be drawn from a range of forms of legal remedy (e.g., compensation, rehabilitation, sanctions) and may include guarantees of non-repetition. It is difficult to understand why the definition is made up of two parts, as it is, particularly as the terms are not used consistently in the rest of the draft. The definitions should make it clear that "remedy" generally includes, inter alia, "reparations" and "compensation". Given the centrality of the concept of "remedy", it would certainly make sense for article 1 to provide a single coherent definition for it. Moreover, there is a further weakening of the role of reparation in article 8 (on legal liability) of the current draft: the wording in article 8.4 of the third draft under which "reparation of a victim" is a component of liability has been cut. The current draft does contain the reference to "effective remedy" in article 1.9 mentioned above, but the only reference to compensation for harm sustained contained in article 8 is a provision in subparagraph 2 (a) stating that remedy must be "responsive to the needs of victims". Given the variation in the consequences of liability and in national legal understanding, the language of article 8 does not make it entirely clear that liability that is responsive

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7 Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Supply Chain Act: Lieferkettensorgfaltspflichtengesetz – LkSG), sect. 3 (1): "The due diligence obligations include: … 6. Taking remedial action (section 7 (1) to (3)), 7. Establishing a complaints procedure (section 8)".
8 CSDD Proposal, Art. 4(1): "(c) … preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent in accordance with Articles 7 and 8; (d) establishing and maintaining a complaints procedure in accordance with Article 9."

to the needs of victims must encompass the compensation of the victims for harm sustained.

The reason that "reparation" was cut from article 8 is not clear. From the perspective of persons who have been harmed, this omission could constitute a significant change for the worse, a change introduced for no discernible reason. Thus, the provisions on liability in the draft should be changed to ensure both that business enterprises can be subject to sanctions (through the revision of article 8.6 of the current draft) and that victims must be compensated for harm sustained.

4.2 Obligation to involve stakeholders dropped

The definition of due diligence obligations in the current draft does not encompass the involvement of stakeholders. Business enterprises need only regularly and in an accessible manner "communicate" to stakeholders and rights-holders how they are addressing the risks arising from their activities (article 1.8 (d)). Yet, taking stakeholders into account, particularly (potentially) affected stakeholders, and their involvement in an enterprise's assessments is essential for setting up outcome-oriented due diligence processes and tracking their effectiveness – which is why just such an approach is laid out in the UNGPs. As the negotiation process continues, efforts should therefore be made to incorporate the following (or comparable) additions in line with UNGPs 18 and 20.

Textual proposal

1.8 (a): … identifying and assessing any adverse human rights impacts, **INCLUDING BY MEANINGFULLY CONSULTING POTENTIALLY AFFECTED RIGHTS-HOLDERS AND OTHER RELEVANT STAKEHOLDERS**, …
1.8 (c): … monitoring the effectiveness of its measures to address such adverse human rights impacts, **THEREBY DRAWING ON FEEDBACK FROM BOTH INTERNAL AND EXTERNAL SOURCES, INCLUDING AFFECTED RIGHTS-HOLDERS AND OTHER RELEVANT STAKEHOLDERS**; …

Hence in this area too, the ambitions of the current draft fall short of the standard in the Supply Chain Act (sect. 4 (4))[9] and the CSDD Proposal (article 6 (4))[10]. The Federal Government and the EU should therefore work towards bringing the draft at least up to the standard of these instruments in this respect.

The current draft now calls on states parties only to "promote", through regulation, the meaningful participation of stakeholders in the development and implementation of laws, policies and other measures (article 6.2 (d)). This language is significantly weaker than that in the third draft (article 6.4 (c) and (d)), which lays an obligation on states parties to ensure that business enterprises consult with a range of (potentially) affected groups (subparagraph 4 (c)) and specifically with indigenous groups

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9 Supply Chains Act (LkSG) sect. 4 (4): "In establishing and implementing its risk management system, the enterprise must give due consideration to the interests of its employees, employees within its supply chains and those who may otherwise be directly affected in a protected legal position by the economic activities of the enterprise or by the economic activities of an enterprise in its supply chains".

