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Methven O'Brien, Claire

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Draft text for a Business and Human Rights Treaty

Claire Methven O'Brien¹

June 2020

Preamble

The Parties to this Treaty,

Recalling the principles and purposes of the Charter of the United Nations,

Recalling further the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work,²

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,³

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil, political, economic, social and cultural rights,⁴

Considering the “Protect, Respect and Remedy Framework” and the “Guiding Principles on Business and Human Rights”,

Recalling States’ existing obligations to human rights and fundamental freedoms,⁵ and stressing that the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lies with the State,⁶ respect, protect and fulfil

Recalling the positive contribution which business enterprises that comply with all applicable laws and respect human rights can make to economic and social progress and the realization of decent work for all⁷

Recognizing that proper regulation, including through national legislation, of transnational corporations and other business enterprises, and their responsible operation can contribute to the promotion, protection and fulfilment of and respect for human rights and assist in channelling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms,⁸

Concerned that weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the

¹ Senior Researcher, Research Department, Danish Institute for Human Rights; Lecturer, School of Law, University of Dundee (cob@humanrights.dk). The author is grateful to Dr. Jacques Hartmann and Dr. Annalisa Saveresi for comments and suggestions made in response to earlier drafts of this text.

² Cf. UNGPs, Commentary to UNGP 12; OECD Guidelines for MNEs, Ch. IV, para.39.

³ Cf. ICESCR, Preamble.

⁴ Cf. ICESCR, Preamble.

⁵ Cf. UNGPs p. 1.

⁶ Cf. HRC Res 17/4, Preamble.

⁷ Cf. ILO Tripartite Declaration, para.2; cf. UNGPs p. 1; see also COE Recommendation, Preamble.

⁸ Cf. UN HRC 8/7, Preamble; UN HRC 17/4, Preamble.

benefits of activities of transnational corporations and other business enterprises and that therefore efforts to bridge governance gaps at the national, regional and international levels are necessary⁹

Recalling the need for rights and obligations to be matched to appropriate, effective and accessible remedies when breached, including where human rights abuses occur in the context of business activities¹⁰

Emphasizing the importance of multi-stakeholder dialogue, analysis and capacity building of all actors better to manage challenges in the area of business and human rights and build on progress achieved to date,¹¹

Recognizing the role of the Protect, Respect and Remedy Framework and Guiding Principles on Business and Human Rights, on which further progress can be made, that will contribute to enhancing standards and practices with regard to business and human rights, and thereby contribute to a socially and environmentally sustainable globalization,

Acknowledging that the promotion and protection of human rights, including in the context of business activities, and the implementation of the 2030 Agenda for Sustainable Development are interrelated and must be mutually reinforcing,¹²

Have agreed as follows,

ARTICLE 1. DEFINITIONS

For the purposes of this treaty:

- a) “Human rights” means internationally-recognised human rights binding on the state in question or applicable to a business enterprises, such as those expressed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, and the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work.¹³
- b) “Businesses” means all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.¹⁴
- c) “Parties” means, unless the text otherwise indicates, Parties to this Treaty.
- d) “Regional economic integration organization” means an organization constituted by sovereign States of a given region which has competence in respect of matters governed by this Treaty or its protocols and has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to the instruments concerned.¹⁵

ARTICLE 2. OBJECTIVES

1. The objectives of this Treaty are:

⁹ Cf. UN HRC 8/7, Preamble, UN HRC 17/4, Preamble.

¹⁰ Cf. UNGPs p. 1.

¹¹ Cf. UN HRC Res. 17/4, para.5; UN HRC 17/4, Preamble.

¹² Cf. UN HRC Res. 37/24.

¹³ Cf. OECD Guidelines for MNEs (2011), para.39, p.32.

¹⁴ Cf. UNGPs p. 1.

¹⁵ Cf. Ozone Art 1(6), UNFCCC Art 1.

- a. To strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities;¹⁶
- b. To prevent business-related human rights violations and abuses;¹⁷
- c. To ensure access to justice and effective remedy for victims of business-related human rights violations and abuses;¹⁸
- d. To promote and strengthen international cooperation to prevent and remedy business-related human rights violations and abuses, and towards harmonization of relevant measures to bridge governance gaps at national, regional and international levels and contribute to a socially and environmentally sustainable globalization.¹⁹

ARTICLE 3. GUIDING PRINCIPLES²⁰

1. In their actions to achieve the objectives of this Treaty and to implement its provisions, the Parties shall be guided, *inter alia*, by the Guiding Principles on Business and Human Rights, as set out in Annex I to this Treaty.
2. The participation of stakeholders, such as businesses, business associations, labour and workers' associations, civil society organisations, rights-holders and their representatives, and human rights defenders is essential in achieving the objectives of this treaty.²¹

ARTICLE 4. GENERAL OBLIGATIONS

1. Each Party shall take appropriate measures, in accordance with the provisions of this Treaty, and in line with its guiding principles, to achieve this Treaty's objectives.
2. To this end the Parties shall, furthermore,
 - a. Periodically review their national legislation, policies and practice, including practices of business enterprises, to evaluate implementation and observance of this Treaty and its guiding principles;²²
 - b. Develop, periodically review and update national action plans on business and human rights,²³ or adapt for this purpose existing strategies, plans or programmes,²⁴ and ensure, by appropriate means and action, their effective implementation and wide dissemination amongst competent authorities and stakeholders;²⁵

¹⁶ Cf. RD Art 2(1)(a).

¹⁷ Cf. RD Art 2(1)(b); UN Secretary General Prevention Agenda <https://www.un.org/sg/en/priorities/prevention.shtml>

¹⁸ Cf. UNGP 25: "access to effective remedy"; RD Art 2(1)(b).

