

## New dynamics – new prospects?

Report on the seventh session of the UN open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights (“treaty”)

by Karolin Seitz

From October 25–29, 2021, the UN open-ended intergovernmental working group on the elaboration of a legally binding instrument on Business and Human Rights met for the seventh time at the United Nations (UN) Human Rights Council in Geneva.

Two developments provided a new dynamic compared to previous sessions. For the first time since the intergovernmental working group’s establishment in 2014, the

United States and Japan participated in its meeting. Germany expressed its views for the first time.

In addition, the proceedings of this year’s session differed from previous years. The third revised draft of the future agreement was gone through article by article, proposed amendments or approvals were recorded directly, and attribution was provided by naming the states in parentheses.

UN High-Commissioner for Human Rights Michelle Bachelet opened the 7<sup>th</sup> session of the intergovernmental working group established by the UN Human Rights Council in 2014. She drew attention to two current trends.<sup>1</sup> First, she said, it could be observed that the impact of business on society and the planet was being more strictly regulated. She welcomed these developments towards, among other things, binding human rights due diligence obligations for companies, but also pointed out a threatening development:

*“Another growing trend, which is quite alarming, is the rising threat to human rights posed by the triple planetary crisis: climate change, pollution and biodiversity loss. Beyond strengthening the respect and protection of human and environmental rights, there is an urgent need, to ensure access to justice and remedy for victims of abuses.”<sup>2</sup>*

The third revised draft for a legally binding instrument published in August 2021 by the Ecuadorian chair of the intergovernmental working group had the potential to move forward in this endeavor, she said. Bachelet therefore made the following appeal to the states: “I urge you all to engage constructively in this process. Do not let this opportunity go by; if progress is too slow, we risk disillusionment and disengagement from this process.”<sup>3</sup>

Civil society organizations, international law experts,<sup>4</sup> national human rights institutes<sup>5</sup>, and several UN human rights experts and special rapporteurs had already assessed the third revised draft as a good basis for negotiations, and called on states to participate constructively.<sup>6</sup>

1 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27711&LangID=E>

2 Ibid.

3 Ibid.

4 For example Prof. Markus Krajewski in his analysis of the third revised draft, online at: <https://www.cidse.org/wp-content/uploads/2021/10/EN-Binding-Treaty-legal-analysis.pdf>

5 <https://owncloud.unog.ch/s/uimBllpxsyirMpm?path=%2F01.%20General%20statements%2F4.%20National%20Human%20Rights%20Institutions#pdfviewer>

6 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27672&LangID=E>

The third revised draft<sup>7</sup> differs from the 2020 draft in only a few aspects.<sup>8</sup> The scope of the draft now includes all human rights, and no longer just the relevant ILO and human rights conventions, including the right to a healthy environment recognized by the UN Human Rights Council in September 2021, and addresses the entire value chain. In addition, the draft now explicitly recognizes the complementarity of the UN Guiding Principles on Business and Human Rights (UNGPs) and includes greater consideration of gender equity and vulnerable groups. The draft speaks of corporate obligations instead of pure corporate responsibility to respect and fulfill human rights. A “human rights violation” is now defined as any direct or indirect harm related to a business activity that impairs or hinders the full enjoyment of human rights and fundamental freedoms. In addition to business activities, the draft treaty covers the “business relations” of all companies, while placing a special focus on the protection of human rights and environmental standards in cross-border business activities. Furthermore, the activities of financial institutions and investment funds are now explicitly covered by the agreement. Companies must include in their regular impact assessments not only the effects of their business activities on human rights and labor rights, but also on the environment and now also on the climate. If an actor with whom the company has a business relationship causes a human rights violation, the company is liable for this if it did not prevent the violation, even though it controls, manages or supervises the actor.

### Participation and positions

At 69, the number of participating states was slightly higher compared to the previous session with 66 in 2020.

#### Participating States in the 7<sup>th</sup> session

Algeria, Argentina, Austria, Belgium, Bolivia, Brazil, Cameroon, Chile, China, Colombia, Cuba, Denmark, Djibouti, Ecuador, Egypt, El Salvador, Finland, France, Germany, Haiti, Honduras, India, Indonesia, Iran, Iraq, Ireland, Israel, Japan, Kenya, Liberia, Libya, Luxembourg, Malaysia, Malta, Mauritania, Mexico, Montenegro, Morocco, Mozambique,

Namibia, Nepal, Netherlands, Nigeria, Pakistan, Panama, Paraguay, Peru, Philippines, Portugal, Qatar, Russian Federation, Saudi Arabia, Senegal, Serbia, Slovenia, South Africa, Sri Lanka, Palestine, Sweden, Switzerland, Thailand, Togo, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela.

