



Deutsches Institut
für Menschenrechte

Position paper

Getting to Critical Mass – Will the EU Now Provide the Necessary Traction?

Statement on the Revised Draft for a Legally Binding
Human Rights Instrument of the United Nation's Open-
ended Intergovernmental Working Group on
Transnational Corporations and Other Business
Enterprises with Respect to Human

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1 What's it all about?

With the adoption of Resolution 26/9 in June of 2014, the UN Human Rights Council decided to establish an intergovernmental working group on transnational corporations and other business enterprises (OEIGWG). The working group's mandate is to elaborate an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises with respect to human rights. The OEIGWG met for the fifth round of negotiations from 14 to 18 October 2019. In attendance were 89 of the 193 UN member states, the State of Palestine and the Holy See (as observer states), and also the EU (albeit without a mandate to negotiate). A revised draft¹ released by the Ecuadorian chairmanship and dated 16 July 2019 served as the basis for discussion at the session, during which 27 UN member states put forth their views on the draft.

It is essential that at least some of the relevant states in which transnational corporations are based ("home states") provide input and support to the negotiation process if the resulting instrument is to serve its intended purpose: closing the gaps in protection and accountability associated with transnational business activities. Thus far, a large majority of the states that have actively contributed to the talks have been states one would classify as countries hosting transnational business activities ("host countries"). The process does not have the support of major Western developed countries like the United States of America, Canada, Australia, Japan and South Korea. The European Union (EU) also made it clear that it was not yet prepared to participate in the negotiations. In the past, the EU justified this non-participation on the grounds that its proposals regarding a greater focus on achieving consensus and overcoming divisions had not been sufficiently taken into account by the sponsors of Resolution 26/9, Ecuador and South Africa. However, the EU does not see any fundamental contradiction between the treaty process and the global consensus reached on the UN Guiding Principles on Business and Human Rights (UNGPR), provided that this consensus constitutes the foundation for further development of the international legal framework for business and human rights.

2 Summary assessment

In position papers that it prepared on the first "elements for the draft instrument"² and the OEIGWG's initial draft, known as the "zero draft"³, the German Institute for Human Rights explained the benefits and necessity of having an overarching international legal framework with respect to specifying the state's protection duties as they relate to business activities. In the Institute's view, the main points contained in the zero draft, released back in the summer of 2018, were already appropriate to the aim to close gaps in the protection of human rights above all along transnational supply chains. It therefore recommended that the Federal Government should use its influence to get the EU to play a supportive and constructive role in the ongoing negotiation process, i.e. to take part in the negotiations and put forth its views on substantive points. In its two position papers, the Institute made it clear that the

¹ The draft is available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (retrieved: 26 Nov. 2019).

² Niebank, Jan-Christian / Schuller, Christopher (2018): Position Paper: Building on the UN Guiding Principles towards a Binding Instrument on Business and Human Rights. Berlin: Deutsches Institut für Menschenrechte.

³ Niebank, Jan-Christian / Schuller, Christopher (2018): Position Paper: OEIGWG has come in from the cold. Will the EU do the same? Berlin: Deutsches Institut für Menschenrechte.

prospects for a successful outcome from the drafting activities depend largely on whether they take the UNGP as their point of departure and supplement the principles in a meaningful way.

The revised draft now on the table exhibits marked improvements over its predecessor. While retaining the key points of the zero draft, it expands the instrument's scope to encompass all (rather than only transnational) business activities and is more closely aligned with approach of the UNGP. It continues to centre around on states' protection duties while giving greater prominence to the perspective of victims. All of this can be seen as a clear effort on the part of the chairmanship to respond to EU concerns. Thus, despite some weaknesses and a need for further revision, the recently released draft should provide a very sound foundation for the intergovernmental negotiations going forward.

3 Scope and definitions

3.1 Scope

Of crucial importance for the effectiveness of a future treaty is the issue of which business enterprises, or rather what kinds of business activities it calls on states to regulate within the scope of their duty to protect human rights.

