



State comments due at the end of February 2021 on a draft treaty on Business and Human Rights (BHR Treaty)

Since 2014, a UN Working Group has been working towards a legally binding convention to regulate the activities of transnational corporations by reference to international human rights law (“BHR Treaty”). The Working Group has held six sessions; the fourth, fifth and sixth session, specifically, were negotiations over a draft text of the BHR Treaty, originally prepared by Ecuador in 2018 and subsequently revised.¹

The Working Group has now called for States to submit their comments on the current draft of the BHR Treaty (the “Second Draft”) by the end of February 2021.²

Crucially important issues for small / developing States (SDS) are at stake (as elaborated upon below). The Second Draft imposes a broad obligation on States to “investigate all human rights abuses covered under this [instrument], **effectively, promptly, thoroughly and impartially**, and where appropriate, **take action** against those natural or legal persons found responsible, in accordance with domestic and international law” (Art 5.3, Second Draft; emphasis added). States participating in the negotiations will have to resolve key questions such as whether human rights obligations should be imposed directly on corporations; what kind of criminal, civil and/or administrative liability States must legislate and enforce; and how to define obligations in relation to access to remedies for victims (including how to define “victims”). States will have to consider these (and other) issues both from the point of view of their jurisdiction over transnational corporations operating within their territory, as well as from the point of view of their own firms which may operate outside of their home jurisdictions. SDS, in particular, must weigh these considerations in light of any resource constraints.

More broadly, it remains to be seen whether and in what ways the BHR Treaty should or will be consistent with the UN Guiding Principles on Business and Human Rights (“UNGPs”), which were unanimously adopted by the Human Rights Council in 2011.

Despite these stakes, State participation in the negotiations has so far been relatively low. Only 66 out of 193 UN Member States participated at the 6th session.³ Among these, only 12 out of 33 Latin America and Caribbean States, 14 out of 55 Asia-Pacific States and 18 out of 54 African States

¹ Established pursuant to the UN Human Rights Council Resolution adopted on 14 July 2014 – Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/09, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9.

² The Second Draft is available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf.

A draft report of the sixth session and other documents from the session can be found at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.

³ Afghanistan, Albania, Algeria, Argentina, Armenia, Austria, Azerbaijan, Bangladesh, Belgium, Bolivia (Plurinational State of), Botswana, Brazil, Burkina Faso, Burundi, Cameroon, Chile, China, Cuba, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Equatorial Guinea, Ethiopia, Fiji, Finland, France, Germany, Ghana, Greece, Guatemala, Haiti, India, Indonesia, Iran (Islamic Republic of), Iraq, Kenya, Malaysia, Mexico, Morocco, Mozambique, Namibia, Nepal, Netherlands, Pakistan, Panama, Philippines, Portugal, Qatar, Russian Federation, Senegal, Slovenia, South Africa, Spain, Sudan, Sweden, Switzerland, Thailand, Togo, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela (Bolivarian Republic of).



participated and only 21 out of 66 participating UN Member States submitted written comments (although Burkina Faso's General Statement was made on behalf of the African Group). **The positions and input of the States from the three regions are particularly essential for the preparation of the third and future drafts of the BHR Treaty, as those regions experience the most human rights and environmental harms from transnational business activities while depending on these activities for their socio-economic development.**

The BHR Treaty process has the potential to affect even those States which do not participate in the negotiations and/or eventually do not ratify the treaty. An international legal instrument, even one that has no legal force strictly speaking, or to which a State is not party, has the power to shape emerging norms of international law and to be used and referred to by various actors.

Key stakes and issues in the Second Draft

States participating in the BHR Treaty process have generally agreed that the existing non-binding standards regulating the business and human rights sphere are not sufficient to address and remedy human rights harm from business activities. Specific rationales provided by States for a legally binding instrument to complement the non-binding standards include:⁴

- providing effective means of prevention, protection and redress related to human rights violations and abuses by business enterprises, or in the context of business activities, and thus filling existing gaps in international law;
- promoting international investments according to quality standards that respect human rights, labor rights and the environment and guarantee effective access to justice for victims of human rights abuses;
- ensuring accountability of transnational corporations for human rights abuses;
- embedding a sustainable, inclusive and human-rights based approach to post-COVID-19 socio-economic reconstruction.

Several key issues remain unresolved and thus subject to States' comments and negotiations, including:

1. *Corporate or State obligations*: Whether the BHR Treaty should impose obligations related to human rights directly on business enterprises, or impose obligations only on States to regulate business enterprises, to investigate and prosecute human rights violations by business enterprises and to provide victims access to remedies;⁵
2. *Which business enterprises are to be covered (including the question of state-owned enterprises)*: Whether the BHR Treaty should apply to all business enterprises or be limited only to transnational corporations ("TNCs") and other business enterprises that undertake activities of a transnational character ("OBEs"). A particular question is whether state-owned enterprises should be excluded. The Second Draft includes *all* business enterprises (Art. 3.1 of the Second Draft). Some States have expressed that this is inconsistent with the Human Rights Council Resolution 26/9⁶ that established the BHR Treaty process, insofar as the Resolution referred only to the activities of TNCs and OBEs.⁷

⁴ See, for example, General Statements provided by Argentina, Brazil, Chile, China, Ecuador, Namibia, Pakistan, Panama, Senegal and Venezuela at the 6th session of the Working Group available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.

⁵ See General Statement of Burkina Faso on behalf of the African Group, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.