Cuba, Bolivia, Ecuador, Namibia, South Africa, Panama, and Venezuela largely welcomed the new draft text. India, Russia, Brazil, and Mexico had some criticisms of the current draft text, but declared their active participation in the UN working group’s negotiations. Argentina, Colombia, Indonesia, the Philippines, and Pakistan also declared their support for the process.

China praised the improvements in the current text, but continued to see weaknesses, particularly with regard to the overly broad scope of the proposed agreement and jurisdictional issues. It said the draft as a whole included obligations that were too burdensome for states and companies. The treaty text must take greater account of the right to development, the Chinese delegation said. India expressed similar views.<sup>9</sup>

Switzerland declared it would not participate in the current negotiations, but would attend the seventh session as an observer.<sup>10</sup> While it welcomed the improvements in the text, it still saw some inconsistencies.

The U.S. declared it had “substantive concerns” about the “prescriptive approach” of the current treaty text and rejected it as a whole.<sup>11</sup> However, it was willing to work with the group to find a collective path for progress in the area of business and human rights.

The U.S. delegation criticized in particular the proposed extraterritorial application of domestic laws and liability for an “overly broad, ill-defined range of human rights abuses.” In addition, the support of many home countries of transnational corporations was still lacking. The treaty would require broad

<sup>7</sup> <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

<sup>8</sup> See the detailed analysis of the Treaty Alliance Germany (2021): From the Supply Chain Act to a Level Playing Field, online at: [https://www.globalpolicy.org/sites/default/files/download/TreatyAllianceGermany\\_Statement\\_3rdRevisedDraft\\_2021.pdf](https://www.globalpolicy.org/sites/default/files/download/TreatyAllianceGermany_Statement_3rdRevisedDraft_2021.pdf)

<sup>9</sup> <https://owncloud.unog.ch/s/uimBllpxsyrMpm?path=%2F01.%20General%20statements%2F1.%20States#pdfviewer>

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

acceptance by all stakeholders – not only by states and civil society, but also by companies. They were therefore open to exploring alternative and consensus-based instruments, such as a legally binding framework agreement, together with business, civil society and other relevant stakeholders.

Strong opposition to the draft treaty and the entire process came from Japan and the United Kingdom.

In a written statement on the occasion of the UN Forum on Business & Human Rights in November 2021, Canada finally also took an official position on the UN treaty process, endorsing the position of the U.S.<sup>12</sup> Canada declared being ready to discuss alternative frameworks at expert level.

The **EU and its member states** hardly spoke up – after all, they still had not clarified the negotiating mandate for the seventh session. In his opening statement, however, the EU representative declared for the first time that the EU “believes in the capacity of an international legally binding instrument to enhance global protection against business-related human rights abuses”.<sup>13</sup> Nevertheless, he said, this would only be possible if the instrument built on the existing consensus – the UN Guiding Principles on Business and Human Rights (UNGPs) – and was supported by a “critical mass” of UN member states across regions. The current draft treaty would need further revision. It went into too much detail in some areas and was too prescriptive. This concerns in particular the parts on civil and administrative liability, applicable law and jurisdiction, and judicial cooperation. In addition, he said, there were concerns about the (lack of) consistency with existing international instruments, including the UN Guiding Principles on Business and Human Rights. “It is also about rethinking the approach on what should be the ‘core’ provisions of this instrument,” he said, adding that overall, the EU recognized the need for binding standards, and pointing to the ongoing EU process toward the EU Sustainable Corporate Governance directive.

In the following days of negotiations, the EU contributed general comments, but not concrete proposals for wording, emphasizing that it would not officially participate in the negotiations. For example, the EU representation asked for linguistic clarification in the preamble as to whether the UNGPs

complemented the treaty or the treaty complemented the UNGPs. When Iran and Egypt questioned the reference to consideration of gender justice in the preamble, the EU representation, along with South Africa, France, Namibia, Palestine, Argentina, and Uruguay, explicitly rejected it. When the U.S. and China proposed removing the violation of the right to a healthy environment as part of the definition of human rights violations, the EU representative disagreed, stating that the upcoming EU regulation was also expected to require companies to identify and avoid the negative impacts of their activities on the environment.