In the revised draft instrument, the scope is no longer restricted to transnational corporate activities. Article 3(1) now says that the treaty applies to "all business activities, including particularly but not limited to those of a transnational character". The definition of business activities ("any economic activity of transnational corporations and other business enterprises") in article 1(3) does open room for confusion, however, and has been interpreted by some as an unnecessary limitation of article 3(1), because of the repeated reference to transnational corporations. Nonetheless, the expanded scope is a clear concession (to the EU and others), and a welcome one from the perspective of rights-holders because, in order to be effective, the protection of their human rights must extend over all forms of business activities.

Although both the majority of states represented and the EU welcomed this expansion of the instrument's scope at the fifth round of talks, the controversy has not been entirely put to rest: some states (most prominently, South Africa) still want the instrument to concentrate exclusively on transnational corporations. The negotiations have made it obvious where the compromise between these positions should lie: the draft should clearly state that states have an obligation under applicable international law to take action to prevent, investigate, sanction and remedy human rights harms caused by economic activities of any kind. In fulfilling this duty to protect, states must regulate the behaviour of business enterprises by establishing a standard of human rights due diligence, the non-compliance with which is subject to sanction (arts. 5 and 6). The treaty must address transnational business activities as a matter of central concern in order to promote the closure of gaps in human rights protections in global supply and value chains in particular. The article defining the purpose of the treaty (art. 2) could make it clear that its aim is to close the gaps in protection associated with transnational activities.

Another improvement in the current draft over the zero draft is that now business activities no longer have to be profit-oriented in order to fall within the regulatory

content of the treaty. Thus, state-owned enterprises no longer fall outside of the scope. Nonetheless, it would be preferable for the draft to incorporate the entire state-business nexus more explicitly and fully (cf. Principles 4-6, UNGP). Like other enterprises, state-owned or state-controlled enterprises should be subject to human rights due diligence requirements. States should also make such due diligence mandatory in connection with foreign trade promotion and with public procurement. It would be advisable to establish a consistent and targeted orientation towards the protection of human rights within the operational activities of international trade and financial institutions (Principle 10, UNGP) in order to ensure state policy coherence. Therefore, the draft should call on states to act on their obligations in this respect.

Another improvement is that states no longer have the option of exempting SMEs from treaty obligations, but instead, under article 5(6), can take measures to avoid imposing undue burdens on them. This corresponds with Principle 14 of the UNGP, which says that the responsibility to respect human rights applies to all enterprises, regardless of their size, sector, operational context, ownership or structure.

3.2 Substantive reference framework

There is still a need for greater precision with regard to the substantive scope. Article 3(3) says the treaty covers “all human rights”. While the open-endedness of this phrase opens up policy space, it also creates a conspicuous absence. Making reference to existing standards in the preamble alone is not sufficient. Problems relating to the rule-of-law principle of legal certainty would certainly arise once states parties began implementing the treaty, if not before. Relevant instruments should therefore be mentioned by name in the operational part of the treaty. At a minimum, the treaty should, like the UNGP, refer to the “International Bill of Human Rights” consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It would be better to include a reference to the nine core human rights instruments: the ICESCR, the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the Convention on the Rights of Persons with Disabilities (CRPD) and the International Convention for the Protection of All Persons from Enforced Disappearance (CED). Reference should also be made to the fundamental principles of the International Labour Organisation (ILO) – freedom of association and the right of collective bargaining, elimination of forced labour, abolition of child labour, prohibition of discrimination in respect of employment and occupation – and to the form in which they are expressed and developed in the eight core ILO standards.

Furthermore, the treaty should make it clear that respecting the human rights of members of particularly vulnerable groups or sections of a population necessarily entails compliance with additional standards as well. Hence, references to, e.g., the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention No. 169, as setting out minimum standards for indigenous rights, should be incorporated into the treaty.

The draft also formulates due diligence duties relating to the environment (arts. 1(2), 4(5)(b) and a5(3)(a)): if these references are going to remain, specific legal sources from international environmental law should be cited in relation to them as should other relevant internationally recognised standards.

3.3 Definitions

Some of the definitions in article 1 are in need of improvement, and some of the terms defined in this article are used inconsistently in the subsequent text.

