

Report on the ninth session of the 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

From October 23 to 27, 2023, 76 states met at the United Nations (UN) Human Rights Council to negotiate an international human rights treaty to regulate companies and their value chains (also known as the “UN Treaty”). Since the UN Human Rights Council adopted Resolution 26/9 in

2014 and mandated an intergovernmental working group to draft such legally binding instrument, it has met nine times. After a slow start, the process has emerged surprisingly stronger from the ninth round of negotiations.

When the 76 UN Member States met for the first day of negotiations, on October 23, 2023, the process already had a difficult year behind it. During the eighth round of negotiations in October 2022, the UN Member States had agreed that all UN regional groups would hold regional consultations on the [third revised draft agreement](#) (presented by the chair of the working group in August 2021) and develop consensus proposals. With the exception of the Latin American group, however, no other group ultimately dealt substantially with the draft agreement, but merely exchanged general views on the process.¹ The African group did not meet at all.

This circumstance proved to be one of the reasons why there was some confusion and lengthy negotiations were held on the program of work for the week on the first day. The African group rejected the [updated draft agreement](#) presented by Cristian Espinosa Cañizares, the Ecuadorian chair of the working group, in July 2023 as the basis for the ninth round of negotiations, as they did not feel involved in the preparation of the draft and did not see their concerns from the eighth round of negotiations taken into account. A meeting organized by civil society organizations in Ghana, which was

also attended by several African countries, was misunderstood by some delegates as a regional consultation, and the results of the meeting submitted to the Chair were interpreted as an official report. In the end, the Chair agreed to display both the [clean version](#) of the updated draft agreement and the [version with track changes](#) with the comments of the states from the eighth round of negotiations on the monitors in the negotiating room. This made it possible to see the changes compared to the previous version of the draft and the comments made by the states in 2022.

Participation and positions

Negotiations on the content of the draft agreement could only finally begin at lunchtime on the second day of negotiations. The laborious negotiations at the beginning contributed, among other things, to the fact that, ultimately, only the preamble and the first three articles of the draft agreement could be discussed during the week.

Another positive reason was that a larger number of delegates participated with substantive interventions. Unlike in previous negotiation rounds,

¹ See the [summary of the outcomes of the regional consultations](#).

delegates did not submit prefabricated statements, but responded to each other, expressed their support or rejection of other countries' proposals, and backed up their concerns, questions, and formulation proposals with concrete examples. It was therefore no longer a mere discussion of the articles, but rather actual negotiations on the text of the agreement.

A total of 76 UN Member States and Palestine, as well as the EU representing its 27 Member States, took part in the negotiations. Côte d'Ivoire spoke on behalf of the African Union with its 55 Member States.

Participating UN Member States at the 9th session:

Albania, Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Belgium, Bolivia, Brazil, Cameroon, Chile, China, Colombia, Côte d'Ivoire, Cuba, Czechia, Democratic Republic of Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, Ethiopia, Finland, France, Germany, Ghana, Honduras, India, Indonesia, Iran, Iraq, Ireland, Israel, Jamaica, Japan, Kenya, Korea, Luxembourg, Madagascar, Malawi, Malaysia, Mexico, Mongolia, Mozambique, Namibia, Nepal, Netherlands, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Portugal, Qatar, Romania, Russia, Saudi Arabia, Senegal, Sierra Leone, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Trinidad and Tobago, Tunisia, Türkiye, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Vietnam.

The **USA** has been negotiating the text of the agreement for the second year. In its opening statement, the US delegation welcomed the work of the chair of the intergovernmental working group, and recognized that more needed to be done, particularly in the area of access to effective remedy. They were prepared to cooperate with the working group to identify a collaborative path forward, which should, however, be consensus- and multi-stakeholder-based, and should build on the UN Guiding Principles on Business and Human Rights (UNGPs). The updated draft agreement contained some improvements, including more flexibility in implementation. However, the US delegation still has serious concerns about the draft as a whole. Many passages were unclear or too prescriptive. Among other things, the draft contained

overly broad rules on jurisdiction and unclear liability provisions, and was incompatible with international law in some places.

Other G7 countries made statements at the beginning, too. The **UK** negotiated on the treaty text for the first time, as they recognize the merits of a new instrument. However, the delegate made it clear at the beginning that, from his perspective, the draft text was in great need of revision. An even stronger orientation on the UNGPs was necessary, and the current disproportionate focus on transnational business activities needed to be balanced. Finally, the UK was not convinced that a state obligation to introduce binding corporate due diligence obligations is necessary.

Japan explained that a UN agreement could only be successful if it was based on a consensus between as many states and stakeholders as possible, as was the case with the UNGPs. However, the current draft agreement would not yet meet this criterion.