When China, Egypt, and Iran questioned the protection of human rights defenders, the EU pointed out that this was an internationally recognized principle. Furthermore, it was important to the EU representation that all companies, not only transnationally operating ones, would be covered by the treaty and to align the language with the UNGPs, for example to speak of “responsibility” instead of “obligation” of companies with regard to the respect and fulfillment of human rights. Finally, the design of due diligence requirements should be based on the OECD Guidelines for Multinational Enterprises, the EU representative said.

In a joint non-partisan commentary, the four Members of the European Parliament Heidi Hautala (Greens/EFA), Maria Soraya Rodriguez Ramos (RENEW), Maria Arena (S&D) and Manon Aubry (The Left) criticized the lack of participation and internal coordination within the EU on the UN treaty process, especially in view of the upcoming EU regulation on the same issue:

*“If the EU were a ship, it would be sailing without a captain, and the passengers – national governments and European citizens – would have grounds for concern about this journey without direction or purpose.”<sup>14</sup>*

In February 2021, the Council of the European Union had unanimously adopted conclusions on the EU’s priorities in UN human rights fora in 2021 and committed to active participation in UN treaty discussions:

*“The EU will also participate actively in the UN discussions on a legally binding instrument on business and human rights with the aim to promote an instrument that*

12 [https://static.sched.com/hosted\\_files/10unforumbhr2021/c7/Canada%27s%20Written%20Submission%20Forum%20session%202021.pdf](https://static.sched.com/hosted_files/10unforumbhr2021/c7/Canada%27s%20Written%20Submission%20Forum%20session%202021.pdf)

13 <https://owncloud.unog.ch/s/uimBllpxsyirMpm?path=%2F01.%20General%20statements%2F3.%20International%20Organizations#pdfviewer>

14 <https://corporatejustice.org/news/why-is-the-eu-still-absent-in-un-negotiations-on-human-rights-rules-for-business/>

*can effectively enhance the protection of victims of business-related human rights violations and abuses and create a more global level playing field.”<sup>15</sup>*

After six rounds of negotiations, **Germany** also took the floor for the first time and reiterated the EU’s statement. The German representative presented the Supply Chain Due Diligence Act adopted in June 2021 and explained “that mandatory due diligence and its enforcement is vital for enhancing human rights protection globally and advancing a global level playing field.”<sup>16</sup>

Germany would share the concerns expressed by the EU representation “about the current detailed and prescriptive approach with vague definitions in a number of sensitive policy areas.”<sup>17</sup>

### The negotiations

Until the last day of negotiations, states commented in particular on articles 1 to 16. There were no comments yet on Articles 17 to 24, which deal with the implementation of the agreement.

Palestine, Egypt, Panama, Brazil, China, South Africa, Cameroon, Cuba, Mexico, and Namibia were particularly engaged in the negotiations. However, even in the seventh session, no agreement was reached on points of contention. Some speak of a “negotiating exercise” among a group of countries, particularly from the Global South.<sup>18</sup>

In his opening statement, the Panama representative pointed out the multiple current crises, ranging from COVID-19, the climate crisis, various forms of discrimination based on gender or ethnicity and the increasing shrinking space for civil society to the negative human rights impacts of digitalization.<sup>19</sup> In all these crises, states as well as companies played a key role. The treaty process would be an expression of society’s awareness of the impact of corporate activity along value chains on people and the planet, and of the profound asymmetry between human rights, decent work, the environment and corporate interests. The treaty would be a

contribution to the transition towards a more inclusive and sustainable economic growth model.

As in previous rounds of negotiations, the main points of contention were the preamble, the articles on scope of application, questions of liability, jurisdiction and applicable law, and the relationship to trade and investment agreements.

With regard to the **preamble**, Palestine, Panama and South Africa called for the inclusion of humanitarian law, Panama for special consideration of children’s rights, and Egypt, China, Iran, and Cuba for a reference to the right to self-determination and the principle of sovereign equality. Bolivia, Cuba, Panama, Palestine, and South Africa called for including the UN Declaration on the Rights of Peasants. Panama proposed including international and regional environmental agreements and the Paris Climate Agreement in the treaty text.

The new wording to speak of human rights obligations instead of corporate responsibility to respect human rights was also controversial. In particular, the USA, the EU, China, Brazil, Mexico, and Chile called for the language to be based on the UN Guiding Principles and for a distinction to be made between state obligations and corporate responsibility for human rights. In addition, opinions differed on whether companies also had a duty/responsibility to avoid human rights abuses to which they indirectly contribute. Palestine, Egypt, Cameroon, and South Africa were in favor, while China, Mexico, and Brazil were against.