10 CSDD Proposal, art. 6 (4): "Member States shall ensure that […] companies are entitled to make use of appropriate resources, including independent reports and information gathered through the complaints procedure provided for in Article 9. Companies shall, where relevant, also carry out consultations with potentially affected groups including workers and other relevant stakeholders to gather information on actual or potential adverse impacts."

(subparagraph 4 (d)) while carrying out their due diligence, in accordance with the internationally recognized standards. Provision(s) to this effect should be reincorporated into the draft.

4.3 Responsibility for activities of third parties unclear

The current draft no longer clearly defines the obligations and liability arising to business enterprises in relation to the behaviour of third parties. Due diligence obligations are defined in article 1.8. The first component of this definition, "identifying and assessing" (subparagraph 8 (a)), has been changed such that the obligation no longer applies to "any actual or potential human rights abuses that *may arise from* their own business activities, or from their business relationships" (third draft, article 6.3 (a) (3); italics added) but instead to "any adverse human rights impacts *with which* the business enterprise *may be involved* through its own activities or as a result of its business relationships" (italics added).

The new criterion of "being involved with" could be interpreted as restricting the scope of the standard, as it appears to require a certain close tie on the part of the enterprise to the "adverse human rights impacts", whereas the language in the third draft did not. The third draft's "may arise" is a neutral element that does not, in itself, require a close tie – although one may, of course, infer the existence of such a tie based on the definition of "business relationship" itself. These relationships are denoted in the UNGP through the wording "caused or contributed to" or "directly linked to"; the wording in the current draft no longer appears to clearly encompass this latter relationship.

Moreover, this revision also has problematic implications for the second element of the definition of due diligence obligations, "prevent and mitigate" (article 1.8 (b)). That which is to be "prevented and mitigated" is now merely "such adverse human rights impacts", which is to say, impacts of the kind described in subparagraph 1.8 (a). By contrast, the corresponding wording in the third draft on these obligations differentiated to a significantly greater degree, particularly with respect to third parties (see third draft, article 6.3 (b) (3): "actual or potential human rights abuses which the business enterprise causes or contributes to through its own activities or through entities or activities which it controls or manages").

From the perspective of setting out coherent rules, a different approach would appear more logical: one in which one starts by establishing where "adverse human rights impacts" can arise and the extent to which the behaviour of third parties may also be of relevance in this respect, and only after having done so begins to refer to them simply as "such adverse human rights impacts". Moreover, it is important that requirements in this respect are uniform across all of the steps of due diligence because of the way these build on one another. The definition currently set out in article 1.8 (a) ("any adverse human rights impacts with which the business enterprise may be involved through its own activities or as a result of its business relationships") is significantly less specific due to the absence of elements like "controls or manages"; it almost appears as though its failure to address corporate law issues relating to corporate structure and control, etc., were deliberate. In addition, the definition no longer encompasses the concept of "contributing" to abuses. The inclusion of this concept is probably important, though, as a way of indicating that even joint causality can suffice – "involved" is a new wording in this context, one that is not drawn from

established standards like the UNGPs, and thus does not convey the degree of participation necessary with sufficient clarity.

The only language touching on this point in the current draft is in article 6.4, where it appears in relation to the "prevention" obligation ("to prevent human rights abuse by third parties where the enterprise controls, manages or supervises the third party"). However, from the perspective of coherence of the instrument, there do not appear to be either reasonable or sufficient grounds for this obligation to apply only for the area of prevention.

Another revision that weakens the previous provisions regarding liability in relation to the behaviour of third parties (article 8.6 of the third draft) has found its way into the current draft as well. Article 8.7 of the current draft[11] addresses liability only in connection in cases where: "(a) there is a situation of control, management or supervision over the legal or natural person or the relevant activity that caused or contributed to the human rights abuse at the time it happened; and (b) the human rights abuse was foreseeable, or in their business relationships, but adequate preventive measures were not adopted." The weakening of these provisions compared to those in the third draft arises in that an enterprise's liability is now contingent upon the fulfilment of both of the criteria in subparagraphs 7 (a) and 7 (b) of article 8 – because the "or" in the third draft has been replaced by an "and".

This substantially limits the scope of liability, as most suppliers in a supply chain are not, in fact, under the control/management/supervision of their customers. Thus, under the current draft provision, liability would remain restricted in practice to an enterprise's own area of operations and that of very closely associated 1st tier suppliers. This change should therefore be reversed in the course of continuing negotiations.

