

# BUSINESS AND HUMAN RIGHTS: A ROCKY ROAD TOWARDS A BINDING TREATY

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## I. INTRODUCTION

As the world has become more connected, it has become evident that companies have an impact on human rights. To some extent, they aid in the fulfillment of fundamental rights—pharmaceuticals assist with the right to health; supermarkets assist with the right to food; and construction companies with the right to housing. However, there is another side to this because companies—like States and individuals—can seriously impair the fulfillment of human rights when they act outside their “Responsibility to Respect.”<sup>1</sup>

Before the first half of the 20th century, individuals did not have rights nor obligations recognized under international law because States had exclusive jurisdiction over these matters, which were considered domestic law affairs.<sup>2</sup> The Third Reich showed the world how States, individuals, and corporations can work together to systematically violate human rights. In the aftermath of World War II, the Nuremberg trials showed that it was possible to adapt and apply obligations—previously applicable to States only—to individuals because there was a willingness to ensure that actions did not go unpunished due to the gravity of the crimes.<sup>3</sup> Today, permanent international tribunals, such as the International Criminal Court,<sup>4</sup> and temporary international tribunals, like the Special Tribunal for Lebanon,<sup>5</sup> hold individuals accountable for international crimes.

The human rights regime was designed to protect people from States’ abuse of power and to protect people from people.<sup>6</sup> Now, steps are being taken to protect people from companies. In 2017, sixty-nine out of the 100 richest entities in the world were corporations.<sup>7</sup> For example, Walmart was positioned above States like Spain, South Korea, and Russia<sup>8</sup> and Exxon Mobil was above States like India and Saudi Arabia.<sup>9</sup> In 2021, Apple’s net worth

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<sup>1</sup> See John Ruggie (Special Representative of the Secretary-General), Hum. Rts. Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (2008).

<sup>2</sup> Chiara Giorgetti, *Rethinking the Individual in International Law*, 22 LEWIS & CLARK L. REV. 1085, 1088 (2019).

<sup>3</sup> See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Charter of the International Military Tribunal].

<sup>4</sup> See Rome Statute of the International Criminal Court art. 1, *opened for signature* July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002).

<sup>5</sup> See S.C. Res. 1757, ¶ 1 (May 30, 2007).

<sup>6</sup> See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Charter of the International Military Tribunal, *supra* note 3.

<sup>7</sup> GLOB. JUST. NOW, *69 of the Richest 100 Entities on the Planet Are Corporations, Not Governments, Figures Show* (Oct. 17, 2018), <https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

was higher than 96% of the world economies.<sup>10</sup> With that power—in addition to creating jobs—corporations can easily interfere with the enjoyment of human rights.<sup>11</sup>

The United Nations (U.N.) included the study of the intersection between business and human rights as part of its agenda for the first time in the mid-70s.<sup>12</sup> However, the topic gained more attention in 2011 with the adoption of the U.N. Guiding Principles on Business and Human Rights (UNGPs);<sup>13</sup> this soft-law instrument has gained significant acceptance in the international community and some companies have implemented them in their codes of conduct.<sup>14</sup> The UNGPs are based on three pillars: “protect, respect, and remedy.”<sup>15</sup>

The first pillar refers to existing obligations that States have under international human rights law to ensure that third parties do not abuse human rights in their territories through the enactment of legislation and policy.<sup>16</sup> The second or “respect” pillar refers to a responsibility that businesses have to

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<sup>10</sup> Ruslana Lishchuk, *How Large Would Tech Companies Be If They Were Countries?*, <https://mackeeper.com/blog/tech-giants-as-countries> (Aug. 31, 2021).