Palestine and Cameroon called for making clear the explicit primacy of human rights over other international agreements, including trade and investment agreements.

Russia, China, Egypt, Iran, Cuba, India, Indonesia, Pakistan, Cameroon and South Africa argued that the **scope** of the treaty should include only transnational corporations, as local companies were already being regulated by national law. Mexico, the EU and Panama, on the other hand, called for all

15 <https://www.consilium.europa.eu/de/press/press-releases/2021/02/22/human-rights-council-adopts-conclusions-on-eu-priorities-in-un-human-rights-fora-in-2021/>

16 <https://www.fr.de/wirtschaft/peinliches-schauspiel-menschenrechte-lieferkettengesetz-91080639.html>

17 Ibid.

18 <https://www.twn.my/title2/unsd/2021/unsd211101.htm>

19 All oral statements made during the 7<sup>th</sup> session can be found here: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Annex\\_Compilation\\_General\\_Statements.docx](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Annex_Compilation_General_Statements.docx) and under [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Annex\\_CompilationCommentsRequestsClarification.docx](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Annex_CompilationCommentsRequestsClarification.docx) and are included in the third revised draft: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/A\\_HRC\\_49\\_65\\_Add1.docx](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/A_HRC_49_65_Add1.docx)

companies to be addressed. Palestine and Namibia argued in favor of the wording in the current draft agreement, which provides for all companies to be covered but places a special focus on business activities of a transnational character.

While Palestine, Panama, Mexico, South Africa, Namibia, and Cameroon voted to strengthen the **rights of victims** through various wording proposals, for example with regard to access to information, Brazil, the USA, and China wanted to limit them rather. Brazil, for example, proposed that only individuals, not groups, should be defined as victims. China did not want to designate family members of the person affected as victims. Cameroon favored referring to “affected individuals and communities” rather than “victims.” Palestine pointed out that non-judicial grievance mechanisms should not interfere with the right of access to judicial mechanisms.

During debates on the article on **prevention**, Cuba and the United States opposed requiring states to establish mandatory corporate due diligence. Palestine and Brazil, on the other hand, supported such an obligation. There were numerous interventions in the detailed drafting of the article on prevention.

France, for example, took the floor and suggested that due diligence obligations should be graded according to company size and turnover, and that jurisdictional responsibilities and liability should be clarified.

Germany also spoke at this point for the first time since the UN working group’s seven-year existence, pointing to the adoption of the Supply Chain Due Diligence Act and arguing that binding due diligence requirements and enforcement were critical to creating a level playing field. The definition of due diligence in the treaty text should be based on the UN Guiding Principles on Business and Human Rights.

Argentina suggested that part of corporate due diligence should be to ensure freedom of association, the right to strike, the right to collective bargaining, non-discrimination on the basis of gender, among others, the elimination of violence and harassment in the workplace, occupational safety and health, prohibition of child labor and forced labor, and social protection.

Cameroon proposed a corresponding due diligence requirement for international financial institutions

as well. China and Cuba, among others, opposed requiring companies to include due diligence requirements in contracts with business partners.

Panama, Mexico, and Brazil also suggested that, in the context of corporate due diligence, the obligation to “mitigate” harm should be deleted, as risks should be mitigated but harm avoided.

The article on **access to justice** was also controversial. Palestine proposed including victims in the reparations process and facilitating access to information. Brazil, Pakistan, and Egypt wanted to orient legal assistance to people affected on national law; Palestine, South Africa, and Mexico opposed this restriction. Major criticism regarding the possibility of reversing the burden of proof came from Russia and Brazil. However, it was supported by Egypt, Namibia, and Palestine.

With regard to the rules on **liability**, Palestine suggested that the States Parties should be required to introduce criminal liability for companies. Panama and Russia had concerns about such a provision.

China favored deleting the provision requiring states to introduce laws that provide for a comprehensive and adequate system of legal liability for human rights abuses in the business context. Mexico and Brazil supported the state obligation to provide for civil liability of corporations in cases of human rights violations, including by other corporations, should the former corporation control, direct, or supervise the other corporation and be able to foresee the violation.

On the issue of **jurisdiction**, China proposed to delete the provision abolishing *forum non conveniens*. Palestine, South Africa, and Namibia were opposed. China, Brazil, and the USA also wanted to delete the *forum necessitatis* provision.

