BRIEFING

European Parliament

# Towards a binding treaty on business and human rights

## Despite progress, still no final outcome in view


## SUMMARY

With its extended value chains, economic globalisation has brought numerous opportunities while also creating specific challenges, including in the area of human rights protection. Loose regulatory frameworks in developing countries, corruption, and a lack of accountability resulting from legal rules shielding corporate interests have facilitated human rights abuses related to operations of transnational corporations, their subsidiaries and supply chains.

This situation has created a pressing need to establish an international normative framework for business operations in relation to human rights. So far, the preferred approach has been 'soft', consisting of the adoption of voluntary guidelines for businesses, such as the United Nations Guiding Principles on Business and Human Rights. Nevertheless, while such voluntary commitments are clearly useful, they cannot entirely prevent gross human rights violations. To address the shortcomings of the soft approach, an intergovernmental working group was established on Ecuador's initiative within the United Nations framework in June 2014, with the task of drafting a binding treaty on human rights and business.

The EU became more actively involved in the negotiations once its initial concerns with regard to the type of businesses covered were taken into consideration, but lacks a formal mandate from the Council and therefore has to rely on ad hoc consensus among its Member States. After seven sessions, the negotiating process remains divisive for participating states, despite continuing strong support from civil society. Disagreements also run deep among legal experts on the technical merits of the current approach. The European Parliament supports this initiative and has encouraged the EU to take a positive and constructive approach.


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IN THIS BRIEFING




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| List of acronyms used | |
|---|---|
| ILO | International Labour Organization |
| OBE | Other business enterprises |
| OECD | Organisation for Economic Co-operation and Development |
| OEIWG | Open-ended intergovernmental working group |
| TNCs | Transnational corporations |
| UNGPs | United Nations Guiding Principles on Business and Human Rights |
| UNHRC | UN Human Rights Council |

# Background

Human rights abuses committed by businesses have been a cause of serious public concern for decades. Examples include: use of forced and child labour, lack of respect for labour rights, including the right to associate and form unions, poor safety and health conditions at work, land grabbing, including from indigenous communities, unlawful violence perpetrated by private security staff, pollution and destruction of the environment, including of water sources, to name but a few.

What makes such abuses particularly problematic is that access to justice and means of redress are often insufficient, due to multiple factors. Prominent among them are those related to the **corporate veil** and the **courts' jurisdiction** in litigation related to transnational corporations. The corporate veil refers to the distinct liabilities of separately incorporated entities, which are part of the same corporate group – a situation that is characteristic of transnational corporations. This allows parent companies to discharge their responsibility for what their subsidiaries do in third countries. While this doctrine has its economic and financial justification, it has deleterious effects on the protection of human rights by businesses, as highlighted in a 2014 publication on corporate abuses and remedies by Amnesty International. While in some cases it has been possible to pierce the corporate veil by proving sufficient decision-making links between parent companies and their subsidiaries, most often it is impossible to hold parent companies to account. An alternative for avoiding this legal hurdle is to impose a duty of due diligence on parent companies with respect to acts by their subsidiaries.

The issue of courts' jurisdiction and applicable law is also very important for claims against transnational enterprises related to human rights and environmental harm. Traditionally, courts in countries where the harm occurred appeared to be most competent to deal with litigation on such harm. However, in developing countries, justice systems are often weak, and legislation may present loopholes that companies take advantage of. Victims and the defendants of their rights can face intimidation, violence and even murder, with the acquiescence of corrupt state authorities. According to a recent UN Human Rights Council report (2021), there is growing concern around the world 'about the role of business in causing, contributing, or being directly linked to such attacks against human rights defenders [working on corporate abuses], or in failing to take action against such attacks'. Moreover, states hosting subsidiaries of powerful transnational corporations (TNCs) do not take action over fear of losing foreign investment.