¹⁹ Cf. RD Art 2(1)(c).

²⁰ Cf. UNFCCC Art 3, CBD Art 3, WHO FCTC Art 4.

²¹ Cf. WHO FCTC Art. 4(7).

²² Cf. COE Recommendation, para.1.

²³ Cf. COE Recommendation para.2.

²⁴ Cf. CBD Art.6 (a).

²⁶ WHO FCTC, Art 5(4).

- c. Co-operate in the formulation of proposed measures, procedures and guidelines for the implementation of this Treaty, and seek to involve stakeholders as appropriate in this regard;²⁶
- d. Cooperate with competent international and regional intergovernmental organisations, regional economic integration organizations and stakeholders to achieve the objectives of this Treaty.²⁷

ARTICLE 5. RELATIONSHIP BETWEEN THIS TREATY AND OTHER AGREEMENTS AND LEGAL INSTRUMENTS

1. In order to promote the achievement of this Treaty's objectives, Parties are encouraged to implement measures beyond those required by this Treaty, and nothing in this Treaty shall prevent a party from imposing stricter requirements that are consistent with this Treaty and in accordance with international law.²⁸
2. The provisions of this Treaty shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant or additional to this Treaty, provided that such agreements are compatible with their obligations under this Treaty.²⁹

ARTICLE 6. JURISDICTIONAL SCOPE³⁰

1. States Parties shall carry out their obligations under this Treaty in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.³¹
2. Nothing in this Treaty shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law or international law.³²
3. Without prejudice to Articles 6 (1) and (2), this Treaty does not exclude the exercise of any jurisdiction established by a State Party under its domestic or international law.

ARTICLE 7. CONFERENCE OF THE PARTIES³³

1. A Conference of the Parties is hereby established.
2. The Conference of the Parties shall promote the development, implementation, evaluation³⁴ and harmonization of measures to advance the objectives of this Treaty and its observance by businesses as well as Parties.
3. To this end, the Conference of the Parties shall:

²⁶ WHO FCTC, Art 5(4).

²⁸ Cf. WHO FCTC Art 2(1); Istanbul Convention Art. 71(1).

²⁸ Cf. WHO FCTC Art 2(1); Istanbul Convention Art. 71(1).

²⁹ Cf. WHO FCTC Art 2(2); Istanbul Convention Art 71(1).

³⁰ Cf. RD Art. 12 Consistency with International Law and Art 7 Adjudicative Jurisdiction

³¹ Cf. Palermo Convention, Art. 4(1).

³² Cf. Palermo Convention, Art 4(2).

³³ Cf. UNFCCC, Art 7, CBD Art 23, WHO FCTC Art 23.

³⁴ WHO FCTC, Art 23(5)(c).

- a. Keep under regular review the implementation and observance, including by businesses, of this Treaty and any related legal instruments that the Conference of the Parties may adopt;
 - b. Take, within its mandate, the decisions necessary to promote the effective implementation and observance of this Treaty;
 - c. Develop and adopt, as appropriate, Guidelines and Recommendations relating to the implementation of this Treaty;³⁵
 - a. Promote and facilitate the exchange of information;³⁶
 - b. Establish such subsidiary bodies as it deems necessary for the implementation of this Treaty;³⁷
 - c. Consider and adopt, as appropriate, protocols to this treaty;
 - d. Seek, where appropriate, the services of competent international bodies, regional organisations and other stakeholders, in activities pertinent to the objectives of this Treaty, and make use as appropriate of information from these bodies and actors;
 - e. Consider and undertake any additional action that may be required for the achievement of the objectives of this Treaty.
4. The Conference of the Parties shall by consensus agree upon and adopt rules of procedure and financial rules for itself and of any subsidiary bodies it may establish.
 5. The Conference of the Parties may establish a secretariat or subsidiary bodies to perform such functions as may be determined by the Conference of the Parties.

ARTICLE 8. ADOPTION OF PROTOCOLS³⁸

1. The Conference of the Parties may adopt protocols pursuant to Article 7.
2. The text of any proposed protocol shall be communicated to the Parties by the secretariat at least six months before such a meeting.
3. The requirements for the entry into force of any protocol shall be established by that instrument.
4. Only Parties to this Treaty may be Parties to a protocol.
5. Decisions under any protocol shall be taken only by the Parties to the protocol concerned.

ARTICLE COMMITTEE OF EXPERTS/WORKING GROUP

ARTICLE FINANCIAL MECHANISM

³⁵ Various guidelines have been developed and formulated under the WHO FCTC: https://www.who.int/fctc/treaty_instruments/adopted/en/. Such guidelines under a BHR treaty could address e.g.

- Remedy, drawing on OHRHC ARP project
- Measures to promote HRDD
- Measures to promote HR reporting
- Human rights impact assessment
- Children's rights – could build on UNCRC General Comment No.16
- Sector specific issues , building on e.g. OECD sector guidance
- Effective multi-stakeholder initiatives.

³⁶ Cf. WHO FCTC, Art 23(5)(a).

³⁷ Cf. UNFCCC, Art. 7.

³⁸ UN FCCC Art. 17.

ARTICLE COMMUNICATION OF INFORMATION RELATED TO IMPLEMENTATION

ARTICLE SETTLEMENT OF DISPUTES

ARTICLE ADOPTION AND AMENDMENT OF ANNEXES TO THE TREATY

ARTICLE DEPOSITARY

ARTICLE SIGNATURE

ARTICLE INTERIM ARRANGEMENTS

ARTICLE RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

ARTICLE ENTRY INTO FORCE

ARTICLE RESERVATIONS

ARTICLE WITHDRAWAL

ARTICLE AUTHENTIC TEXTS

ANNEX I. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS