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Report on the eighth session of the UN open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights (“treaty”)

by Karolin Seitz

Since 2014, the United Nations (UN) Human Rights Council in Geneva has been negotiating an internationally binding agreement on business and human rights – also known as the UN Treaty. From October 24–28, 2022, the intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights (OEIGWG) met for the eighth time. The countries of the global South

as well as the major industrialized nations were present at the meeting. New informal proposals by the Ecuadorian Chair caused initial confusion in the negotiations. With the G7’s commitment in June 2022 to an international binding standard, the formation of the “Friends of the Chair” group, the U.S. government now co-negotiating, and the prospect of a European Union negotiating mandate, the process has gained new weight and momentum.

As in previous years, the eighth session of the intergovernmental working group was opened by the UN High Commissioner for Human Rights. **Volker Türk**, newly appointed UN High Commissioner for Human Rights in September 2022, pointed to the multiple crises. He described that “in some cases, business has taken advantage of times of crisis for their own gain, which, in an uncontrolled/unregulated environment, can aggravate human rights abuses”. By coming together at the eighth session on the UN treaty, he said, States, civil society and business would recognize that additional measures would be required “to improve government accountability for ensuring human rights are respected by business enterprises and improve access to effective remedies for those harmed by business-related activities”. He called on States from across all regions to engage constructively in the negotiations.

In addition, he stressed the importance of civil society participation in the process, their expertise and contributions. At the same time, however, he stated that it was necessary to have the business community at the table as well. In contrast, given the experience of civil society organizations with strong

business lobbying in national and **regional** business and human rights regulatory processes as well as **in other policy areas**, and the **decades-long (successful) business lobby against binding human rights regulation of business at global level**, many organizations warn against the involvement of business associations and companies in the process. Some are calling for the complete exclusion of corporations and their advocacy groups from the negotiations, as provided, for example, in Article 5.3 of the World Health Organization’s (WHO) **Framework Convention on Tobacco Control**, which protects the development of new health policies from the tobacco lobby.

The Friends of the Chair Group and new proposals from the Chair

During the seventh session of 2021, States had agreed to convene a group of ambassadors from different countries to continue work on the draft agreement. This group, called “Friends of the Chair,” was to hold consultations on specific provisions of the draft during the intersessional period. However, the Ecuadorian Chair was not successful in initiating such a group in advance of the eighth

session because not each of the five UN regional groups (Africa, Asia-Pacific, Latin America and the Caribbean, Western Europe and Other States [WEOG], Eastern Europe) designated representation. Azerbaijan, France, Indonesia, Portugal, and Uruguay had indicated their willingness, but an African country was missing.

It was planned that the subgroup would develop consensus proposals. Since the subgroup could not yet begin its work in the absence of African representation, there were no new proposals. As a result, the Ecuadorian Chair submitted a set of [own proposals for Articles 6–11](#), just a few weeks before the eighth round of negotiations. Neither had the Ecuadorian Chair been tasked with drafting his own new textual proposals by States, nor was the proposal based on States' negotiations and comments from previous years. While the Chair's proposals appear better structured, a number of key aspects that are essential for effective human rights and environmental protection in the globalized economy [have been dropped](#). In a joint statement, the international Treaty Alliance, The Global Campaign, The ESCR-Net, Feminists for the Binding Treaty, and Youth Friends of the Treaty rejected the Chair's proposals as entirely inadequate and [called](#) for negotiations to be conducted solely on the basis of the [Third Revised Draft](#). Many countries, in particular the African Group, as well as other countries from the global South, called for this too. The Third Revised Draft was based on the previous rounds of negotiations and had also been commented on by States during the seventh round in 2021.

At the beginning of the negotiations, some countries asked the Chair to clarify which document was now the basis for negotiations during the week. For example, the U.S., Mexico and Panama in particular had initially [commented](#) on the Chair's proposals. There was back and forth between the Third Revised Draft and the Chair's proposals. It was only when some State representatives complained on the third day that the Chair declared the Third Revised Draft as the sole basis for negotiation, but that States could propose to incorporate individual proposals of the Chair into the draft agreement. States, including the U.S., then commented on the Third Revised Draft. At the beginning, the U.S. had rejected it completely.

Participation and positions

The global trend toward human rights regulation of business activities, the need to improve access to justice for people affected by corporate human rights abuses, and the relevance of the UN process for developing common global standards in this area are now clear to most countries. Thus, during the eighth round, all the “big players” were in the negotiating room – starting with the U.S., the EU, Australia, United Kingdom and Japan, and including India, China, Brazil and Russia. The countries of the global South continue to provide significant support and backing for the process. A total of 66 UN Member States and Palestine (with observer status) took part in the eighth session. Participation thus fell to the 2020 level, having risen to 69 countries in 2021. However, Côte d'Ivoire spoke on behalf of the African Group, which consists of 54 countries, and the EU representation spoke on behalf of its 27 Member States.

Australia and Norway showed up in the negotiating room for the first time in 2022, but expressed major concerns about the current draft agreement and the process right at the beginning. They did not take the floor again in the following days.¹ The United Kingdom and Japan also presented clearly skeptical statements and joined the position of the U.S. representation.

The **U.S.** participated in the negotiations for the second time, now even with three delegates. Although they continued to have concerns about the current draft agreement, the **U.S. delegation** stated that they would participate constructively in the negotiations and negotiate in good faith. They made several comments and proposed amendments to the various articles of the Third Revised Draft. The U.S. representative shared the view of the intergovernmental working group that more needs to be done to build on the UN Guiding Principles on Business and Human Rights (UNGPs), particularly with regard to climate change and better protection of human rights defenders. Overall, however, the U.S. believes that a less prescriptive approach, in the form of a framework agreement, would be a better option. They welcomed the new proposals by the Chair. They considered these “as a promising step in the right direction”, as they would provide increased flexibility for implementation. However, they said, even this text was still too prescriptive, and some elements too broad. The U.S. representa-

¹ The oral statements of the representatives of states, civil society, and business can be found on the [website of the intergovernmental working group](#), as well as on [UNWebTV](#).

tive emphasized the role of the multi-stakeholder approach for the success of the UNGPs. This approach, which aims at cooperation and consensus among the various stakeholders, including civil society groups and the business community, must also be applied in the UN treaty process, she said.

While Mexico and Panama tried to make the Chair's proposal more binding in the requirements for States, the U.S. sought the exact opposite and wanted to replace "shall" with "should" or add "as appropriate" in some places. For example, States should – "as appropriate" – introduce due diligence requirements for companies, but not be required to do so by the agreement. In addition, companies should only be "encouraged" to engage in human rights due diligence, not obligated to do so. Moreover, in the view of the U.S., relevant state agencies should only seek to ensure that effective remedies are provided.

Brazil, Palestine, Mexico, Namibia, South Africa, the U.S., Kenya, Bolivia, Panama, and Uruguay contributed to the session with a particular amount of statements and comments. China and Russia remained fairly silent compared to the previous round of negotiations, explaining that their positions had not changed since the seventh session. While Russia continued to view the Third Revised Draft not a good basis for starting negotiations, China declared its support for the Chair's continued work.

Participating States in the 8th session

Algeria, Angola, Argentina, Austria, Australia, Azerbaijan, Belgium, Bolivia, Brazil, Brunei Darussalam, Burkina Faso, Cameroon, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Cuba, Czechia, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Guatemala, India, Indonesia, Iran, Iraq, Ireland, Italy, Japan, Kenya, Lithuania, Luxembourg, Malaysia, Mali, Mexico, Mozambique, Namibia, Netherlands, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Portugal, Qatar, Republic of Korea, Russian Federation, Saudi Arabia, Senegal, South Africa, Spain, Sweden, Switzerland, Togo, Türkiye, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Zambia.

The **EU and its Member States** did not officially participate the negotiations of the eighth session. However, they are on the verge of entering the negotiations. It is no longer a question of 'if', but only 'when'. In bilateral talks, the EU representation

stated that it first wanted to wait for the joint positioning in the Council of the EU on the upcoming EU directive on corporate human rights due diligence. Already in this year's round of negotiations, the European External Action Service, which represents the EU in the process, became more involved than before and, with a view to selected articles of the draft agreement, outlined which provisions the forthcoming EU directive would provide in this regard. As in the previous year, the EU representation, in its **opening statement**, recognized the potential of a binding international agreement, but pointed out that such an agreement would have to be based on consensus, legally sound, realistically implementable, and supported by a "critical mass" of UN members from all regions. In addition, the EU welcomed the Ecuadorian Chair's efforts to move the process forward with new proposals. The latter included important changes. The Third Revised Draft also contains positive aspects, for example, the provision requiring companies to integrate a gender perspective in all stages of human rights due diligence processes and the provision that due diligence processes should be proportionate to the size of the company and the context of its operations. Despite all this, the EU continues to have concerns about the process and the draft agreement. For example, it doubts the practical feasibility; the draft would be too detailed and prescriptive, and in other parts too vague. In addition, the agreement must apply to all companies, including those with state participation.

Portugal and France declared their clear support for the process and, among other things, committed themselves as members of the Friends of the Chair group to actively and constructively advancing the process.

The **German government** contributed to the first day of negotiations with proposals on the content and structure of the agreement as well as proposals on further negotiation modalities. Binding human rights due diligence obligations, as provided for in the German Supply Chain Due Diligence Act and the forthcoming EU directive, combined with regulations on access to remedy, should be components of the agreement. According to the German representation, however, the agreement would only have a chance to succeed if it was "as little intrusive into national legal systems as possible" and provided enough flexibility as state choices or state reservations in relation to appropriate aspects of the treaty. In order to facilitate further negotiations, the representative of the German government suggested a language harmonization group, as is common in

other negotiation processes. In addition, the German government supported the EU's position.

During its G7 presidency in 2022, the new German government had set itself the goal of working toward recognition by the G7 of the need for an internationally binding standard, which was finally achieved at the June 2022 summit in Elmau. Prior to this, the German Ministry of Labor and Social Affairs had hosted an international [conference](#) on the topic. Then, in September 2022, Labor Minister [Hubertus Heil](#) declared its support for international rules at UN level, as a global economy would need global rules. According to him, an EU decision on a negotiating mandate in order to be able to constructively and actively participate in the UN Treaty process was overdue.

Expert panel on the negotiation process

After States had delivered their general opening statements, Prof. Surya Deva and Prof. Robert McCorquodale discussed procedural issues in the negotiations. [Robert McCorquodale](#), a member of the UN Working Group on Business and Human Rights established in 2011 to monitor implementation of the UNGPs, praised the inclusiveness of the process, the increase in knowledge of the issue stimulated among some States by the process, increased awareness of the impact environmental damage has on human rights, and the commitment of the Ecuadorian Chair. Some aspects could have been better, however. For example, States engaged little between the annual meetings. McCorquodale hoped that would now change with the Friends of the Chair group. He regretted that there was no longer any discussion of direct obligations for companies in the agreement. “While lacking in some previous provisions”, the Chair’s new proposals were better aligned with the UNGPs, he said.

[Surya Deva](#), former member of the UN Working Group on Business and Human Rights, also gave an assessment of the current state of the process and made suggestions to achieve agreement among States and facilitate greater engagement. Although there is a growing consensus about that a treaty is required, efforts are hampered by “political incoherence, corporate capture of regulatory institutions, and myopic vision of pursuing economic development at the cost of human rights and the environment,” Deva said. For the UN treaty process to go forward, he demanded that “the needs of rights-holders should shape political feasibility, rather than the other way round”.

The UN treaty should seek a balance between specificity and flexibility. Rather than regulating precise details, the treaty ought to set out broad but specific provisions for implementation at the national level. Overall, however, it would be the content rather than the form that mattered most, he said, commenting in this context on the proposal put forward by the U.S. representative in 2021 to give the treaty the form of a less prescriptive framework agreement.

He also cautioned against building on the core elements of the UNGPs to build consensus. Finally, he said, the second pillar of the UNGPs (corporate responsibility) was not intended to be legally binding, therefore the language used in it was not suitable for legislation. Furthermore, the Treaty should seek to address the gaps in the UNGPs, such as with respect to a consideration of environmental pollution, climate change, or the right of indigenous peoples to consultation and free, prior, and informed consent (FPIC).

Deva proposed a group of experts to advise the Friends of the Chair group. There should be regional consensus-building processes and consultations. A new fund should finance these. In addition, it was necessary to set a clear timetable for further negotiations. If States showed the political will and corresponding commitment, the negotiations could be completed by 2025.

The substantive negotiations

The program of work of the eighth session was to start with Articles 6 to 13 and to deal with the remaining articles later during the week.

In their contributions, many state representatives reiterated their positions from the seventh session. Occasionally, they added new comments or expressed support for proposals by other States. The most discussed articles were the Preamble and Article 6 on prevention. There were no new comments on Articles 13, 17 through 24.

Some States, including South Africa, Palestine, Panama, Cuba, and the Philippines, requested at various points that the agreement consider the role of companies with regard to the climate crisis and environmental damage more and that the treaty text therefore also include the relevant agreements, such as the Rio Declaration on Environment and Development or the UN Framework Convention on Climate Change. The U.S. objected to this amendment.

As during the seventh session, a number of countries, including Namibia, Kenya, Costa Rica, and Bolivia, reiterated their call for a gender perspective to be adopted in the various measures under the agreement, as South Africa, Namibia, Palestine, Argentina, Mexico, Panama, Uruguay, the EU, and France had also done in 2021. Children (Palestine, Uruguay, Mexico, Kenya, Brazil, Panama) and peasants (Bolivia, Namibia and South Africa) needed special consideration, too.

Egypt, China and Iran had wanted to remove the reference to the rights of human rights defenders from the draft during the 2021 session. This was now strongly criticized by Costa Rica, Uruguay, Panama, Palestine, Mexico and Brazil.

No less problematic was the demand by the U.S. delegation to delete the reference to international humanitarian law in the preamble. Palestine and Kenya objected to this change, and Mexico had reservations, too.

South Africa and Namibia suggested that labor rights be given greater and more comprehensive consideration in corporate due diligence.

During the eighth session, the U.S. delegation repeatedly underscored its view that companies have no “obligation” but only a “responsibility” to respect human rights and therefore do not commit “human rights abuses” but can only have “adverse impacts” on human rights. They should therefore merely “seek” to prevent or mitigate corresponding adverse impacts. The U.S. was not alone in believing that companies had no human rights obligations, but only a responsibility to respect. Already in 2021, Mexico, Brazil, Chile, Panama, as well as China, but also the EU representation (at Article 2.1 b) had expressed this view.

Brazil asked that criminal liability for legal or natural persons be established exclusively for acts or omission, but not for the attempt, participation, or complicity in a criminal act. Palestine, on the other hand, during discussions on Article 8, called for expanding the liability regime to include joint liability of natural and legal persons.

Article 10 requires States to adopt any legislative or other measures necessary that statutory or other limitations shall not apply for the commencement of legal proceedings in relation to human rights abuses resulting in the most serious crimes. Namibia, Palestine, and South Africa requested that this

provision apply not only to the most serious crimes, but to all crimes against international law.

When it came to Article 2 on the statement of purpose, Article 3 on the scope of the treaty, and Article 6 on prevention, the disagreements over which companies should be regulated by the treaty again became apparent. Bolivia and the Philippines, for example, joined Egypt, China, Cuba, Pakistan, Indonesia, and Iran in calling for the treaty to apply only to transnational corporations and other business enterprises with transnational character, as provided for in Resolution 26/9. Mexico, Panama, Palestine, Kenya, and Namibia, on the other hand, called for the agreement to apply to all companies, but especially to economic activities of a transnational character.

The **business sector** was again represented by the International Chamber of Commerce (ICC), the International Organization of Employers (IOE), and the US Council for International Business (USCIB). As in the seventh session, the **ICC** doubted whether the draft agreement was heading in the right direction. In its opinion, an alternative approach should be taken. It stated its intention to engage constructively in the process. The **IOE** and **USCIB** were much more explicit in their opening statements, calling for business representatives to be at the table in the drafting of the agreement, even though the process is intergovernmental. The IOE said the process continued to lack substantial support from States. While it welcomed the Chair’s proposals, it had a number of major concerns. The ICC left it at a general statement at the beginning of the meeting. The IOE and USCIB commented on individual articles throughout the week.

Once again, numerous **civil society organizations** from around the world participated with comments and proposed amendments to the draft text. Civil society organizations used side events to draw attention to issues including environmental damage by companies and the risk of corporate influence, as well as the role of African countries in the process. The demand for **direct corporate obligations** in the agreement and an **international human rights tribunal** before which people affected can sue transnational corporations for human rights violations was raised again by the Global Campaign to Reclaim Peoples’ Sovereignty, Dismantle Corporate Power, and Stop Impunity.

Strong statements were made by victims of corporate human rights violations and environmental pollution, for example by people affected by

the dam collapse in Brumadinho, Brazil or the so-called “Cancer Alley” in Louisiana, U.S. For the second time, youth groups participated in the conference, among others with their own group, the Young Friends for the Binding Treaty.

Trade unions also participated in the meeting with numerous comments, represented by the International Trade Union Confederation (ITUC), the International Transport Workers’ Federation (ITF), the German metalworkers’ union IG-Metall, and the global union federation IndustriAll. In a joint **side event**, they presented the role of trade unionists in the implementation of the Treaty and how trade union rights should be better integrated into the current text of the agreement.

Outcome

On the last day of the meeting, States met behind closed doors, excluding civil society and corporate actors, and again discussed what role the Chair’s proposals should have in the further course of the process. Finally, States agreed that the latter should simply be posted on the website of the intergovernmental working group as a conference room paper together with the comments submitted on them.

On the fourth day of negotiations, Cameroon announced that it would join the Friends of the Chair group. The subgroup that has now formed will continue to work with the Ecuadorian Chair on compromise proposals and hold consultations with the various actors until the next round of negotiations in fall 2023. The Ecuadorian Chair will then update and publish the draft agreement to include comments from States and the results of the Friends of the Chair group’s negotiations by the end of July 2023.

Outlook

With the G7’s commitment to an international legally binding standard, the formation of the Friends of the Chair group, the U.S. government now actively involved, and the prospect of an EU negotiating mandate in the near future, the process has

gained new weight and momentum. The allegation made in some quarters that the process lacked critical mass, i.e. that it had too little traction due to a lack of participation by, among others, the major industrialized States, is now a thing of the past.

On December 1, 2022, the EU Council agreed on a **common position** regarding the upcoming EU directive. Therefore, nothing now stands in the way of a negotiating mandate for the ninth session. Already more than half of the EU Member States, as well as Hubertus Heil, had called on the European External Action Service to do so. After all, the UN agreement would be complementary to the EU directive on corporate human rights due diligence, and the two regulations would strengthen each other. This was explained by the four academics Nadia Bernaz, Markus Krajewski, Kinda Mohamadieh, and Virginie Rouas in a recently published **study**. For example, the current draft agreement includes several provisions that would improve access to justice for those affected by corporate human rights abuses and environmental damage. Private international law issues are addressed, including jurisdiction and applicable law in transnational cases. These are areas hardly covered by the upcoming EU directive.

In order to achieve real progress in the negotiations, a time and work schedule with an increased frequency of thematically focused meetings between the annual sessions would be necessary. The countries should also set themselves a common goal with regard to the time horizon. After all, as the parallel negotiations on a **global treaty against plastic pollution** at the United Nations Environment Assembly (UNEA) and on a **global treaty on pandemic prevention, preparedness and response** at the World Health Organization (WHO) show, this is entirely possible given the right political will. Negotiations on a plastics agreement have been underway since March 2022 and are expected to be concluded as early as the end of 2024. At the WHO, negotiations on the pandemic treaty have been underway since December 2021. It is planned to submit the final text of the agreement to the World Health Assembly for adoption in 2024, too.

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Comments of, inter alia, States and civil society organizations on the third revised draft agreement: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session8/oral-statements>

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