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Submission of the Institute for NGO Research to the Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights

Institute for NGO Research (an NGO in special consultative status with ECOSOC since July 2013), has prepared this submission to UN open-ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (IGWG). Our submission offers comment on both the Report of the fourth session of the IGWG and also the Zero Draft Treaty. We hope that this information will aid the IGWG in its efforts relating to a legally binding instrument.

Introduction

The promotion of increased corporate responsibility and respect for human dignity is an important and noble goal. Many serious incidents, resulting from weak regulation, poor oversight, inadequate enforcement, and even criminal behavior, have resulted in horrific working conditions, and many deaths and injuries. The shocking collapse of the Brumadinho dam in Brazil and the killing of hundreds of employees and town residents is just the latest illustration of the urgency of this issue.

Nevertheless, the current efforts to rectify the human rights issues posed by business activity, particularly through the creation of a new international legal mechanism, the Zero Draft Treaty, will likely prove ineffective and possibly even counterproductive. Unfortunately, the process underlying the treaty rests on several flawed premises. These core theoretical errors are evident in the dominant voices involved in creating the Treaty draft.

It is simply not the case that an internationally legally binding instrument is the only way to rectify “legal gaps” and “obstacles faced by victims of business-related human rights abuse”. This submission highlights several reasons why this is so: the lack of defined human rights abuses by the treaty, the failure to precisely delineate duties owed by corporations under these norms, the nature of armed conflict versus systematic rights abuses in “peacetime”, and the oft-relied upon, yet short-sighted, anti-business paradigm. Instead, we offer several recommendations as to where the attention of the IGWG would better place its efforts.

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Defining the Violations

As with previous business and human rights initiatives, the Zero Draft Treaty discusses business-related human rights abuses in purely general and all-encompassing terms. Yet, before appropriate remedies can be fashioned to address a so-called “remedy gap”, there needs to be a concrete examination of the scope and content of the “human rights” violations at issue. In many cases, the violations alleged to have occurred do not derive from any actual law or existing human right, but rather reflect the aspirations of those seeking to advance a particular policy or change of behavior. In cases where violations have occurred, there are often relevant laws already existing, but simply require better enforcement.

Article 1 of the treaty “Preamble” is indicative of this problem and it occurs throughout the draft. It states: “Underlining that all business enterprises . . . shall respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur.”

Claiming that “all businesses” shall respect “all” human rights impacts and mandating that they “avoid causing or contributing to adverse human rights impacts” is an impossible standard that no business (or even state) could meet. Every action taken by any person at any time could cause or contribute to an adverse human rights impact. This is all the more so for businesses. For instance, simply hiring one person over another could cause or contribute to an adverse human rights impact. Being a successful business could cause or contribute to adverse human rights impacts to the employees and businesses of less successful companies. Promotion of businesses active in green energy has negative impacts on those working for companies involved in fossil fuel energy. Workers that take employment without following the proper legal procedures impacts those who choose to obtain work in accordance with domestic and international regulations.

Similarly, Article 3.2 of the Draft treaty mandates that “this Convention shall cover all international human rights and those rights recognized under domestic law.” This provision is also unworkable. Setting aside that “all international human rights” are undefined, the recognitions of all “rights recognized under domestic law” is simply absurd. Would all states parties to the treaty be therefore bound by the domestic law of all other parties? Would this obligation carry even where two states’ domestic laws are fundamentally at odds? Many states recognize rights that are completely incompatible with international human rights standards. For instance, states that abide by Sharia Law have completely different notions of gender rights that stand in direct conflict to international human rights law. Yet, locally, such states under Sharia might style these laws as “human rights”. In other cases, states domestically may define differently the minimum age for child labor. Some countries allow children as young as 10 to work, while other countries set the limit at 16 or 18. Should countries with high standards be obligated to respect the laws of countries that establish very low thresholds? And would states that have different policy preferences be forced to give

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precedence to the priorities of other states?

Article 6.1. is similarly vague when it dictates that “Statutes of limitations shall not apply to violations of international human rights law which constitute crimes under international law”. No explanation is provided as to what international human rights laws constitute “crimes” under international law.

The failure to define these types of provisions is fatal to the Zero Draft Treaty. The precise contours of the legal obligations at issue, particularly for such an all-encompassing legal instrument, is absolutely necessary. In fact, it is the lack of concrete definitions in the business and human rights field in general that is largely responsible for the perceived lack of adequate remedies. If we don’t know what specific activity is proscribed, it is almost impossible to fashion appropriate remedies. It is also impossible to assess whether the current remedies already in place are adequate.