Other industrialized states, including Australia and Norway, spoke on the first day of the session. **Australia's** representative welcomed the work of the Chair and the improvements in the updated draft, in particular the stronger focus on the UNGPs and the attempt to give states more flexibility in national implementation. At the same time, however, the text had too broad a scope, for example with regard to the regulations on jurisdiction, and was too imprecise and ambiguous in many places. In its current form, the draft was not suitable for avoiding and addressing the negative effects of economic activity and achieving a broad consensus among states.

Norway's delegate welcomed the work of the Chair, but stated that they were not in a position to take part in the negotiations. The current text of the agreement contained too far-reaching obligations, and it was not yet clear that the treaty in its current form provided added value compared to the UNGPs and was complementary to them.

In the absence of a negotiating mandate, the **EU and its Member States** once again did not officially participate in the negotiations, but only made general contributions. The European External Action Service (EEAS), which represents the EU Member States in the process, repeatedly explained the absence of a negotiating mandate by stating that the trilogue negotiations on the European regulation, the *Corporate Sustainability Due Diligence Directive*

(CSDDD), had to be concluded first.² The EU's opening statement differed only slightly from that of the previous year. After explaining what measures it was already implementing in the area of "business and human rights", the EU representative pointed out that, based on experience with voluntary measures and growing social demands, the EU was now also determined to create legally binding regulations, such as the CSDDD.

The EU representative then stated that she saw potential in a binding international agreement, but pointed out that such an agreement would have to be based on the consensus created by the UNGPs, be legally sound and realistically implementable, and be supported by a significant number of UN Member States from all regions. She welcomed the work of the Chair and the updated draft agreement. She positively noted the draft's orientation towards the UNGPs, in particular the scope of application, which includes all companies. It was also a step in the right direction that the text allowed states more flexibility in implementation. In particular, she would support the provision in the draft to introduce binding human rights due diligence obligations for companies.

Despite all this, the EU still has concerns. It misses the reference from the previous draft version to the right to a clean, healthy and sustainable environment. Furthermore, it would welcome the re-introduction of the requirement for companies to report on non-financial aspects. She was also surprised by the deletion of liability for the failure of due diligence. The draft was too detailed and prescriptive and not compatible with the EU's legal system when it came to access to remedies and civil law provisions, as well as being too vague in some other areas.

In addition to the EU delegation, France, Portugal, and Germany spoke. **France** supported the EU's statement and announced that it would continue to work within the Friends of the Chair Group. France particularly welcomed the changes to Article 6 on prevention, which was now more clearly formulated and would strengthen women's rights and the rights of human rights defenders. It was important that the agreement addressed all companies and was based on existing UN and OECD agreements. Portugal acknowledged the progress that had been made since the previous round of negotiations. However, it was important to take greater

account of environmental rights, the rights of indigenous groups and women, to demand increased attention in conflict regions, to introduce mandatory due diligence, and to strengthen access to justice.

The **German government** participated in the ninth round of negotiations exclusively as an observer. In a general opening statement, the German delegate explained that, in view of the national and regional initiatives for binding standards in the area of business and human rights, now was the right moment to consider the shape of a future legally binding instrument at UN level. A combination of binding due diligence obligations and regulations on access to remedy would be conceivable. However, a UN agreement could only be successful if it interfered as little as possible with national legal systems. States should therefore be given enhanced flexibility in implementation, for example through state choices (or state reservations) or a tier system with opt-in options. The form of a framework convention was also conceivable.

During its G7 presidency in 2022, the German government put the UN treaty on the agenda at the initiative of Federal Minister of Labor Hubertus Heil and successfully lobbied for the G7 to commit to the need for an internationally binding agreement in its final declaration. In September 2022, **Heil** reaffirmed his support for the UN treaty process and called for an early EU negotiating mandate.

In addition to the International Labor Organization (ILO), the South Centre and the United Nations Institute for Training and Research (UNITAR), the World Health Organization (WHO) was also among the **international organizations** participating in the negotiations. The **WHO representative** welcomed the updated draft treaty. She pointed out that the process must be protected from undue political influence by companies and from actual or perceived conflicts of interest, and that the draft treaty should provide for corresponding regulations, just as the Framework Convention on Tobacco Control does.

The International Chamber of Commerce (ICC), the International Organization of Employers (IOE), and the US Council for International Business (USCIB) represented the **business sector**. The **ICC** emphasized the UNGPs as the central instrument, and complained that not enough states had

² For a possible EU negotiating mandate, see also [Seitz \(2023a\)](#).

implemented the UNGPs to date. It continued to be concerned about the approach being pursued in the intergovernmental working group. Any regulation, at national, regional, or international level, had to be based on the UNGPs and developed within the framework of multi-stakeholder consultations. The IOE also declared the UNGPs to be its “guiding star”, and the treaty process to be a long way from reaching a consensus. The current draft continued to move in the right direction, but was still in great need of revision. It was too prescriptive and threatened legal certainty, economic development, trade and investment, productivity and competitiveness, as well as state sovereignty. Many definitions were too unclear, the scope of the duty of care and liability as well as the regulations on jurisdiction and remedies were too broad, and the scope of application was unclear. According to the IOE, all companies should be covered, but small and medium-sized enterprises should be excluded from the scope. The USCIB reiterated the IOE’s statement, and warned that the treaty in its current form would result in companies withdrawing from many developing countries.

