

On Standby

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”)

by Karolin Seitz

From October 26 to 30, 2020, the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) met for the sixth time at the United Nations (UN) Human Rights Council in Geneva. The discussions were based on the second revised draft presented by the Ecuadorian Chair of the working group in August 2020.¹

The session was overshadowed by the impact of the COVID-19 pandemic. It was held in a hybrid format, i.e. with the option of on-site or virtual participation. Of the 66 participating states, many said they were unable to prepare coordinated government positions because of

the COVID-19 restrictions. Therefore, no intergovernmental negotiations took place, only discussions on the draft. Major points of contention, including the scope of the agreement and liability rules, were raised again and could not be resolved during the session.

Whether the EU and its Member States will finally made up their minds regarding a negotiating mandate for the process by the next session in autumn 2021 depends heavily on how ambitious the announced European legislative initiative and other initiatives, such as the German Supply Chain Law, are. Active participation by the EU will have a signal effect on other industrialized nations that have abstained from the process so far.

In June 2014, the UN Human Rights Council passed Resolution 26/9 establishing an intergovernmental working group and mandating it to draft an international human rights treaty to regulate corporate activities globally. Since then, the UN working group has met six times in Geneva, most recently from October 26 to 30, 2020. The process is the result of decades of efforts to agree on binding rules for corporations at global level. The treaty process represents the first intergovernmental initiative to move beyond ineffective voluntary measures.

The debates on an international legally binding instrument are taking place in a currently very dynamic political environment. The responsibility of business for the protection of the environment and human rights is increasingly being debated worldwide.

At the end of November 2020, the Swiss popular initiative for a supply chain law was supported by a narrow majority of the population, but ultimately failed because of the majority of the cantons.² In April 2020, EU Commissioner for Justice Didier Reynders announced that he would present a legislative initiative at the European level in spring 2021.³ The Council of the EU supported this plan with a council conclusion in early December 2020.⁴ The U.S. Congress is debating a bill that would oblige American companies to prove that their product supply chain is free of forced labor from Chinese re-education camps. The House of Representatives overwhelmingly approved the bill back

¹ Chair-Rapporteur of the OEIGWG (2020a)

² <https://www.theguardian.pe.ca/business/reuters/swiss-firms-narrowly-avoid-responsible-business-liability-as-vote-divides-nation-525393/>

³ <https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/european-commission-consultation-on-proposed-due-diligence-law/>

⁴ <https://www.consilium.europa.eu/media/46999/st13512-en20.pdf>

in September 2020.⁵ In several EU member states, there are parliamentary or civil society initiatives to regulate environmental and human rights protection in supply chains.⁶ The German government, for example, has announced a supply chain law, but has been arguing about the details of the law for months.⁷

In August 2020, Ecuador's negotiating team presented a second revised draft of the treaty which served as the basis for the sixth session of the UN working group. There is wide agreement among several legal experts and civil society organizations that room still exists for improvement with regard to some formulations, but the current draft is now ready for negotiations.⁸

For example, Surya Deva, Professor of Law at the City University of Hong Kong, is of this opinion. He says the current draft is politically feasible without unduly compromising the necessary regulatory focus of the agreement. The draft attempts to strike a balance between the competing interests of states, companies and civil society organizations.⁹

Participation overshadowed by COVID-19

The sixth session was affected by the impact of the COVID-19 pandemic. It was held in a hybrid format, i.e. with the option to participate on-site in Geneva or virtually. In previous years, about 200 representatives of civil society organizations and affected groups from around the world had traveled to Geneva to follow the sessions and contribute their own experiences and proposals to the inter-governmental debates. These contributions constituted a central element of the sessions. Travel restrictions imposed because of the COVID-19 pandemic did not allow civil society actors to participate on-site in the year of the sixth session. As a result, the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop

Impunity feared that a meaningful participation by civil society actors could not be guaranteed. The Global Campaign declared that the adequate conditions for intergovernmental negotiations would not be given and instead called for the continuation of consultations on the draft.¹⁰ Brazil, among others, had called for such direct intergovernmental negotiations at the end of the fifth session in 2019.

Ultimately, no negotiations took place during the sixth session. Some state representatives announced that they had not been able to prepare coordinated and detailed government positions on the current draft because of the COVID-19 restrictions. Personal informal meetings for further agreements between state representatives were also possible either.

