

UN SHARPENS DRAFT TREATY ON BUSINESS AND HUMAN RIGHTS

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Legal Briefings – By **Antony Crockett** and **Alisha Matthew**

The group drafting a new UN treaty adds to global pressure for mandatory human rights due diligence, expanded duties for corporates and better remedies for victims.

The Intergovernmental Working Group on transnational corporations and other enterprises with respect to human rights (“**Working Group**”) has recently released the [third draft](#) of a proposed business and human rights treaty.

The Working Group was established by the United Nations Human Rights Council in 2014 with a mandate to develop a treaty on business and human rights (see our earlier post [here](#)). The Working Group will meet from 25 to 29 October 2021 to discuss the revisions.

The latest draft has been published just two months after the 10th anniversary of the [United Nations Guiding Principles on Business and Human Rights](#) (“**UNGPs**”). While the UNGPs were unanimously endorsed by all the member States of the Human Rights Council, a significant number of States abstained or voted against the resolution to establish the Working Group. In discussions regarding previous drafts of the treaty, a range of contentious issues have emerged including whether the treaty would apply to all business enterprises, or only transnational corporations, as well as the nature and extent of the obligations to be imposed.

Reaching a consensus on those issues and others raised by the latest draft will take time. Meanwhile, continued regulatory focus on ESG across the globe is likely to result in domestic legislative reforms moving ahead of the treaty discussion.

WHAT'S IN A NAME?

Formally, the draft treaty is entitled "*Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*". All treaties, of course, are legally binding under international law. The explicit reference to the legally binding nature of the instrument in this context appears intended to emphasise that, unlike the UNGPs, a treaty would expressly define new legal obligations for the State parties.

International human rights law already imposes obligations on States which are relevant to the regulation of corporate activity. For example, international human rights law protects various labour and employment rights, the right to privacy and the right to health.

The existing legal obligations of States to protect human rights form the foundation for the first pillar of the 'protect, respect and remedy framework' on which the UNGPs were based. In particular, the UNGPs emphasise that States' have a legal duty to protect against human rights abuse by third parties, including business enterprises.

The UN Human Rights Committee has described the State obligation to protect human rights in similar terms and, further, as entailing a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence to identify, prevent and mitigate the risk of violations of economic, social and cultural rights.

IF STATES ARE ALREADY OBLIGED TO PROTECT AGAINST BUSINESS RELATED HUMAN RIGHTS ABUSES, WHY IS A NEW TREATY NEEDED?

The stated purpose of the treaty is to, among other things, "*clarify and facilitate effective implementation of the obligation of States to respect, protect, fulfil and promote human rights in the context of business activities, particularly those of transnational character*" (art. 2.1).

The draft seeks to achieve this purpose by imposing obligations on State Parties to take certain steps to ensure that businesses respect existing human rights. It does this by foremost requiring State Parties to regulate the activities of businesses "*within their territory, jurisdiction, or otherwise under their control, including transnational corporations and other business enterprises that undertake activities of a transnational character*" (art. 6.1). This language marks a change from the previous iteration of the draft, which used the term "**domiciled** within...".

In terms of the type of regulation contemplated, the draft treaty proposes a State obligation to introduce laws or regulations to make human rights due diligence mandatory for businesses (art. 6.3). While the second iteration of the draft only mandated human rights due diligence in relation to environmental and human rights, the third draft requires due diligence to cover “*human rights, labor rights, environmental and climate change impact assessments*” (art. 6.4(a)). The draft treaty also requires States to mandate reporting on non-financial matters, such as group structures and suppliers, and policies, risks, outcomes and indicators regarding human rights, labour rights, and health, environmental and climate change standards (art. 6.4(e)).

If regulations of this type sound familiar, that is because they are precisely the sorts of measures recently introduced or under consideration in various States.

For example, the 2017 French Law on the Corporate Duty of Vigilance makes it mandatory for large companies to take steps to identify and avoid the risk of harm to human rights and the environment (a snapshot of the law is available [here](#)). Germany and Norway have passed similar legislation recently and a proposed EU-wide mandatory ESG due diligence framework, also encompassing human rights due diligence, is taking shape (as we discuss in previous posts [here](#) and [here](#)).

Non-financial reporting requirements covering human rights issues have become relatively widespread, including in Europe, the Americas and the Asia-Pacific.

These developments have occurred notwithstanding the lack of express treaty obligations. In that sense it is not clear a new treaty is needed. It cannot be excluded, however, that a new international accord might lead to even more rapid regulatory reform.

WHAT DOES THE DRAFT TREATY SAY IN RELATION TO REMEDIES AND LIABILITY?

The draft treaty also envisages an obligation on States to provide victims of business-related human rights abuse with access to remedies in the courts and via non-judicial mechanisms (art. 7.1).

States would be obliged to ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights abuses arising out of the business activities or business relationships of legal and natural persons (art. 8.1).

For example, the draft treaty continues a provision which would require States to adopt laws that ensure liability for failing to protect another person with whom they have a business relationship from causing or contributing to human rights abuses, where the former controls, manages or supervises such person or the relevant activity, or should have foreseen risks of human rights abuses (art. 8.6).

WHAT ARE THE PROSPECTS OF THE TREATY BEING ADOPTED?

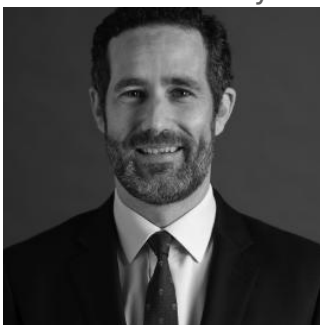
The Working Group was established with an expressly "open-ended" mandate, perhaps recognising that achieving international consensus on a business and human rights treaty will be a long term project. Seven years and three drafts later it seems unlikely that a consensus will be reached at the October meeting or even in the medium term.

Nevertheless, the latest draft reflects developments which are already seen at domestic level, in particular the introduction of mandatory human rights due diligence obligations for corporations. Claims by victims of business-related human rights in national courts and via existing non-judicial grievance mechanisms are also increasingly commonplace and there is evidence that courts are more likely to agree to hear these claims than once was the case.

International law is not only developed through treaty making. A general and consistent practice of States over time may result in the crystallisation of customary international law norms reflecting that practice. The introduction of mandatory human rights due diligence legislation is not so widespread or consistent to conclude that States view regulation of this nature as a matter of international legal obligation. But developments in relation to the introduction of mandatory human rights due diligence rules have moved ahead of the treaty-making process and may yet accelerate. As we have said before on this blog, progress creeps up on you.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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