Brazil proposed a rule under which an affected person would first have to exhaust all legal instances in the country where the damage occurred before turning to a court in another country. Egypt and South Africa had reservations about such a rule, and Namibia and Palestine clearly opposed it.

Brazil had concerns about the provision to allow affected parties to choose the **applicable law** (that of the place of the damage, the place of the corporation, or the residence of the affected party). The U.S. also criticized the overly broad choices.

Brazil considered the rules on **mutual legal assistance** between states to be too burdensome, and the U.S. as too prescriptive.

Strong opposition also came from Brazil, Panama, Egypt, Pakistan, and Iran regarding Article 14.5, which provides for this **treaty's supremacy over trade and investment agreements**. Palestine, on the other hand, proposed that the provision be further expanded to require that all (not just new) trade and investment agreements be in compliance with the UN treaty, and that existing agreements be adjusted accordingly.

Finally, Brazil and China questioned the need for an institution to **monitor enforcement of the treaty**; the United States suggested that the new institution would require significant additional funding from the UN. Palestine, Egypt, and Namibia disagreed and stressed the importance of a strong monitoring body for the treaty.

The **private sector** was represented by the International Chamber of Commerce (ICC), the International Organization of Employers (IOE), and the US Council for International Business (USCIB). The ICC stated that it was not opposed to binding regulations, but that these had to be aligned with the UN Guiding Principles. It continued to have wide-ranging criticisms of the current draft treaty and recommended, as it had during the previous session, that alternative approaches be taken, particularly with regard to structure and focus.<sup>20</sup> The IOE lamented that its concerns raised during the sixth session had not been included in the third revised draft treaty, and that the draft remained inconsistent with the UN Guiding Principles.<sup>21</sup> Together with the Business at OECD and Business Europe associations, it believes that the current draft is unnecessary and represents an inadequate response to existing business and human rights challenges. Instead, the UN Guiding Principles should be further implemented. The IOE argued for a complete restart of the negotiations and recommended pursuing the debates on a framework convention within the UN working group.

A broad alliance of **trade unions** declared its support for the UN treaty process and made its relevance clear, especially in light of the COVID-19 crisis. The third draft would be a good basis for negotiations, they said.<sup>22</sup> The unions called on all states to participate constructively in the process. The need for binding international standards was also made clear by trade unions at a side event.<sup>23</sup> Progress has already been made with the Global Framework Agreements between trade unions and company management. However, companies would be free to decide whether or not to enter into such agreements. This has created a two-tier system in which some workers have more protection than others and some multinationals have more responsibility than others.

Among others, the civil society network ESCR-Net warned against states exclusively representing the interests of corporations and appealed for accountability to their citizens: “We elect governments, not corporate actors. We advocate for democracies, not corporatocracies. States who are echoing corporate language, such as the US, must consider that their duty is public service, it is to serve our rights and our interests as people and to protect the planet – and not the interest of profit making for the 1 percent.”<sup>24</sup>

### Debate on a framework convention

The U.S. delegation took up the arguments of the Danish scientist Claire Methven O'Brien and business representatives who propose a general framework agreement as an alternative to the current draft treaty.<sup>25</sup> Instead of detailed regulations, (according to the researcher) the signatory states should ultimately only agree on common general objectives and be obliged to implement the UN Guiding Principles on Business and Human Rights in forms of national action plans, without going into more detail on how this implementation should be structured. Further agreements in the form of additional protocols should be formulated later by a Conference of the Parties.

However, this proposal has several weaknesses. If the contracting states are given too much leeway in

20 <https://owncloud.unog.ch/s/uimBlpxsyirMpm?path=%2F01.%20General%20statements%2F3.%20Intergovernmental%20organizations#pdfviewer>

21 <https://owncloud.unog.ch/s/uimBlpxsyirMpm?path=%2F01.%20General%20statements%2F5.%20Non%20governmental%20organizations%20with%20ECOSOC%20consultative%20status#pdfviewer>

22 [https://www.ituc-csi.org/IMG/pdf/trade\\_union\\_proposals\\_for\\_the\\_business\\_and\\_human\\_rights\\_treaty.pdf](https://www.ituc-csi.org/IMG/pdf/trade_union_proposals_for_the_business_and_human_rights_treaty.pdf)

23 <https://www.globalpolicy.org/en/event/2021-10/side-event-7th-session-un-treaty>

