

THE NINTH ROUND OF NEGOTIATIONS ON A UN TREATY ON BUSINESS AND HUMAN RIGHTS: A STEP TOWARDS A POSITIVE FUTURE

PROCESS AND STATUS PRIOR TO THE NINTH SESSION

The ninth round of negotiations on an internationally binding treaty on business and human rights (*UN Treaty*) took place in Geneva under the auspices of the UN Human Rights Council (HRC) from 23 to 27 October 2023.

The process began almost a decade ago (2014) with the adoption of Human Rights Council Resolution 26/9, which set up an *open-ended intergovernmental working group* (OEIGWG) chaired by Ecuador to develop an “international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”. Unfortunately, (transnational) corporations are repeatedly implicated in all types of human rights abuses. Incidents such as the collapse of the Rana Plaza textile factory move this reality into the public spotlight on a regular basis. The treaty is intended to prevent precisely such incidents in future.

Ecuador and South Africa were instrumental in putting this process in motion. Since then, negotiations on the individual elements of the treaty text have taken place every October for a period of one week at the *Palais des Nations* in Geneva. In addition to the States, civil society organisations, trade unions and business

associations also have the opportunity to participate in the negotiations. Year in year out, non-governmental organisations (NGOs) actively contribute to the ongoing debate while also raising awareness through informational events taking place on the margins of the conference, drawing attention to current challenges bearing relevance to the ongoing negotiations of the agreement, above all in the form of case studies.

The aim of the *UN Treaty* is to establish an instrument laying down human rights responsibilities of transnational corporations and other business enterprises worldwide. Countries that ratify the treaty would commit themselves under international law to making corporate human rights due diligence mandatory in their national bodies of law, to ensuring respect for human rights worldwide and to easing access to justice and effective remedies for victims of human rights abuses by business enterprises. It is intended to amend, complement and strengthen existing human rights standards already laid down in legally non-binding instruments (*soft law standards*) such as the *UN Guiding Principles on Business and Human Rights* (UNGPs), as it has been shown that these alone are not sufficient. A legally binding instrument, however, is and remains the strongest and most tangible way to close

regulatory gaps in the international legal framework.

After the OEIGWG commenced its work in 2015, the first two meetings (2015 and 2016) were primarily devoted to discussions of fundamental issues such as form, content and scope. The first draft (*Zero Draft*) was presented by the OEIGWG in July 2018 in the run-up to the fourth round of negotiations in October 2018 and has since that time been updated (with some exceptions) after each meeting to include amendments proposed by the States as well as written contributions and then resubmitted before the beginning of the next round of negotiations. This may appear to be a very long and tedious process at first glance, but this is not unusual when it comes to negotiating an international treaty under the auspices of the UN, as potentially 193 UN Member States have to forge some sort of consensus.

A brief overview of the status of meetings and the treaty:

- **2015: First meeting of the OEIGWG (chaired by Ecuador)**
- **2016: Second meeting of the OEIGWG**
- **2017:** The Chair presents possible *elements for a legally binding instrument* as a basis for the **third meeting of the OEIGWG in 2017**
- **2018: Zero Draft** to serve as the basis for the **fourth meeting of the OEIGWG in 2018**
- **2019: Revised draft** to serve as the basis for the **fifth meeting of the OEIGWG in 2019**
- **2020: Second revised draft** to serve as the basis for the **sixth meeting of the OEIGWG in 2020**
- **2021: Third revised draft** following open informal consultations to serve as the basis for the **seventh meeting of the OEIGWG in 2021**
- **2022: Third revised draft with specific textual proposals** - submitted by States during the previous seventh session - to serve as a basis for the **eighth session of the OEIGWG in 2022**. Establishment of a ***Friends of the Chair group*** (Azerbaijan, France, Indonesia, Cameroon, Portugal and Uruguay) to advise the Chair on the further mode of work
- **2023: Revised draft (adjusted clean version July)** to serve as the basis for the **ninth meeting of the OEIGWG in 2023** after intersessional State consultations were held between April-June 2023 and the submissions of written contributions, as well as a **revised draft (version in mark-up mode)**

Textual basis before the start of this year's negotiations

The draft treaty presented by the Ecuadorian Chair in July 2023 was intended to serve as the basis for the ninth round of negotiations. It is based on the updated 2021 draft version, which incorporated the results of regional consultations held by the *Friends of the Chair* group between the eighth and ninth session.

