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## Columbia FDI Perspectives

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Editor-in-Chief: Karl P. Sauvart ([Karl.Sauvant@law.columbia.edu](mailto:Karl.Sauvant@law.columbia.edu))

Managing Editor: Marion A. Creach ([marion.creach@sciencespo.fr](mailto:marion.creach@sciencespo.fr))

### **A legally binding instrument on business and human rights to advance accountability and access to justice\***

by

Kinda Mohamadieh\*\*

In October 2018, an open-ended inter-governmental working group (under the United Nations Human Rights Council) undertook the first reading of the [zero draft](#) of a “legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.” The effort is led by Ecuador and South Africa, and an increasing number of states attend the annual sessions, although many developed countries still do not participate. A revised version of the draft is expected in June 2019, to be discussed at the working group’s October 2019 session.

International human rights law, including the International Covenants on [Civil and Political Rights](#), as well as [Economic, Social and Cultural Rights](#), already imposes due diligence obligations on states to protect against human rights abuse by third parties, including enterprises, within their jurisdiction, such as the obligation to “prevent, punish, investigate or redress the harm caused by private persons or entities.”<sup>1</sup> Where domestic legal and institutional frameworks fall short of these obligations, they ought to be developed. Yet, states often face challenges in holding transnational businesses, operating through subsidiaries and/or supply chains, accountable, given their ability to escape liability based on jurisdictional grounds.

The draft seeks to address such challenges. It requires measures to prevent human rights violations within the context of “business activities of a transnational character” that “take place or involve actions, persons or impact in two or more national jurisdictions.”<sup>2</sup> There are suggestions to expand the scope of the instrument to “all business enterprises.” Given that it would seek to garner international cooperation and mutual assistance to address cases where unilateral action by states is insufficient, the proposed approach, which consists of focusing on such cases while not excluding domestic enterprises that have transnational linkages, is relevant. For greater certainty, negotiating parties could specify that the instrument does not exclude national or state-owned entities.

The draft includes due diligence obligations for enterprises covering “the activities of [their] subsidiaries and that of entities under [their] direct or indirect control or directly linked to their operations, products or services” (article 9). While the Ecuadorian drafters presented these requirements as building on the approach in the [Guiding Principles on Business and Human Rights](#), critics have pointed out that the draft might be diluting the Guiding Principles.

Generally, it is crucial that the instrument incorporates a broad notion of human rights due diligence, which covers companies' subsidiaries and entities within their supply chains. Failure to comply with due diligence requirements should trigger commensurate liability and compensation.

To facilitate victims' access to courts, the draft vests jurisdiction in the courts where the violation took place, or where the involved enterprise has "its statutory seat, or central administration, or substantial business interest, or subsidiary, agency, instrumentality, branch, representative office or the like" (articles 5.1 and 5.2). Some have foreseen parallel proceedings. This risk could be addressed through procedural rules, such as adapted fork-in-the-road provisions, while guarding an approach empowering victims.

The relationship between the states' commitments under the instrument and those under trade and investment agreements garners attention too, including whether the instrument could establish the primacy of human rights law over trade and investment law. The instrument could set forth standards for organizing the interface between these bodies of law, so that trade and investment agreements are not negotiated or interpreted in a manner conflicting or inconsistent with states' human rights obligations.

The draft reinforces rights of victims to information and legal assistance pertaining to administrative and other costs (article 8). It clarifies standards of liability under administrative, civil and criminal laws (article 10) and advances criminal liability for legal persons and links civil liability of parent companies to that of subsidiaries and entities in supply chains (article 10.6).

The draft includes a provision on mutual legal assistance among states, in "investigations, prosecutions and judicial proceedings" and recognition and enforcement of judgments (article 11). Another provision recognizes "the importance of international cooperation [...] for the realization of the purpose of the [...] Convention" (article 12). The draft also provides for a Committee of experts at the international level to monitor states' implementation and compliance (article 14). A draft optional protocol expands the competence of the Committee to "receiv[ing] and consider[ing] communications from or on behalf of individuals or group of individuals."<sup>3</sup>

Other issues have been raised for discussion, including the scope of rights covered by the instrument, the protection of human rights defenders, the opportunity to impose direct obligations on businesses, and an international court on business and human rights.

An instrument that advances the prevention of human rights abuses and addresses procedural and jurisdictional barriers to legal action against transnational businesses will strengthen international law in response to changes in transnational business conduct. For example, if victims face a defunct subsidiary, such an instrument could facilitate access to justice and remedy before the courts of the parent company's home state. It will also offer companies further clarity on regulatory requirements.

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\*\* Kinda Mohamadieh (kinda.mohamadieh@gmail.com) was a senior researcher at the South Centre in Geneva, Switzerland at the time of writing. The author is grateful to Carlos Correa for his feedback and to Surya Deva, Harris Gleckman and Carlos Lopez for their helpful peer reviews.

<sup>1</sup> [United Nations Human Rights Committee, “International covenant on civil and political rights, General Comment No. 31,” CCPR/C/21/Rev.1/Add. 13 \(2004\), para. 8.](#)

<sup>2</sup> *Ibid.*, article 4.2.

<sup>3</sup> See also [draft optional protocol](#).

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For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Alexa Busser, [alexa.busser@columbia.edu](mailto:alexa.busser@columbia.edu).

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