Given this situation, there have been attempts to sue the subsidiaries of transnational companies in courts in developed countries where the parent company is domiciled, but this approach also faces serious obstacles. EU legislation opens the door to claimants from third countries to bring litigation in EU courts against natural and legal persons domiciled in the EU for harm incurred in those third countries. Several dozen such cases have been brought to EU courts, but in only a few have the courts decided that they had jurisdiction. Using these legal provisions, Dutch courts delivered a landmark judgment in a case (*MD et al* v. *Shell Petroleum N.V.*) brought by Nigerian farmers, supported by the Dutch foundation Milieudefensie. They claimed that their land and water became infertile because of oil pollution caused by the pipes of Shell Nigeria. The Dutch courts decided that

they had jurisdiction on the matter, which they judged according to Nigerian law. The final ruling found Shell Nigeria liable for the damages and asked both Shell Nigeria and Royal Dutch Shell (the parent company) to install leakage detection systems

Despite these developments, many **practical obstacles persist** when victims search for justice abroad. These include high costs for legal representation, the complexity and length of proceedings, lack of information, the difficulty of delivering the evidence in a foreign court, etc. As concluded by an opinion issued by the EU Agency for Fundamental Rights, the EU also needs to address numerous obstacles that make access for victims to remedies in cross-border cases difficult in the internal market.

There is thus a profound asymmetry between TNCs' rights and obligations. While they enjoy substantial rights through trade and investment agreements, their responsibility for human rights abuses to which they are related is less clear and more difficult to enforce.

## Existing soft law approaches and their limits

To remedy the situation, numerous international, regional and national initiatives have been launched (see box), which have all privileged a soft approach based on voluntary standards. In the 2000s, human rights became part of the OECD guidelines for multinational enterprises and of relevant ILO standards. The adoption of UN guiding principles (UNGPs, see box) in 2011 marked a decisive step forward. Today, the UNGPs enjoy quasi-universal recognition, being unanimously endorsed by the United Nations Human Rights Council (UNHRC). They impose commitments on both states and businesses and put special emphasis on remedies for human rights abuses committed by corporations.

The EU has shown commitment to the international business and human rights governance regime and has undertaken various actions[1] under the main instruments mentioned above. The EU has been particularly engaged with the UNGPs, even if it sees its role as being confined to soft promotion and coordination. It has supported their development and considers them 'the authoritative policy framework' in addressing corporate social responsibility. EU Member States are at the forefront of implementing the UNGPs, for example with regard to establishing the required national action plans (half of the 30 countries with such a plan are EU Member States, according to the Danish Institute of Human Rights).

Nevertheless, according to a 2017 study for the European Parliament, although much progress has been achieved in implementing the UNGPs (for example, the OECD Guidelines have been aligned with the UNGPs and new tools have been developed),

### Five 'internationally recognised standards'

– 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) are guidelines to prevent, address and remedy human rights violations committed in business operations.

– 2000 United Nations Global Compact: this is the world's largest voluntary corporate sustainability initiative, encouraging businesses to align their strategies and operations with universal human rights, labour, environment and anti-corruption principles, and take actions that advance societal goals.

– 1976 Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (last revised in 2011) are 'recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The [OECD] Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.'

– Launched in 2010 by the International Organization for Standardization, the ISO 26000 Guidance Standard on Social Responsibility provides guidance on how businesses and organisations can operate in a socially responsible way. This means acting in such an ethical and transparent way as would contribute to the health and welfare of society. As the standard provides guidance rather than requirements, it cannot be certified, unlike other ISO standards.

– The International Labour Organisation's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted in 1977 and last amended in March 2017, offers guidelines to multinational enterprises, governments and employers' and workers' organisations in areas such as employment, training, conditions of work and life, and industrial relations. This guidance is based mainly on principles laid down in international labour conventions and recommendations.

human rights abuses by corporations persist. Possible reasons for these shortcomings include the absence of a central mechanism to ensure their implementation, and their non-binding character. Dissatisfaction has been growing with the slow and ineffective implementation of the UNGPs – though they were much acclaimed at the time of their adoption. The limits and shortcomings of the UNGPs have been widely recognised by both governments and civil society organisations.

## A binding treaty on human rights and business

A binding international treaty appears to be a solution to these problems. A first attempt towards such a treaty was the draft United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights. However, this initiative failed in the United Nations Commission on Human Rights in 2004. It contained obligations for TNCs to respect and protect the whole array of internationally recognised human rights and to provide remedy in case of violations.

On the other hand, defenders of the UNGPs have warned against the 'monumental challenges' the practical implementation of the treaty would pose. Critics have also pointed out that the countries that launched the treaty initiative and many of those supporting it have quite problematic human rights records and have done little to implement the UNGPs. A more balanced view expressed by an academic expert, J. L. Černič, acknowledges that the UNGPs and the proposed treaty both have advantages and disadvantages of their own. Therefore, the best strategy may be to continue with several initiatives in order to enhance victims' access to remedies and to teach corporations how to pursue effective due diligence to prevent potential human rights abuses.

