

SWP Comment

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The EU and the Negotiations for a Binding Treaty on Business and Human Rights

Multilateral cooperation for strengthening the EU's strategic autonomy in supply chains

Sikho Luthango and Meike Schulze

The European Union (EU) is seeking out new partnerships and to strengthen existing ones, particularly with Global South states, to enhance its open strategic autonomy. This includes a resilient supply of raw materials for its twin transition to a digital and green economy. Hosting many transnational corporations, several of these partners advocate for a binding international standard to regulate business and human rights beyond the non-binding United Nations Guiding Principles (UNGPs). Thus, the EU should establish a mandate and actively engage in the negotiations for a Binding Treaty on Business and Human Rights (BHR) to consolidate its image as a defender of human rights internationally. Multilateral negotiations enable dialogue and mutual cooperation that regional and national laws on supply chain due diligence do not, and thus risk acceptance by international partners once implemented. This poses a challenge for mutual cooperation, which is necessary to achieve corporate accountability.

The governance system for business and human rights has seen a further consolidation in the last decade with international, regional and national initiatives. Thereby, the endorsement of the UNGPs in 2011 marked a decisive step. Developed in a multi-stakeholder process, the UNGPs create a framework that imposes non-binding standards on both states and businesses. However, shortly after their adoption – emerging from what can be described as a “wide but thin” – rather than a ‘thick’ consensus” – was another push from states

to establish a binding instrument, which was a direct reaction to the non-binding character of the UNGPs.

In September 2013, at the United Nations Human Rights Council (UNHRC), Ecuador proposed the creation of an Open-ended Intergovernmental Working Group (OEIGWG) to elaborate a legally binding instrument (LBI) on transnational corporations (TNCs) and other business enterprises with respect to human rights. At the 26th session of the UNHRC in June 2014, Ecuador's resolution (29/6) was adopted and co-



sponsored by Bolivia, Cuba, South Africa and Venezuela. However, there was a small majority that cast 20 votes in favour, with 14 against and 13 abstentions. The EU member states all voted against the resolution and, together with other Global North states, received the treaty alliance with hostility, arguing that the parallel process would pose a threat to the implementation of the UNGPs. This was perceived by some states as a negative signal, and the credibility of EU member states as promoters of human rights was questioned.

Despite this opposition, the OEIGWG held its first session in July 2015, with Ecuador elected as Chair, and subsequently seven further meetings in Geneva by the end of 2022. The Chair published the First (Zero) Treaty Draft before the negotiations were held in 2018 for textual proposals by states. In the 8th session, held in October 2022, states debated the latest Third Revised Draft, a draft text for an LBI including various states' proposals for amendments. A "Friends of the Chair Group" – a geographic, economic and political representation of states tasked with the facilitation of compromises for the treaty across regions – was also consolidated in the last session.

The process has so far seen engagement from many of its supporters, but it lacks dynamic and broad state participation. This is slowly changing, however, as momentum around business and human rights is increasing globally and as more states join the negotiations – including the United States (US), Japan and the United Kingdom (UK) – following some criticism about the progress and credibility of the negotiations. Moreover, the EU's strong opposition to the process has subsided. Even though an official negotiating mandate has not yet been established, the advancement of the legislative process for a binding EU supply chain law may pave the way for greater international engagement.

The EU's active engagement in the negotiations is especially significant, as the EU seeks to reshape its economic ties. The pandemic – especially in relation to China – and the subsequent interruption of global

supply chains, as well as Russia's war against Ukraine, have compelled the EU to reassess its supply chain dependencies. Additionally, the intensification of US-China trade tensions since 2022 has solidified the EU's objective to strengthen its strategic autonomy and build more resilient supply chains to achieve its transition to a digital and green economy (twin transition). To this end, international partnerships that enable the strategic diversification of supply chains are to be consolidated or newly established.

It is important for the EU to send a consistent signal about the significance of human and environmental standards to like-minded partner states. Regulating business through regional and national due diligence laws that will have an extraterritorial impact, but without participating in multilateral negotiations, does not send a consistent signal to these partners.

Patterns, allies and divisions at the negotiations for a binding treaty

As in previous international negotiations on the regulation of transnational corporations, positions to elaborate on an LBI were divided. And even though the process has gained momentum since 2021, disagreement on certain issues remains. Many countries of the Global South continue to campaign for a comprehensive LBI that goes beyond the UNGPs. The Global North's opposition to the process has been weakened. However, the belief that the voluntary nature of the UNGPs is sufficient is still widespread and remains contentious with the initiators and proponents of an LBI.

