

BRIEFING PAPER ON THE ZERO DRAFT *UNPACKING ARGUMENTS AGAINST A TREATY*

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On 26 June 2014 the UN Human Rights Commission approved a resolution to form a working group (Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, OEIGWG) to elaborate a legally binding instrument to regulate the activities of transnational corporations and other companies with regard to compliance with human rights standards ('Treaty Process'). The working group has met four times since then. In July 2018 the Ecuadorian chair submitted a first draft treaty (*Zero Draft*) which was debated at the fourth meeting of the UN working group in October 2018. The states were invited to comment on this draft until end-February 2019.

The present briefing paper discusses objections raised in political debates to the overall process or to contents of the *Zero Draft* and formulates proposed solutions.

1. Argument on the significance of an international regulation generally:

"Most human rights violations are not the result of a lack of international rules and obligations, but of a failure at national level to implement existing ones."

It is true that most human rights violations result from the unwillingness or inability of many states to protect human rights appropriately. The reasons for this are many and varied. These gaps in protection are what makes it important for companies active in these countries or associated with them through their business relationships and supply chains to assume responsibility for respect for human rights, investigate risks to human rights and take preventive measures. The UN Guiding Principles on Business and Human Rights (UNGPs) recommend this particularly for corporate activities in regions affected by conflicts.

However, there is a problem in the inadequate linking of the first and second pillars of the UNGPs: in their duty to protect, states are not consistently enough obliged to impose upon companies their responsibility to act with due diligence on human rights.¹

The challenge is to close this conceptual gap with a future treaty on business and human rights. The *Zero Draft* provides for a state's obligation under international law to impose a binding duty of care for

human rights on companies (cf *Zero Draft*, Arts 9, 10). The treaty should regulate corporate responsibility for subsidiaries and global supply chains and facilitate cross-border proceedings (cf. *Zero Draft* Art. 5). It also needs additional measures to strengthen the procedural rights of those affected (cf. *Zero Draft*, Arts 8, 11).²

Several states are reluctant to introduce binding standards in the field of business and human rights on their own because they fear this would be a competitive disadvantage for their companies. By contrast, uniform international standards would establish a level playing field for companies.

2. Argument on scope of application (with reference to Art. 3.1. in combination with Art. 4.2 *Zero Draft*):

“Restriction of the scope of application of the planned treaty to transnational economic activities would lead to distortion of competition. Instead, the treaty must apply to all companies.”

The question of the scope of application of a future treaty on business and human rights is controversial. While international law experts such as Prof. Olivier De Schutter welcome the link to the “transnational character” of the economic activity,³ representatives of the EU and German Federal Government argue that removing purely domestic companies from the scope of application would result in distortion of competition.

This is true to the extent that the focus on transnational economic activities must not create a disadvantage to individuals affected by human rights violations or environmental injury from companies operating exclusively at a domestic level.

However, the draft adopts a very broad interpretation of the “transnational character”. According to Art. 4.2, this covers any for-profit economic activities involving acts (including electronic) or having effects in two or more legal systems. As hardly any company operates its business without transnationality today, the cross-border link should be present in the vast majority of cases.

The transnational meshing of the economy poses particular challenges. These include specifically which law companies have to take into account in business activities abroad. Questions like these can only be resolved through international agreements. However, such agreements are

not necessary with purely national issues. Companies with an extensive supplier network need to consider different levels of due diligence than a company which is only active locally in a manageable context.

To this extent it is appropriate for an international treaty on business and human rights to focus on transnational business activities. This focus is also familiar from other transnational economic systems, such as EU law where the assertion of basic freedoms requires a cross-border context.

Nevertheless, a treaty on business and human rights should govern the human rights responsibility of companies in a generally binding manner and not allow exceptions for specific companies.