Despite the constraints of the COVID-19 pandemic, 66 UN member states, as well as Palestine and the Holy See, participated in the sixth session. Numerous civil society organizations joined from around the world, contributing more than 100 statements live or via video message. In particular, Panama, Mexico, Ecuador, Brazil, Namibia, the Philippines, China, Russia, and Palestine participated with substantial contributions. Few other states spoke. Compared to previous years, oral participation by States was lower overall during the sixth session. Owing to the hybrid format of the session, spontaneous discussions were difficult, while informal exchange between the participants was hardly possible.

The following states participated in the 6th session:

Afghanistan, Albania, Algeria, Argentina, Armenia, Azerbaijan, Australia, Bangladesh, Belgium, Bolivia, Botswana, Brazil, Burkina Faso, Burundi, Cameroon, Cuba, Chile, China, Denmark, Ecuador, El Salvador, Fiji, Finland, France, Germany, Ghana, Greece, Guatemala, Haiti, India, Indonesia, Iran, Iraq, Cameroon, Qatar, Kenya, Cuba, Malaysia, Mexico, Morocco, Mozambique, Namibia, Nepal, Netherlands, Pakistan, Panama, Philippines, Portugal, Russia, Sweden, Switzerland, Senegal, Slovenia, Spain, Sudan, South Africa, Thailand, Togo, Czech Republic, Turkey, Tunisia, Ukraine, United Kingdom, Uruguay, Venezuela.

5 <https://cleanclothes.org/news/2020/us-house-of-representatives-votes-to-take-action-against-forced-labour-in-cotton-supply-chains>

6 <https://corporatejustice.org/news/16793-mandatory-human-rights-due-diligence-an-issue-whose-time-has-come>

7 As of 14.01.2021

8 Cf. <https://www.globalpolicy.org/component/content/article/265-policy-papers-archives/53230-pm-treatylieferkette100820.html> and <http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/> and <http://opiniojuris.org/2020/09/07/symposium-the-2nd-revised-draft-of-a-treaty-on-business-and-human-rights-moving-slowly-in-the-right-direction/>

9 <https://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/>

10 https://www.stopcorporateimpunity.org/wp-content/uploads/2020/08/Statement_GC_2nd-draft-TNCs_ENG.pdf

The position of the EU and the German government

The majority of the 12 EU Member States present were represented by the European External Action Service (EEAS). While France, Belgium, and Spain had contributed their own, albeit very general, statements during the previous session, this time, only France spoke up with a report on the experiences of the French supply chain law.

In his opening statement, the EEAS representative acknowledged that an international agreement could demonstrate value added if it improved access to justice for victims of corporate human rights abuses and created a level playing field for companies globally.¹¹ He recalled basic conditions that the agreement must meet. It must address all companies, be consistent with the UN Guiding Principles on Business and Human Rights, be realistically implementable and enforceable, and be supported by a critical mass of UN member states. The EU representative welcomed the new draft's further convergence to these concerns. However, the text still has significant shortcomings, particularly with regard to its relationship with the UN Guiding Principles and other international agreements, as well as its scope of application. Ambiguities remain with regard to the rules on civil and criminal liability, applicable law, and jurisdiction. In addition, not enough states would participate in the negotiations yet. The EU representative ended his statement by assuring the Chairman that the EU would continue to follow the process and participate in the debates.

In the subsequent meetings, the EU raised individual queries regarding the articles, but without making any alternative concrete proposals for wording. Finally, even after six years of the process, the EU still has no negotiating mandate.

Some EU Member States, including Austria, Belgium, Finland, France, Ireland, Italy, the Netherlands, Poland, and Spain, had aimed for more active involvement by the EU.¹² According to discussions

with representatives of these governments, however, the European External Action Service and the EU Commission are currently the main obstacles. They have behaved quite passively so far, have not initiated and carried out a structured and coordinated analysis of the text even after being asked to do so, and have initiated coordination with regard to the sixth session at very short notice.¹³ Since the content of the agreement is a “mixed agreement” with exclusive areas of competence for the EU (e.g. the common trade policy) and areas of competence shared by the EU and the EU Member States (e.g. in the area of environmental protection, the internal market or judicial cooperation),¹⁴ an EU negotiating mandate also requires a clear analysis of the draft treaty with regard to the distribution of competences – another task of the EEAS.