<sup>11</sup> See *Business and Human Rights Litigation in Latin America: Lessons from Practice*, BUS. & HUMAN RTS. RES. CTR. (July 12, 2022), <https://www.business-humanrights.org/en/from-us/briefings/business-and-human-rights-litigation-in-latin-america-lessons-from-practice>; Lydia DePillis, *Two Years Ago, 1,129 People Died in a Bangladesh Factory Collapse. The Problems Still Haven't Been Fixed*, WASH. POST (Apr. 23, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/04/23/two-years-ago-1129-people-died-in-a-bangladesh-factory-collapse-the-problems-still-havent-been-fixed>; Zia ur-Rehman et al., *More than 300 Killed in Pakistani Factory Fires*, N.Y. TIMES (Sept. 12, 2012), <https://www.nytimes.com/2012/09/13/world/asia/hundreds-die-in-factory-fires-in-pakistan.html>; *Rana Plaza*, CLEAN CLOTHES CAMPAIGN, <https://cleanclothes.org/campaigns/past/rana-plaza> (2018).

<sup>12</sup> See Economic and Social Council Res. 1913 (LVII), 3 (Dec. 5, 1974).

<sup>13</sup> See Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations And Other Business Enterprises*, U.N. Doc. A/HRC/17/31, ¶ 6 (Mar. 21, 2011) [hereinafter UNGPs]; U.N. WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, *GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS* (2016), [https://www.ohchr.org/Documents/Issues/Business/UNWG\\_NAPGuidance.pdf](https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf).

<sup>14</sup> See UNGPs, *supra* note 13; *Business and Human Rights Statement*, KPMG, <https://home.kpmg/xx/en/home/about/who-we-are/governance/business-and-human-rights-statement.html>; *Human Rights in the Volkswagen Group*, VOLKSWAGEN GROUP, <https://www.volkswagenag.com/en/sustainability/supply-chain/business-and-human-rights.html>.

<sup>15</sup> UNGPs, *supra* note 13, ¶ 6.

<sup>16</sup> Ma Kalthum Ishak & Rohaida Nordin, *Assessment on State's Duty to Protect Human Rights Violations by Business Enterprises Within Oil & Gas Industry (O & G)*, 25 MALAYSIAN J.L. & SOC'Y 1, 41 (2019).

respect human rights by acting under due diligence.<sup>17</sup> Due diligence in this context requires that companies identify, prevent, and mitigate risks of human rights abuse in a continuous manner in their operations, products, and relationships with third parties.<sup>18</sup> When companies are unable or unwilling to act diligently, they are expected to answer for the negative consequences of their actions.<sup>19</sup> However, the legal effectiveness of this responsibility depends on States enacting the appropriate framework to overcome barriers—such as *forum non conveniens*—that could prevent victims from receiving adequate reparations.<sup>20</sup> This is why the third pillar of “remedy” requires that States have appropriate judicial and non-judicial mechanisms to redress victims of corporate abuse.<sup>21</sup> Consequently, States are still meant to be the primary bearers of duties and a new treaty seeks to solidify the UNGPs by turning them into hard law.

## II. FROM UNGPs TO TREATY

The quest for a treaty on business and human rights is not new. Previously, attempts have failed in part because they sought to impose direct international obligations on corporations,<sup>22</sup> but the outcome could be very different this time. The project of a treaty based on the UNGPs started approximately three years after the adoption of the principles when the U.N. Human Rights Council adopted a resolution that created an “intergovernmental working group on transnational corporations and other business enterprises with respect to human rights” with the mandate to draft a binding instrument on these issues.<sup>23</sup> States like India, Pakistan, Venezuela, and Russia voted in favor,<sup>24</sup> while others like Germany, the United States, the United Kingdom, and South Korea voted against it.<sup>25</sup> Peru, Mexico, Chile, the United Arab Emirates, and

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<sup>17</sup> UNGPs, *supra* note 13, ¶ 17; Sabine Michalowski, *Due Diligence and Complicity: A Relationship in Need of Clarification*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS 218, 221 (Surya Deva et al. eds., 2013).

<sup>18</sup> UNGPs, *supra* note 13, ¶ 17; ALEX NEWTON, THE BUSINESS OF HUMAN RIGHTS: BEST PRACTICE AND THE UN GUIDING PRINCIPLES 94 (1st ed. 2019).

<sup>19</sup> See UNGPs, *supra* note 13, ¶ 11.

<sup>20</sup> Benny Santoso, *Just Business—Is the Current Regulatory Framework an Adequate Solution to Human Rights Abuses by Transnational Corporations?*, 18 GERMAN L.J. 533, 555 (2017).