A representative of the International Transport Workers’ Federation (ITF) spoke on behalf of several **global union federations**, including the ITUC, BWI, EI, IndustriAll, IUF, IFJ, PSI and UNI. He welcomed the Chairman’s work, but regretted that none of their previously submitted demands had been included in the updated draft treaty. The representative criticized the fact that key provisions in Articles 6, 7, 8 and 9 had been weakened. It was also regrettable that the references to the climate crisis and the obligation of companies to prevent and compensate for environmental damage had been deleted. At the same time, there would be some improvements, particularly with regard to access to information, legal aid and consultation with rights holders. The treaty had to be an instrument that effectively balances the normative asymmetry between the legally enforceable rules that protect corporate interests through the investor-state arbitration system (ISDS) and the soft law approaches to the corporate duty to respect human rights.

As in previous years, numerous **civil society groups** from around the world and **national human rights institutes**, including the **German Institute for Human Rights**, the French institute

and the Congolese institute, took part in the negotiations.³

The member organizations of the **Global Campaign** to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity declared their firm rejection of the updated draft, not only with regard to its content, but also with regard to its drafting process. For example, the draft arbitrarily adopted proposals from the highly problematic proposals that the Chair had independently submitted in addition to the third revised draft in 2022.⁴ At the same time, many relevant proposals put forward by states and civil society organizations during the eighth round of negotiations were ignored.

Some civil society groups, including **FIDH** and the **Treaty Alliance Germany**, acknowledged the streamlining of the updated draft and the inclusion of some positive elements. At the same time, they criticized the weakening of some articles regarding the legal protection of those affected, in particular the deletion of core elements in the articles on prevention, liability, and jurisdiction. In some places, the addition that the planned regulations (in particular when it comes to the state obligation to introduce a liability system) should only apply if they are compatible with the national legal system was highly problematic.

The deletion of any reference in the previous version to environmental and climate agreements as well as the state obligation to introduce environmental and climate-related due diligence for companies received much criticism.

The substantive negotiations

Once again, countries from the Global South in particular, as well as the UK and the USA, made a particularly large number of contributions to the negotiations.⁵

The delegates spent a long time discussing the preamble. Among other things, they debated which UN conventions and declarations should be explicitly mentioned. Brazil, Honduras, and Malawi, for example, were in favor of mentioning the UN Declaration on the Right to Development, on human rights defenders and on the rights of indigenous peoples. Bolivia, South Africa, Malawi, Colombia,

3 A list of the participating organizations can be found on pages 10 and 11 of the Chair’s report on the 9th round of negotiations (**Chair-Rapporteur of the OEIGWG (2023a)**). Other organizations were part of the delegation of these listed organizations with ECOSOC consultative status at the UN.

4 See debate and criticism of the so-called “Chair’s Proposals” in **Seitz (2022a)**.

5 The states’ comments can be **found here**.

and Egypt also called for the UN Declaration on the Rights of Peasants to be mentioned. The UK, Chile, Panama, Honduras, Ecuador, South Africa, and Malawi called for greater emphasis on labor rights in the text. Others demanded greater consideration of children's rights and people with disabilities as well as requirements for special attention in conflict areas. While China, Egypt, Malawi, Brazil, Honduras, Cuba, and Colombia wanted to reverse the reformulation of "corporate obligations" to "corporate responsibility" in the current draft agreement compared to the previous version from 2021, the UK, the USA, Panama, and Peru spoke out against this and in favor of aligning with the language of the UN Guiding Principles on Business and Human Rights. These speak of the responsibility of companies and the obligation of states to protect human rights.

On the third day of the session, Article 1 was negotiated, which provides various definitions. This included the definition of "victims", the question of whether we should speak of "human rights violations" or "human rights abuses" in the business context, and how these should be defined. The definitions of human rights due diligence, business activities and relationships as well as remedies were also discussed.

