International Business and Human Rights Dispute Settlement Before Domestic Courts: The Draft UN Treaty for Business and Human Rights

By:

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Human rights principles and standards are strongly reflected in the 17 Sustainable Development Goals (SDGs) adopted at the UN Sustainable Development Summit in 2015. However, for victims of human rights violations at the hands of transnational corporations the question of redress remains daunting. Access to justice challenges faced by such victims before domestic courts have placed this issue at the forefront of international discourse. Accordingly, one of the 'pillars' on which the United Nations Guiding Principles on Business and Human Rights (UNGP) are founded is the "need for rights and obligations to be matched to appropriate and effective remedies when breached", including state-based judicial, state-based non-judicial, and non-

state–based remedies.

Over the past few years, several initiatives have been developed in an attempt to facilitate the implementation of this 'pillar' of the UNGP. One mechanism seeking to improve victims' access to domestic courts is the draft United Nations Treaty for Business and Human Rights, which aims to guide states in preventing and compensating for human rights violations by businesses. Officially named a "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises", the draft treaty was first released by the UN working group in July 2018, followed by a more detailed and coherent draft in July 2019. While a step in the right direction, the draft treaty will likely require further amendments if it is to ensure adequate access to effective remedies by victims of corporate human rights abuses before domestic courts.

According to the 2019 draft's statement of principles, the treaty would apply to all "business activities", not limited to "transnational" or "for-profit" activities, since it is "difficult to differentiate between transnational and national companies in practice". Moreover, the draft treaty is designed to facilitate victims' "access to remedy regardless of the kind of company committing the abuse". The 2019 draft also purports to cover "all human rights". Such a wide scope may have been motivated by an aspiration to provide as comprehensive an instrument as possible that will gain broad international support. It has also been viewed as endorsing the idea that "business can affect virtually all internationally recognized rights. Therefore, any limited list will almost certainly miss one or more rights that may turn out to be significant in a particular instance, thereby providing misleading guidance".

At the same time, the complete lack of specificity in the treaty's scope of application, which is not even limited to those human rights that are " internationally recognized", may result in procedural and substantive hurdles in practice. The draft attempts to diffuse these risks by requiring signatory states to ensure their domestic legislation and procedures comply with their obligations under the treaty. While this allows for, and may even encourage, the harmonization of domestic human rights legislation, it might also be counterproductive and lead to states adopting the "lowest common normative

denominator". Since the future treaty seeks to harmonize the imposition of legal liability across national jurisdictions, it may be more effective to set out at least the minimal human rights violations that would give rise to such liability. The list of international human rights instruments currently included in the Preamble could provide the basis for this.

In other important aspects, the scope of the 2019 draft is more limited. For instance, it provides a possible exceptionfor "small and medium sized undertakings" in order to "avoid causing [them] undue additional burdens". The language of this provision refers to "incentives and other measures to facilitate compliance" with the treaty, rather than explicitly to exemptions. However, such exemptions remain a possible tool for states to use in this context. An exemption or other measures made solely on the basis of the size of the business undertaking may give rise to suspicions that "double standards [are] at play, with the intention of some of controlling foreign corporations without being required to do the same in regards to local 'strategic' businesses", or that it "may be abusively taken advantage of by developing or other States in order to favor the 'impunity' of abuses perpetrated or assisted by 'strategic' corporations or in 'strategic sectors'".

Furthermore, the requirements for establishing legal liability of a corporation for "...its failure to prevent another natural or legal person with whom it has a contractual relationships" from committing human rights violations or abuses seem unduly narrow. While "contractual relationship" is defined quite broadly, the 2019 draft only allows for liability based on "control" or "risk", but not on "relationship", as in the 2018 draft. This may be problematic since "a close relationship between natural or legal persons within supply chains or other business operations is easier to prove for victims than to show whether control was exercised or risk was (not) assessed". The draft treaty also does not provide the test for establishing when an enterprise should have foreseen risks of human rights violations, or for establishing the extent of sufficient control or supervision. At the same time, the draft treaty attempts to overcome this limitation by setting out an extensive list of victim rights, including that "...courts asserting jurisdiction under this (Legally Binding Instrument) may require, where needed, reversal of the burden of proof for the purpose of fulfilling the victim's access to justice and remedies".

In sum, the 2019 draft treaty promotes the third ‘pillar’ of the UNGP, as well as the human rights principles reflected in the SDGs, by improving victims’ access to domestic remedies for corporate human rights violations, and addresses some of the concerns arising from its 2018 predecessor. Yet it continues to provide only a partial response that does not entirely remove the hurdles victims face in seeking redress through domestic litigation. In its current form, the draft treaty’s overly broad and indeterminate scope risks compromising its enforceability, while its vague legal tests for establishing legal liability and allowance for exemptions by states may undermine its effectiveness. Ultimately, the approach for those who wish to see effective compliance and redress must be multi-pronged, and additional mechanisms should be developed alongside improving victims’ access to domestic courts. The OECD Guidelines for Multinational Enterprises, Ombudspersons for Responsible Enterprise, and international arbitration, are examples of existing or developing alternatives that policy makers, researchers, and practitioners should consider.

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