Outlining the key demands of Global South states

Global South states, which are commonly host states of TNCs, are facing increasing domestic pressure to address human and environmental rights violations, with many exploration or extractive projects in several

of these countries having been halted. For example, in South Africa, a Shell seismic survey for oil and gas was interdicted by the wild coast community due to a flawed human rights due diligence process. There are weak governance zones and challenges in the implementation of legislation in some of these states, which adds another layer of difficulty in addressing these violations. This has increased the need to pursue cases in the home states of TNCs, as with the landmark verdict by the Court of Appeal in The Hague, Netherlands, that found Shell Nigeria liable for pollution caused by leaking oil pipelines.

These states are also mainly initiators and proponents of the resolution for an LBI on business and human rights. Ecuador, as the long-term Chair, and South Africa are keeping the negotiations alive and shaping the process significantly. States such as South Africa, Cuba, Bolivia, Namibia, Algeria, Panama, Palestine and Cameroon remain strong supporters of a comprehensive, broad-spectrum treaty. These states argue that the voluntary nature of the UNGPs is insufficient and demand a comprehensive legal instrument at the international level, as they continuously experience the prevalence of human rights violations by businesses and challenges to access remedy.

A 2021 study by Ullah and co-authors shows that Global North-listed TNCs are often engaged in violations of human rights and/or environmental rights, which mostly occur in developing countries and are often related to the extractives sector. The vast majority of these companies institutionalised sustainability committees and are signatories of the Global Compact, but they fail to disclose violations of this kind and hamper access to remedy.

An illustrative case is what is now known as the 2012 Marikana Massacre in South Africa, where 34 workers were killed during a strike at a platinum mine. Responsibility and remedy are still being negotiated today. At the centre remains the question of liability of the British mining company operating in South Africa, Lonmin, which had export relations mainly internationally, including

with BASF in Germany. Issues such as liability and access to remedy remain key concerns for many TNC-host countries, which the non-binding UNGPs do not address: Corporate veils lead to complex liability issues, and the jurisdiction of courts in legal disputes often has a negative impact on the protection of human rights. Suing the parent company in the TNC's home state, or the main buyer's, is fraught with considerable obstacles.

Moreover, these states often weigh the pursuit of an LBI against the fear of losing foreign investment. But this may change if more Global South states join the negotiations. The African group can also be expected to strengthen. For example, with Ghana's announcement to implement the UNGPs through the establishment of a National Action Plan (NAP), it may re-join and actively shape the negotiations. Furthermore, despite concerns from civil society about not having an African representative in the Friends of the Chair Group, Cameroon's announcement to join the group in the 8th session indicates that there is still a commitment from the African group as a regional bloc. Greater regional coordination in the area of business regulation is also likely to minimise inter-state competition in light of new investments. In the wake of the geopolitical changes of the last two years, major economies – the US, the EU and China – are seeking to secure partnerships with the Global South, especially for critical minerals but also other strategic supply chains, which increases the leverage of these states, including on the protection of human rights.

Fragmented BRICS: An opportunity to strengthen dialogue with like-minded states?

Except for Brazil, which abstained, the other BRICS states all voted in favour of elaborating on an LBI back in 2014 and have been actively engaged in the negotiations, thus showing their commitment to multilateral negotiations. However, as argued by some scholars, the Global North/South distinction

can obscure important power dynamics and resources as it relates to businesses, including accountability, because TNCs are also located in developing and emerging economies, as with the BRICS states. Their regional – partly global – economic influence is already pronounced.

Their view regarding international standards is interesting to observe, as their political leverage is continually increasing, with the forum planning to expand and form an alternative to the G7. Although they all emphasise the protection of their right to socio-economic development, they take different stances towards the provisions of the Third Revised Draft.

South Africa has strongly advocated for an LBI since the beginning and remains invested in the process, despite concerns about the direction of the Cyril Ramaphosa presidency. It sees extraterritorial obligations (ETOs) as key to access justice. ETOs guarantee the rights of those impacted by human rights violations to be heard in all stages of proceedings and removes legal obstacles such as the doctrine of *forum non conveniens*. The doctrine is a common measure used by TNCs to evade accountability in places where foreign courts may dismiss a case to be heard in another “appropriate” jurisdiction, usually where the violation occurred. Some scholars, such as De Schutter, argue that ETOs are weakly formulated by the UNGPs and should be clarified in an LBI.