# The drafting process

| Timeline of events relating to the binding treaty initiative | |
|---|---|
| June 2011 | The UNGPs were adopted unanimously by the UNHRC |
| September 2013 | Ecuador called for a new binding treaty to be negotiated |
| June 2014 | Ecuador's resolution on a binding treaty was adopted in the UNHRC by a simple majority<br>A parallel resolution tabled by Norway reaffirming the importance of the UNGPs and calling for an examination of the benefits and limitations of a binding treaty was unanimously adopted |
| October 2015 | First session of the open-ended intergovernmental working group (OEIGWG) tasked with drafting the new treaty |
| October 2016 | Second OEIGWG session |
| October 2017 | Guiding document entitled 'Elements' for the draft binding treaty published |
| October 2017 | Third OEIGWG session |
| March 2018 | The UNHRC endorsed the 'Elements' document and authorised the OEIGWG to continue its work |
| July 2018 | Release of Zero Draft treaty and draft optional protocol |
| 15-18 October 2018 | Fourth OEIGWG session (EU position) |

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| 16 July 2019 | Revised draft extended the scope to all companies in line with the EU requirement |
| 14-18 October 2019 | Fifth OEIGWG session (EU position) |
| 6 August 2020 | Second revised draft |
| 26-30 October 2020 | Sixth OEIGWG session (EU position) |
| 17 August 2021 | Third revised draft |
| 25-29 October 2021 | Seventh OEIGWG session |

Data source: OEIGWG webpage.

When, in September 2013, Ecuador proposed the creation of an open-ended intergovernmental working group to negotiate a treaty instrument in the United Nations (UN) framework, its initiative won strong support from civil society organisations. However, support from the UNHRC members was moderate. Ecuador's resolution (A/HRC/26/9), tabled at the 26th UNHRC Session on 26 June 2014 and co-sponsored by Bolivia, Cuba, South Africa and Venezuela, was adopted with only 20 votes in favour, 14 against and 13 abstentions. It was rejected by the industrialised members, including the EU Member States sitting on the UNHRC, while most Latin American members abstained.

The mandate provided by the resolution is to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' (paragraph 1). The resolution does not define TNCs; it only explains in a footnote what is meant by 'other business enterprises' (OBEs): this concept 'denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law'.

The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG), established under the above-mentioned resolution A/HRC/26/9, held its first session in October 2015 and subsequently held six further sessions, by the end of 2021. On 2 October 2017, the OEIGWG chair published Elements for the draft legally binding instrument, which was followed by four drafts (from zero to, currently, the third draft).

The seventh OEIGWG session, held in October 2021, debated the third draft. Several countries from the South – both more and less democratic – including South Africa, Cuba, Venezuela, Namibia, Paraguay, Bolivia, Ecuador and India, expressed their continued support for the process. It was the first session attended also by the United States, which remained reserved about the process, insisting on the need for consensus and suggesting the possibility of looking for alternative formats, such as a framework treaty. While progress has been made on a number of issues, levels of support for the draft continue to vary significantly among states, with some countries still opposing, for example, the application of due diligence to local companies. The session ended quite inconclusively, with the decision to continue consultations and to establish a 'Friends of the chair' working group to work on gathering support for the project.

The working method of the group has been criticised, for example by CIDSE, an international alliance of Catholic social justice organisations, which considers that the modus operandi of the past sessions of the OEIGWG 'cannot lead to a meaningful consensus, because states are not engaging in multilateral dialogues and discussion, but rather in a series of bilateral conversations with the Chairmanship.'

# Third draft treaty – Key content

The third revised draft upholds the structure, scope and content of the previous two drafts of 2020 and 2019, improving the style and clarifying some issues. It covers all business activities, including business activities of a transnational character. It also covers all internationally recognised human rights which are binding on the state parties, mentioning explicitly not only international human rights treaties and ILO standards but also the Universal Declaration (which is not binding as such, only as far as it has become part of customary law). It gives equal emphasis to prevention (based on due diligence) and remedies. The draft puts its central emphasis on the rights of victims of human rights abuses in the context of business activities: right to access to justice, protection from intimidation, reprisals, breaches of privacy, access to information and legal aid. Victims are entitled to state protection. More concretely:

- The draft require state parties to regulate business enterprises to ensure that they respect human rights. State parties shall require enterprises to conduct **due diligence** with the aim of identifying, avoiding, preventing and mitigating effectively human rights abuses. Penalties should be established at national level for enterprises that fail to comply with this due diligence obligation. Besides human and labour rights, and the environment, the risk assessment should now also include climate change. Trade unions should be involved in consultations on due diligence.
- Strengthening **corporate liability** is a further major objective: national jurisdictions should provide for effective, proportionate and dissuasive criminal, civil and/or administrative sanctions for legal or natural persons conducting business activities that cause human rights abuses. The liability should extend in the case of transnational enterprises to business relationships that these 'control, manage or supervise'.[2] The chapter is very detailed, providing e.g. for the need to establish insurance bonds or other financial guarantees to compensate victims.
- Provision of **effective remedies and access to justice**: the right to effective remedies is central to human rights law and to the UNGPs; nevertheless, in practice, victims of corporate abuses have difficulty getting access to remedies. To deal with this, the draft treaty defines the applicable jurisdiction broadly, such as to include the courts of the country where legal or natural persons alleged to have committed or caused by omission a harm are domiciled. The third draft aims to facilitate access to justice also by limiting the use of the *forum non-conveniens* doctrine (based on which it can be decided that the interests of justice are better served by a court in the country where the harm occurred) when the judges decide to reverse the burden of proof on companies. The draft gives jurisdiction to courts in other countries than that of the defendant's domicile 'if no other effective forum guaranteeing a fair judicial process is available' and if the claimant is present on the territory of the forum, or the defendant has assets or conducts substantial activity there.
- **Access to justice** comes along with numerous facilities for victims: access to information, adequate and effective legal assistance to victims provided by the state, removing legal obstacles, and the possibility for judges to reverse the burden of proof towards the defendant.
- The draft imposes an obligation on states to provide each other with **mutual legal assistance** to the greatest extent possible. Relevant court decisions will be recognised in another state.
- Promoting effective technical cooperation and capacity building, and sharing best practices and information are among the means envisaged for strengthening **international cooperation** bilaterally and in partnership with relevant international and regional organisations and civil society.
- **Monitoring and enforcement mechanisms**: the third draft provides for the establishment of an international committee composed of 12 experts, which would

provide guidance on understanding and implementing the treaty, receive regular reports by state parties and provide recommendations based on these reports.

- **Human rights defenders**: the preamble contains a reference to human rights defenders – this has been a strong recommendation by civil society.
- The draft also calls on states to remove obstacles to justice faced by women and other vulnerable groups and asks to integrate a gender perspective in due diligence processes.

## Some core issues of debate

**The scope**: should the envisioned treaty be limited to transnational corporations and other business enterprises involved in transnational operations (TNCs and OBEs), or should it cover all companies, at least of a certain size, including local ones? The initial draft limited the scope of the treaty to TNCs and OBEs involved in transnational operations, in line with the explicit formulation of the mandate of the working group. The EU opposed this approach, insisting from the start that it should cover all business enterprises. Arguments in favour of EU positions include the fact that many human rights violations are committed by local companies and the treaty would put transnational companies at a competitive disadvantage in relation to their local competitors. According to Carlos López, a Senior Legal Advisor at the International Commission of Jurists, if the scope is limited to transnational corporations it may lead to the 'absurd outcome that egregious criminal conduct (for instance, crimes against humanity) may not be punishable if committed by businesses acting only within one jurisdiction'. The further drafts have expanded the scope 'to all business activities, including business activities of a transnational character' (Article 3, third draft).

**The broad scope of human rights** covered has also been a matter of debate. The third draft keeps a broad coverage of all human rights, but, unlike the previous drafts, it now adopts a precise reference mentioning the international human rights treaties to which states are parties, as well as the Universal Declaration and customary law. The inclusion of the Universal Declaration and the ILO Declaration on Fundamental Principles and Rights at Work remains problematic given the fact that they are not binding treaties, even if they enjoy universal acceptance in principle. According to critics of this approach,[3] the broad coverage of all human rights could push the treaty to such a level of abstraction that it would be practically ineffective.

