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SYMPOSIUM ON NEW PATHWAYS TOWARD SUPPLY CHAIN ACCOUNTABILITY

THE UN SUPPLY CHAIN TREATY NEGOTIATIONS: BETWEEN TRANSNATIONAL CIVIL LITIGATION AND PUBLIC LAW BEYOND BORDERS

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The negotiations on a treaty to regulate global supply chains and their impact on human rights will hold its tenth session in December 2024. The question the negotiations address is not completely new: previous efforts, starting in the 1970s at the United Nations,[1] tried to establish international obligations for "transnational corporations" (TNC), but found the issue of defining the subject to be regulated challenging. Academia and civil society also took turns defining the concept, although much of the focus equally revolved around the issues surrounding or caused by transnational corporations (i.e., the resource curse, regulatory chill, etc.). However, the current debate in the intergovernmental working group established by the Human Rights Council has focused, among other important elements, on defining the object of regulation—transnational corporations or transnational business activities—as well as the specific forms of liability under domestic law that could be used in cases of human rights harms or environmental degradation caused by business enterprises. This contribution addresses these two issues, considering some of the debates during the ninth session, and exploring aspects that need to be considered as the process moves forward.

Defining Supply Chains

The conversation about the definition of TNC has been mostly present in the context of UN business and human rights treaty negotiations[2] that started with the adoption of Resolution 26/9 by the Human Rights Council in 2014. Indeed, since the first session of the process in 2015, the open-ended intergovernmental working group set up to advance the process has debated if an instrument should address transnational corporations exclusively, or if all businesses should be covered—but with some specific treatment for transnational business activities.[3] The United Nations Guiding Principles on Business and Human Rights (UNGPs), as perhaps the most

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[1] Surya Deva, *Treaty Tantrums: Past, Present and Future of a Business and Human Rights Treaty*, 40 NETH. Q. HUM. RTS. 211 (2022).

[2] Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/RES/26/9 (June 26, 2014).

[3] Carlos López & Ben Shea, *Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session*, 1 BUS. & HUM. RTS. J. 111, 113–14 (2015).

authoritative instrument in the field, put it bluntly: all businesses have a responsibility to respect human rights, but implementation methods may differ from one business entity to another.[4] However, states in room XX at the Palais des Nations are mostly divided in three camps: a group that advocates for (direct) TNC regulation under international law; a group that argues that all businesses should be covered by the instrument; and a (smaller) group that recognizes that all businesses should be covered, but with a specific focus on transnational business activities.

However, except for a few recent references made by some Latin American states, the fact that transnational corporate groups work through complex global or regional supply chains composed by national business units operating in a coordinated manner across borders has rarely been openly discussed in the context of the business and human rights treaty negotiations. That is precisely the question that the treaty negotiations should cover to capture the complex legal and operational reality of transnational business activities, and effectively regulate and ensure corporate accountability.

The framing made by Latin American states during the ninth session[5] was particularly relevant to explain the phenomenon: the first point was to specify that, from a legal perspective, TNCs are a series of business enterprises operating as a network, with each unit constituted according to the national legal framework of the country in which they operate. The participation of a parent company relies on a contractual or property nexus with the local entity, and in many cases, sourcing of goods or services also relies on a contractual or property nexus between the different units or with third parties. Therefore, if a treaty is to effectively regulate transnational business activities, it cannot formally focus on "transnational corporations"; it should focus on the legal structures that facilitate transnational business activities,[6] as recognized by the recent legislation on corporate sustainability due diligence adopted in France, Germany, and the EU, for example. Although from a management perspective, the establishment of group-wide procedures and methods of work for transnational groups has generally been a standard practice, done under the umbrella of a brand identity or name, this hides a more complex legal reality that relies on corporate law paradigms such as separate legal personality to avoid accountability. And yet, that is a characteristic that human rights due diligence, the process posited by the UNGPs to facilitate the identification and management of human rights risks by companies (as well as a central element of the draft treaty), tries to address.[7]

The issue, of course, revolves around who bears responsibility whenever human rights harms or environmental degradation occurs. Several possibilities arise: Is it the parent company, especially if it was heavily involved in the operations and decisions of its foreign subsidiaries? Or should the parent company be liable if it failed to prevent foreseeable harm to third parties, even if the harm was caused by a foreign subsidiary or another entity in its supply chain without its direct involvement? Should it be the foreign subsidiary exclusively, which should be solvent to address any harm that may arise while operating in a host country? Or, are both the parent company and its subsidiary responsible, as a corporate unit? The answer will depend on the specific circumstances of the case and the way that the company operates, as well as on the domestic legislation of both home and host states. However, from

[4] Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Pillar II (UNGPs), UN Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UNGPs].

[5] Human Rights Council, Text of the Updated Draft Legally Binding Instrument with the Textual Proposals Submitted by States During the Ninth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/55/59/Add.1 (Feb. 13, 2024).