While the previous draft based its definition of “victims” (zero draft art. 4(1)) on the term “harm”, the new definition (rev. draft art. 1(2)) appears to distinguish between “human rights violations” (by states) and “human rights abuse” (by enterprises). This is a sensible distinction, but these terms are not used consistently in subsequent provisions. According to the logic of the draft, a “human rights violation” occurs when a state, as the bearer of a duty to protect human rights under international law, violates that duty; “human rights abuse” occurs when an enterprise, which comes under an obligation indirectly, by way of the state’s duty to protect, fails to fulfil its responsibility to respect human rights. There are other words that could be used here as well, such as “breach”. The essential point is that the distinction should be maintained throughout the text of the treaty.

Debate about the terms “victim” and “alleged victim” arose again during the fifth round of negotiations. Some delegations considered the use of the term “victim” to contain an impermissible attribution of blame to enterprises, whereas others saw the addition of “alleged” as casting inappropriate doubt on the rights of victims. This controversy could be put to rest by consistently applying a human rights-based approach and using the term “rights holders” throughout the draft.

The definition of “contractual relationship” (art. 1(4)) is of key significance for the scope of corporate due diligence duties. This term met with rejection from all sides at the negotiations. A new draft should replace it with the broader concept of “business relationships” (cf. section 5.2 below, under the heading “Extent of due diligence”, pp 8).

4 Rights of victims

Article 4 (Rights of victims) is intended to strengthen the right to effective remedy and the minimum of procedural rights associated with it. The call for the elimination of barriers to effective remedy for rights holders is very welcome. One such barrier is the lack of access to important documents in the possession of an enterprise: without such documents it is often impossible for rights-holders to prove sufficient grounds. The draft therefore contains provisions aimed at establishing “equality of arms”, by balancing out asymmetries in access to information (arts. 4(6), 4(7), 4(11), 4(12)(a)). Another improvement is that article 4(16) now contains a provision enabling courts to reverse the burden of proof. Great care must be taken in wording this provision.

The costs of litigation are another huge problem for many rights-holders. States need to do more to dismantle domestic financial barriers that prevent rights-holders from asserting their rights. It is appropriate, therefore, that the draft tackles this problem from multiple angles, including through the fund provided for in article 13(7).

To strengthen the position of rights holders, article 4 should be expanded as follows:

- A right to interim relief should be added to the provisions in paragraph 5. When there is urgent need, it must be possible for a court to grant effective protection of rights before it issues a ruling in the main proceedings.
- The right of access to information appears somewhat vague; it should be replaced by a provision calling for enterprises to be placed under explicit disclosure obligations.
- Another point of fundamental importance is that rights-holders should be able to join their claims in one set of proceedings or use representative proceedings (e.g. class-action suits or other collective proceedings).

5 Prevention

5.1 Orientation towards the due diligence concept from the UNGP

The new draft is consistent with the UNGP in that the entire text clearly centres on obligations on the part of states: it addresses only states, as international-law subjects, and calls on them to act on their duty to protect human rights by placing responsibilities on enterprises. Article 5(1) affirms that the state has a duty to regulate the activities of business enterprises effectively.⁴ Article 5(2) calls on states to do so by requiring enterprises to conduct “human rights due diligence”. Paragraphs 2 and 3 of this article are recognisably based on the standard of the human rights due diligence process, the central concept of the UNGP.⁵ The set of obligations to be imposed on enterprises is now, in line with the UNGP, behaviour oriented rather than outcome oriented and it picks up on the core elements of due diligence specified in the UNGP: States should take measures to ensure that enterprises have processes in place to identify actual or potentially adverse impacts on human rights, take measures to prevent potentially adverse impacts, verify the effectiveness of these measures and make themselves accountable through reporting. A particularly welcome aspect is that enterprises are to base their due diligence processes on consultations with rights-holders (art. 5(3)(b)). Grievance mechanisms at the enterprise level – a core element of human rights due diligence under the UNGP – are not called for in the second or third paragraphs of article 5. This is regrettable, because such mechanisms can help enterprises identify adverse human rights impacts and make it possible for them to identify systemic problems, by analysing complaints, and to adjust their practices accordingly. Moreover, these mechanisms can potentially make it possible for enterprises to provide swifter remediation of adverse impacts and to prevent damage from getting worse and grievances from escalating (see Commentary on Principle 29, UNGP).