In a joint video, a coalition of European civil society organizations sharply criticized the EU's reluctant participation.¹⁵

In July 2020, 75 members of the European Parliament had already called for an EU negotiating mandate for the treaty process in a joint letter to the Commission.¹⁶ They stressed that the two processes – the European initiative for a legal anchoring of human rights due diligence and the debates on a treaty – were increasingly converging and aligning. They further stated:

“The EU has an obligation enshrined in the EU treaties to uphold the principle of multilateralism, a duty it defends and upholds in related fields like trade and investment. The EU must uphold this value in the human rights and environmental field by engaging in the treaty process, and it must play its role as a global leader by championing the process and encouraging its partner countries to engage in it.”¹⁷

The mayors of Barcelona, Marseille and Strasbourg as well as several city councilors supported the demand of the members of the European Parliament.¹⁸

11 https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/GeneralStatements/IOs/EU_statement_6th%20session_IGWG%20LBI_item%204.docx

12 Answer from the Dutch Government to a question from the Parliament of 24.06.2020: <https://www.tweedekamer.nl/downloads/document?id=5089e178-5881-438f-8ec3-af6618588801&title=Verslag%20van%20een%20schriftelijk%20overleg%20over%20toezeggingen%20gedaan%20tijdens%20het%20Algemeen%20Overleg%20Internationaal%20Maatschappelijk%20Verantwoord%20Ondernemen%20%28IMVO%29%20van%203%20maart%202020%20%28Kamerstuk%2026485-326%29.doc>, p. 34, question 89

13 So the representative of the Foreign Office in a hearing of the Human Rights Committee in the Bundestag (Heute im Bundestag No. 1190 of 5.11.2020): <https://www.bundestag.de/hib?url=L3ByZkNzZS9oaWlvODA0MDMyLTgwNDZMg==&mod=mod454590> and government representatives of other EU Member States in personal conversation.

14 Cf. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020>.

15 <https://twitter.com/i/status/1322107383901020165>

16 <https://oezlem-alev-demirel.de/wp-content/uploads/2020/07/20200720-Letter-requesting-a-negotiation-mandate.pdf>

17 Ibid.

18 <https://bindingtreaty.org/local-authorities-in-support-to-the-un-binding-treaty/>

The European Network of National Human Rights Institutions (ENNHRI) also welcomed the improvements of the second revised draft in a joint statement and called on the EU and its Member States to engage more actively in the negotiations.¹⁹ The German Institute for Human Rights stated: “There are no longer any convincing factual arguments against taking part in further negotiations and fine-tuning the text.”²⁰

The German government officially supports the process.²¹ It took part in the session as an observer but did not make any statements of its own. In 2019, the German government still explained that it would not be able to take a position on the UN treaty process until the decision had been made in Germany for or against a national supply chain law. After the devastating result of the monitoring of the National Action Plan on Business and Human Rights had been published in July 2020, the Chancellor announced a supply chain law.

However, according to Holger Dreiseitl, responsible at the German Foreign Office, the ministries are not unanimous in their position on the UN treaty, as is the case with the supply chain law.²² Dreiseitl declared that with the development of the key points and a concrete draft of the national law, the position of the various ministries on the treaty process would also change significantly.²³ Adding that whether the current treaty draft is fundamentally negotiable should also be seen as a political and not just a legal question.

In terms of content, the German government supports the joint statement by the EU. It holds the view that three points are central to the success of an international treaty. The agreement must cover all companies, be based on the UN Guiding Principles, and be realistically implementable. The process is also criticized for its lack of traction. Important industrialized countries have abstained from the process so far.²⁴

19 <http://ennhri.org/wp-content/uploads/2020/10/ENNHRI-Statement-on-EU-and-its-Member-States-involvement-in-the-development-of-a-Treaty-on-Business-and-Human-Rights.pdf>

20 https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Position_Paper_Who_will_join_the_negotiating_table.pdf, p. 13.

21 Heute im Bundestag No. 1190 of 5.11.2020: <https://www.bundestag.de/hib?url=L3ByZXNzZS9oaWVlODA0MDMyLTgwNDAzMg==&mod=mod454590>

22 https://www.globalpolicy.org/images/pdfs/Bericht_Fachgesprch_UN-Treaty_und_Umweltaspekte-10-2020.pdf, p. 6.

23 Ibid.

24 Heute im Bundestag Nr. 1190 of 5.11.2020: <https://www.bundestag.de/hib?url=L3ByZXNzZS9oaWVlODA0MDMyLTgwNDAzMg==&mod=mod454590>

On the content of the negotiations – resurgence of old points of contention

On the first day of the session, many of the states present reiterated their support for the process.²⁵ The only clear opposition to the process was expressed by the representative of the government of the United Kingdom. Switzerland explained that it would only participate in the session as an observer. China stated that the current draft was not seen a basis for negotiation. It would impose an unreasonable burden on companies.