However, as a state that is also home to TNCs, South Africa is currently facing such a case. In 2020, Zambian communities filed a lawsuit against mining company Anglo American for lead poisoning in one of its operations in Zambia. As of January 2023, a South African court is currently deciding whether the subsidiary of the Anglo American mining company will face a class-action lawsuit.

Compared to South Africa, China, Russia and Brazil are engaging actively in the negotiations with textual proposals but reject several key provisions of the treaty, especially those relating to ETOs. Most notably, all three strongly emphasise the

protection of national sovereignty and, in line with this argument, reject the removal of the doctrine of *forum non conveniens*.

With this type of engagement, China is pursuing a longer-observed approach in UN human rights bodies and attempting to rewrite norms in its interest, especially in its pursuit of new strategic partnerships with other Global South states.

In Brazil, the government change to a left-leaning President Lula da Silva is likely to have an impact on the government’s stance in the coming negotiations. Lula recently came out against the deforestation of the Amazon rainforest, which shows a stronger political commitment to the protection of human and environmental rights than with the previous government. Whether Lula will be able to achieve a balancing act between Brazil’s domestic development needs and the protection of human and environmental rights remains to be seen in the upcoming negotiations.

Under President Narendra Modi’s government and in line with its support for (re-formed) multilateralism, which is the inclusion of developing states in institutions of global governance, India supports the UN process for an LBI. India’s representatives, however, emphasise their national initiatives and need for a flexible agreement that takes into account their right to development. Once the EU comes to the fore, it may be in India’s best interest to align itself by using a long-observed foreign policy approach that usually emphasises its values on the rule of law and democracy. As a potential partner, this would set India apart from China.

At the moment, one can conclude that the BRICS’ participation in the negotiations is fragmented. Thus, the EU should use the binding treaty negotiations as an opportunity to intensify dialogue with these emerging economies with which a closer partnership is envisioned. These include South Africa as well as the observation of developments in Brazil and India. Additionally, noting what these states consider as important in the treaty negotiations is necessary if potential partnerships are to be built.

Possible Global North constellations: The EU needs its own strategic position

Since the 7th session in 2021, more Global North states have participated in the negotiations, presenting their positions and influencing the process. These states' participation is significant because of their economic influence worldwide as the home states for many TNCs, and through them they can shape integrated transnational supply chains. For example, Australia and Japan re-joined the negotiations in 2021 and 2022 after being absent for several years. The US participated for the second time at the 8th session in 2022 after vehemently rejecting the process at the beginning. Therefore, all G7 members (except for Canada) as well as the EU were present in Geneva. The G7 labour ministers also announced their support for an LBI in 2022 – a reflection of changing attitudes among many Global North states.

Nevertheless, several Global North states such as Norway, Australia and Japan openly reject the Third Revised Draft and are not actively engaging in the negotiations. In doing so, these states are broadly aligning themselves with the position of the US, which is experiencing a changing landscape domestically, especially as it relates to the rights of indigenous groups. For example, Arizona is currently dealing with resistance from Native American groups against a copper-mining project backed by Rio Tinto and BHP. US-based civil society groups that support the rights of indigenous groups were also actively participating in the negotiations at the 8th session.

However, with its statements and textual proposals, the US still rejects a broad-spectrum treaty. It favours voluntarism by, for example, suggesting to change “obligations” of businesses to “responsibility” – a key feature of the non-binding nature of the UNGPs. These proposals are in line with the suggestion for a framework agreement and as a less “prescriptive” approach in regulating business. Nonetheless, the US also aims to diversify and reduce its dependency on

China. Considering the increasing domestic pressure for the protection of human rights, the US can be expected to remain committed to negotiating in the coming sessions. However, it remains unlikely that it will ratify a broad-spectrum treaty. In this scenario, an alliance of states with the US can be expected. This may weaken some of the strong demands coming from certain Global South states.

The majority of EU member states have not yet established their own positions on the LBI – they continue to act as a regional bloc, awaiting an EU mandate. However, having voted against the establishment of the OEIGWG in 2014, the EU's initial absolute opposition to a binding instrument has softened. For example, a long-time demand of the EU was the broadening of the treaty's scope of application, and this is now fulfilled with the provisions of the Third Revised Draft. Additionally, the EU concession can be seen as a reflection of increasing international debates about the responsibilities of business and increased awareness of consumers.

In alignment with other Global North states, the EU critiques the level of detail and lack of clarity of various legal formulations and terms of the Third Revised Draft, including liability clauses, despite not having an official mandate yet. However, these arguments are opposed by states that insist the option to seek clarity on the text is available by means of negotiating the Third Revised Draft, as opposed to not establishing a mandate.

