

Contribution to the second draft treaty on transnational corporations and other business enterprises of the UN Working Group on business and human rights

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Abstract: The present contribution aims at providing comments, perspectives and relevant information that could be taken into consideration to bring further improvements to the second revised draft treaty on transnational corporations and other business enterprises, for the treaty to be a significant step forward in protecting human rights from corporate abuses. It focuses on the main sticking points that emerged from the discussions: the definitions, the scope, the role of States in preventing risks and abuses, and the access to justice and remedy through the issue of adjudicative jurisdiction.

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1. In view of the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, the Human Rights Council adopted the resolution 26/9 on 26 June 2014. This resolution established the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights “whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.
2. At the end of the sixth negotiated session in October 2020, the Chairperson rapporteur invited stakeholders to contribute to the drafting of a future treaty on business and human rights. The present document provides few amendments and comments to Articles 1, 3, 6 and 9 of the second draft treaty to the United Nations working group on business and human rights. It does so with reference to international human rights law, environmental law and the French due diligence law adopted in 2017.

I. ARTICLE 1 – DEFINITIONS

A. Article 1.2

“Human rights abuse” shall mean any harm committed by a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights.

Comments

3. The reference to “environmental rights” should be more precise, or at least clarified. The mere reference to environmental rights is indeed questionable with regard to the sectoral and fragmented nature of international environmental law. The multiplication of treaties and bilateral or multilateral conventions does not allow for a unitary understanding of environmental rights. States may thus have ratified only certain international instruments and may not be equally committed to environmental protection.
4. Accordingly, the notion of environmental rights could be clarified by referring to the right to a healthy environment (1) as well as procedural rights, such as public access to information about the environment, public participation in certain environmentally relevant decisions and access to courts of law and tribunals in environmental matters (2).

(1) The right to a healthy environment

5. The right to a healthy environment has broadly incorporated into legal frameworks around the world, as it is implemented both in regional systems and in national legislations and enjoys some recognition amongst the international community and public opinion.

a. At national level

6. At national level, the right to a healthy environment is constitutionally protected in more than a hundred states,¹ amongst which, as early as 1976 and 1978, Portugal and Spain ; Norway (Art. 112 of its Constitution) ; South Africa (Art. 12 of its Constitution of 1996) ; France (Art. 7 of its Environmental Charter) and numerous countries of South America (Constitution of the Argentine Republic, Art. 41; Constitution of the Federative Republic of Brazil Art. 225; Constitution of the Republic of Chile, Art. 19(8); Constitution of the Republic of Colombia, Art. 79; Constitution of the Republic of Ecuador, Art. 14; Constitution of Haiti, arts. 253 and 254; Constitution of the United Mexican States, Art. 4; Constitution of the

¹ UN Special Rapporteur John H. Knox, ‘Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ A/73/188 (United Nations General Assembly, 19 July 2018); see also David R. Boyd, ‘Catalyst for change: evaluating forty years of experience in implementing the right to a healthy environment’, in John H. Knox and Ramin Pejan (eds.), *The Human Right to a Healthy Environment* (Cambridge, Cambridge University Press, 2018).

Republic of Nicaragua, Art. 60; Constitution of the Republic of Panamá, arts. 118 to 121; Constitution of the Republic of Paraguay, Art. 7, Constitution of the Republic of Perú, Art. 2(22); Constitution of the Bolivarian Republic of Venezuela, Art. 127). Some countries have even chosen to protect the environment itself (Constitution of Bolivia, Art. 33; Constitution of Ecuador, Art. 295; Constitution of Brazil revised in 1996, Art. 225). In some countries such as India, Nepal and Uganda, this right has also been used to fill gaps related to air pollution, plastic pollution and forest conservation. Thus, according to a report from former UN Special Rapporteur John H. Knox, “155 States have a binding legal obligation to respect, protect and fulfil the right to a healthy environment, while 36 States have expressed their support for the right to a healthy environment through non-binding international declarations”.²

b. At regional level

7. At regional level, the right to a healthy environment is referred to by several instruments such as the African Charter of Human and People’s Right (1981), with its Article 24 stating that “all peoples shall have the right to a general satisfactory environment favourable to their development”, whilst its Protocol on the Rights of Women in Africa (2003) states that women should have “the right to a healthy and viable environment” (Art. 18). The Additional Protocol to the American Convention on Human Rights (1988) similarly provides that “everyone shall have the right to live in a healthy environment and to have access to basic public services” (Article 11). Beyond those regional systems, it is worth noting that the right to a healthy environment is also mentioned in the Arab Charter on human rights of 2004 (Art. 38), whilst a right to a “safe, clean and sustainable environment” is entrenched in the ASEAN Human Rights Declaration of 2012 (para. 28.f).
8. Finally, it should be mentioned that the right to a healthy environment has also been incorporated in conventions focused on procedural environmental rights. This may be illustrated by the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), adopted by the United Nations Economic Commission for Europe in 1998 as part of the Environment for Europe process. The recognition of a right to a healthy environment is indeed evident through the Convention, and in particular through its preamble, which recalls Principle 1 of the Stockholm Declaration and recognises that “adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself”. Another similar example is the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazu Agreement), concluded in 2018 and which explicitly mentions the right to a healthy environment.