Another aspect refers to **duty bearers**: who should be responsible for fulfilling the obligations defined under the treaty? Normally, states are responsible for applying public international treaties to which they are parties. One recital in the third draft (and this is a novelty compared to the previous draft) mentions the 'obligations of business enterprises' regarding human rights abuses. This suggests that corporations may have direct human rights obligations under international law, which is contrary to the classical approach that only holds states accountable for human rights abuses committed on their territory.[4] The recital is not endorsed by the articles of the draft, which impose obligations on states only to prevent and provide remedies for human rights abuses committed by corporations. According to CIDSE, 'the reference to obligations of enterprises in the preamble could be used to interpret the LBI in such a way that states should establish direct human rights obligations for enterprises in their domestic law which could then lead to direct legal actions against corporations based on a human rights violation'. Business associations underline that 'obligations only fall on companies where the law requires it or they themselves have agreed to be bound. The draft cannot therefore impose those obligations without individual State ratification and legislation. This needs additional language clarifying that this applies "where required by national law"'.

# Binding legal initiatives at EU and Member State level

Existing legal initiatives could provide an indication as to the possible objectives of the future treaty, as already recognised in the preparatory OEIGWG debates. At global level, there are several examples of such initiatives, with the EU and a few of its Member States being among the frontrunners.

Beyond the EU, the UK has adopted mandatory due diligence for companies with regard to forced labour and trafficking in their supply chains, while some other countries have sectoral legislation in place (for example, the US on conflict minerals) or non-binding initiatives. In Switzerland, an attempt to introduce mandatory due diligence failed in a popular referendum in November 2020.

## EU level

The EU's Non-Financial Reporting Directive (Directive 2014/95/EU), which entered into force in 2014 and whose transposition deadline was 6 December 2016, lays down obligations for large companies to disclose information on the way they manage social and environmental aspects, including human rights. They have to report on the due diligence processes undertaken in relation to these matters. In April 2021, the Commission presented a proposal for a Corporate Sustainability Reporting Directive (CSRD), which would revise the Non-Financial Reporting Directive, specifying in greater detail the due diligence disclosure requirements, in line with international instruments.

Another legislative initiative imposing due diligence obligations on EU companies is the Conflict Minerals Regulation, which took effect on 1 January 2021. Importers of four minerals (tin, tantalum, tungsten and gold) into the EU are obliged to check the likelihood that the raw materials could be financing conflict or could have been extracted using forced labour.

The EU Timber Regulation requires EU traders who place timber products on the EU market for the first time to exercise 'due diligence' in order to minimise the risk of placing illegally harvested timber. It is currently being updated to include other products that contribute to deforestation, such as soy, beef, palm oil, wood, cocoa and coffee.

After several delays, in February 2022 the Commission published a proposal for a directive establishing due diligence obligations for all sectors. It requires Member States to adopt national legislation obliging larger companies to conduct human rights and environmental due diligence with respect to identifying actual or potential adverse impacts, preventing and mitigating these impacts, and bringing actual adverse impacts to an end, monitoring the effectiveness of their due diligence policy and measures, and publicly communicating about due diligence. Companies should also establish a complaints procedure accessible to affected persons and trade unions. Member States shall establish effective, proportionate and dissuasive sanctions for non-compliance with the legislation and ensure that companies are liable for damages in case of non-compliance.

In 2021, the European Commission and the European External Action Service published guidance based on existing international due diligence standards for EU companies to address the risk of forced labour in their operations and supply chains.