<sup>21</sup> Ruggie, *supra* note 1, ¶ 22.

<sup>22</sup> See U.N. Econ. & Soc. Council, Sub-Comm’n on the Promotion & Protection of Hum. Rts., Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003); Comm’n on Hum. Rts., Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/DEC/2004/116 (Apr. 22, 2004).

<sup>23</sup> See Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

<sup>24</sup> *Id.* ¶ 3.

<sup>25</sup> *Id.*

Argentina abstained from voting.<sup>26</sup> Since then, four drafts have been discussed.<sup>27</sup>

The so-called “zero draft” contained fifteen articles that addressed issues such as the establishment of an international victim’s fund to provide financial and legal assistance, State obligation to establish minimum standards of due diligence, inter-State cooperation mechanisms, and remediation mechanisms.<sup>28</sup> The draft’s third article applied to “any business activities of a transnational character”<sup>29</sup> and violations of “all international human rights and those rights recognized under domestic law.”<sup>30</sup> This article was criticized for significantly limiting the potential treaty to only multinational corporations.<sup>31</sup> Others disagreed, arguing that the treaty should focus on those corporations because these companies are the ones that often escape liability.<sup>32</sup> Article 3(2) established that the treaty would apply to all international human rights, but it was seen as problematic because it could be interpreted as an attempt to impose obligations on States that have not agreed to and that it could deter them from signing and later ratifying the treaty.<sup>33</sup> The first and second drafts maintained that the treaty would apply to all international human rights.<sup>34</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> See Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Entities (Jul. 16, 2018), <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> [hereinafter Zero Draft]; Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Entities, (July 16, 2019), [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf) [hereinafter First Draft]; Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Entities, (Aug. 6, 2020), [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG\\_Chair-Rapporteur\\_second\\_revised\\_draft\\_LBI\\_on\\_TNCs\\_and\\_OBEs\\_with\\_respect\\_to\\_Human\\_Rights.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf) [hereinafter Second Draft]; Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Entities, (Aug. 17, 2021), <https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf> [hereinafter Third Draft].

<sup>28</sup> See Zero Draft, *supra* note 27.

<sup>29</sup> *Id.* § 2, art. 3(1).

<sup>30</sup> *Id.* § 2, art. 3(2).

<sup>31</sup> Human Rights Council, *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, ¶ 35, U.N. Doc. A/HRC/40/48, (Jan. 2, 2019) [hereinafter *Report on the Fourth Session*].

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* ¶ 74.

<sup>34</sup> First Draft, *supra* note 27, § 1, art. 3(3); Second Draft, *supra* note 27, § 1, art. 3(3); Third Draft, *supra* note 27, § 1, art. 3(3).

Article 5 of the draft on jurisdiction allowed individual suits or class actions against corporations in the places where the acts or omissions occurred or in the courts of the State in which the entity maintains its domicile.<sup>35</sup> The Chairman of the working group added that this article would allow victims to choose the forum in which their case would be heard.<sup>36</sup> Opposing views argued that Article 5 would threaten State sovereignty and cause distraction from the victim's need to seek redress in the jurisdiction where the injury occurred.<sup>37</sup> On the other hand, those in favor argued that States had the power to regulate the acts of their nationals abroad and that extraterritorial jurisdiction was an accepted concept under international law.<sup>38</sup> Other views advocated a broader application that would prohibit *forum non conveniens* and allow jurisdiction under the doctrine of *forum necessitatis*.<sup>39</sup>

The debates around the zero draft introduced modifications that were reflected in the first draft. Article 5 of the first draft established that States should regulate the activities of companies—including multinational corporations—within their territory or jurisdiction through legislation.<sup>40</sup> This was positive because it opened the door to other forms of corporations and not only to those of transnational character. Some delegations expressed that States already regulated these situations and requested clarification on whether States had the obligation to regulate companies operating within their territory as well as those with activities in host States.<sup>41</sup> Furthermore, Article 5(3) established that consultations should be carried out with groups whose rights may be affected in the interest of abuse prevention.<sup>42</sup> Supporters argued that these consultations should aim to obtain the free, prior, and informed consent of these groups.<sup>43</sup>

Article 10 established provisions on mutual legal assistance between States.<sup>44</sup> Criticism was raised against this article because it did not contemplate how to deal with procedures and sanctions that often differ in domestic jurisdictions when dealing with civil, criminal, and administrative matters.<sup>45</sup> This article was also criticized for not being flexible; some argued that State

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<sup>35</sup> Zero Draft, *supra* note 27, § 2, art. 8(5).