² Knox (n1), 13.

9. The case law of regional courts has also played a leading role in defining the scope of the right to a healthy environment. This is true in particular of the African Commission on Human and Peoples' Rights with regards to the case of *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*,³ where the Commission established direct state responsibility for environmental degradation caused by a private actor. This may be similarly illustrated by an Advisory Opinion of the Inter-American Court of Human Rights, in which the Court held that "a healthy environment is a fundamental right for the existence of humankind".⁴ It should finally be noted that although the European Convention on Human Rights does not recognise any right to a healthy environment, the European Court on Human Rights has sought to recognise this right on the basis of others rights enshrined in the Convention. Rather than relying on the collective approach to this right, adopted by the African and Inter-American systems,⁵ the Court has relied on an individual approach drawn from the right to life⁶ and the right to private and family life.⁷ In 2006, the European Committee on Social Rights adopted the same approach and interpreted Article 11 of the European Social Charter (right to protection of health) as including the right to a healthy environment.⁸

c. At international level

10. At international level, the right to a healthy environment has also gained widespread recognition since the adoption of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) in 1972. It is thus arguable that this right is part of the general principle of international law on the right to live in a sustainable climate system, the protection of which is notably ensured by the World Charter for Nature of 1982; the Rio Declaration of June 1992; the United Nations Framework Convention on Climate Change of 1992; the Kyoto Protocol of 1997 and the Paris Agreement of 2016. The role played by this general principle has wide consequences which may be witnessed as much at international level as in lower levels.
11. Accordingly, the implementation or recognition of a right to a healthy environment both at national, regional and international level militate in favour of its inclusion in Article 1, which will clarify the notion of environmental rights.

³ African Commission on Human Rights and Peoples' Rights, *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, n° ACHPR/COMM/A044/1 (27 October 2001); see notably para. 52.

⁴ Inter-American Court of Human Rights, *Advisory Opinion*, n° OC-23-17 (15 November 2017), para. 59.

⁵ For comments, see notably Kathia Martin-Chenut and Camila Perruso, 'La contribution des systèmes régionaux de protection des droits de l'homme à la pénalisation des atteintes à l'environnement' in Laurent Neyret (ed.), *Des écocrimes à l'écocide, le droit pénal au secours de l'environnement* (Bruylant 2015).

⁶ Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). See in particular European Court of Human Rights (ECtHR), *Öneryıldız v/ Turkey* n° 48939/99 (30 November 2004).

⁷ Art. 8 of the ECHR. See notably ECtHR *Lopez Ostra v. Spain*, n° 6798/9 (9 December 1994); *Taşkın and Others v. Turkey*, n° 46117/99 (10 November 2004), para. 107 and 112; *Fadeyeva v. Russia*, n° 55723/00 (30 November 2005).

⁸ European Committee on Social Rights, *Marangopoulos Foundation for Human Rights v. Greece*, n° 30/2005 (6 December 2006), para. 195.

(2) Procedural environmental rights

12. The mention of environmental rights should also be clarified by the addition of a reference to procedural environmental rights. Beyond the sole notion of the right to a healthy environment, some States have indeed included such procedural rights in their national law, which include the rights to receive information, the rights to participate in decision-making about environmental matters and to obtain access to justice system if the right to a healthy environment is being violated or threatened.⁹ Both the Aarhus Convention and the Escazu Agreement also illustrate the increasing attention attached to the information and participation of the population in environmental matters. Eventually, it should be mentioned that the role of environmental procedural rights has been made significant through decisions of the International Court of Justice (hereinafter ICJ). As early as the *Corfu Channel* case, the International Court of Justice enshrined the obligation of coastal States to inform other States of navigational dangers of which they were aware.¹⁰ In the case concerning the *Gabčíkovo-Nagymaros* project, the ICJ then focused in 1997 on reconciling economic development with its impact on the environment, specifying that this reconciliation has become one of the norms that States must take into consideration before planning new activities or implementing existing commitments, particularly in an international or transboundary context.¹¹ The ICJ further confirmed the obligation to carry out an environmental impact assessment, for industrial activities only, in two judgments of 2010¹² and 2015.¹³ Accordingly, the mention of procedural environmental rights should also be added to Article 1, on account of their growing recognition.

(3) Additional remarks

13. Two remarks remain to be made on Article 1.
14. Firstly, the wording “including regarding environmental rights” is questionable as it may seem redundant. It should be verified why the word “regarding” has been added and whether it is desirable not to suppress it from the Article. For instance, should it be kept because the expression “environmental rights” would then refer to “the enjoyment” rather than “human rights and fundamental freedoms”?
15. Secondly, it is worth noting that the draft refers to “environmental standards” rather than environmental rights in its Article 6.3 (e). To ensure a better clarity of the draft, it would be advisable to add the term “rights” next to the term “standards”.

⁹ See notably Knox (n1), para. 31.

¹⁰ ICJ, *Corfu Channel*, (United Kingdom v. Albania), Merits (9 April 1949).

¹¹ ICJ, *Projet Gabčíkovo-Nagymaros (Hungary v. Slovakia)*, (25 September 1997).

¹² ICJ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, (20 April, 2010).