On the third and fourth day of negotiations, the states finally dealt with the highly controversial Articles 2, on the purpose of the treaty, and 3, on the scope of application. One issue was whether the agreement should regulate all business activities or only transnational corporations and business activities of a transnational character. At this point, Cuba introduced a formulation to the round that was supported by Chile and Bolivia according to which both business activities of transnational character and other business activities should be covered by the agreement. The South African representation supported this proposal, vehemently insisting that the treaty should only regulate transnational corporations and other business enterprises of transnational character. This demand was supported by Russia, Ghana, Iran, Malawi, China, Algeria, Indonesia, Pakistan, Honduras, and Colombia. Mexico, Panama, Chile, Peru, and the USA, on the other hand, called for the agreement to regulate all business activities, including those of a transnational character.

Article 3, in addition, dealt with which human rights should fall under the scope of the agreement. Cuba, China, Egypt, and Iran, among others, wanted only internationally recognized human rights agreements to be included, Mexico and Colombia all recognized human rights, and Panama and Peru all human rights.

Result

In the afternoon of the last day, when it came to the question of how the process as a whole should be continued, the Chair then proposed, to everyone's surprise, that a new resolution be submitted to the UN Human Rights Council for a vote at its March 2024 session. According to the Chair, the resolution should provide the process with more financial and human resources so that negotiations could be intensified. Many state representatives were hesitant and expressed concerns that the controversial question of the scope of application would also be discussed in the UN Human Rights Council as part of the vote. Some delegates doubted that they would be able to agree on the scope of application before the next UN Human Rights Council session. In view of the tense situation, other geopolitical interests would presumably also influence and override voting behavior. While on the one hand there is a chance that the resolution could give the process new impetus and resources, on the other, there is a risk that the process could be completely derailed. Colombia, South Africa, Mexico, Chile, Honduras, the USA, and France generally welcomed the Chairman's desire to drive the treaty process forward.

Other options for strengthening the process with financial resources include voluntary state contributions or a so-called "*procedural* decision" by the UN Human Rights Council. After informal intergovernmental negotiations behind closed doors on the last day of negotiations, this last option was finally agreed upon.⁶ The African Union, the Latin American states and the EU were ultimately surprisingly united in not wanting a new resolution. The states also agreed that the Chair should hold further intergovernmental and thematic consultations until the next (tenth) round of negotiations in October 2024. The Office of the UN High Commissioner for Human Rights is to provide increased support for the negotiations and also bring in a group of legal experts to advise on the intergovernmental

⁶ See also the conclusions and recommendations in the Chair's official report ([Chair-Rapporteur of the OEIGWG \(2023a\)](#))

consultations. The “Friends of the Chair” group will advise the Chair on the further working methods.

Outlook

Some questions remain unanswered after the ninth round of negotiations. For example, it remains unclear what strategy the Ecuadorian Chair of the negotiations, Cristian Espinosa Cañizares, was pursuing with his surprising proposal for a new resolution. What is certain is that he has challenged the state representatives and forced them to take a clear stance in favor of an intensified continuation of the process.

It also remains to be seen when the procedural decision will be initiated, to what financial extent and with what work program it will be structured. It is possible that the procedural decision will not be dealt with until the next session of the UN Human Rights Council, in March 2024 and that the decision on increasing the budget of the intergovernmental working group will not be taken until the budget negotiations in the Administrative and Budgetary Committee (5th Committee of the General Assembly) in New York in December 2024. It will also remain exciting to see what results the informal thematic consultations will produce, whether the division between countries over the scope of the agreement will be overcome and how well

the Friends of the Chair group⁷ and the Chair will work together. Transparency and the involvement of all regions will be key to avoiding incidents at the next round of negotiations in fall 2024 similar to those that had occurred with the African regional group during the previous ninth round. The involvement of civil society organizations and their expertise, which have driven the process forward in the past, is essential. Transparency and a review of potential conflicts of interest will be important in the selection of legal experts for further process consultation.

Finally, it remains uncertain whether the EU will push for active participation in the negotiations on the UN treaty after the EU CSDDD, which is expected to be adopted at the beginning of 2024. A majority of EU Member States, including the German government, have been calling for the EU to actively participate in the negotiations for some time. However, this has so far failed due to resistance from the EEAS, which has not yet submitted a legal analysis of the current draft agreement to the EU Member States, even after repeated requests. It would be in the EU’s interest to join the UN treaty negotiations as soon as possible, not only to create a level playing field for all companies worldwide, but also so that it does not miss out on the new dynamic in the process and the opportunity to shape the agreement in its own interests.

⁷ During the seventh round of negotiations in 2021, the UN Member States had decided on forming a “Friends of the Chair” group with representatives from all UN regional groups. The group was to hold regional consultations and draw up consensus proposals. Representatives from all regions were only found during the eighth round of negotiations in 2022. The group includes the following UN Member States: Azerbaijan, France, Indonesia, Cameroon, Portugal, and Uruguay.

Further informationen

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Oral statements by states and civil society organizations, among others, on the third revised draft treaty: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session9/oral-statements>

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