Many states welcomed the fact that the second revised draft no longer limits the scope of a company’s duty of care to other companies along its supply chain with which it has contractual relationships, but now includes all of a company’s business relationships. This regulation also corresponds to the understanding of the UN Guiding Principles. However, Brazil, among others, considered the scope of the due diligence obligation to be too far-reaching.

Many states praised the draft’s improvement in terms of greater attention to gender equality.

As actual negotiations once again did not take place, any issues of dispute were settled.

A major point of contention from previous sessions came up again during the sixth session: the question of which companies the treaty should cover. The second revised draft provides that both transnational corporations and other business enterprises, including state-owned enterprises, fall under the scope of the agreement. States may facilitate obligations for small and medium-sized enterprises according to their size, nature, sector, location, operating context, and severity of risks. China, India, South Africa, Pakistan, Cuba, Venezuela, Mozambique, and the Philippines called for limiting the treaty to transnational corporations. Ecuador, Panama, Mexico, Namibia, and the EU, on the other hand, favored a scope of application to all corporate activities.

Brazil and China viewed the introduction of environmental due diligence as problematic,²⁶ whereas Egypt and the Holy See welcomed this new provision in the draft. Civil society organizations asked

25 See comments from individual states at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.

26 https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/GeneralStatements/States/Brazil_General_statement.docx

to make explicit that environmental due diligence is also related to liability.

Many delegates and representatives of civil society organizations highlighted the importance of Article 4 on the rights of victims. Other delegations criticized the article as inadequate, not complementary to national law, or too burdensome for states. Some delegations considered the definition of “victims” as too broad. Civil society organizations called for further strengthening of the provisions to reverse the burden of proof and with regard to access to information for those affected by human rights violations.

Requests for amendments were made in particular for Article 8 on legal liability. Here, a better distinction between civil and criminal liability would be necessary. China stated that the existing tort law compensation system was sufficient and that there was no reason to establish additional liability standards. Brazil and Russia opposed criminal liability of legal entities for human rights abuses. Palestine proposed a middle course. Legal persons should be held criminally liable only in cases of war crimes, crimes against humanity, and other serious violations of (international humanitarian) law. Article 8.7 on the liability of a company for damage caused by a company it controls was particularly controversial. Egypt supported the paragraph, while Mexico suggested replacing factual control with legal control, further narrowing the scope. China strongly criticized the paragraph as violating the principle of separation under company law.

The provisions on jurisdiction (Article 9), i.e. before which courts in which country claims should be admissible in the event of damage and which law is to be applied (Article 11), are also controversial. In this context, Brazil called for the principle of subsidiarity, i.e. those national legal mechanisms should be exhausted first. While Namibia, Ecuador, Chile, Egypt and the Philippines supported the abolition of the *forum non conveniens* principle, Brazil, Russia and China argued for its retention. China reiterated at this point that the regulations should not interfere with state sovereignty. Russia argued that it was important to have the broadest possible range of grounds on which to refuse recognition and enforcement of other countries’ court decisions.

Major disagreement among states was evident with regard to Article 14.5 on the relationship of the treaty to trade and investment agreements. The article gives the provisions of the treaty precedence over

those of investment agreements. Russia and Brazil, for example, called for the deletion of the paragraph, whereas Panama, Mexico, Palestine, Chile, and Azerbaijan strongly supported it and civil society organizations called for further strengthening of the article.

The International Trade Union Confederation (ITUC), together with other trade union federations, submitted numerous statements and recognized the current draft as a good basis for further negotiations.²⁷ Improvements would be necessary to the effect that the agreement recognizes trade unionists as human rights defenders, and that they should be included in the due diligence processes. Greater clarity would be needed on the relationship between liability for human rights abuses and liability for lack of or inadequate implementation of human rights due diligence processes. They also regretted that, unlike in the revised draft of 2019, affected persons would no longer be able to file a lawsuit against the responsible company in their home country. Migrant workers, for example, who have returned to their home country often do not have the opportunity to return again to the country of the company or of the incident to take legal action. The unions also called for a strong control mechanism for the agreement in the form of an international court.