¹³ ICJ *Construction of a Road in Costa Rica along the River Juan (Nicaragua v. Costa Rica)*, (16 December 2015).

Textual suggestions

16. “‘Human rights abuse’ shall mean any harm committed by a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights, such as the right to a healthy environment and procedural environmental rights.”

B. *Article 1.5*

“Business relationship” refers to any relationship between natural or legal persons to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State, including activities undertaken by electronic means.

Comments

17. The current definition of “business relationship” is not sufficiently precise. Indeed, it is defined as “any relationship” to conduct business activities. While the reference to affiliates, subsidiaries, agents, suppliers, etc. is relevant and important, the provision does not define what kind of relationship must exist between these actors to give rise to the due diligence obligation of enterprises. As a consequence, some States recommend reducing the scope of the provision. Indeed, since the definition of “business relationship” delimitates the scope of the due diligence obligation (Art. 6), it must be more predictable. Plus, an overly broad definition of business relationship could make the due diligence obligation unrealistic and impossible for enterprises to meet. This is why the French law on the duty of vigilance has established a threshold in the relationship between enterprises and their business partners that give rise to the obligation. However, the French law is far too restrictive as it requires a long and established relationship. Thus, while the type of relationship that gives rise to the obligation must be specified, it should not be excessively restricted, otherwise the treaty would lack effectiveness.
18. Enterprises should undertake human rights due diligence in their business relationships. However, for enterprises, the responsibility to ensure respect for human rights must be a function of their ability to influence the behavior of their business partners. The obligation should arise whenever the enterprise has the ability to influence the decisions or activities of individuals or other organisations such as agents, suppliers etc. It should be the duty of enterprises to act whenever they have leverage - whenever they are able to prevent risks and mitigate abuses committed by their business partners through their influence, for instance, by terminating the contract.

19. To specify the definition of “business relationship” and to include the notion of influence, the treaty could refer to the concept of “sphere of influence”¹⁴. The concept of sphere of influence rationalizes the ability of enterprises to exert influence. The concept makes the link between the influence exercised by enterprises and their duty of due diligence. This concept is well established and precisely defined (1). The use of this concept will give the necessary scope to the due diligence obligation (2), and in particular respond to the current obstacles of corporate liability (3). Finally, it will provide flexibility by introducing a gradation in the due diligence obligation and corporate responsibility (4).
20. First, this concept has been defined by the standard ISO 26 000. The concept is framed by objective criteria that take into account the characteristics of the sector, the company, the nature of the products and their production and marketing process (Section 7.3 of ISO 26 000). The enterprise’s ability to influence its stakeholders is derived from their involvement or interest in the company's value-producing activity. Additionally, the concept of “sphere of influence” is well established in international law. Many instruments refer to it such as the UN Global Compact in its first principle. More importantly, the OECD Guidelines for Multinational Enterprises mentions their influence in defining “enterprises”.¹⁵ Additionally, to define enterprises’ obligations, the Guidelines refer to their power of leverage to influence and consequently to prevent and mitigate adverse impacts on human rights. To comply with their obligations, enterprises must act within their sphere of influence.¹⁶ Plus, this concept has been used by the Court of Justice of the European Union in competition law.¹⁷ To conclude, the reference to a well-known and objectively defined concept would bring more in this provision.

¹⁴ See in particular, the United Nations report of John G. Ruggie, ‘Clarifying the concepts of “sphere of influence” and “complicity”’ (2008); Kate Macdonald, ‘Re-thinking “Spheres of Responsibility”: Business Responsibility for Indirect Harm’ (2010); Marie Navarre and Arnaud Peythieu, ‘Human rights and businesses: how can one assess the corporate responsibility to protect human rights?’ (ESG Analysis 2017); Boris Loeve ‘Analysis of the notions of "due diligence" and "sphere of influence" in the context of the respect of human rights by companies: challenges in defining the scope of application of CSR standards’ (French Ministry of Foreign and European Affairs, 22 March 2010), available at https://www.diplomatie.gouv.fr/IMG/pdf/Analysis_of_the_notions_of_due_diligence.pdf ; and Brigitte Pereira, ‘ISO 26000, Due diligence, sphere of influence and human rights’ (2014) 9:2 *Revue de l'organisation responsable*, 60-75.

¹⁵ See OECD, ‘OECD Guidelines for Multinational Enterprises’ (OECD Publishing, 2011), 17, available at <http://dx.doi.org/10.1787/9789264115415-en> : “A precise definition of multinational enterprises is not required for the purposes of the Guidelines [...] While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another”.

¹⁶ *ibid.*, p. 24: “Meeting the expectation in paragraph A.12 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact”. See also p. 33 : “Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impacts”.

¹⁷ Court of Justice of the European Union, third Chamber, *Akzo Nobel NV and Others v Commission of the European Communities*, C-97/08 P (1 September 2009).