[6] Humberto Cantú Rivera, *From "Zero" to "Revised": Redefining the Business and Human Rights Treaty*, 3 Humanitäres Völkerrecht 21, 26–27 (2020).

[7] UNGPs, *supra* note 4, Prin. 17.

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the perspective of liability, international human rights law posits that victims of human rights abuses should have access to justice and have a right to reparation,[8] including where the perpetrator is a corporate actor.

With these questions in mind, successive drafts of the business and human rights treaty have tried to identify the best avenue to ensure access to remedy and reparation for victims, as well as the establishment of legal liability for human rights abuses by businesses. The current treaty draft sets forth in Article 8 that states should establish civil, administrative, and criminal liability against legal persons consistent with their national legal principles. Thus, the specificities would be left for states to decide, which would give them some discretion in terms of the substantive and procedural elements to consider for the purpose of determining legal liability for corporate human rights abuses. While this could create some level of normative disparity, it could also facilitate agreement between negotiating states in relation to this complex question, just as other treaties have done in the past.[9]

Forms of Liability for Corporate Human Rights Abuses: Between Civil, Administrative, and Criminal Law Via Treaty

Reaching agreement around the subjective scope of the treaty (i.e., transnational business activities) could provide certainty regarding one of the regulatory objectives of the negotiation: defining legal liability for corporate human rights abuses. This is particularly relevant because, absent an international superstructure with the power to enforce international law directly upon TNCs, the only other viable option is to rely on existing mechanisms under domestic law. This leads to the aforementioned legal avenues of civil, administrative, and criminal liability in national jurisdictions,[10] which is also the approach followed so far in the negotiations for a legally binding instrument.

Out of the three options, civil liability appears to be a key avenue for access to remedy, particularly for a large number of states that recognize the principle of prevention of harm to third parties (*alterum non laedere*) or a version of it. Indeed, in many jurisdictions, causing harm to a third party would normally result in the duty to repair it, unless specific exceptions apply. There is also a growing conversation around the use of tort or extracontractual civil liability in emerging legislations on corporate sustainability due diligence,[11] and even beyond those legislations, relying on established principles of civil law.[12] Beyond some procedural hurdles, however, it appears that the main challenge may be translating human rights (abuses) into the specific categories recognized by tort law or civil law.[13] Indeed, while bodily harm or the death of a person may be more simply addressed by civil liability, other human rights violations (for example, environmental damage that impacts the right to water, or non-compliance with free, prior, and informed consultation) may be more challenging to address for civil courts. This is because the specific elements that torts or extracontractual liability rely on may be more difficult to establish, due to their "diffuse" nature or to the complexity of establishing a nexus between the harm and the obligation that was unfulfilled. In any case, civil liability exists in many legal traditions across countries, and could lead to finding common ground,

[8] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (Dec. 16, 2005).

[9] Humberto Cantú Rivera & Danielle Anne Pamplona, *Law and Diplomacy in the Business and Human Rights Treaty Negotiations*, *in* Research Handbook on Law & Diplomacy (David P. Stewart & Margaret E. McGuinness eds., 2022).

[10] Anne Peters et al., *Business and Human Rights: Towards a "Smart Mix" of Regulation and Enforcement*, 83 Heidelberg J. Int'l L. 415 (2023).

[11] Nicolas Bueno & Franziska Oehm, *Conditions of Corporate Civil Liability in the Corporate Sustainability Due Diligence Directive: Restrictive, But Clear?*, Verfassungsblog (May 28, 2024).

[12] Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 Int'l & Comp. L. Q. 789 (2020).

[13] Carsten Koenig, *Human Rights or Private Rights? – Effective Protection of Victims in Global Supply Chains*, 118 AJIL Unbound 269 (2024).

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including in relation to the analysis of whether preventive measures that have been adopted should be considered for the purpose of the calculation of damages.

A second prong would be administrative liability, which is also largely present within domestic jurisdictions, particularly around labor, environment, and even some other aspects, including non-discrimination issues. Furthermore, some recent legislative developments, including the Supply Chain Act in Germany or the EU's Corporate Sustainability Due Diligence Directive,[14] rely on administrative liability as a tool to sanction companies for their lack of compliance with due diligence standards[15] in an effort to promote observance of legal requirements by businesses. One important aspect that should be considered by participating delegations is that administrative liability for failure to implement due diligence processes should be independent from administrative liability for other failures to comply with domestic administrative law, in particular regarding elements that relate to human rights standards. Perhaps most importantly, states should clearly outline how administrative liability for procedural shortcomings (i.e., failure to exercise due diligence properly) pairs with administrative liability for failure to comply with labor, environmental, or other substantive standards. Particularly, how to understand this relationship—and the scope of administrative reach—in the context of global or regional supply chains.[16]