<sup>36</sup> *Report on the Fourth Session*, *supra* note 31, ¶ 77.

<sup>37</sup> *Id.* ¶ 79.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> First Draft, *supra* note 27, § 2, art. 5.

<sup>41</sup> Human Rights Council, *Report on the Fifth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, ¶ 13, U.N. Doc. A/HRC/43/55 (Jan. 9, 2020), [hereinafter *Report on the Fifth Session*].

<sup>42</sup> First Draft, *supra* note 27, § 2, art. 5(3).

<sup>43</sup> *Report on the Fifth Session*, *supra* note 41, ¶¶ 13–14.

<sup>44</sup> First Draft, *supra* note 27, § 2, art. 10.

<sup>45</sup> *Report on the Fifth Session*, *supra* note 41, ¶¶ 87–88.

authorities should be allowed to make an *ex officio* decision to not recognize foreign judgments based on security, public order, or sovereignty concerns.<sup>46</sup>

The second draft introduced significant changes. The most relevant changes are in the preamble and Articles 1, 3, and 9. The preamble under this draft includes the International Labour Organization (ILO) Tripartite Declaration—in addition to the UNGPs—as part of the instruments that will complement the treaty obligations if consensus is achieved.<sup>47</sup> Article 1 on definitions modified terms such as “victim” and “business activity.”<sup>48</sup> The definition of victim was expanded, stating that any person is to be considered a victim “whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted.”<sup>49</sup> The definition of business activity was stretched to include any activity that is for economic or other profit that is carried out by a natural or juridical person.<sup>50</sup> Previous drafts—and the UNGPs—were consistent in relating business activities to only entities.<sup>51</sup> However, this one introduces the natural person as a responsible subject throughout the document to a point where the draft treaty has become a business activities and human rights treaty, rather than just a treaty that involves business entities and human rights.

Article 3 on implementation addresses which companies the treaty may apply to, how to adapt prevention obligations, and what rights would be protected under it.<sup>52</sup> This second draft introduces a reservation clause that would allow States to decide which companies they bind and which they do not, stating: “Unless stated otherwise, [it] shall apply to all business enterprises including but not limited to transnational corporations and other business enterprises undertake business activities of a transnational character.”<sup>53</sup> If a clause of this nature is maintained, it would be likely to contravene the object and purpose of the treaty since its intention is to ensure that victims have a framework to turn to when business activities cause adverse effects, regardless of how these entities are structured.

Article 3 could also give States a lot of room to exempt companies that they have a direct or indirect interest in. They could exclude State-owned companies from these responsibilities as well as multinational companies for fear of putting themselves at a disadvantage vis-à-vis other States that are regulating their business activities in light of the treaty. At the end of the day, a State could choose to only regulate domestic private companies, leaving out those that tend to cause more significant impact on human rights. Article 3(2)

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<sup>46</sup> *Id.*

<sup>47</sup> Second Draft, *supra* note 27, at pmb1.

<sup>48</sup> *Id.* § 1, art. 1.

<sup>49</sup> *Id.* § 1, art. 1(1).

<sup>50</sup> *Id.* § 1, art. 1(3).

<sup>51</sup> See Zero Draft, *supra* note 27; First Draft, *supra* note 27.

<sup>52</sup> Second Draft, *supra* note 27, § 1, art. 3.