5.2 Extent of due diligence

In order to close gaps in protection in globalised economic structures, a treaty must ensure that the human rights due diligence obligations that states impose on enterprises do not relate only to the activities of the individual enterprise itself. Rather, the instrument should clearly define the circumstances under which enterprises must consider the human rights risks posed by activities of “third parties” in their due

⁴ Cf. General Comment No. 24 (2017) of the UN Committee on Economic, Social and Cultural Rights and General Comment No. 16 (2013) of the UN Committee on the Rights of the Child.

⁵ These are mentioned explicitly in the preamble, which emphasises the corporate responsibility to respect human rights, repeating Principles 13 and 14 of the UNGP almost word for word.

diligence. Under the current draft, an enterprise's due diligence obligations would extend over its own activities and to risks arising from its contractual relationships. This has substantial consequences for the extent of corporate due diligence (art. 5(2)(a–d) and 3(d)) and for liability issues (art. 6(6)). Though article 1(4) sets out a very broad definition of “contractual relationships” (“any relationship between natural or legal persons to conduct business”), it would nonetheless be preferable for the draft to take its cue from the UNGP in this respect. The UNGP say that enterprises' responsibility to respect human rights encompasses “adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”⁶ Business relationships include an enterprise's relationships with business partners, with entities in its value chain, and with any other non-state or state entities directly linked to its business operations, products or services, irrespective of the existence of a contractual relationship.⁷ By taking up this extensive concept from the UNGP, the draft could ensure that enterprises would bear responsibility for human rights risks in their supply chains even when no direct contractual relationship exists.

5.3 Inclusion of environmental issues

The inclusion of environmental issues (in arts. 1, 2, 4(5)(b) and 5(3)(a)) makes sense, because inadequate protection of the natural environments in which people live can have serious consequences for the implementation of human rights. There can be no question of exercising the rights to life, water, food and health where the environment upon which people's lives and livelihoods depend is not preserved and protected. For instance, mining often results in the destruction of natural living spaces, by lowering of the water table or polluting the groundwater with heavy metals and other harmful substances. Conversely, compliance with human rights principles, such as access to information and participation, has a positive effect on the protection of natural environments. The rights to assembly and free expression and also the right to remedy are vital to the work of activists who defend the environment. These examples make it clear that corporate human rights and environmental due diligence cannot be separated. This aspect should be taken into even greater account in the context of further revision of article 5.

5.4 Occupied and conflict-affected areas

There is also a need for greater precision with respect to corporate due diligence requirements in occupied and conflict-affected areas, e.g., specifying which “enhanced human rights due diligence measures” states should require (art. 5(3)(e)). In its present form, the draft does not make it clear whether enterprises should be required to refrain from becoming active in areas where conflicts already exist or under what circumstances they should cease business activities in an area.⁸ The UNGP do not answer these questions either; however, they do recommend consulting with credible, independent experts, including experts from governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives (Commentary on Principle 23 UNGP). Article 14(3) remains very vague on states' obligations with respect to areas affected by conflict. The UNGP (Principle 7) provide some guidance as to how states can support respect for human rights in areas affected by conflict.

⁶ Principle 13 b, UNGP

⁷ Commentary on Principle 13, UNGP

⁸ Manandhar, Timeela / Thielbörger, Pierre (2019): Handschlag oder Kniefall? Ein Kommentar zum Revised Draft Treaty on Business and Human Rights. In: Fachinformationsdienst für internationale und interdisziplinäre Rechtsforschung.

5.5 Corporate capture

Finally, article 5(5) is of fundamental importance and should be seen in connection with the state's duty to protect and the corresponding duties to regulate. There is invariably tension between the interests of individual businesses or industries and the public interests that states have a duty to pursue. This recognition is reflected in the provision of the draft calling on states to guard their political decision-making processes against undue influence by parties representing business interests. Effective rules restricting the influence of industry on policy have yet to be implemented at the EU level. Among other criticisms, the European Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU) has charged the Government of more than one EU member state of acting as a vehicle for the interests of a particular industry. Germany, unlike the EU, does not even have a statutory framework for the introduction of a legally binding register of lobbyists and organisations engaged in lobbying.⁹ Given this situation, article 5(5) should definitely be retained and rendered more precise through the addition of clearly worded rules and limits.¹⁰

6 Disadvantaged and marginalised groups

A new paragraph in the preamble recognises the “distinctive and disproportionate impact of certain business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, migrants and refugees”. Article 5(3) provides for special attention to be paid to the heightened risks faced by these groups in the context of consultations with rights-holders potentially affected by adverse human rights impacts within the framework of prevention of such impacts. Article 14(4) lays an obligation on states to address the specific impacts in relation to such groups in their implementation of the instrument. Article 4(4) mentions gender equality in connection with court proceedings. In addition, provisions on protecting human rights defenders (suggested by the EU and the Agency for Fundamental Rights, FRA, among others) have been added to the preamble and to paragraphs 9 (“guarantee a safe and enabling environment” for human rights defenders) and 15 of article 4.