24 <https://owncloud.unog.ch/s/uimBlpxsyirMpm?path=%2F08.%20Article%206%2FNon-governmental%20organizations%20with%20ECOSOC%20consultative%20status#pdfviewer>

25 [https://www.researchgate.net/publication/355574582\\_LBI\\_3rd\\_DRAFT\\_bridging\\_edits\\_to\\_Framework\\_Convention\\_Claire\\_Methven\\_O'Brien\\_250921](https://www.researchgate.net/publication/355574582_LBI_3rd_DRAFT_bridging_edits_to_Framework_Convention_Claire_Methven_O'Brien_250921)

national implementation of the UNGPs, the patchwork of national regulations that currently exists will be perpetuated. Already, some countries have introduced mandatory due diligence requirements for companies and state mechanisms for their enforcement (e.g. France and Germany), while others continue to rely on voluntary implementation (e.g. USA, Denmark, Spain).<sup>26</sup> The 25 existing National Action Plans for Business and Human Rights not only rely on voluntary recommendations for companies, but hardly improve the legal protection of people affected and mostly ignore the corporate responsibility for environmental damage and gender discrimination.<sup>27</sup> Although the UN Guiding Principles have created an important global reference framework, human rights experts agree that even after more than ten years of their existence, the situation for victims has hardly improved.<sup>28</sup> A certain level of detail and clear rules on implementation is therefore necessary to improve the access to justice for people affected, achieve legal certainty for companies and a level playing field.

After all, it is not about a level playing field as such, but about establishing a high global standard in terms of human rights and environmental protection. The third revised draft treaty already contains important provisions in this regard. For example, in addition to the introduction of binding due diligence obligations in the sense of the UNGPs and detailed regulations on liability in the event of damage, the draft also includes rules on state cooperation in the prosecution and investigation of transnational human rights violations as well as a clarification of the applicable law and place of jurisdiction. These elements are essential to improve access to justice for people affected, especially in cases of human rights violations by transnational corporations. In addition, the third revised draft introduces a primacy of the treaty provisions for states over the obligations arising from trade and investment agreements. While currently companies can sue states for lost profits in international arbitration tribunals, such a new provision will again expand the political space for states to fulfill their human rights obligations.<sup>29</sup>

Moreover, it is by no means certain that such framework agreements will be successfully achieved, as it can be observed with the UN Framework Convention on Climate Change, the researcher Virginie Rouas adds.<sup>30</sup>

Civil society organizations assess the proposal primarily as a diversionary tactic to delay the creation of binding international standards.

In a joint letter to the U.S. administration, several U.S. and international civil society organizations described the U.S. delegation's proposal for an alternative instrument as a "deep disrespect for the large group of largely Global South nations that have worked for seven years to strengthen the international human rights system (...). Any efforts by the U.S. to delay or obstruct the momentum of this large committed group of UN member states can only be seen as a desperate attempt to defend the corporate interests of U.S. companies, and undermine the human rights system."<sup>31</sup>

Finally, the text of the treaty was developed in consultation with human rights experts and on the basis of reports from people affected. Furthermore, over the years, the text of the agreement has been increasingly aligned with the UN Guiding Principles with regard to the scope of application and the definition of due diligence.

## Result

The result of this year's negotiations is a draft treaty which clearly shows the agreement and proposed amendments of the participating countries.<sup>32</sup>

A so-called "Friends of the Chair" group will now continue to work on this text. Participation in the group is open to ambassadors from Geneva country offices and is intended to reflect regionally balanced representation. The composition of the group has not yet been announced by the Chair of the UN working group (as of 1/02/2022). The task of the Friends of the Chair is to discuss further proposed amendments to the current draft agreement before

26 [https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse\\_Studie/Analyse\\_NAPs\\_UNGP\\_engl..pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analyse_NAPs_UNGP_engl..pdf)

27 <https://corporatejustice.org/news/justice-delayed-10-years-of-un-guiding-principles/>

28 <https://www.ohchr.org/Documents/Issues/Business/UNGPs10/Stocktaking-reader-friendly.pdf>, p. 20 and <https://corporatejustice.org/news/justice-delayed-10-years-of-un-guiding-principles/>

29 [https://www.cidse.org/wp-content/uploads/2017/03/CIDSE\\_Study\\_Primacy\\_HR\\_Trade\\_\\_Investment\\_Policies\\_March\\_2017.pdf](https://www.cidse.org/wp-content/uploads/2017/03/CIDSE_Study_Primacy_HR_Trade__Investment_Policies_March_2017.pdf)