To this end, the German Federal Government and the EU should support a fall-back clause in the revision of the *Zero Draft* which obliges states to extend the corporate obligations and procedural laws to national situations as well, as far as transfer is possible.⁴

In addition, Prof. Olivier De Schutter’s recommendation to define “transnational character” to cover also state-owned companies should be adopted.⁵

3. Argument for taking into account the UN Guiding Principles (relating to Art. 9 *Zero Draft*):

“The Zero Draft does not take the UNGPs into account. The negotiating process undermines the consensus reached on the UNGPs and effective short-term measures (including NAPs) for raising human rights standards for business.”

The UNGPs are a globally accepted reference framework which provides orientation in the field of business and human rights. We accordingly support the idea that a future treaty should build on this international consensus both formally and materially. The *Zero Draft* presented by the Ecuadorian presidency of the UN working group does this, by clearly building on the language of the UNGPs and the concept of human rights due diligence, and emphasising in its preamble the primary responsibility of the states for protecting human rights.

The Draft provides for the states parties to oblige companies by law to undertake human rights due diligence. This creates clarity and a binding nature for the

¹ Olivier De Schutter et al. (2012): Human Rights Due Diligence: The Role of States. ECCJ/ ICAR (<http://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf>)

² Cf. Treaty Alliance Germany (2017): Towards global Regulation on Human Rights and Business. Position paper on the UN Treaty Process for transnational corporations and other business enterprises (www.cora-netz.de/wp-content/uploads/2018/03/2017-12_Treaty-Alliance-Germany_position-paper.pdf). ³ Olivier De Schutter (2018): The “Zero Draft” for a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises: A Comment, p. 2 (https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/DeSchutter_Panel3-4.pdf). ⁴ Treaty Alliance Germany (2018): Statement of the “Treaty Alliance Germany” on the draft for a legally binding UN Treaty on Business and Human Rights (»Zero Draft«). Berlin (https://www.globalpolicy.org/images/pdfs/TreatyAllianceGermany_StatementZeroDraft_10-2018.pdf). ⁵ De Schutter (2018), p.3.

measures to be taken, strengthening the connection between the first pillar (state obligations) and the second (corporate responsibilities) in the UNGPs. The third pillar of the UNGPs, access to justice for victims, is strengthened through international cooperation and the elimination of barriers to access to justice. In this way, the *Zero Draft* is a decisive further development of the UNGPs, which have previously been limited in their effect by their soft law status, and addresses existing gaps in the protection of human rights. For example, in its opinion on the *Zero Draft* supporting the process the European Network of National Human Rights Institutions (ENNHRI) also emphasises that a treaty based on the three pillars of the UNGPs can be seen as complementing the guiding principles.⁶

The future revision of the *Zero Draft* should continue to give attention to consistency of content and language with the UNGPs. For example, the concept of human rights due diligence described in Art. 9 should be supplemented by establishing internal complaints mechanisms in companies, as required by the UNGPs.

The Treaty Process has not in any way led internationally to a reduction in commitment, but has instead increased the pressure on states to take effective measures to protect human rights. Overall, it can be assumed that a UN treaty will have greater leverage than the UNGPs as a result of its binding nature under international law and the associated instruments for implementation, and will persuade more states to act than in the past.

4. Argument on legal liability (relating to Art. 10 Zero Draft):

“A UN treaty would expose companies to an incalculable risk of liability.”

The *Zero Draft* provides for national establishment of binding due diligence and defines elements of civil and criminal liability in Art. 10. Civil liability should be limited in accordance with Art. 9 in combination with Art. 10, and only affect an indirectly involved company if it had control over or a close relationship with the subsidiary or supplier or should at least have foreseen the injury.

This clarification is welcome, but should be set out in greater detail in further rounds of negotiation. The question of attribution must be approached in a more nuanced way. There can only be liability for injury which

would have been identifiable for the company and which it could have avoided with reasonable diligence (cf. Art. 10 (6) (a-c)). In the event of injury, the company can clear itself with implemented due diligence measures. The level of due diligence to be expected depends on the risk situation.