Thanks to these additions, the new draft exhibits considerably more sensitivity to disadvantaged and marginalised groups. However, the following additions and clarifications would, *inter alia*, be desirable:

- Rather than providing an exhaustive list of groups, an open-ended formulation should be used. This would allow groups that are not explicitly named, such as internally displaced persons or LGBTIQ persons, to be covered as well.
- An integrative, holistic and gender-specific approach is necessary. Beyond the context of general descriptions of aims, states should commit to eliminating structural causes of discrimination and violence, power imbalances and particular

⁹ Cf. the resolution adopted at the June 2019 conference of German commissioners for freedom of information: Entschließung der 37. Konferenz der Informationsfreiheitsbeauftragten (IFK) in Deutschland am 12. Juni 2019 in Saarbrücken zum Lobbyregister, https://www.bfdi.bund.de/SharedDocs/IFG/IFGEntschlie%C3%9Fungssammlung/AGID_IFK/37Konferenz_Lobbyregister.html?nn=5571352 (retrieved on 06 Nov. 2019).

¹⁰ Cf. case studies at ESCR-Net, <https://www.escr-net.org/corporateaccountability/corporatecapture> (retrieved: 06 Nov. 2019), ALTER-EU, Alliance for Lobbying Transparency and Ethics Regulation, Corporate Capture in Europe, https://www.lobbycontrol.de/wp-content/uploads/180913-Studie-corporate_capture_vf4_final.pdf (retrieved: 06 Nov. 2019).

barriers for women and girls (e.g. in the areas of participation and remedy).

Multiple and intersectional forms of discrimination must also be considered.¹¹

- Human rights risk and impact assessments should have to reflect the distinctive and disproportionate impacts on certain groups using, e.g., gender-responsive due diligence. This should be explicitly addressed in the draft.
- It is also important for whistle blowers to count as human rights defenders. The instrument should clearly articulate that revealing trade and business secrets for the purpose of exposing human rights abuses serves the general public interest and thus can be lawful.
- Special attention to indigenous peoples is necessary in connection with the provisions on prevention. Certainly, the incorporation of an obligation to undertake free, prior and informed consultations with groups who may potentially be affected in corporate due diligence obligations (art. 5(3)(b)) is a welcome addition. However, this falls short of that which is provided for in the UN Declaration on the Rights of Indigenous Peoples and ILO Convention 169, as well as in the World Bank standards and IFC Performance Standards. Simply holding consultations with indigenous groups is not always enough. The right to self-determination gives rise to a requirement to obtain the informed consent of the rights holders before engaging in activities like mining or oil drilling involving indigenous territories. The draft should therefore make it plain that an enterprise is committing a due diligence violation if it carries out a project for which the state has not previously obtained the free, prior and informed consent of the indigenous groups concerned. Furthermore, the draft should also make clear who is responsible for carrying out the consultations, the state, the enterprise or both collectively. A clear allocation of responsibilities is necessary here.

7 Legal liability

National criminal and civil law must be geared towards providing effective legal protection of rights in connection with human rights violations or abuses associated with transnational economic activities. The treaty, with its provisions on legal liability, would make an important contribution in this respect. Article 6(4) calls on states parties to arrange for “effective, proportionate and dissuasive sanctions and reparations to the benefit of victims”. The provisions here are more extensive than those in the prior draft and, on the whole, take the perspectives of rights holders better into account. They fall roughly into three categories: an enterprise’s liability for adverse human rights impacts that it causes itself (art. 6(4)), liability for adverse impacts to which the enterprise contributed (art. 6(6)) and liability for behaviours in violation of international criminal law (article 6(7)). In addition, states can require enterprises to maintain financial security to cover potential claims for compensation (art. 6(5)).