4.4 Weakening of prevention

As described in section 4.3, subparagraph 8 (a) of article 1 has been revised in such a way that the obligation to identify and assess no longer applies in cases of "any actual or potential human rights abuses that may arise from their own business activities, or from their business relationships" (cf. third draft article 6.3 (a)) but now only in cases of "any adverse human rights impacts with which the business enterprise may be involved through its own activities or as a result of its business relationships".

The deletion of "actual or potential" (UNGP language) could be interpreted as indicating that only actually existing "adverse human rights impacts" are at issue, i.e., that enterprises need only identify and assess situations in which "a reduction in or removal of a person's ability to enjoy an internationally recognized human right" can be found to have occurred as a matter of fact.

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[11] Note: The 7th paragraph of article 8 is omitted in its entirety in the "clean" version of the current draft (https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf). However, one can probably assume that this is merely due to an oversight while preparing the document since the paragraph still appears in the version in which the changes are visible. (https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-track-changes.pdf, pp. 48-49). Of course, the deletion of the entire paragraph would be an even greater step backwards.

This would represent a substantial step backwards and is not compatible with a risk-based approach: identifying and prioritizing risks is the whole point of a risk-based approach, even if it ultimately emerges that no interference in human rights has occurred. The Supply Chain Act[12] and the CSDD Proposal[13] also provide for risk-based regulation.

5 Broader scope (article 3)

Unlike the previous drafts, the current draft defines the scope of the instrument very broadly, so as to encompass all business enterprises in principle. By contrast, the scope envisaged in the first years of the negotiation process encompassed only enterprises that are transnationally active, which is to say, primarily those enterprises that maintain their principal domicile in an industrialized state and have supply and value chains that extend across national borders. This approach was categorically rejected by industrialised states and was cited as a key argument against their entry into the negotiations.

5.1 Coverage of all business enterprises

The expansion of the scope of the current draft to encompass all enterprises is a welcome development. With this change, the scope of the draft instrument extends beyond those of the Supply Chain Act and the CSDD Proposal, in that, unlike them, it does not recognise any threshold value with respect to the size of the enterprise (annual turnover or number of employees). This is important, both in relation to a “level playing field” – meaning competition under the same conditions – and from the perspective of rights-holders.

Under article 3.2 of the current draft, states can vary the scope of corporate due diligence obligations based on enterprise size, sector, operational context or the severity of impacts on human rights. This, too, should be seen as a positive development, as it means that states are now explicitly granted the possibility of tailoring their legislation to reflect the proportionality principle. In this respect, the current draft is consistent with the UNGPs and could accommodate the Supply Chain Act and the CSDD Proposal. The instrument may find broader support among states now that it affords states parties some degree of flexibility in implementation. However, when implementing the instrument, states parties should take care not to lose sight of its goals – to provide a minimum standard of protection for rights-holders and equal competition conditions for enterprises.

5.2 Definition of material scope less clear-cut

By contrast, the definition of the instrument’s subject matter in article 3.3 is less clear cut than that in the third draft, as a result of the omission of the reference to specific human rights instruments. In the UNGPs, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are defined as the minimal standards for the “internationally recognised human rights” along with the fundamental principles of the ILO as set out in the Declaration on Fundamental Principles and Rights at Work. The

[12] Cf. Supply Chain Act (LkSG) section 3 (1) “Enterprises are under an obligation to exercise due regard for the human rights and environment-related due diligence obligations set out in this Division in their supply chains with the aim of preventing … any risks to human rights or environment-related risks …“

[13] Cf. CSDD Proposal, art. 1 (1) “This Directive lays down rules (a) on obligations for companies regarding actual and potential human rights adverse impacts …“

Commentary of UNGP 12 also recommends that enterprises consider, based on the specific context, the rights of persons belonging to certain groups, for instance indigenous peoples. The deletion of all references to existing human rights instruments in the current draft is therefore problematic and is not in alignment with the UNGPs. It is important that the instrument clearly establish which of the internationally recognised human rights it protects.