Compared to the previous draft, the new draft treaty is more closely aligned with the UNGPs, is clearer and more concise in its implementation and offers State Parties more latitude in some respects. Nevertheless, there has been some back-peddling in the new text compared to the previous 2022 version. This is in particular reflected by a watering down of Articles 6 to 9, which relate to prevention, access to remedy, legal liability and adjudicative jurisdiction. Other areas subjected to criticism include failure to include environmental and climate aspects, no mention being made of what is in the meantime a vested right to a clean, healthy and sustainable environment, and inadequate consideration being afforded to human rights defenders in the current version.

State involvement and positioning

For a considerable time, the *UN Treaty* was almost solely espoused by States of the Global South. The resolution was adopted in the Human Rights Council with only 20 votes in favour, 14 against and 13 abstentions. States such as Indonesia, Cuba and Venezuela, but also Russia, China and India, had voiced their support for the resolution. As expected, industrialised nations like the USA, Japan and all the Member States of the European Union, which were members of the HRC at the time, voted against the resolution. Brazil abstained.

Positions have shifted in recent years, however, with a host of countries debating or already having enacted their own national supply chain due diligence laws, such as France (*Loi de Vigilance*, 2017) or Germany (*Lieferkettensorgfaltspflichtengesetz*, 2021). The *UN treaty-making* process also began to gather pace in 2021 after Ecuador, in its capacity as chair and rapporteur for the OEIGWG, put forward the third revised draft in August of that year. This was especially intended to align the text more closely with already existing instruments and frameworks, such as the UNGPs, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) and other relevant mechanisms of the International Labour Organization (ILO), as well as the OECD Guidelines for Multinational Enterprises, in order to facilitate implementation. New momentum also developed when the USA and Japan actively joined in the negotiations for the first time at the ensuing session of the OEIGWG held in 2021. Germany also spoke out for the first time in the seventh year of negotiations. Finally, parallel to the *UN Treaty* process, the G7 States also committed to an internationally binding instrument at their June 2022 summit. This was a significant *volte-face*. Negotiations at the eighth session held in 2022 fell short of expectations, however. An immense amount of work still needs to be performed to define even fundamental principles. And in lieu of all stakeholders getting involved, in particular States, it will not be possible to

steer the process to culmination and achieve a consensus on the most important hallmarks of an internationally legally binding instrument.

The European Union (EU), which does not have a negotiating mandate, has thus far only taken part in the negotiations with observer status, limiting itself to forwarding general statements and communicating a few sceptical objections. This may change in the future once the EU has issued a supply chain law. The EU Council, European Parliament and Commission are expected to come up with an agreement for the proposed *EU Corporate Sustainability Due Diligence Directive* (CSDDD) by the end of the current legislative term at the latest. The EU has cited the existing UN Guiding Principles on Business and Human Rights as grounds for not seeking a negotiating mandate, drawing attention to the disconnect between the draft and these UNGPs, the scope of application, as well as the need to streamline and provide more flexibility for States to implement such an instrument. These points of contention were partially acknowledged in the draft treaty put forward in July 2023, which could be viewed as a concession intended to encourage the EU States to engage more in the proceedings.

NEGOTIATIONS IN THE NINTH SESSION

Kick-off with obstacles

While progress has been sluggish in recent years, some initial signs of progress in negotiations could be witnessed this year. This ninth session, however, also experienced some ups and downs, starting with differences of opinion about which text should use as the point of departure in the negotiations, causing a bumpy start to the session and offering considerable insight into the overall prevailing mood.

Behind this was the fact that the African group failed to meet within the agreed timeframe for its regional consultation, occasioning confusion and uncertainty in the wake of a regional meeting arranged by NGOs. This meeting, which was

held in Ghana on 3 October, was also attended by representatives of African States and was mistakenly interpreted as an official consultation. Its conclusions were then forwarded to the Chair, but became a dead letter because the cut-off date for incorporating regional results had already expired. The African Group thereupon vehemently rejected the updated draft agreement of July 2023 submitted to serve as the basis for the week of negotiations. This subsequently led to the aforementioned dissension between the States. It was ultimately agreed both to retain the draft version as presented and to furnish everyone with a parallel version in mark-up mode in order to be able to track changes (as well as comments by the States made in the previous session). This was to be welcomed, as civil society and some States (particularly African and Latin American ones) had already raised the question in the run-up to and upon commencement of the meeting as to why some parts of the third version of 2022 were no longer included in the new current draft, thus providing a better overview. The African group also called for its concerns to be mentioned in the report issued at the end of the ninth session.