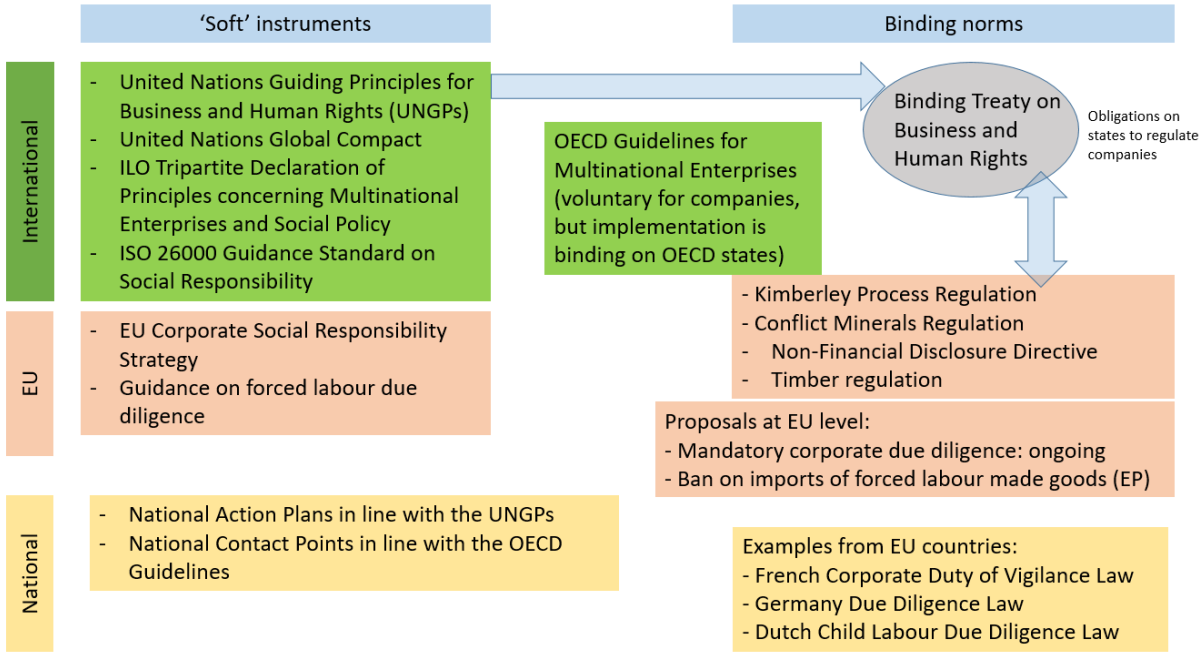
## EU Member State level

The EU's two largest economies – France and Germany – have adopted comprehensive mandatory due diligence laws. France was the first country in the EU and the world to adopt a general due diligence law (loi sur le devoir de vigilance) in 2017. It applies to large companies with over 5 000 employees in France and over 10 000 in the world. These companies shall exercise due diligence with regard to the companies they control, and all contractors and suppliers to which they have 'an established commercial relation'. They must set up a vigilance plan with regard to human rights, health, security of persons and the environment in order to prevent and mitigate risks, as well as an alert mechanism with the participation of labour unions. The draft law initially proposed fines in case of non-compliance, but the respective provisions were struck down by the Constitutional Council. The law establishes civil liability in case of damage caused by its not being respected. Civil society organisations hoped this law could serve as a model for EU-wide legislation, in line with the precedent set by the French law on non-financial reporting, which preceded the above-mentioned EU directive on the subject.

Germany adopted a law on due diligence (Sorgfaltspflichtengesetz) in July 2021, after a survey of Germany companies with more than 500 employees between 2018 and 2019 showed that less than 20 % sufficiently integrate voluntary due diligence in their management. The law applies to enterprises with more than 3 000 employees (1 000 employees from 1 January 2024) that have their central administration, principal place of business, administrative headquarters, statutory seat or branch office in Germany. They are under an obligation to establish a risk management system to identify, prevent or minimise the risks of human rights violations and damage to the environment in their operations and supply chains. Administrative fines may be imposed, which can amount to up to €800 000 or up to 2 % of annual global turnover if this is over €400 million. The law explicitly excludes any civil liability resulting from non-compliance with its provisions.

Other EU countries have also been considering such laws: in Austria, a proposal is under examination in Parliament, while in several other EU countries civil society and political forces have conducted campaigns in favour of instituting mandatory due diligence for enterprises. In 2019, the Netherlands adopted a child labour due diligence law, which requires enterprises to make sure no child labour occurs in their supply chains.

Figure 1 – The proposed treaty in the current business and human rights governance system




Source: EPRS, 2022.

# Stakeholder positions

The European Economic and Social Committee (EESC), in an own-initiative opinion adopted in 2019, on the binding UN treaty on business and human rights, called on EU institutions to support the ongoing treaty process and constructively engage in the negotiations. The EESC stresses that the treaty should be drafted 'coherently with existing due diligence systems, especially the UNGPs, to facilitate easier implementation and to avoid redundancies', and recommends a strong international monitoring and enforcement mechanism.

Numerous civil society organisations are very supportive of the project and have been strongly involved in the UN process. Civil society has usually pointed to the inefficacy of voluntary standards and the need to oblige companies to respect human rights, in view of the numerous violations committed with the complicity of transnational corporations. A broad global alliance of civil society organisations (the Treaty Alliance) has been built in order to support the treaty negotiation process. They have published a statement urging states to support the process.