21. Second, the object of the treaty is to regulate activities of business enterprises that threaten/may constitute a threat to human rights. Since the definition of “business relationship” delimitates the scope of due diligence, the definition should be able to capture the diverse and widely varying channels through which businesses affect human rights, both directly and indirectly. The concept of “sphere of influence” is adapted to the current disparity of forms of relationships and enterprises. Today, the absence of a definition of an enterprise creates a legal vacuum in terms of liability when the enterprise or corporation takes on an international dimension. The concept of “sphere of influence” enables to include activities of other entities whose activities are closely related to the core enterprise such as subcontractors and suppliers (ISO 26 000, Art. 7.3.1).
22. Third, the concept enables to overcome existing obstacles to corporate responsibility. Indeed, currently, the lack of legal understanding of corporate groups in national and international law prevents access to remedies for victims. In national laws principles such as the legal autonomy of subsidiaries or the relative effect of conventions constitute obstacles to reparation. Yet, once the adverse impact has occurred within the sphere of influence of the corporate group, the core enterprise should be able to be held liable. With regards to the activities of enterprises in countries without any human rights regulation, the concept of sphere of influence constitutes a guarantee of respect for human rights. This is a response to the lack of regulation in certain states where activities are located.
23. Finally, the application of this concept together with the concept of due diligence introduces a necessary gradation in corporate responsibility. Indeed, the responsibility to respect human rights must be a function of the capacity to influence in relation to those same circles of influence. At the same time, the concept is suited to a proactive approach to the respect of human rights as it invites enterprises to play a positive role (ISO 26 0000, Art. 6.3.1.2).

II . ARTICLE 3 – SCOPE

A. Article 3.1

Unless stated otherwise, this (Legally Binding Instrument) shall apply to all business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character.

Comments

24. The confirmation of the widening of the scope of the instrument must be approved. The approach taken can be described as a “hybrid” approach¹⁸: it allows the instrument both to focus on addressing business activities of a transnational character and to prevent the form of a business enterprise from permitting it to evade its human rights accountability.
25. However, in order to dispel any doubts on the scope and for the coherence of the instrument as a whole, there is a need to expressly add a reference to “State-owned enterprises”,¹⁹ already included in the definition of “business activities” in Article 1.3.
26. Also, in order to clarify or deny the existence of certain exceptions to the personal scope, the expression “unless stated otherwise” should either be suppressed or clarified. As is, the provision suggests that there are certain exceptions without specifying in which cases or under which criteria those exceptions could apply.

Textual suggestions

27. “This (Legally Binding Instrument) shall apply to all business enterprises, including but not limited to transnational corporations, **State-owned enterprises** and other business enterprises that undertake business activities of a transnational character.”

B. Article 3.2

Notwithstanding Art 3.1 above, when imposing prevention obligations on business enterprises under this (Legally Binding Instrument), State Parties may establish in their law, a nondiscriminatory basis to differentiate how business enterprises discharge these obligations commensurate with their size, sector, operational context and the severity of impacts on human rights.

¹⁸ Trade Union Comments (UNI, IndustriALL, BWI, IUF, ITF, PSI, ITUC CSI, IE), ‘Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’ (October 2020), 3. Available at: [https://www.ituc-csi.org/IMG/pdf/legally_binding_instrument_en.pdf]

¹⁹ IOE, ‘Position on the second revised binding treaty on business and human rights’, (7 October 2020), 2. Available at: [https://www.ioe-emp.org/news/details/final-position-paper-on-the-second-revised-treaty-on-business-and-human-rights]

Comments

28. The provision needs clarification as a whole: on the one hand, it may allow States to focus on activities that present the most risks in terms of human rights impact, and on the other hand, it may allow a lighter treatment of human rights abuses committed by “less powerful” enterprises.
29. In order to please the various stakeholders, a solution could be to add a clause ensuring uniformity of requirements on enterprises according to their actual capacities which will guarantee equal treatment in the application of the instrument²⁰.

C. Article 3.3

This (Legally Binding Instrument) shall cover all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law.

Comments

30. To begin with, all international human rights treaties should be included in the material scope of the instrument. In that sense, the expression “any core international human rights treaty” seems to exclude those without a treaty body²¹ and should be replaced by the expression “any international human rights treaty”.
31. Also, the expression “to which a State is a party” gives rise to several problems.²² Firstly, it seems useless regarding the fundamental ILO conventions given that all ILO member States have recognized the fundamental rights and principles set out in the ILO Declaration on Fundamental Principles and Rights at Work adopted in 1998 (and revised in 2010)²³. Moreover, under the ILO Constitution,²⁴ every ILO member State has the obligation to report on all conventions whether it has ratified it or not, as well as on ILO recommendations. Secondly, regarding all the international instruments it refers to “Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention”, the expression could allow an enterprise to rely on different sets of human rights standards depending on the country in which it undertakes its business activities. In order to prevent such a situation, the expression should be deleted from the provision and replaced by a reference to “relevant provisions” of those instruments.

²⁰ See IOE (n19), 2; and also Ecuador, ‘Sexta Sesión de trabajo intergubernamental de composición abierta con el mandato de elaborar un instrument internacional jurídicamente vinculante sobre embresas transnacionales y otras empresas con respecto a los derechos humanos’ (27 October 2020).

²¹ CNCDH, *Avís de suivi sur le projet d’instrument juridiquement contraignant sur les sociétés transnationales et autres entreprises et les droits de l’Homme*, A-2020-14 (15 October 2020), 7.

²² See notably F4BT, ‘Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights’ (October 2020); or ECCHR, ‘Statement during the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises’ (27 October 2020).