The agenda

Due to the delay in the start of what was then a short week of negotiations, but also because of strong sentiments of some States regarding particular articles making specific reference to case studies, negotiations ultimately only addressed the preamble along with Articles 1 (*Definitions*), 2 (*Statement of Purpose*) and 3 (*Scope*) out of a total of 24 articles.

In addition to election of Chair-Rapporteur Cristian Espinosa Cañizares (new Permanent Representative of Ecuador to the United Nations Office at Geneva since the beginning of 2023) and concurrence on the work programme for the ninth session, **day 1** was devoted to **general statements** in which States, regional groupings, NGOs and business associations took the floor. A mounting number of countries like South Africa voiced unease

about the scope of application in the updated draft, calling for it to be confined solely to transnational corporations once again, as the new updated draft provided for an extension of the text to include all business enterprises and not just transnational corporations. Moreover, many countries commented on the amendments made to the legal liability provisions, stressing a need to institute a comprehensive liability system that is in line with national and international law. Another issue that increasingly cropped up, and this was also addressed by the EU, was the lack of any reference being made to the right to a clean, healthy and sustainable environment. This was also criticised by other countries, NGOs and trade union associations. The International Transport Workers' Federation (ITF) also found fault with the fact that its proposals had been ignored, while expressing its misgivings over the dilution of Articles 6 to 9.

The meeting was overshadowed by the Israel-Palestine conflict, with some countries increasingly voicing their views and stances, prompting the Chairman to recurrently call for statements to be limited to the treaty negotiations.

Continuing with the general statements from the previous day, especially the **preamble** was placed on the agenda on **day 2**. The need was discussed to cite human rights declarations and conventions - such as the ILO conventions, the UN Declaration on Human Rights Defenders, the UN Declaration on the Rights of Peasants and a greater consideration of children's rights and people with disabilities, as well as the inclusion of corporate due diligence obligations in conflict regions. Another point in the dialogue was gender equality, underscored by the EU as one of its fundamental values. The Latin American countries also appealed for a more *gender-responsive* language to be included in the current draft (*gender-responsive access to justice, gendered impacts of corporate abuses & violations*).

Day 3 was dedicated to **Article 1 (Definitions)**, in which the definition of victims, business

activities and relationships, human rights due diligence, and remedy were debated. With regard to the definition of victims, there was an intensified discussion in particular over whether mention should be made of human rights "violations" or, instead, "abuse" in the context of the impact of corporate activities (*corporate violations* versus *abuse*). The UK, for example, argued that the term "abuse" is very broad.

On **day 4**, the debate centred on **Article 2 (Statement of purpose)**, the objectives of this treaty, and **Article 3 (Scope)**, the area of its application. In particular, it was debated whether companies had *obligations* or merely *responsibilities*. Previous drafts had still opted for the term "obligations", which has now been replaced by "responsibilities" in the current text and is tantamount to a weakening of requirements applying to business enterprises. States like the UK, Panama, Peru and the USA argued that the language of the UNGPs, which makes reference to corporate responsibility and the duty of States to protect human rights, should be adopted as a guiderail here. The NGOs, on the other hand, argued with reference to the legally binding nature of the planned treaty that enterprises also have obligations to respect human rights.

In the debate over the scope of application laid down in Article 3, many States differed over the issue of what kind of companies the treaty should regulate: all business enterprises (transnational or not), (supported by Chile, Mexico, Panama, Peru and the USA) as proposed by the Chair; or limited to transnational corporations (TNCs) and other business enterprises of a transnational nature (advocated by various States, including China, Ghana, Honduras, Colombia, Pakistan, Russia and South Africa) as put forward in Resolution 26/9; or to all business enterprises with a special focus on TNCs (Brazil). The Chair's proposal to draft a new resolution in the HRC in order to precisely spell out the scope of application and save time during the OEIGWG's negotiation week came as a surprise, however. As negotiation of such

resolutions is a very time-consuming affair with the outcome uncertain, this was unanimously rejected. As an alternative, States called for more resources as well as support from independent legal experts in the proceedings in order to be able to resolve such issues more efficiently going forward.

On the **5th and final day** of the meeting, the States discussed recommendations by the Ecuadorian Chair on how to galvanise the process. Proposals included:

- States considering a *procedural decision* to the HRC. This means that countries would refrain from discussing the scope of application yet again. A further objective of such a procedural decision would be to mobilise additional resources for the process (methodology) in order to leverage these for intergovernmental consultations.
- Organising intersessional, cross-regional consultations on various topics with the help of the *Friends of the Chair* group. The Chair would be supported by five legal experts handpicked by the Office of the High Commissioner for Human Rights (OHCHR) on the basis of geographical distribution.
- Considering all textual proposals from the week of negotiations in order to carry on with negotiations in October 2024.