<sup>53</sup> *Id.* § 1, art. 3(1).

grants flexibility in terms of the measures to be applied depending on the nature of the company and its activities.<sup>54</sup> This flexibility could be counterproductive as it doesn't establish a basis that States could turn to when establishing domestic measures. But Article 3(3) represents some progress in terms of the scope of the treaty. The second draft added that it would cover internationally recognized rights, fundamental freedoms of the Universal Declaration, and human rights treaties and ILO treaties to which the State is a party;<sup>55</sup> giving it a more feasible approach by not imposing "all international human rights" obligations that some States have not consented to be bound to.

Article 9, which focuses on jurisdiction, adopts the recommendations made during the discussions of the previous drafts. It establishes that jurisdiction shall be mandatory and that courts may not decline jurisdiction on the grounds of *forum non conveniens*.<sup>56</sup> Jurisdiction is subject to the courts being in the State where the abuse occurred, where the act or omission occurred, or in the domicile of the legal or natural person alleged to have caused or contributed to the damage. As expected, this raised concerns of forum shopping by victims and calls for jurisdiction based on the nationality or domicile of the victim.<sup>57</sup>

To date, a third draft of the treaty is still being discussed. The draft has included a more diverse jurisdictional clause that would allow victims to also seek remedy in courts where the abuse produced effects, and in those where the victim is a national.<sup>58</sup> Moreover, it does not exclude civil jurisdiction based on other grounds established in domestic laws and relevant treaties.<sup>59</sup> However, these courts "shall avoid imposing any legal obstacles, including . . . *forum non conveniens*" for victims to initiate proceedings.<sup>60</sup> These proceedings would have a more flexible statute of limitations because the draft included that domestic legislation shall allow a reasonable amount of time to initiate them when the harm was only identifiable a long period of time after its occurrence.<sup>61</sup>

Lastly, Article 14, titled "Consistency with International Law Principles and Instruments," now contemplates that the treaty would not affect rights related to State immunity.<sup>62</sup> But perhaps more notably, the draft has maintained that investment and trade agreements shall be interpreted in a way that

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<sup>54</sup> *Id.* § 1, art. 3(2).

<sup>55</sup> *Id.* § 1, art. 3(3).

<sup>56</sup> *Id.* § 2, art. 9(3).

<sup>57</sup> Human Rights Council, *Report on the Sixth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations And Other Business Enterprises with Respect to Human Rights*, U.N. Doc. A/HRC/46/73, ¶ 34 (Jan. 14, 2021).

<sup>58</sup> Third Draft, *supra* note 27, § 2, art. 9.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* § 2, art. 9(3).

<sup>61</sup> *Id.* § 2, art. 10(2).

<sup>62</sup> *Id.* § 2, art. 14(4).



does not undermine the treaty and other human rights treaties, and that all new agreements in both areas shall be compatible with such instruments.<sup>63</sup> At a simple glance, this could be worrisome for both investors and States because existing agreements could be interpreted in a more expansive way than was intended when the parties agreed because human rights regime would also come into play. However, to some extent, international tribunals have started dealing with similar issues. In *Suez v. Argentina*, Argentina argued that the lack of fulfillment of its bilateral investment treaty obligations was justified under necessity because, as part of its human rights obligations, it had to act to guarantee the right to water.<sup>64</sup> This was rejected by the tribunal when it expressed that the State could have had respected both types of obligations without choosing which to fulfill or not.<sup>65</sup>

States like the United States remain opposed to the treaty project. During the seventh session of discussion, it expressed continued opposition because the draft involves the extraterritorial application of domestic laws, an “ill-defined range of human rights abuses,” and that the negotiations are still so contentious that “a sizable percentage of States that are home to the world’s largest transnational corporations” have limited participation.<sup>66</sup> In the eight session of discussion, the U.S. advocated for a “less prescriptive approach, more akin to a framework agreement”<sup>67</sup> and suggested that a more prescriptive approach could be achieved through optional protocols that States could adopt at a later time.<sup>68</sup> This puts to question how effective this treaty would be if the State with the most multinational corporations<sup>69</sup> decides to not become a party.

During the eight sessions of discussion, China, an important recipient of foreign investment and a source of multinational companies, highlighted some measures it has taken to promote responsible business conduct. It released a

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<sup>63</sup> *Id.* § 2, art. 14(5).