²³ ILO Declaration on Fundamental Principles and Rights at Work (1998, revised in 2010).

²⁴ ILO Constitution, Articles 19. 5.e, 19.6.d and 22.

32. Support must be expressed for the inclusion of “customary international law” in the provision as it is consistent with Article 38 of the ICJ Statute. Besides, it is mentioned in Article 8.9 of the instrument on criminal or functionally equivalent liability of legal persons but should also be included in Article 14 on the conformity of the instrument with international law.
33. In order to improve the consistency with Article 1.3 on the definition of “human rights abuse” and with the instrument’s reference to the 2030 Agenda for Sustainable Development, environmental rights should be expressly mentioned in the provision.²⁵
34. Finally, regarding the provision as a whole, a wording similar to Principle 12 of the UN Guiding Principles²⁶ could set out a minimum standard that would avoid a dispersion of criteria and otherwise probably lead to a consensus among the stakeholders. Indeed, the provision would not establish the ratification of a specific treaty by the State as a condition for rights to be included in the material scope of the instrument but would include, at a minimum, the rights expressed in the International Bill of Human Rights (Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Right) which benefits from a worldwide influence.

Textual suggestions

35. “This (Legally Binding Instrument) shall cover all internationally recognized human rights ~~and fundamental freedoms emanating from the Universal Declaration of Human Rights~~, which include the rights set out in the International Bill of Human Rights, any ~~core~~ relevant provisions of international human rights treaty and of fundamental ILO convention ~~to which a state is a party and~~ , the fundamental rights and principles set out in the ILO's Declaration on Fundamental Principles and Rights at Work, as well as customary international law, and environmental rights.”

²⁵ CNCDH (n21), p. 7.

²⁶ United Nations, ‘Guiding principles on Business and Human Rights’ (2011), Principle 12: “The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International labour Organization’s Declaration on Fundamental Principles and Rights at Work”.

III . ARTICLE 6 – PREVENTION

A. Article 6.1

State Parties shall regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction, including those of a transnational character. For this purpose States shall take all necessary legal and policy measures to ensure that business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character, within their territory or jurisdiction, or otherwise under their control, respect all internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations.

Comments

36. First, reference should be made to the existing instruments such as the Guiding Principles of the United Nations, the Principles of the OECD Guidelines and the ILO Declarations.
37. Second, there are inconsistencies between the terms used in the project and the terms used in the UN Guiding Principles and the OECD Guidelines which talk about “prevent and mitigate adverse human rights impacts”. Indeed, “impacts” and “abuses” do not refer to the same thing. According to the interpretive guide of the UN Guiding Principles on Business and Human Rights endorsed by the Office of the United Nations High Commissioner for Human Rights (OHCHR), “impacts” refers not only to actual human rights impacts, but also to potential human rights impacts. On the contrary, “abuses” mean that harm occurred. Therefore, the term “abuses” is substantially more restrictive in scope than the term “impacts”, since it excludes any adverse impacts that may occur but has not yet done so.
38. As the UN Guiding Principles distinguish between actual and potential human rights impact, due diligence should refer to the term “risks” to cover the range of situations where human rights may be at stake and to improve consistency with those core principles. Indeed, “risks” are defined as “potential adverse human rights impacts” according to commentary of the UN Guiding Principle 17. In this regard, the General Comment n°24 on State obligations under the International Covenant on Economic, Social and Cultural Rights of the ESCR Committee in the context of business activities explains that prevention and mitigation of the risks tend to avoid human rights being abused (para. 16).
39. Yet, it is important for enterprises to prevent risks a priori and then to mitigate the eventual negative impacts *a posteriori*. Otherwise, it will implicitly enable business enterprises to take risks if they mitigate their impacts. In the context of protection of human rights, risks cannot be taken. Due diligence has to be initiated at the earliest stage possible to be effective as agreed in UN Guiding Principle 7: “Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships”. Similarly, the General policies chapter of the OECD Guidelines talks about prevention of risks and mitigation of remaining impact “if

the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible.” Their due diligence must be “risk-based”.

40. Thus, States Parties should promote identification and prevention of risks as well as strengthening mitigation of human rights adverse impact. The duty of States to protect human rights requires States to ensure that enterprises have a double obligation. Enterprises must prevent any risks of adverse impacts of their activities and, if taken, mitigate any adverse impacts on human rights.

Textual suggestions

41. “State Parties shall regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction, including those of a transnational character. For this purpose States shall take all necessary legal and policy measures to ensure that business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character, within their territory or jurisdiction, or otherwise under their control, respect all internationally recognized human rights and prevent risks and mitigate any adverse impacts throughout their operations.”

B. Article 6.2

For the purpose of Article 6.1, State Parties shall require business enterprises, to undertake human rights due diligence proportionate to their size, risk of severe human rights impacts and the nature and context of their operations, as follows (...).