The restriction in article 3.3 regarding the scope of human rights covered by the instrument to those "binding on the State Parties" links the instrument's material scope to the individual state parties' specific situation with respect to their ratification of human rights instruments (the third draft did this too). Thus, this provision gives rise to different *ratione materiae* for different state parties. This is inconsistent with the idea of a "level playing field", and it creates a potential source of confusion for rights-holders. There is almost no way to avoid this though: it is highly unlikely that potential signatory states would choose to bind themselves to treaties that they have not ratified. Were this language not included, there would be significantly less willingness to sign the treaty on the part of the states concerned.

6 Rights of victims (article 4)

6.1 Further clarification of the term "victim" necessary

Article 1.1 of the current draft defines a "victim" as any person "who suffered a human rights abuse in the context of business activities …." This concept of victim is drawn from article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance,[14] and represents a key achievement of this Convention.

In the business and human rights context, the term "victim" is intended to be clearly understood as encompassing all rights-holders whose human rights are potentially or actually put at risk through corporate activities. The wording in the current draft carries with it a danger that a human rights abuse must already have been found to have occurred, thus undermining the notions of prevention and risk mitigation – these last being a very central element of the due diligence obligations and the fundamental idea underpinning the UNGPs.

In the eighth round of negotiations, the USA requested that the term "victim" be replaced by "rights holder" and Cameroon and the Occupied Palestinian Territory urged the use of the wording 'victims or affected individuals and communities" – to no avail. As the negotiation process continues, more states should push for a clarification of the term "victim" throughout the draft that brings it into line with the UNGPs.

6.2 Right to submit claims needs further elaboration

Happily, the rights of victims to file complaints with courts and in non-judicial forums, including through a representative and in the form of class actions, remain intact in the latest draft (article 4.2 (d)). Wording that will ensure the right to submit claims to administrative implementation authorities and supervisory authorities should be added as well.

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[14] CED, Art. 24 (1): "For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance."

Textual proposal

Article 4.2 (d): “be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms, **AND RELEVANT STATE AGENCIES** of the States Parties to this (Legally Binding Instrument)”.

Another positive aspect of the latest draft is the insertion into article 4 of a paragraph (4.4) on the right of victims to request precautionary measures to protect their rights. The previous drafts lacked such a provision. In cases where precautionary measures are needed to prevent an alleged abuse from resulting in what might be irreparable harm to victims, it must be possible to obtain effective protection for the rights of the affected persons before the court has arrived at a decision in the principle proceedings.[15] There are welcome additions in the second paragraph of article 4as well, namely, the language inserted into the subparagraph 2 (f) further specifying the rights to information and the new wording in the new subparagraph 2 (g) recognising additional rights (“be guaranteed full participation, transparency, and independence in reparation processes”).

7 Deletion of reference to areas affected by conflict (article 6)

Under a provision in article 6.4 (g) of the third draft, state parties were to ensure that business enterprises exercised enhanced diligence in occupied areas or areas affected by conflict (cf. UNGP 7). The current draft no longer contains this provision. The sole mention of the necessity for special attention to activities in areas affected by conflict in the current draft is one in article 16.3 (just as in the previous draft), but this provision relates only to the implementation of the instrument as a whole and not to the preventive measures that are necessary.

The deletion of the provision in article 6 is difficult to understand and unwelcome from the perspective of rights-holders. Human rights risks are always heightened in conflict-affected areas. Enhanced diligence on the part of enterprises that are active in such areas is therefore necessary.

8 Access to justice (article 7, articles 9-11)

8.1 Collective redress

The current draft contains a welcome addition from the perspective of rights-holders in article 7.4 (f): states parties undertake to ensure that national laws governing civil procedure allow collective redress (“possibility of group actions”).

Collective redress has traditionally been regarded with scepticism in Germany. This is due to concerns about a proliferation of class action suits, such as those seen in the USA. Recent years though have seen a trend towards options for collective complaints even in Germany, such as the introduction of the civil procedure of the “model declaratory action” (*Musterfeststellungsklage*) in 2018 and the implementation

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[15] Deutsches Institut für Menschenrechte (2020) Stellungnahme: Wer setzt sich mit an den Verhandlungstisch? p. 5, https://nbn-resolving.org/urn:nbn:de:0168-ssoar-72066-8

of the EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers. Viewed in this light, a decision on the part of the Federal Government to agree to the inclusion of a provision of this kind as in the course of continuing negotiations would be advisable.