Some EU member states are increasingly sympathetic to the process and are pushing for an EU negotiating mandate, including clarification on competencies between the EU and its member states. This will determine which provisions the EU and the member states can negotiate on respectively. The LBI covers various aspects that fall under the EU's competence, such as international trade, which will expand further with the adoption of the CSDDD. However, there are still many aspects of the LBI that will remain within the competence of the member states, such as provisions related to proce-

dural law. This coordination will also affect the timely establishment of a mandate.

France and Portugal, both participants from the EU since 2016, have agreed to be part of the Friends of the Chair Group. And, with Germany having passed the German Supply Chain Act (LkSG) and shown support for the upcoming EU regulation, the political will for an LBI seems to be growing. However, there seems to be no agreement yet on a common government position in Germany. Labour Minister Hubertus Heil stated in October 2022 that the negotiations in the UNHRC should be constructively supported and that an EU mandate was overdue, but the responsible Foreign Office remains hesitant, as does the Ministry of Justice. A common German position is integral to advancing the process regionally and internationally.

Potential alliances with the EU – and especially with the US – are likely. Once a mandate has been established by the EU, building an alliance with the US without taking into account the key demands of the Global South and potential ramifications may negatively impact the EU’s partnership efforts. This warrants a strong EU position of its own.

The EU’s draft supply chain law and its role in the negotiations

In February 2022, the EU Commission proposed the draft for an EU supply chain law, the Corporate Sustainability Due Diligence Directive (CSDDD). On the basis of this draft, the trilogue negotiations between the Commission, the Parliament and the Council of the EU are currently taking place. A final draft law is expected by 2024.

The EU demonstrates a political willingness to move away from voluntary standards towards more binding regulation for corporates. However, with its current lack of active engagement in the binding treaty process and without a mandate to negotiate, this willingness has not materialised at the international level. With more engagement in the multilateral process, the EU has

a better chance of presenting the image it is striving for: a promoter and defender of human rights and a trustworthy international partner.

In this respect, the external perception of legislative initiatives at the regional level, without engagement in the multilateral negotiations, needs to be acknowledged. Implementing due diligence laws with cross-border implications can be interpreted as the Global North imposing laws on the Global South, especially since only limited forms of dialogue and consultation with relevant partners have occurred. This may lead to a risk of acceptance of these laws by potential and existing partners and may pose challenges for mutual cooperation, especially with the states of the Global South, which are affected most by the human rights impacts of TNCs. The EU can send a consistent signal by being more active at this level.

Nevertheless, regional initiatives such as the upcoming CSDDD may very well enrich the process at the international level by, for example, broadening the scope of the treaty to include impacts on the environment as well.

As seen during the 8th session in 2022, the EU has already begun to use the CSDDD proposal to inform the negotiations. However, the limits and implications of using the proposal as the only basis for engaging multilaterally should be considered. This is particularly important in order to acknowledge the longstanding demands of communities – and partly states – in the Global South to ensure proper access to justice, particularly for victims of human right violations.

Access to justice is a particular challenge in transnational supply chains. A study by the European Law Institute found that neither the CSDDD nor the laws from France or Germany lift the corporate veil and adequately address access to remedy. For example, as the CSDDD currently declares, civil liability can only be invoked when there is a direct link between the company’s failure to comply with its due diligence obligations and the damage. This

approach is likely to impede victims' access to justice. Ensuring access to justice and remedies often remain insufficiently provided for in due diligence laws. Hence, the LBI sets a liability regime that applies beyond due diligence obligations.

In order to build partnerships, the EU must be willing to take a step towards its partners in this area. Diversifying its supply chain will require a balancing act between its potential alliance with other Global North states, such as the US, and its goal of creating and strengthening its partnerships with Global South states.

And in the spirit of having an instrument that aligns with the UNGPs – a longstanding focus of the EU in the negotiations – the provisions set out in the current Third Revised Draft would provide not only continuity, but also complementarity to the current CSDDD.

Impasse? The proposal for a framework convention

During the 8th session in 2022, several states argued in their opening statements that an alternative instrument in the form of a “Framework Convention/Agreement”, as opposed to a “Treaty”, may be more of a workable format for increasing the participation by and interest of states. It is argued that it would help in reaching agreement on essential minimum standards while allowing for greater flexibility in terms of national implementation. However, it is also not clear yet whether this would take the form of an agreement or convention. The proposal originated from the US and has received support from states such as Germany and the UK. However, it has been met with critiques from some states, civil society and some academics.