Comments

42. The obligation to undertake human rights due diligence shall apply to all business enterprises of any kind. Indeed, just like the UN Guiding Principle and the OECD Guidelines (para. 37), the Preamble states that all business enterprises have the responsibility to respect human rights. The current formulation of the provision is ambiguous and suggests that the responsibility depends on these factors. Yet, the United Nations Guiding Principles notably states that “only the scale and complexity of the means through which enterprises that responsibility may vary”. Accordingly, all business enterprises are subject to the obligation to undertake human rights due diligence notwithstanding factors such as its size, nature, sector, location, operations (1). These factors can only be taken into account because they are a function of a greater risk of human rights abuses. Thus, they can be used to strengthen the due diligence for high-risks enterprises (2), to adopt incitative measures (3) or to reinforce the obligation of States to ensure the effectiveness of procedures with regard to enterprises most at risk (4).

43. First, the current wording of the provision could lead to the creation by States of a threshold for the enterprise to be subject to due diligence. This is the case of the French legislation on the duty of vigilance, which establishes such a threshold. As a consequence, some business enterprises in high-risk or high-density sectors are not subject to the law. In the same way, the thresholds are easily circumvented by the parent companies and their subsidiaries in view of the persistent lack of communication by the companies of their workforce.
44. Second, if factors such as the size of companies and the nature and context of their operations are to be taken into account, this would be to strengthen the due diligence of certain enterprises only where these factors are proportionate to the risks of human rights abuses. Such interpretation has already been affirmed in the OECD Guidelines.²⁷
45. Third, these factors can be taken in account when states provide incentive measures to ensure compliance with this due diligence (para. 4). Indeed, if all business enterprises are subject to the same obligations, smaller ones should be helped by States to comply with them.
46. Finally, factors such as the size, nature, sector, location and operation context of enterprises can be taken into account to strengthen the obligation of States to control the effectiveness of the procedures (para. 5).

Textual suggestions

47. “For the purpose of Article 6.1, State Parties shall require business enterprises, to undertake human rights due diligence **regardless of** their size, risk of severe human rights impacts and the nature and context of their operations, as follows.”

C. Article 6.3

State Parties shall ensure that human rights due diligence measures undertaken by business enterprises under Article 6.2 shall include: (...).

Comments

48. The relationship and structuring of paragraphs 6.2 and 6.3 is not clear. In the event that the “due diligence measures” in Article 6.3 refer specifically to measures as defined in Article 6.2 (b), it would be advisable to refer to them more clearly in Article 6.3.

Textual suggestions

49. “State Parties shall ensure that human rights due diligence measures undertaken by business enterprises under Article 6.2**(b)** shall include: (...).”

²⁷ See OECD Guidelines, para. 40: “In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention” In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention”.

D. Article 6.3 (c)

Conducting meaningful consultations with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas;

Comments

50. First, many States expressed a desire to introduce more examples relating to the categories of individuals to be consulted by enterprises. In particular, Panama proposed to include people of African descent and older persons; Egypt proposed to include peasants and rural communities; Chile proposed to include LGBTI populations. Their inclusion in the draft treaty would make it possible to diversify the examples already proposed, provided, however, that the list of examples is not exhaustive.
51. Second, the wording “meaningful consultations” is questionable since it does not guarantee that companies will take into account the demands expressed by the individuals or groups of individuals consulted. In order to ensure, on the one hand, that a dialogue with these groups of individuals is established and, on the other hand, that the results of this dialogue are integrated into the measures taken by enterprises as part of their duty of care, it would be advisable to modify the beginning of Article 6.3, for example as follows: “implementing the results of mandatory consultations”.
52. Third, insofar as Article 6.3 (d) seems to specify, in accordance with existing standards, the way in which consultations with indigenous peoples should be carried out, it would be interesting to insert a provision that would also clarify the way in which consultations with other categories of individuals should be carried out. The proposed amendment to Article 6.3 (c) is indeed likely to remain insufficient as to the nature of such consultations. On this point, it would be possible to take over the principles set out in existing Conventions, in particular ILO Convention No. 169 (Article 6). The provision to be added could be worded as follows:

Ensuring that consultations with individuals and communities are carried out in good faith and in a forum appropriate to the circumstances, and led with appropriate procedures and in particular through their representative institutions.

Textual suggestions

53. “Implementing the results of mandatory consultations, with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, while giving special attention to those facing heightened risks of business-related human rights abuses, including, but not limited to, women, children, persons with disabilities, older persons, peasants and rural communities, indigenous peoples, people of African descent, migrants, refugees, LGBTI populations, internally displaced persons and protected populations under occupation or conflict areas;”.

E. Article 6.3 (e)

Reporting publicly and periodically on non-financial matters, including information about group structures and suppliers as well as policies, risks, outcomes and indicators on concerning human rights, labour rights and environmental standards throughout their operations, including in their business relationships;

Comments

54. As mentioned in the commentary on Article 1, environmental “standards” should be replaced by “environmental rights” so as to match with the reference to environmental rights in Article 1.
55. Furthermore, it should be added an obligation to report these information in a clear, visible and accessible document, as required by the Guide of the United Nations Convention against Corruption (2005) developed by the United Nations Office on Drugs and Crime (UNODC) for anti-corruption ethics and compliance programmes of companies (UNCAC, Articles 5, 10, 13). Otherwise, the report may be embedded in other management reports of the enterprise that are readable only by investors or professionals. Rather, the interest of such a disposition is to promote transparency to the public, knowing that enterprises’ reputation encourage compliance. For instance, a similar disposition contained on the French law on the duty of vigilance is not effective since enterprises incorporate such information into the financial report which is not readable for the public.