<sup>64</sup> See *Suez, Sociedad General de Aguas de Barcelona, S.A and Interagua Servicios Integrales de Agua, S.A v. Argentine Republic*, ICSID Case No. ARB/O3/17, Decision on Liability (July 30, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0813.pdf>.

<sup>65</sup> *Id.*

<sup>66</sup> Human Rights Council, *Annex to the Report on the Seventh Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. Doc. A/HRC/49/65 Add.1, ¶ 23 (2021).

<sup>67</sup> HUM. RTS. COUNCIL, COMPILATION OF GENERAL STATEMENTS FROM STATES AND NON-STATE STAKEHOLDERS DURING THE EIGHT SESSION, § A, ¶ 20 (2022), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/wgtranscorp/session8/igwg-8th-compilation-general-statements.pdf> [hereinafter Eighth Session].

<sup>68</sup> *Id.*

<sup>69</sup> See Billy Cheung, *What Countries Are Most Multinational Corporations Based In?*, INVESTOPEDIA (Aug. 20, 2022), <https://www.investopedia.com/ask/answers/021715/why-are-most-multinational-corporations-either-us-europe-or-japan.asp>.

human rights action plan in 2021 to ensure such behavior in supply chains, encouraged companies to comply with the UNGPs, and provided guidance and support to companies in textile and clothing and mining industries to adopt responsible foreign investment guidelines.<sup>70</sup> This posture is said to be an effort to secure investments in the Global South, especially in the mineral activities and supply chains.<sup>71</sup>

The European Union (EU), on the other hand, is not waiting for a treaty to start creating mechanisms to hold companies accountable for human rights violations. In the eighth session, it stated that the EU took important steps in 2022: a legislative proposal to obligate companies to act under due diligence requirements taking into account human rights and the environment, and a proposal to ban products that use forced labor.<sup>72</sup> Germany highlighted that it enacted legislation in 2021 with the Supply Chain Due Diligence Act.<sup>73</sup> It also advocated for a framework agreement structure and an establishment of a “smaller drafting group proposing compromises to issues under discussion” to optimize the negotiation process.<sup>74</sup>

### III. CONCLUSION

As highlighted above, some States have already enacted measures to address corporate abuse, but their efficacy remains to be seen. In the case of China, only time will tell how “sincere” its efforts are since it is widely known as a State that often disregards human rights. However, a treaty on business and human rights would be innovative in the sense that it would contain provisions that have not been included in international treaties nor part of customary international law. The effort is commendable, but a treaty can only do so much if there is a limited number of States that sign, ratify, and enforce it. The issue of jurisdiction is one of the most contentious topics. It has been so since the beginning of the drafting process because the drafters have continued to expand the jurisdictional scope, allowing many States to possibly have jurisdiction over one case that involves a multinational corporation.

While the jurisdictional provision aims to avoid companies escaping liability, there are other ways these cases could be heard. The internationalization of these disputes could be a way to solve this and avoid the abuse of the *forum non conveniens* doctrine. Establishing international tribunals that deal with business and human rights when multinationals are involved could also

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<sup>70</sup> Eighth Session, *supra* note 67, § A, ¶ 4.

<sup>71</sup> SIKHO LUTHANGO & MEIKE SCHULZE, GERMAN INST. FOR INT'L & SEC. AFFS., THE EU AND THE NEGOTIATIONS FOR A BINDING TREATY ON BUSINESS AND HUMAN RIGHTS (2023), [https://www.swp-berlin.org/publications/products/comments/2023C16\\_BindingTreatyBHR.pdf](https://www.swp-berlin.org/publications/products/comments/2023C16_BindingTreatyBHR.pdf).

<sup>72</sup> Eighth Session, *supra* note 67, § B, ¶ 1.

<sup>73</sup> *Id.* § A, ¶ 8.

<sup>74</sup> *Id.*

increase acceptance because the disputes would be discussed in neutral forums outside the home or host State, as is often done in international investment disputes. Finding a workable solution to the jurisdictional issue is crucial to ensure that a future treaty can achieve its intended purpose of protecting human rights against corporate abuse.