30 <https://humanities-digital-library.org/index.php/hdl/catalog/view/achieving-access-to-justice/235/425-1>, pp 344-349

31 <https://docs.google.com/document/d/1MCc6Px1pqLvC16VTSWyxPUyxiU2YZMmBH31BlxDM7M0/edit#heading=h.pzgr25g8tayg>

32 <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session7/igwg-7th-draft-report.pdf>

the next meeting of the UN working group, with the aim of “ensuring the broadest possible cross-regional support.”<sup>33</sup>

Civil society organizations issued a joint statement calling for transparency regarding the work of this group.<sup>34</sup> The results of the negotiations and changes to the text should be made public, and civil society organizations should be regularly informed and consulted on the progress of the negotiations. This request was supported by a number of states and was included in the Chair’s written recommendations at the conclusion of the meeting.<sup>35</sup>

Following the deliberations of the Friends of the Chair group, the Chair will present an updated draft text to the UN working group in late July 2022. This will not be a fully revised fourth draft agreement, but rather the third revised draft supplemented by these proposed changes, which was released by the Chair in August 2021 and deliberated during the seventh session in October 2021. The supplemented draft agreement will then form the basis for the eighth round of negotiations from October 24–28, 2022.

## Outlook

In bilateral talks with civil society, the EU representation had stated that as soon as the EU Commission’s proposal for a EU Sustainable Governance Directive was presented, the EU’s position vis-à-vis the UN treaty process would also be clarified. As the publication of the proposal has already been delayed for the second time, the Dutch government declared at the beginning of December 2021 that it would now no longer wait for the EU proposal and would push ahead with the process toward a Dutch supply chain law.<sup>36</sup> EU member states should also follow this example with regard to their positioning toward and participation in the UN working group’s negotiations, and no longer use the so far missing EU regulation as an excuse for inaction.

Finally, an EU regulation alone will not solve the global problem of corporate impunity. A binding UN treaty could close the legal gap and prevent

a complex and inconsistent patchwork of standards and rules. Regional and global instruments are necessary and should complement each other to ensure effective prevention and robust enforcement, liability and access to justice for those affected.<sup>37</sup>

In January 2022, the Council of the European Union had announced in its conclusions to possibly also participate in the group of “Friends of the Chair”: *“The EU will engage actively in the UN discussions, on a legally binding instrument on business and human rights, including through a possible involvement in the proposed Group of Friends of the Chair and by working with partners to explore ideas for a consensus-based instrument that can effectively enhance the protection of victims and create a global level playing field.”*<sup>38</sup>

Participation in the group would be an important step to advance consensus building among states on the future agreement. In addition, the EU Commission should have clarified the negotiating mandate by the next meeting of the UN working group in October 2022.

In its coalition agreement, Germany’s new government is committed to the socio-ecological transformation as well as to the continuation of the Alliance for Multilateralism initiated by former Minister Heiko Maas. However, for the new government, multilateral action in certain areas seems to end at Europe’s borders. While it is in favor of an EU-wide supply chain law, it says nothing about its future involvement in the UN treaty process.<sup>39</sup> Yet a UN treaty could contribute significantly to the planned transformation and better protect people, the environment, and the climate.

During its G7 presidency in 2022, the German government will now at least work to “ensure that international environmental, labor and social standards provide the framework for corporate action and discuss requirements for an internationally accepted, binding standard for corporate due diligence.”<sup>40</sup> This plan is an important step toward increasing support for the UN treaty process among the industrialized nations, which have so far been rather skeptical.

33 Ibid.

34 <https://www.stopcorporateimpunity.org/statement/>

35 <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session7/igwg-7th-draft-report.pdf>

36 <https://www.business-humanrights.org/en/latest-news/netherlands-govt-to-develop-national-due-diligence-law-following-eu-delay/>

37 <https://friendsoftheearth.eu/wp-content/uploads/2021/10/Briefing-Why-EU-legislation-and-a-UN-instrument-on-corporate-accountability-must-be-complementary.pdf>

38 <https://www.consilium.europa.eu/media/53956/st05277-en22.pdf>

39 Coalition Contract of the new German Government from November 24, 2021: <https://www.spd.de/koalitionsvertrag2021/>

40 <https://www.g7germany.de/resource/blob/974430/2000068/be22c645010baa6c4bf7c7efd41a7a11/2022-01-21-g7-programm-data.pdf?download=1>

The Corona pandemic has dramatically demonstrated the tension between corporate profit maximization and the realization of human rights. By also opposing a temporary suspension of vaccine patents at the World Trade Organization (the so-called TRIPS waiver), the new German government has all too clearly decided against the human right to health for all and in favor of profit maximization for a few pharmaceutical companies.