Several influential organisations of employers, such as the International Organisation of Employers (IOE), Business at OECD (BIAC), BusinessEurope and the International Chamber of Commerce (ICC) have followed the negotiation process closely. While they have not rejected the initiative, they remain reserved. At the seventh session of the Working Group, the ICC stressed that a treaty 'has to be internationally consistent; and align with the standards embodied in the UNGPs'. It also called for an assessment of the current direction and to consider alternative approaches. The International Organisation of Employers (IOE) expressed, at the same session, its disappointment at the fact that the draft does not address the main issues which have been raised, such as important divergences from the UNGPs, particularly in the area of due diligence. It considers the treaty in its current form 'an unnecessary and inappropriate response'. The IOE, BIAC and BusinessEurope published a joint detailed statement on the third revised draft, asking that it use the same language on prevention and due diligence as the UNGPs, to avoid confusion for business. It is critical of many aspects, including access to remedy and liability and risk of legal uncertainty.

In Europe, various stakeholders such as academics, global justice campaigners and NGOs have expressed strong support for the treaty. European civil society organisations have come out strongly in favour of the treaty, calling on the EU and its Member States to engage in the discussion on the content of the treaty.

The European Network of National Human Rights Institutions (ENNHRI) considers that 'despite remaining shortcomings, the third revised draft is a good basis for further intergovernmental negotiations' and calls on the EU and its Member States to agree on a formal negotiating mandate and to actively participate in the drafting process.

CIDSE strongly supports the initiative. In a study on the third draft, it considers that this draft 'provides a useful, appropriate and sufficiently clear basis for substantial negotiations.'

Legal experts are divided on the technical merits of the current approach. A policy brief published in October 2021 by the ASSER Institute (a centre of expertise on international and European law in the Netherlands) asks for more coherence with UNGPs over the definition of human rights due diligence, and a stronger emphasis on remedy instead of harmonisation of legal systems.

Carlos López considers that 'similar to the 2nd Draft (2020), the current draft is a useful proposal for a serious conversation and negotiation, but still insufficiently clear to be adopted'. For example, 'the provisions on accountability and remedy are insufficient, with several of them still drafted in an ambiguous or vague way'.

Claire Methven O'Brien, writing on the second draft, considers that the text resembles a model law or an international private law convention more than an international treaty, given the focus on remedy and the detailed prescriptive nature. States actually prefer to have discretion over the means they use to implement international obligations and therefore they could be reluctant to endorse the draft. The author has developed an alternative draft treaty to avoid these shortcomings.

Other authors (Grama et al)[5] highlight the 'creative rewriting' of the content of human rights due diligence, which creates some significant divergences with the UNGPs: by focusing on human rights abuses instead of prevention and addressing adverse impacts, and with regard to the steps to implement HRDD. The same authors stress that, by using 'language mimicking the EU Brussels-I bis Regulation',[6] the draft is 'likely to create more tensions and potential jurisdictional conflict, without resolving actual problems or lowering barriers for victims'. Moreover, there is no simple solution for effectively regulating business enterprises – which is the main objective of the treaty – because 'corporate crime and corporate wrongdoing are notoriously difficult to regulate effectively, even within state borders'.

Given the way the draft treaty defines the applicable jurisdiction, there is also the possibility of parallel judicial proceedings in two different states, which the text does not sufficiently address.

# European Union position

The EU has observer status in the UN Human Rights Council, the body overseeing the drafting process. The EU Delegation to the UN in Geneva has represented the EU in the discussions. In the absence of a formal mandate for negotiations from the Council, the positions defended by the EU delegation in the negotiations have to be agreed each time beforehand among all Member States. This has represented, at times, an obstacle to stronger, more coherent EU involvement.

From the start, the EU set two main requirements for a legally binding international treaty: first, that the scope of the discussion must not be limited to TNCs but extend to all companies, and second that the treaty should be firmly rooted in the UNGPs, making sure that their implementation is not undermined. The EU considers that the UNGPs have allowed for tangible progress on better protecting human rights in relation to business activities and they provide an efficient framework, which needs to be implemented. As explained above, while the initial ('zero') draft did not comply with the EU's first requirement, the subsequent ones have extended the scope to all companies, which has allowed the EU to be more actively involved in the negotiations.