The researchers Ford and O'Brien, whose reasoning is often used by states in the negotiations, propose alternative instruments such as a framework convention/agreement, a declaratory instrument or a narrow-spectrum BHR treaty on abuses amounting to international crimes. They argue that

this approach would achieve broad state participation. One example often used in this context is the WHO Framework Convention on Tobacco Control, which has 168 signatories and is one of the most subscribed-to treaties in the UN system.

At the core of this argument is the question of form rather than why a treaty should be pursued at all. Furthermore, arguments for a framework convention suggest that what is achievable as a next step – emanating from the UNGPs – is obliging state parties to adopt and implement NAPs. These arguments also suggest that – based on the past failures of instruments such as the *Draft Norms*, which marked one of the earliest failed attempts at creating direct legal obligations for companies – a comprehensive BHR treaty would not achieve widespread participation or ratification, especially among large economies that host TNCs. Moreover, it is also being proposed that proponents of the LBI must suggest what mechanisms and institutions will be used to foster compliance with the treaty, alongside the additional obligations it will impose on states.

The Third Revised Draft of the LBI already envisions institutional arrangements, such as a committee of experts and regular state conferences, to monitor and comment on implementation, including the exchange of states' status reports. These governance structures could be further strengthened within a broad-spectrum treaty and be aligned with UNGP structures.

As the former UNHRC's Business and Human Rights working group representative, Deva argues that questions about form over substance are like putting the “cart before the horse”. The intention of a platform such as the OEIGWG is to deliberate on substance, and therefore of more importance, which is why a BHR treaty is needed.

Additionally, although there is room to discuss formats, any attempts that do not transcend what the UNGPs aim to accomplish are unlikely to achieve the desired compromises and move the process ahead. Of substance, access to justice remains on the agenda of many Global South states.

Recommendations

Although the non-binding UNGPs have established themselves as the central normative framework for a wide range of states, businesses and other stakeholders, there are still governance gaps that persist at the international level, especially as it relates to accessing remedy.

Implementing the UNGPs with-related initiatives such as the CSDDD is still necessary, but they need to be accompanied by continued multilateral engagement to send a consistent signal to existing and potential cooperation partners. The draft LBI provides not only continuity but also complementarity to the UNGPs.

In view of G7 commitments and in a time when the diversification and expansion of international partnerships are a political objective, the EU should establish a mandate to ensure that this is not a missed opportunity to cooperate with established and potential partners in the area of business and human rights. This would strengthen the EU's diplomacy as a credible partner and human rights defender.

The goal of achieving strategic autonomy should also be weighed against any potential alliances with other Global North states that might be pursued at the negotiations and possibly weaken the demands of existing and potential Global South partners.

The provisions and experience around the adoption of the CSDDD can inform the binding treaty negotiations in some respects; however, it should not serve as the sole basis. As it currently stands, the CSDDD proposal is not comprehensive in matters of most importance for Global South partners, such as access to justice and liability. In addition, the CSDDD is criticised by many states in the Global South for its non-inclusive approach and extraterritorial impact. Thus, the lack of commitment to the multi-lateral LBI negotiations could jeopardise acceptance of the CSDDD and cause diffi-

culties with mutual cooperation efforts in the regulation of business.

With the Council of the EU, and thus the member states' positions on the CSDDD proposal being agreed upon, it is the right time for the European External Action Service, in coordination with the EU Commission, to seek a negotiation mandate. This requires clarification about areas of competence to ensure a coherent and strategic representation of the EU and its member states in the OEIGWG.

The Federal German Government should actively engage in the Council of the EU on the matters of an international agreement. Germany can also attempt to establish a coalition of the willing in Europe with states such as France and Portugal that are sympathetic to the LBI process – therewith supporting the establishment of an EU mandate.

At first, however, it requires coordination and agreement on a common German position between the federal ministries for the treaty process and core demands – the lead Foreign Office should work towards this outcome.

Subsequently, the G20 summit in India in September 2023 should be used to promote active international participation in the negotiations and strengthen the dialog with like-minded BRICS countries.

In order to strengthen the *modus operandi* and intergovernmental cooperation at the negotiations, the German government could offer stronger technical and financial support to the Friends of the Chair Group (and its respective group representatives).

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SWP
Stiftung Wissenschaft und Politik
German Institute for International and Security Affairs

Ludwigkirchplatz 3 – 4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

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