The company is accordingly not responsible for every violation of rights in the supply chains, but it must identify significant risks and counter these. In most countries, the company cannot rely solely on information from local authorities, and must make its own assessment of the situation and follow up on complaints by the impacted population. This involves a process. If a human rights violation is discovered somewhere in the supply chain, this does not mean that a company must immediately fear sanctions or complaints. In such cases, it is important that a company should not simply accept human rights violations, but should instead take reasonable and appropriate measures to address such violations. In the EU there are states which are already obliging companies to undertake human rights due diligence, and introducing liability, such as the French due diligence legislation. It is a question of formulating these liability provisions to be legally secure and defining an international minimum standard.

The draft is restrained when it comes to criminal liability of companies. Rather than providing for any corporate criminal legislation, the draft also leaves scope for alternative sanctions by the states parties (Art. 10.12).

The draft completely omits any public law sanctions. Effective administrative sanctions include e.g. exclusion from public procurement, state subsidies or export credits and public guarantees for investment or export credits.

5. Argument on the relationship between human rights and trade and investment agreements (relating to Art. 13 Zero Draft):

“Primacy of human rights obligations over obligations under trade and investment agreements is not possible.”

The special position of human rights in international law is already emphasised in Art. 103 of the UN Charter. Based on this, the UN Committee on Economic, Social and Cultural Rights establishes in General Comment 24

⁶ ENNHRI (2018): ENNHRI Statement on Occasion of the 4th session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG) (http://www.ennhri.org/IMG/pdf/ennhri_statement_on_zero_draft.pdf).

that states may not deviate from their human rights obligations in trade and investment agreements. Principle 9 of the UNGPs also requires states to maintain adequate policy space to meet their human rights obligations in trade and investment agreements.

This is, however, complicated by the fact that trade and investment agreements have effective enforcement instruments, whereas the UN Human Rights treaty bodies can only issue recommendations. In the event of conflict, deviations from human rights obligations remain without consequences for a state, whereas violations of international trade and investment law carry the threat of sanctions up to the point of payment of compensation. An additional factor is that investment arbitration tribunals have so far refused to take human rights considerations into account in their arbitral awards. Investment protection standards, provisions on intellectual property rights in seed and drugs and obligations to cut tariffs in the agricultural sector have frequently blocked implementation of human rights obligations for this reason.

A supremacy clause for human rights in a future UN treaty on business and human rights would contribute towards correcting this de facto imbalance in international law. Following a formulation proposed by Prof. Markus Krajewski, the states parties would be obligated to assess human rights risks and exclude these as far as possible before entering into trade agreements. Implementation would require them to interpret the trade agreements so that there is no restriction of human rights. Equally, human rights must be taken into account and protected in the findings of arbitration mechanisms.⁷

Such a supremacy clause would be entirely compatible with the EU Treaty of Lisbon. Arts 3 and 21 of this Treaty already obligate the EU to observing and promoting human rights in their foreign economic relationships.⁸ To create a level playing field, the EU and German Federal Government should press for primacy of human rights obligations to be firmly established in a future treaty on business and human rights. While this is recommended in the Draft Elements, the formulations in the *Zero Draft* relating to this are lagging behind Principle 9 of the UNGPs and the EU obligations under the Treaty of Lisbon, and would accordingly de facto put the EU at a disadvantage.

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⁷Markus Krajewski (2017): Ensuring the primacy of human rights in trade and investment policies: Model clauses for UN Treaty on transnational corporations, other businesses and human rights: CIDSE, MISEREOR et al. (<https://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html>).

⁸Cf. Lorand Bartels (2014): Eine menschenrechtliche Modellklausel für die völkerrechtlichen Abkommen der Europäischen Union. (*A model human rights clause for EU international treaties*) Berlin/Aachen: Deutsches Institut für Menschenrechte/MISEREOR (https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_Menschenrechtliche_Modellklausel.pdf).