8.2 Enforceability of foreign judgements

The current draft no longer contains the provision regarding the enforceability of foreign judgements found in article 7.6 of the third draft. The reason for its deletion is unclear. It ought to be reinserted, though, because the execution of foreign judgements is associated with particular difficulties for complainants.[16]

8.3 Limitations on legal jurisdiction

From the perspective of rights-holders, having as much freedom as possible regarding the choice of forum for litigation is important when it comes to obtaining access to effective remedy. Article 9.3 of the third draft provided for state parties to ensure that competent courts did not raise any barriers for complainants and that the doctrine of *forum non conveniens* could not be applied in such cases. *Forum non conveniens* is a common-law doctrine that allows a court to rule that it is not responsible for a case if it determines that it would be more appropriate for the case to be heard in another court.[17] All that remains of this in the current draft is an obligation to respect the rights of victims in decisions relating to jurisdiction with respect to “the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter” (article 9.3 (a)).

The reason that this weakening of the language is particularly problematic from the perspective of rights-holders is that courts often use the *forum non conveniens* doctrine to dismiss transnational cases, making this doctrine a significant procedural obstacle for complainants. A provision barring the application of this doctrine should therefore be reconsidered in the course of the ongoing negotiation process.

Paragraph 4 of article 9 in the current draft is a new addition that makes sense both from the perspective of rights-holders and in terms of the effectiveness of a future instrument. The provision in this paragraph lays an obligation on competent state bodies (e.g., courts) to coordinate with one another when cases are pending in multiple states. However, this new provision replaced a quite different provision in this same paragraph of the third draft, one which was not taken up elsewhere in the current draft. Under the (deleted) third draft provision, courts would have jurisdiction over claims against a defendant that was not domiciled in within its jurisdiction if the claim itself related to another claim against a defendant did have its domicile there. This provision from the 3rd draft would have allowed claimants to submit claims in an additional jurisdiction and thus possibly to have a choice of multiple forums. Nonetheless, its omission seems reasonable to the extent that article 9.4 (3) of the third draft would have resulted in a significant expansion of legal jurisdiction that is unlikely to have met with broad acceptance internationally.

Another decisive limitation relating to legal jurisdiction arises from the deletion of article 9.5 (third draft). Under the deleted provision, rights-holders would, in certain

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16 See Texaco/Chevron Case (re Ecuador): https://www.business-humanrights.org/en/latest-news/texacochevron-lawsuits-re-ecuador-1/ (accessed on 29.9.2023).

17 Ibid., p. 10.

circumstances, have been able to pursue their claims in other countries if a fair judicial process could not be expected to be provided to them otherwise (*forum necessitatis*). This provision is of extreme importance for redress and should be reincorporated into the draft instrument.

8.4 Concretisation regarding statutory limitation periods

Article 10 of the current draft concretises the provisions on statutory limitation periods. This is a welcome development: appropriate limitations periods are a major factor when it comes to access to effective justice. States should consider three criteria when determining limitations, which should:

1. be appropriate to the gravity of the human rights abuse;
2. allow for the context and circumstances of the abuse and the length of time needed to identify relevant harms; and
3. respect for the rights of victims in accordance with article 4.

The elaborated provisions in article 10 are a welcome addition to the draft instrument. However, in addition to these, the establishment of a minimum limitation period would be desirable (cf. position of the European Parliament on of the CSDD Proposal regarding article 22(2)(a): “at least ten years”).

8.5 Applicable law

Of importance with regard to effective redress is that the choice of applicable law be left up to the claimants and that claimants be enabled, inter alia, to base their complaint on the law of the state whose court has jurisdiction or in which the business enterprise against which the complaint has been laid is domiciled. Thus, the proposed deletion of the article addressing this issue, which was one of the “informal proposals” put forth by the Chair Rapporteur, would have been extremely problematic from the perspective of redress. Happily, and logically, the current draft retains article 11.[18] Under paragraph 2 of that article, matters of substance can, at the request of the person who has been harmed, always be governed by the law of another state in which “the acts or omissions have occurred or produced effects” or in which “the natural or legal person alleged to have committed the actions or omissions is domiciled”.