Chair Espinosa wrapped up the ninth meeting of the OEIGWG, announcing the intention of presenting the meeting report at the 55th HRC meeting in March 2024. The draft report is to be a summary of the debate from this year's round of negotiations. It was adopted by consensus without any recommendations or conclusions being drawn. The annex to the report will contain the text of the draft treaty, updated with the submissions made by the States during the ninth session, and together with the full report is to be made available on the [OHCHR website for the ninth session](#).

OUTLOOK

Compared to previous years, the ninth session has been an important step forward in the process to establish an internationally binding legal instrument. States have finally entered into the phase of real negotiations, even if they are proceeding at an extremely slow pace. Those States that were previously rather sceptical have made constructive contributions. In the past, the process was often not credited with having much legitimacy on the grounds that too few States were involved and the process therefore fell short of critical mass. Since this year at the latest, this argument no longer holds weight. A feeling of joint purpose and advocacy for the process is gaining ground, even if it will still be a long haul. In spite of all this, even greater state participation and commitment is required. Although more than 70 UN Member States, as well as the EU and Côte d'Ivoire acting on behalf of the African Union, took part in the ninth session, even more States need to be brought to the table. The accord will only garner the necessary approval and legitimacy through the broadest possible participation of States. At the end of the day, the treaty must be individually ratified by each State and will not automatically apply to all UN members once negotiations have been completed. Ultimately, the accord must be implemented by as many States as possible in order to have the desired impact. The newly launched and planned work processes (hybrid format of negotiations; intergovernmental thematic consultations with the involvement of legal experts) are reason for hope that a greater efficiency can be attained in the next round of negotiations, however. Regarding the question of the scope of application, which is still a source of contention among the many countries, it is to be hoped that the planned reform processes for the workflows will also contribute to an early understanding among the States as to which business enterprises the agreement should apply to.

Overall, however, there is still a great need to enhance awareness of the *UN Treaty* in order

to actively draw more States into the negotiations. This needs to be with the broadest possible involvement of civil society organisations, an arena in which the FES can make a key contribution. There is a need for national, regional and international civil society organisations to continue to actively participate in the negotiations. After all, these are the actors who know first-hand how business enterprises are implicated in human rights abuses in a wide variety of contexts throughout the world. Civil society organisations must contribute their knowledge and experience to ensure that realities on the ground are tackled effectively in actual fact. At the same time, they can raise further awareness of the negotiations in local contexts and, if they have not already done so, persuade their national governments to actively take part in the negotiations. One thing must be perfectly clear: the overall framework must not be narrowed! Human rights violations and abuses in connection with corporate activities must be included, including labour rights, gender equality, environmental issues and the challenges posed by corporate activities in conflict zones. This requires the elaboration of forceful provisions along with a commitment of enhanced resources to further drive the process.

This begs the question, however, as to what influence the European CSDDD will have on the *UN Treaty* process: it remains to be seen whether the directive will actually support the *UN Treaty* or, quite to the contrary, even impede it. EU participation in the process can only be of usefulness, however, whether it be to help shape the agreement in line with the EU's own vision or to create a level playing field globally. Of course, both arguments also apply to all other States that have not yet entered into the negotiations. The *Treaty Alliance* has long been urging an EU negotiating mandate, and various Member States are plugging for active participation. On top of initiatives at national and regional levels (such as the CSDDD), a binding international treaty can serve as an important additional instrument with which to

boost corporate accountability by creating a level playing field globally while ensuring effective access to remedies for victims of corporate human rights abuses worldwide. The *UN Treaty* could ultimately help render the CSDDD even more effective at regional level. Moreover, a legally binding treaty would propel discussions on the updating of national rules and arrangements.

If the process receives sufficient backing in the future, the *UN Treaty* may therefore set things in motion with the prospect of better protection and promotion of human rights worldwide. Because this is precisely what it is all about: strengthening rights and improving situations of people on the ground who are at risk due to corporate activities. In conjunction with other initiatives at national, regional and

international levels, the *UN Treaty* constitutes a key opportunity to bolster the development of existing human rights norms and standards while reinforcing them with an urgently needed legally binding framework. This year's 75th anniversary of the Universal Declaration of Human Rights on 10 December 2023 offers an occasion to provide a renewed commitment to human rights while also advancing this process to devise a legally binding instrument to regulate the activities of transnational corporations and other business enterprises throughout the world.

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