It is time to send a clear signal and restore Germany's human rights reputation. Otherwise, it will be difficult for the new German government to gain credibility in the international arena when it comes to human rights.

### Further Informationen

**Chair-Rapporteur of the OEIGWG (2021a):** Draft Report on the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.  
<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session7/igwg-7th-draft-report.pdf>

**Chairmanship of the OEIGWG (2021b):** Third revised draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.  
<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

**Martens, Jens/Seitz, Karolin (2016):** The Struggle towards a UN Treaty. Towards global regulation on human rights and business. Berlin/Bonn/New York: Global Policy Forum/ Rosa Luxemburg Stiftung—New York Office.  
[https://www.globalpolicy.org/images/pdfs/UN\\_Treaty\\_online.pdf](https://www.globalpolicy.org/images/pdfs/UN_Treaty_online.pdf)

**Seitz, Karolin (2018):** One step further towards global regulation of business. Report of the third session of the UN working group on a binding instrument on trans-national corporations and other business enterprises with respect to human rights ("treaty"). Berlin/Bonn/New York: Global Policy Forum/Rosa Luxemburg Stiftung—New York Office.  
[https://www.globalpolicy.org/images/pdfs/GPF-Briefing\\_One\\_step\\_further\\_Report\\_of\\_the\\_3rd\\_session\\_on\\_the\\_Treaty](https://www.globalpolicy.org/images/pdfs/GPF-Briefing_One_step_further_Report_of_the_3rd_session_on_the_Treaty)

**Seitz, Karolin (2021):** On Stand-by. Report on the sixth session of the open-ended intergovernmental working group on a binding instrument on transnational corporations and other business enterprises with respect to human rights ("treaty") Berlin/Bonn: Global Policy Forum/Rosa-Luxemburg-Stiftung.  
[https://www.globalpolicy.org/sites/default/files/Briefing\\_On\\_Standby\\_6th\\_Session\\_UN\\_Treaty.pdf](https://www.globalpolicy.org/sites/default/files/Briefing_On_Standby_6th_Session_UN_Treaty.pdf)

**Treaty Alliance Germany (2021):** From the Supply Chain Act towards an international Level Playing Field. Statement of the Treaty Alliance Germany on the Third Revised Draft for a legally binding Treaty on Business and Human Rights („Third Revised Draft“).  
[https://www.globalpolicy.org/sites/default/files/download/TreatyAllianceGermany\\_Statement\\_3rdRevisedDraft\\_2021.pdf](https://www.globalpolicy.org/sites/default/files/download/TreatyAllianceGermany_Statement_3rdRevisedDraft_2021.pdf)

Reports on the individual negotiation days of the 7th session:  
<https://corporatejustice.org/news/un-treaty-negotiations-it-all-comes-down-to-political-will/>

Website of the UN Working Group:  
<https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgotnc.aspx>

Comments of, inter alia, States and civil society organizations on the third revised draft agreement:  
<https://owncloud.unog.ch/s/uimBllpxsyirMpm?path=%2F>

### Imprint

#### New dynamics – new prospects?

Report on the seventh session of the open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights ("treaty")

#### Publisher:

Global Policy Forum Europe e.V.  
 Königstraße 37a, 53115 Bonn  
[europe@globalpolicy.org](mailto:europe@globalpolicy.org)  
[www.globalpolicy.org](http://www.globalpolicy.org)  
 Contact: Karolin Seitz

Rosa-Luxemburg-Stiftung  
 Straße der Pariser Kommune 8 a, 10243 Berlin  
[info@rosalux.org](mailto:info@rosalux.org)  
[www.rosalux.de](http://www.rosalux.de)  
 Contact: Till Bender

**Author:** Karolin Seitz

**Editorial assistance:** Till Bender and Mike Gardner

**Design:** [www.kalinski.media](http://www.kalinski.media)

Berlin/Bonn, February 2022

The briefing is part of a cooperation project between the Global Policy Forum Europe and the Rosa Luxemburg Foundation, funded by the German Federal Ministry for Economic Cooperation and Development (BMZ). The positions presented here do not reflect the viewpoint of the funding agency. The author is solely responsible for the content. The publication is distributed free of charge and may not be used for election campaign purposes.