A final, and perhaps more complex, point revolves around corporate criminal liability, a concept that despite some recent progress, remains foreign to many jurisdictions, on the basis of the belief that legal persons cannot commit crimes. Notwithstanding this approach, there is a growing acknowledgement of corporate criminal liability in domestic legislations, undoubtedly spearheaded by efforts to combat corruption, which has expanded into other areas of law.[17] For example, in Latin America,[18] a large number of jurisdictions recognize some form of corporate criminal liability, mostly for economic crimes, but also for the equivalent of gross human rights violations (such as human trafficking and slavery) or environmental harm. In this regard, several international legal instruments require states to consider establishing corporate criminal liability in their jurisdictions for certain offenses,[19] consistent with their domestic legal principles, which leaves a door open for the progressive development of this concept.

As mentioned before, a key challenge for these three modalities of legal liability is the transnational membrane underlying business activities. For the civil liability regime, private international law provides some answers,[20] including in terms of the definition of the domicile of the parent company of a transnational group, the *forum*

[14] Supply Chain Act, Secs. 12-21, 23-24 (Ger.); Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, Arts. 24–27.

[15] Markus Krajewski, *Administrative Enforcement of Corporate Human Rights Due Diligence Legislation: A Flower in the "Bouquet of Remedies,"* Verfassungsblog (May 29, 2024).

[16] Nicolás Bueno et al., *The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise*, 9 Bus. & Hum. Rts. J. (forthcoming 2024).

[17] For an overview of the potential role of criminal law in the context of the treaty negotiations, see Shane Darcy, *The Potential Role of Criminal Law in a Business and Human Rights Treaty*, *in* Building a Treaty on Business and Human Rights: Context and Contours (Surya Deva & David Bilchitz eds., 2017).

[18] Experiencias Latinoamericanas sobre reparación en materia de empresas y derechos humanos (Humberto Cantú Rivera ed., 2022).

[19] International Law Commission, Draft Articles on the Prevention and Punishment of Crimes Against Humanity, Art. 6.8 (2019); UN Convention Against Corruption, Art. 26.2 (2004); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Art. 3.4, UN Doc. A/Res/54/263 (May 25, 2000).

[20] International Law Association, *Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations* (2012); *see also* Catherine Kessedjian, *Questions de droit international privé de la responsabilité sociétale des entreprises: Rapport general*, *in* Private International Law Aspects of Corporate Social Responsibility (Catherine Kessedjian & Humberto Cantú Rivera eds., 2020).

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conveniens, and the applicable law.[21] This, to some extent, has been reflected in the successive negotiation drafts of the treaty, with certain efforts to add or expand toward other legal figures, including *forum necessitatis*, plurality of defendants, or even a choice of law selected by claimants. In all of them, there is an effort to push for the progressive development of private international law, and for a closer interaction of this branch with international human rights law.[22]

However, for administrative and criminal liability, the question becomes less clear. The problems in this context are the jurisdictional limits for states to impose administrative sanctions or to initiate criminal prosecutions, including in terms of the existence of parallel legal figures in different states (particularly in relation to criminal law) as a precondition for (successful) collaboration, and the conferral of mutual legal assistance. These are complex issues that could benefit from further reflection, analytical work, and intergovernmental discussions to clarify if and how states could define certain parameters of action. The goal should be to avoid exorbitant overreach by certain jurisdictions, and to focus instead on effective collaboration to sanction gross human rights violations amounting to international crimes. In any case, this is also an opportunity to ensure coordination between three ongoing intergovernmental negotiations: the treaty negotiations on supply chain activities; the negotiations on private military and security companies; and the forthcoming negotiation of a convention on crimes against humanity.

Conclusion

In sum, the key challenge facing the intergovernmental working group at this point is how to find balance between the different purposes the instrument tries to achieve, and coherence in the terms selected for it. This is important to ensure a working interrelationship between the purpose of the instrument and the legal requirements it sets forth for its implementation, in order to ensure prevention and accountability. Achieving these goals implies recognizing three things: first, the need to go beyond existing UN terminology (even if only from a practical perspective) to ensure that the instrument is able to capture the way that global supply chains function; second, identifying existing state practice that provides sufficient support to efforts of codification, particularly around issues that are already acknowledged in international instruments or where there is sufficient consistency (state practice) across domestic jurisdictions; and third, finding ways to build agreement (and consensus, if possible) on complex legal issues that require a renewed understanding or interaction between different branches of international law, considering the hurdles that domestic jurisdictions regularly face to implement international standards.

[21] *See* Tibisay Morgandi, *Parent Company Liability,* Forum Non Conveniens *and Substantial Justice*, 11 Camb. Int'l L.J. 118 (2022).

[22] Humberto Cantú Rivera & Catherine Pédamon, *ILA White Paper on Business and Human Rights* 71–83 (2022).

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