9 Modifications relating to legal assistance (article 12)

The provisions on interstate legal assistance in the current draft, which were carried over from the third draft, are basically desirable. Moreover, the revisions incorporated into article 12 that originated in the informal proposals of the Chair are generally a source of welcome clarification. However, there are also deletions of language contained in the third draft that do not improve the article.

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[18] That a choice of law can be a decisive factor for the outcome of litigation is illustrated by the case of Jabir et al vs. Kik, for example. For more on this see Landgericht Dortmund (10.01.2019): Pressemitteilung: Landgericht Dortmund weist Klage gegen KIK wegen Verjährung ab. https://www.lg-dortmund.nrw.de/behoerde/presse/Pressemitteilungen-aus-den-Vorjahren/PM-Urteil-KIK.pdf (Accessed:18 Sep. 2023).

For instance, the examples of forms of legal assistance in article 12.5 of the third draft were important as they contributed to the specificity and concretisation of the instrument. It is therefore difficult to understand why they were deleted.

Finally, the provisions on the recognition and enforcement of court judgments in paragraphs 10 and 11 of article 12 have been deleted. These should be reinserted because they address aspects, the implementation and enforcement of judgements, in connection with which claimants frequently confront major obstacle. It must be said, though, that while the deletion of these provisions is certainly problematic from the perspective of rights-holders, it probably also increases the practicability of the instrument, as standards vary a great deal internationally. This, in turn, is associated with limited willingness on the part of many states to recognise and enforce the judgements of foreign courts.[19]

10 Conclusion and outlook

Along with several changes that are positive from the perspective of rights-holders (e.g., regarding collective remedy and the concretisation of statutory limitations periods), the current draft includes a number of changes that weaken the protection of rights-holders relative to that provided under the third draft. It appears highly probable that the intention behind these changes was to present a draft that industrialised states of the Global North would view as an appropriate basis for negotiation. Only if these states join the negotiation process can it hope to develop the momentum necessary to bring about positive changes for rights-holders. This means that the current draft presents opportunities, as well as risks, from the perspective of rights-holders. For the opportunities to outweigh the risks, industrialised states will have to step up to grasp this outstretched hand.

Negotiations on this instrument have been being held in Geneva since 2014 – with no end in sight and with no engagement by the EU. The EU’s stance is (no longer) consistent with its own manifold efforts to ensure human-rights compliant supply chains at the EU level. The EU has justified its absence from the negotiation process in Geneva by pointing out that many states, and particularly states in the Global North, have barely taken any notice of the process at all, making the chances of a successful outcome very small. This argument ceased to be valid during the eighth round of negotiations in 2022, when the USA, the largest economic power in the Global North, took part in the negotiations for the first time. This indicates that the process has received sufficient attention to make it of relevance for the EU as well.

Another argument raised by the EU is that many parts of the third draft instrument would be impossible to implement and could never become a subject of consensus. However, the current draft contains several changes that ought to be desirable from the EU’s perspective. This relates, in particular, to the following:

1. The clarification making it explicit that all business enterprises come within the scope of the instrument in principle – not only transnational enterprises;

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[19] Ibid., p.16.

2. The extensive integration of the informal proposals of the Chair, which address many of the criticisms raised by the EU (streamlined, better structured and worded in language more like that normally used in human rights instruments);
3. The improvements in implementability, as states are given more flexibility with respect to the instrument's integration into their legal systems.

Furthermore, the EU is only going to be able to change the current draft to better reflect its own views if it contributes constructive input to the negotiations. That the draft is less than optimal should be an argument in favour of joining the negotiations rather than a reason not to. Nine years after the start of negotiations, it is time for the EU to become involved and help take the process forward through active and constructive engagement in Geneva, reflecting its own efforts at the regional level.

In view of the protracted and challenging negotiation process over the last nine years, one has to ask whether it is going to be possible to achieve the desired aim using the framework within which the negotiations have taken place up to now. It might be possible to make more progress in the process by supplementing the official rounds of negotiations with informal talks and smaller-scale formats. Ecuador will probably not be able to deal with these additional tasks on its own, but the "Group of friends of the Chair" could intensify its work as an intermediary in the periods between the official rounds of negotiations and organise regular regional intersessional negotiations that could prepare the way for achieving greater progress in the formal sessions.

Imprint

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