The business community was represented by the International Chamber of Commerce (ICC), the International Organization of Employers (IOE), and the U.S. Council for International Business (USCIB). They consider the current draft as non-negotiable, reject it in its entirety and demand that the working group change its course completely.²⁸ The business associations claim that the draft fails to outline practical and effective ways to remedy the situation at the local level. It would also deviate from the UN Guiding Principles, creating great uncertainty about roles, responsibilities and expectations. They maintain that the draft includes an overly broad definition of victims and too vast a scope of adjudicative jurisdiction and applicable law. It is based on a scope of due diligence that is too broad for a company to control. Furthermore, it is unacceptable for the business associations that a company can be held liable not only for causing and contributing to human rights abuses, but also for failure to prevent them. In addition, they criticize that the draft does not contain a “safe harbor” pro-

27 https://www.ituc-csi.org/IMG/pdf/legally_binding_instrument_en.pdf

28 <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=147873&token=4a22b843c8911c002d84ef45e411ebbeb72beab>

vision, i.e. that companies that can demonstrate appropriate due diligence measures are automatically absolved from liability for human rights abuses. A reversal of the burden of proof and an additional environmental due diligence requirement are not acceptable, they maintain.

Claire Methven O'Brian of the Danish Institute for Human Rights agrees that the second revised draft is not negotiable.²⁹ According to her, it is legally incoherent and states would not agree to the treaty in this form. As an alternative, she proposed a framework convention based on the UN Guiding Principles, which would initially contain few state obligations but could be successively expanded by additional standards.

However, there are no signs so far of any greater support for such a framework convention, especially from major industrialized nations. It is also questionable whether a framework convention would offer substantial value added compared to the current draft. Key elements such as a remedial mechanism and a binding human rights due diligence obligation would most probably not be included in such a framework convention.

The way forward

Unlike in previous years, the participating states adopted the conclusions of the working group and the Chairman without incident on the last day of the session.³⁰ States, academia, civil society and business can submit concrete textual suggestions and modifications to the second revised draft in the form of a matrix template until February 2021.³¹ In a second matrix template, general comments and requests for clarification of individual articles can be submitted. In March 2021, the secretariat of the working group will publish a summarizing matrix template of all submissions. Such an approach will make it possible to better understand the detailed positions of the various actors and to better identify potential points of conflict. Between now and the next session of the UN working group, probably in fall 2021, the Chair will hold several informal consultations. A group of experts will advise him on the preparation of the third revised draft, which he

plans to present by the end of July 2021. For their part, the various actors involved in the process are encouraged by the chair to organize consultations at regional and national level.

Conclusion

The low level of state participation, not least because of the COVID-19 restrictions, once again did not allow to overcome fundamental points of contention during the sixth session. Moreover, it was not clear what political backing the process has by all the states involved.

Whether the EU will finally succeed in presenting a detailed positioning on the draft agreement and a joint negotiating mandate by the next session of the working group will depend on how the EU Commissioners and the individual EU member states campaign for this and take initiative. The level of ambition of EU Commissioner Reynders' draft EU regulation announced for spring 2021 and further developments regarding a German supply chain law will be crucial for the further engagement of the EU and its Member States as well. These developments will also send an important signal to other industrialized nations and further drive the trend towards human rights and environmental regulation of supply chains.

Furthermore, it is important that Germany and the EU enter into talks with other industrialized countries about the UN treaty and work to bring more countries from the Global North to the negotiating table. After all, the EU has it in its own hands to provide the necessary traction.

The urgency of necessary improvements regarding human rights and environmental protection in global value chains became even more apparent during the COVID-19 pandemic. People in precarious employment situations at the beginning of many global supply chains were hit hardest by the pandemic.³² Many actors from politics, civil society and business have recognized this and have promoted processes to create clear rules for corporations. At the same time, however, pressure against such rules is increasing massively, whether it be large-scale campaigns by the business community against regulation in Switzerland or the months-long blocking of a law by the Ministry of Economics in Germany. The question now is which forces will

29 <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/transcending-the-binary-linking-hard-and-soft-law-through-a-ungpsbased-framework-convention/9EC58B32613692F38BD4ACC3581E44F6>

30 https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/IGWG_DraftReport6thSession.docx

31 <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>

32 <https://www.business-humanrights.org/en/from-us/media-centre/major-fashion-brands-record-profits-while-vulnerable-workers-languish-in-poverty/>

gain the upper hand in this debate and whether the reconstruction after the COVID-19 pandemic will be ‘business as usual’ or whether the course will be

set for a solidarity-based, ecologically and socially sustainable economy. A UN treaty would be a part of this.

More Information

Chair-Rapporteur of the OEIGWG (2020a): Draft Report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.

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https://www.globalpolicy.org/images/pdfs/TreatyAllianceGermany_Statement_2ndREvisedDraft_2020.pdf

Reports on the individual negotiation days of the 6th session:

<https://corporatejustice.org/>

UNTV Webcast of the OEIGWG:

<http://webtv.un.org/meetings-events>

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