Of particular significance is article 6(6), which addresses liability for a failure to undertake sufficient efforts to prevent another entity in its supply chain with whom it has a contractual relationship from causing harm. This liability would kick in under either of two circumstances: one being that the enterprise sufficiently controls or supervises the relevant activity that caused the harm, the other being that the risks were foreseeable. The revised draft differs from its predecessor in this respect, as the

¹¹ Cf. ILO Convention - Violence and Harassment Convention, 190 (No. 2019). Cf. ILO Convention - Violence and Harassment Convention, 2019 (No. 190).

zero draft provided for a third circumstance triggering such liability: “close relation” with an entity in its supply chain (cf. art. 10(6)(b), zero draft). The loss of this third trigger might be seen as a step backwards from the perspective of rights-holders, as it is probably easier to prove the existence of a “close relation” than it is to prove actual control or the foreseeability of human rights risks. Moreover, basing liability on the existence of a contractual relationship could result in gaps in protection: even when no contractual relationship exists, an enterprise can still contribute to adverse human rights impacts by failing to exercise existing financial or de facto influence. This applies particularly in the case of relationships between parent and subsidiary enterprises.¹²

It seems that article 6(6) is not yet ideally aligned with article 5 in terms of language or conceptual basis. In particular, it lacks a clear and explicit link to the standard of the corporate due diligence process. Whereas article 5 calls for enterprises to be required to undertake a process rather than deliver an outcome, article 6(6) centres around a “failure to prevent” and fails to draw an explicit link between legal liability and the violation of due diligence obligations from article 5. In light of the UNGP, it would be helpful to clearly state that when enacting legislation requiring enterprises to perform human rights due diligence (art. 5), states should ensure that failure to do so would trigger liability on the part of an enterprise. This leads to the question of whether an enterprise can and should be able to release itself from liability by showing that it did conduct due diligence or whether liability should be possible even then and if so, under what circumstances. The draft should take great care to avoid any ambiguity in this respect.

The provision on liability for criminal offenses in article 6(7) now recognises that enterprises can encourage and/or trigger, inter alia, genocide, crimes against humanity or war crimes. A positive aspect of this is that the list of criminal offences refers to definitions contained in internationally recognised standards. Article 6(9) calls on states to ensure that domestic criminal law applies to natural or legal persons conducting business activities. From the perspective of rights-holders, it would be more useful to make penalising enterprises under criminal law mandatory.¹³ The only way to provide effective human rights protections is to make human rights due diligence a must for corporations. Corporate criminal law can play an important role in ensuring that inadequate human rights diligence has a negative impact on returns from investments or operations.

One could also wish that the draft provided states with guidance as to the level of sanctions with the aim of making them effective, proportionate and dissuasive. Moreover, it might be advisable to include a reference to article 25(3) of the Rome Statute of the ICC, which sets out internationally recognised forms of the commission and participation in the commission of a crime.

¹² The case of Vedanta Resources plc. is one of multiple cases illustrating this. In this case, the Supreme Court of the United Kingdom accepted the finding of lower courts that the natural resources company Vedanta owed a duty of care to the Zambian complainants affected by water pollution caused by the copper mining activities of a Vedanta subsidiary. By doing so, it confirmed the British parent company’s liability.

¹³ Cf. Utlu, Deniz / Niebank, Jan-Christian (2017): Calculated risk: economic versus human rights requirements of corporate risk assessments. Berlin: Deutsches Institut für Menschenrechte

8 Adjudicative jurisdiction and applicable law, statutory limitations

The provisions on adjudicative jurisdiction, statutory limitations and applicable law (arts. 7- 9) are aimed at closing gaps in accountability. Rights holders in countries hosting transnational business activities often face a denial of justice. Frequently, for instance, they cannot not obtain access to judicial remedy in the home countries of the enterprises, regardless of how well founded their claims may be.