⁶ UN Human Rights Council, Resolution adopted by the Human Rights Council on 14 July 2014, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with



Potential challenges in implementing obligations in domestic law: Obligations contained in the Second Draft may present practical challenges in their implementation, including due to inconsistencies between the relevant provisions and States' domestic legal systems.⁸ They may also impose an onerous burden on certain States. These relates, for instance, to:

- a. Obligations to guarantee the rights of victims, to take necessary measures to ensure the protection of victims, their representatives, families and witnesses, to conduct investigations of human rights abuses and to hold relevant individuals and legal persons accountable (Art. 4 and 5 of the Second Draft). This includes specific rules such as reversing the burden of proof (i.e. the usual rule that complainants in civil matters bear the onus of proving their case), if consistent with domestic law, in order to ensure access to remedy for victims;
- b. Establishing on business enterprises mandatory due diligence obligations (including to identify and assess potential human rights abuses that may arise from business activities or – more broadly – business relationships, taking appropriate measures to prevent and mitigate these, and to continuously monitor the effectiveness of these measures) (Art. 6 of the Second Draft);
- c. Providing courts and State-based non-judicial mechanisms with the necessary jurisdiction to ensure that victims have access to an “adequate, timely and effective remedy” (Art. 7 of the Second Draft), including jurisdiction over claims by victims of *any nationality or domicile* against legal or natural persons *not domiciled* in the State's territory, in certain circumstances (Art. 9 of the Second Draft). States must also remove from their domestic law the doctrine of *forum non conveniens* (i.e. the legal doctrine whereby courts may refuse to exercise jurisdiction over matters where there is a more appropriate forum available) as grounds to deny jurisdiction in human rights cases covered by the BHR Treaty (Arts. 7 and 9 of the Second Draft);
- d. Legislating and enforcing specific rules on the legal liability of persons (both legal and natural) responsible for human rights abuses, and providing for gender responsive reparations for victims (Art. 8 of the Second Draft);
- e. Ensuring that statutes of limitations do not apply to “violations of international [sic] which constitute the most serious crimes of concern to the international community as a whole”, and that statutes of limitation for all other crimes and all civil claims allow a “reasonable period of time” for investigation and commencement of other legal proceedings (Art. 10 of the Second Draft);
- f. Requiring individuals and companies conducting business activities in the State's territory to maintain financial security, such as insurance bonds or other financial guarantees, to cover potential claims of compensation (Art. 8 of the Second Draft);
- g. Allowing a victim, in some cases, to request the courts to apply the substantive law of (i) the State where the human rights violations occurred or (ii) the State where the alleged perpetrator is domiciled (Art. 11 of the Second Draft), rather than the law of the State to which the courts belong.

respect to human rights, A/HRC/RES/26/09, available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9.

⁷ See, for example, General Statements provided by Burkina Faso on behalf of the African Group, Egypt, Ethiopia, India, Philippines at the 6th session of the Working Group available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.

⁸ See, for example, General Statements provided by Argentina, Brazil and Chile at the 6th session of the Working Group available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.



At the 6th session, some delegations particularly stressed the need to maintain the balance between, on the one hand, the commitment to ensuring that transnational companies are accountable for human rights abuses, and, on the other hand, the socio-economic developmental concerns of developing countries and the need to not impose an excessive burden on these countries.⁹

In addition, Burkina Faso (on behalf of the African Group) proposed that the BHR Treaty should address the issues that have arisen in connection with the role of pharmaceutical TNCs and the WTO TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property), in light of the COVID-19 pandemic, though it is not yet clear how.¹⁰ State delegations may address this in their comments on the Second Draft.

Next steps in the Working Group process

States and other relevant stakeholders are currently invited to make two submissions to the Working Group by the end of February 2021 based on two matrix templates, to contain:¹¹

1. “concrete textual suggestions, modifications, additional language, requests for deletions, as well as expressions of support on the current provisions” of the Second Draft (Matrix Template I); and
2. “general comments and requests for clarification” (Matrix Template II).¹²

The Working Group will then prepare a Third Draft of the BHR Treaty, no later than July 2021.¹³ Presumably, States and other stakeholders will have the opportunity to negotiate this Third Draft at the 7th session of the Working Group. This 7th session is currently unscheduled, but all Working Group sessions have so far taken place in October.

The Working Group has also recommended that States take certain steps in relation to internal consultations and further engagement with the BHR Treaty negotiation process.¹⁴

How IILA Can Support SDS

Given the importance of these issues, and the pressing time schedule, IILA can work with SDS delegations in the following suggested ways:

1. *Most immediately*, assess and advise on legal issues and options arising in relation to the Second Draft. Using Matrix Templates I and II, IILA can support SDS in formulating their positions, comments and requests for clarification in relation to the text of the Second Draft, including any reservation of positions that need to be made before the end of February 2021;

⁹ See, for example, General Statements provided by India and Brazil at the 6th session of the Working Group available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.

¹⁰ See General Statement of Burkina Faso on behalf of the African Group provided at the 6th session of the Working Group (available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>).

¹¹ As recommended under section VII.A.43(b) of the Draft report of the 6th session available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.

¹² Matrix Template I and Matrix Template II are available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.

¹³ As mandated under section VII.A.43(f) of the Draft report of the 6th session available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.

¹⁴ As per sections VII.A.43(c) - (e) of the Draft report of the 6th session of the Working Group available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>.



2. *In the medium term, provide ongoing support in any process of formulating State positions on the BHR Treaty, assessing the Third Draft when released later this year, and supporting SDS in preparing for, attending and negotiating at the 7th session of the Working Group .*

Should you require any further details or wish to discuss how IILA can help your government to engage with these substantive and procedural issues going forward, please do not hesitate to write to us at info@independentILA.org.

Prepared by Independent International Legal Advocates in conjunction with Elena Marchenko, a member of the New York City Bar Association's Working Group on Business and Human Rights.