Textual suggestions

56. “Reporting publicly and periodically on non-financial matters in a clear, visible and accessible document, including information about group structures and suppliers as well as policies, risks, outcomes and indicators on concerning human rights, labour rights and environmental standards and rights throughout their operations, including in their business relationships;”.

F. Article 6.4

States Parties may provide incentives and adopt other measures to facilitate compliance with requirements under this Article by small and medium sized business enterprises conducting business activities.

Comments

57. This provision goes hand in hand with the amendment made to Article 6.2. Indeed, as enterprises are subject to the same obligation to respect human rights regardless of their size, sector of activity, it is advisable that States facilitate the implementation of preventive measures by small and medium sized business enterprises.

G. Article 6.5

State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential human rights abuses resulting from the business enterprises' size, nature, sector, location, operational context and the severity of associated risks associated with the business activities in their territory or jurisdiction, or otherwise under their control, including those of transnational character.

Comments

58. As States' resources are limited, they need to concentrate or monitor more closely the compliance by enterprises most at risk. In order to characterise the enterprises most at risk, States take into account criteria such as the size, sector of activity, location and operational sector of the company.

Textual suggestions

59. "State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, this requirement being strengthened where the size, nature, sector, location, operating environment and nature of the activities of enterprises within their territory or jurisdiction or otherwise under their control, including those of a transnational nature, are conducive to a greater risk of human rights abuses."

IV . ARTICLE 9 – ADJUDICATIVE JURISDICTION

A. General comment

Comments

60. In order to avoid the risk of the use of jurisdiction by corporations, a new provision should be added after Article 9.5. Its purpose would be to expressly exclude the possibility of the second court seized staying proceedings in the event that the plaintiff at first instance seeks a declaration that it has no obligation towards the plaintiff at second instance. Indeed, a corporation could bring an action before a court first to have its lack of liability established and to thwart the plaintiffs' action before another court. This new provision would thus aim to protect the effectiveness of the right of recourse provided for in the draft treaty.
61. Article 21.6 of the Preliminary Draft Treaty on Jurisdiction and Foreign Judgments in Civil and Commercial Matters thus provided that the *lis pendens* exception is excluded “if, before the court first seized, the plaintiff's action seeks a declaration that he is under no obligation towards the defendant and that, before the court second seized, an action on the merits has been brought”. In other cases, the court seized may stay the proceedings until the first court has given its decision. Where appropriate, recognition of the judgment should be assessed in accordance with the rules of fair trial and public policy. This is provided for in Articles 509 to 509-7 of the French Code of Civil Procedure: judgments must have been duly handed down by a court or an authorized foreign judicial authority, in compliance with the rules of procedure and in accordance with national public policy.

Proposed additions

62. “1. The court, seized of an action by victims of a human rights abuse, may not decline jurisdiction, nor stay the proceedings when a first action by the plaintiff has been brought with a view to establishing his or her lack of liability.
2. In other cases, the second court hearing the case stays proceedings and waits until the first court gives its decision. The first court will assess the recognition of the decision in accordance with the rules of fair trial and its national public policy.”

B. Article 9.2

Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal person conducting business activities of a transnational character, including through their business relationships, is considered domiciled at the place where it has its:

- a. place of incorporation; or*
- b. statutory seat; or*
- c. central administration; or*
- d. principal place of business.*

Comments

63. With the development of digital technology, corporations may have commercial interests in states where they have no establishment. For example, a corporation may generate a major part of its turnover through the sale of its products or services over the Internet to nationals of a State in which it has no physical presence.
64. The notion of substantial business activities thus makes it possible to adopt a broader definition of domicile which takes into account the evolution of economic societies. Thus, this notion includes both the place of the Company's principal place of business and the place in which the Company has an interest even though it is not physically present there.
65. This is also the concept adopted by the Committee on the Rights of the Child in its General observation No 16 : “a reasonable link exists when a business enterprise has its center of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned”.²⁸ This position is also in line with the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights:

States must adopt and enforce measures to protect economic, social and cultural rights, [...] in each of the following circumstances : [...] c) as regards business enterprises, where the corporation, or its parent or controlling company, has its center of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned (Principle 25).

Textual suggestions

66. “Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal person conducting business activities of a transnational character, including through their business relationships, is considered domiciled at the place where it has its:
- a. place of incorporation; or
 - b. statutory seat; or
 - c. central administration; or
 - d. ~~principal place of business~~ **substantial business activities;**”.

C. Article 9.4

Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is closely connected with a claim against a legal or natural person domiciled in the territory of the forum State.

²⁸ Committee on the Rights of the Child, ‘General comment no. 16 (2013 on State obligations regarding the impact of the business sector on children’s rights’, CRC/C/GC/16 (17 April 2013).