8.1 Adjudicative jurisdiction

Like the zero draft, the revised draft provides for the possibility to vest (civil) jurisdiction in the home state or the host state of an enterprise. Specifically, the new draft provides three alternatives with respect to the country in which an action can be brought: that in which the act or omission giving rise to the harm occurred (art. 7(1)(a)), that in which the rights-holders are domiciled (art. 7(1)(b)) or that in which the enterprise is domiciled (art. 7(1)(c)). The possibility of vesting jurisdiction in the home state of transnational corporations is crucial for providing remedy for human rights abuses by enterprises in developing and emerging countries with inadequate justice systems. From the perspective of rights-holders, the greatest possible choice of judicial fora is important for enabling them to obtain access to effective remedy. To close gaps in accountability effectively, the draft should clearly indicate that *forum non conveniens*, a legal doctrine applied chiefly in common law systems, must not be applied. This doctrine allows a court to stay or dismiss a case if it determines that another court is more appropriate. *Forum non conveniens* has repeatedly prevented rights-holders from gaining access to justice in the home states of enterprises in the past. Perhaps the most prominent example of this is the dismissal by US federal courts of lawsuits against the Union Carbide Corporation, a US company, relating to the catastrophic gas-leak in India known as the Bhopal disaster (1984). Moreover, the draft instrument should also call for the introduction of a *forum necessitatis* (forum of necessity) doctrine in order to safeguard the possibility of effective access to legal remedies. This would, for instance, enable courts in the EU to rule on a legal dispute under exceptional circumstances, i.e. when initiating or continuing proceedings in a non-EU country to which the dispute has a close connection, would pose an undue burden or be manifestly impossible.

8.2 Statutory period of limitation

In many instances, applicable statutory limitations do not take into the account the complexity of issues surrounding adverse human rights impacts in the context of transnational business activities, the difficulties involved in accessing information or the amount of effort involved in preparing in one country for proceedings to be held in another. Article 8(2) addresses this concern by calling for “reasonable” statutory periods of limitation for civil and other proceedings. These provisions should be made more precise and detailed. They should clearly convey that states must grant more time for the prosecution of transnational claims of this kind than is provided under the general provisions on statutory limitations. Incorporating the concept of the delayed activation of the statutory limitations period would also improve the draft. Limitations periods should not be activated until the persons concerned have become aware of the facts providing grounds for the claim. Damage to health, for example, sometimes does not become apparent until years after the event giving rise to the damage.

8.3 Applicable law

The question of applicable law is also of crucial importance for the effective remedy of human rights harms. In European law, the law applicable to claims for damages arising out of a tort/delict is, as a general rule, the law of the country in which the damage occurred, in accordance with the conflict-of-law rule in article 4(1) of the Rome II Regulation. This can be disadvantageous to complainants, however, if the law of the state in question provides a lesser standard of protection. A case in point: four Pakistani complainants were prevented from asserting possible claims relating to the devastating fire at a textile factory in Karachi against the German textile discounter Kik simply because the claims were time-barred under Pakistani law.¹⁴

Article 9 of the current draft creates a choice of the law of the state in which the court sits and the law of the country where enterprises have caused human rights abuses. The alternatives are the law of the country in which the event giving rise to the damage occurred (art. 9(2)(a)), the law of the country in which the victim has legal residence or the law of the country which the defendant enterprise is domiciled (art. 9(2)(c)). This could ensure a higher standard of protection.

Like the provisions relating to liability, the provisions relating to adjudicative jurisdiction and statutory limitations periods need to be revised to incorporate a clear distinction between matters relating to civil law and those relating to criminal law and their treatment.

9 International legal assistance and cooperation, relation to other international law standards

9.1 International legal assistance

Despite the numerous accusations of complicity in human rights violations that have been raised against business enterprises, actual investigations or prosecutions have been very, very rare.¹⁵ It is therefore imperative that states parties afford one another with legal assistance in initiating and carrying out investigations, prosecutions, judicial and other proceedings. Specifically, to facilitate effective, prompt, thorough and impartial investigations, states should make all relevant information available and supply all evidence necessary for the proceedings. These aims, pursued in article 10(1), are very worthy. The provision relates to cross border cooperation between justice systems on matters of civil, criminal and administrative law, yet it neither explicitly states that this is the case nor does it distinguish sufficiently among these different types of proceedings. It would be preferable, for the sake of precision and clarity, for it to do both.

9.2 International cooperation

In article 11(1), states parties undertake to cooperate with one another, in line with article 56 of the Charter of the United Nations. Article 11(2) lists possible cooperation measures. These measures, including technical support, capacity building and

¹⁴ Cf. Ruling of Hamm Higher Regional Court of 21 May 2019: Az 9 U 44/19.