However, the EU's position on the third draft continues to convey numerous reservations. In its statement delivered at the OEIGWG, the EU Delegation in Geneva, representing the EU in the negotiations, emphasised the need for a draft treaty that would be 'supported by a critical mass of UN members across regions', which does not appear to be the case currently. It further pointed to the 'many issues that will require much more hard work', considering that 'substantial changes to the text are required to meet the concerns of UN members'. The EU emphasised the need to achieve an instrument that is effectively applicable, and expressed its concern about 'the level of detail and prescriptiveness of the draft instrument, in a number of policy areas such as civil and criminal liability, applicable law and jurisdiction, or judicial cooperation'.

## European Parliament position

Parliament is a staunch supporter of the binding treaty initiative. It has expressed its full support for the UN-level preparatory work to this effect. In resolutions adopted during the previous term, it argued against any obstructive actions,[7] and called on the EU to show its full commitment to such an instrument and actively engage in the debates.[8] It also emphasised the need to build the principle of accountability into the planned treaty, which could be achieved by including a grievance mechanism.[9]

In an October 2018 resolution on the EU's input for the binding treaty, Parliament expressed the view that the 'new instrument should impose on States the obligation to adopt regulatory measures requiring companies to apply human rights due diligence policies and procedures, and proposed that companies should be accountable in either the forum where the harm was caused, or the forum where the parent company is incorporated or where it has a substantial presence'.

Parliament has also recognised the insufficiency of voluntary action. In an own-initiative report, 'EU flagship initiative on the garment sector', it expressed concern that the existing voluntary initiatives aimed at achieving sustainability of the garment sector's global supply chain have not been effective enough in addressing human rights- and labour rights-related issues in the sector.

Most recently, in its February 2022 resolution on human rights and democracy in the world and the European Union's policy on the matter, Parliament reaffirmed the need to establish an international binding instrument and called on Member States to actively engage in the process, repeating a similar recommendations it made in the previous reports on the same topic adopted during this term (2021, 2020). In a letter to the Commission and the Council in July 2020, 75 MEPs called on the EU to adopt a negotiating mandate and fully engage in the UN treaty negotiations.

## MAIN REFERENCES

Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, webpage with collection of all relevant documents.

Business and Human Rights Resource Centre, Binding Treaty, collection of resources.

## ENDNOTES

1 For an overview of EU actions in the area, see the following studies: The EU's engagement with the main business and human rights instruments (Stephanie Bijlmakers, Mary Footer, Nicolas Hachez, Frame Project, November 2015), and Implementation of the UN Guiding Principles on Business and Human Rights (Beata Faracik, European Parliament Study, January 2017, especially pp. 38-40).

2 As the CIDSE study remarks, the liability scenarios proposed by the third draft 'go beyond standards which currently exist in many legal systems and would therefore increase the basis of liability'.

3 See John G. Ruggie, Comments on the 'Zero Draft' Treaty on Business and Human Rights.

4 On the issue of state versus companies' obligations, see Direct Corporate Obligations by David Bilchitz and Carlos López.

5 ASSER Policy Brief No. 2021-01, Authors: Ben Grama, Antoine Duval, Annika van Baar, and Lucas Roorda, 2021.

6 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See consolidated version.

7 See the European Parliament resolution of 14 December 2016 on the annual report on human rights and democracy in the world and the European Union's policy on the matter 2015; the European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries; and the European Parliament resolution of 21 January 2016 on the EU's priorities for the UNHRC sessions in 2016.

8 See the European Parliament resolution of 17 December 2015 on the annual report on human rights and democracy in the world 2014 and the European Union's policy on the matter; the resolution of 12 March 2015 on the EU's priorities for the UN Human Rights Council in 2015; and the resolution of 12 March 2015 on the annual report on human rights and democracy in the world 2013 and the European Union's policy on the matter.

9 In its resolution of 14 February 2017 on the revision of the European Consensus on Development, Parliament asked the EU to support the adoption of a legally binding international instrument to hold companies to account for their human rights violations. In its resolution of 14 April 2016 on the private sector and development, Parliament asked the EU to support such an instrument since it would provide effective remedies for victims in cases where the domestic jurisdiction is unable to prosecute companies effectively. The inclusion of a grievance mechanism in such a binding instrument is also called for in Parliament's resolution of 19 May 2015 on financing for development.

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