Comments

67. Thus, States Parties should promote identification and prevention of risks as well as strengthening mitigation of human rights adverse impact. The duty of States to protect human rights requires States to ensure that enterprises have a double obligation. Enterprises must prevent any risks of adverse impacts of their activities and, if taken, mitigate any adverse impacts on human rights.
68. Rather than giving a precise definition of the concept, at the risk of confining it, it seems more relevant to give only the outlines of the concept in order to leave the judge a margin of appreciation.
69. The draft treaty requires that complaints must be “closely connected” and not “so closely connected” as is the case in Article 6.1 of Regulation No 44/2001. Thus, the required connection is to a lesser degree than in EU law. The Court of Justice of the European Union, in the *Painer* case,²⁹ provides some interesting insights. According to it, there is a connection between different claims, that is to say a risk of irreconcilable judgments if those claims were determined separately, the identical legal bases of the actions brought is only one relevant factor among others (para. 79). It adds that it is not necessary for the legal basis of the applications to be the same (para. 80).
70. In the case of *Akpan v Shell*,³⁰ the Court of Appeal of The Hague considered that the complaints were sufficiently connected to be judged together on the basis of a cluster of evidence. In particular, it relied on the fact that “between defendants, held liable as the joint and several parties at fault, there exists a group link, in which the acts and omissions of SPDC as a group company play an important role in the assessment of the liability/obligation, if any, of RDS as top holding” (para. 3.4). In this case, the facts and content of the claims were also the same (para. 3.4). Therefore, following this case law, two complaints can be closely connected when the parent company is bound by a duty of due diligence and the factual basis and subject-matter of the complaints are the same.

D. Article 9.5

Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection to the State Party concerned.

²⁹ Court of Justice of the European Union, third chamber, *Painer*, ECLI:EU:C:2011:798 (1 December 2011).

³⁰ Court of Appeal of The Hague, *A.F. Akpan v. Royal Dutch Shell, PLC*, ECLI:NL:RHBDA:2013:BY9845 (18 December 2015).

Comments

71. As of today, the forum of necessity is recognised as a general principle of public international.³¹ Indeed, many legislations have enshrined it. However, a comparative analysis of these legislations tends to show that none of them uses the term “sufficiently close connection”.
72. Terms used are: “sufficient connection” by the Dutch Court;³² “sufficiently connected”;³³ “sufficient connection”;³⁴ “close connection”;³⁵ “adequate relation”³⁶ or “strong linking factor”.³⁷ But none of the legislation mentioned define what constitutes such connections.
73. In view of the object and purpose (to prevent any risk of denial of justice) of this provision, the concept should not be interpreted strictly. This is, moreover, the position of the Belgian courts, for whom the mere fact that the plaintiffs had assets in Belgium was sufficient for the courts to declare themselves competent. It is also the position of the Quebec courts. In principle, Quebec courts have extraterritorial jurisdiction when plaintiffs demonstrate a real and substantial connection. The forum of necessity in Article 3136 of the Civil Code is an exception to this principle with respect to “the impossibility of having access to a foreign court in a litigation that has a sufficient link with Québec”.³⁸ Accordingly, the degree of connection is less than that of the real and substantial connection in principle.
74. The preamble recalls the right of everyone to have effective and equal access to justice and remedy in case of violations of international human rights law or international humanitarian law. From this perspective and following the Quebec position, the term “sufficient connection” seems more adequate than “sufficiently close connection” which introduces an additional degree of connection when the purpose of the provision is to avoid a denial of justice.

Textual suggestions

75. “Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial is available and there is a ~~sufficiently close connection~~ **sufficient connection** to the State Party concerned.”

³¹ Arnaud Nuys, ‘Study of Residual Jurisdiction: Review of the Member States’ Rules concerning the “Residual Jurisdiction” of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations’ (General Report, JLS/C4/2005/07-30-CE/0040309/00-37, 3 September 2007).

³² See Mirjam Freudenthal and Frans van der Velden, ‘The Netherlands’ in JJ Fawcett (ed.), *Declining Jurisdiction in Private International Law: Reports to the XVIth Congress of the International Academy of Comparative Law* (Athens, August 1995).

³³ Swiss Federal Code on Private International Law, Art. 3.

³⁴ Code Civil of Quebec, Art. 3136.

³⁵ Belgium Code of Private International Law Code, Art. 11.

³⁶ In Poland. See Nuys (n31).

³⁷ In Portugal. See Nuys (n31).

³⁸ Supreme Court of Canada, *Lamborghini (Canada) Inc. v. Automobili Lamborghini SPA*, RJQ 58 (1997), para. 48.

Background information on the Paris Human Rights Center and the authors of the submission

The *Paris Human Rights Center* (*Centre de recherche sur les droits de l'homme et le droit humanitaire – CRDH*, dir. Prof. O. de Frouville) is an academic research center, located at the University Paris II Panthéon-Assas. Since 1995, it has been developing a research project characterized by an integrated vision of all norms and institutions of international law related to the protection of human rights. It hosts both collective and individual research, by providing supervision and support for PhD students³⁹ and through a Master's program in human rights and humanitarian law (dir. Pr. S. Touzé).

The **Assas International Law Clinic (CDIA / AILC)** was founded in 2019. It is open to the participation of students in their final year of studies at *Paris II Panthéon-Assas* University, mainly those in the "*Master 2 Droits de l'Homme et Droit Humanitaire*" as well as the "*M2 Justice Pénale Internationale*". Clinic participants are given the opportunity to gain practical experience by collaborating with various institutional partners active in the fields of interest of the Clinic.

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³⁹ For more details on the Center's activities, see <http://www.crdh.fr/>.

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