¹⁵ Statement by the Working Group on Business and Human Rights Chairperson to the 35th session of the Human Rights Council, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21713&LangID=E> (retrieved: 06.11.2019).

exchange of experiences, are urgently needed by the host states of transnational enterprises. Here, again, greater precision and detail is needed, as is a closer alignment with article 10. In the area of capacity building, for instance, human rights-based development cooperation measures would be advisable, such as strengthening or establishing monitoring structures or the dismantling of barriers to effective remedy. The draft should also call for cooperation with national human rights institutions,¹⁶ unions and representatives of disadvantaged and marginalised groups.

9.3 Relation to other international law commitments

The German Institute for Human Rights considers human rights to take precedence over commitments of other kinds arising from trade and investment agreements. In reality, though, obligations under trade and investment agreements often place constraints on states' abilities to live up to their duty to protect human rights. The present draft does not go far enough in tackling this problem, merely stating that all bilateral or multilateral agreements should be compatible with the instrument to be created or be interpreted in accordance with it (art. 12.6). The zero draft was considerably more specific in this respect (distinguishing, for example, between already existing and future agreements, see article 13(6) and (7) of the zero draft). The UNGP make it clear that maintaining domestic policy space is part of the duty to protect human rights (Principle 9). At the EU level, article 21 of the Treaty on European Union expressly states that the commitment to human rights applies for the external action of the EU, and thus for trade agreements with non-EU countries. The EU has also undertaken to ensure that greater consideration is given to human rights in impact assessments for trade agreements.

In connection with the further revision of the draft instrument, the focus should be less on explicitly defining a hierarchy in the sense of primacy of human rights and more on clarifying the specific obligations states must comply with to ensure the "compatibility" of other instruments. When states enter into economic agreements, such as bilateral investment agreements, free trade agreements or contracts for investment projects, they must make sure that these agreements contribute to the realisation of human rights rather than violate them. Human rights and human rights principles (e.g., non-discrimination, transparency) should be considered during negotiations on trade agreements. This draft instrument should therefore place an obligation on states to carry out stand-alone human rights impact assessments before such agreements are concluded so that impacts on the human rights situation can be taken into consideration, so that human rights violations do not occur and so that subsequent dispute settlement proceedings can be avoided. Such settlement proceedings must also be compatible with human rights obligations. States should also report in detail on how they incorporate human rights expertise both in their preparation of impact assessments and in their monitoring of existing trade agreements.

¹⁶ Cf. Niebank (2019): *Bringing Human Rights into Fashion: Issues, Challenges and Underused Potentials in the Transnational Garment Industry*, Deutsches Institut für Menschenrechte, pp. 48 ff.

10 Outlook

The present draft provides a significantly improved basis for the intergovernmental negotiations moving forward.

During the fifth round of negotiations, the EU noted the improvements in the revised draft with appreciation, acknowledging the Ecuadorian chairmanship's efforts to address some of the EU's concerns. The EU should therefore – in line with its competences – take swift action to reach an agreement on the issuance of a formal negotiation mandate to the European Union Extern Action Service to enable it to contribute to shaping the negotiation process going forward. Germany should advocate this within the framework of EU coordination.

There are no convincing arguments against taking part in the negotiations and the fine-tuning of the text. As the EU requested, the initially narrowly defined scope of the treaty has been expanded to include all corporate activities. There is no reason to believe that the treaty process would undermine the UNGP, particularly as the new draft is clearly oriented towards them. The EU could push through an even closer alignment with the UNGP by actively participating in the negotiations. There is no shortage of participation on the business side; on the contrary, the opposite appears to be the case (cf. the section in this paper headed 5.5: Corporate capture). The EU recently ascribed some of its reluctance to become involved in the process to the lack of "critical mass". Applying this notion from game theory to the ongoing negotiations process, critical mass will be reached once a certain number of states have been persuaded to join in. Once this threshold is passed, i.e. the critical mass is reached, the efforts to get an instrument adopted will become self-sustaining and continue on to a successful close. The EU now has the opportunity to bring the process past this threshold, by joining, with its 28 member states, in on the negotiations. Doing so would bring key home states of large transnational corporations into the process and nearly double the traction of the process.

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The Institute

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