The short shrift given to defining violations also has serious implications for justice, fairness, and due process. Many of the business-related cases involve accusations of the worst crimes that could lead to severe civil and criminal punishments, financial ruin, and reputational damage. Before these charges are levied, there needs to be absolute clarity as to the proscribed activity. This is a fundamental principle of rule of law.

Ascertaining the substance of rights is not an easy task. Even the UN Guiding Principles (UNGPs) can only provide general advice: “[t]he responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work.”¹

Setting aside the issue as to whether businesses have any obligations to uphold these instruments as opposed to States (to be discussed in the next section), even these core instruments, provide little clarity to businesses regarding the content and scope of the “human rights” they are supposedly responsible for respecting. Several of these documents such as the Universal Declaration of Human Rights and the ILO Declaration are not binding legal instruments. The International Covenant on Economic Social and Cultural Rights (as well as many other human rights treaties) contain aspirational or progressive norms, rather than definitive standards.

In practice, the lack of specificity in the human rights conventions, combined with references to non-binding recommendations couched as legal obligations, leads to significant problems for businesses trying to increase respect for human rights. It also

¹ OHCHR, “Guiding Principles on Business and Human Rights, Implementing the ‘Protect, Respect and Remedy Framework,’” 2011 [UNGP Guide], available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

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creates problems for developing appropriate remedies. For example, the ILO's Declaration on Fundamental Principles (a non-binding document aimed at States) includes the "right to collective bargaining".² While there is a lot of description in the Fundamental Principles of the benefits of collective bargaining, the principles do not contain much content as to how this right is actually realized.

This vague content, especially as applied to businesses raises many questions: How should a business define this right? Whose definition must a business apply? Does the right to collective bargaining mean that a business is obligated to unionize its workforce? What if the employees decide against doing so? Is a company required to bargain regarding every aspect of the employer-employee relationship? To what extent are businesses required to accede to worker demands? Is failure to bargain every aspect of the working relationship a "gross abuse" of human rights? Is it a violation such that a corporation could be held civilly or criminally liable? How does a business comply with due diligence obligations regarding this right? Has it failed to carry out due diligence if a business does not apply the broadest definition of the "right to collective bargaining"?

Another ILO principle centers on the "elimination of discrimination".³ Yet, even this important goal is hard for a business to avoid adverse human rights impacts in the absence of concrete norms. In its description of the principle, the ILO mentions that "[e]liminating discrimination starts with dismantling barriers and ensuring equality in access to training, education." Again, even though this document is geared towards States, does this statement mean that businesses are obligated to provide and ensure "education and training"? To what extent? To whom? Who is supposed to carry out the educating and training? Beginning at what point? Does this mean on-the-job training and education? Is this a "gross abuse" if a business does not provide access? Is this denial of access actionable? How does a business begin to conduct sufficient due diligence? Again, far from providing clear guidance and standards, the instruments relied upon often create more confusion.

Another issue compounding the problem is that many of the same issues addressed in international human rights and humanitarian law are also regulated by dozens of other bodies of laws both at the domestic and international level. These areas include labor and employment law, law of the sea, environmental law, trade law, criminal law, corporate governance law, maritime law, admiralty law, contract law, anti-trust law, securities law, anti-discrimination laws, anti-corruption laws, transparency laws, privacy laws, terror financing laws, public safety, natural resource law, wildlife law, land management, and many many others. As a result, the potential exists for significant confusion and conflicts regarding the application and primacy of norms.

² ILO, "Freedom of association and the effective recognition of the right to collective bargaining," available at <http://www.ilo.org/declaration/principles/freedomofassociation/lang--en/index.htm>

³ ILO, "Elimination of discrimination in respect of employment and occupation," <http://www.ilo.org/declaration/principles/eliminationofdiscrimination/lang--en/index.htm>

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To use the ILO example regarding the need to provide education and training in order to eliminate discrimination, has a company committed a “gross abuse” if domestic law only requires State-provided primary school education and the company fails to step in to provide secondary education?

The commentary to the UNGPs provides little help either. And this demonstrates that simply incorporating the language of the UNGPs into the Zero Draft, as suggested during the 2018 meetings, will not rectify the many problems. For example, the UNGP commentary states that “the responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.”⁴ It is unclear what it even means that a business has a “responsibility” that is “distinct from issues of legal liability”. Are those who speak about the need to strengthen remedies claiming that businesses should be held legally liable for “responsibilities” that are ill-defined and not required anywhere by law?

Another section of the commentary says that “business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families.” Which standards are businesses required to review? What if standards are in conflict or a situation pits several classes of people in conflict– which ones take priority? How are businesses practically supposed to weigh all of these factors? What if they decide that in their case, that it makes more sense to prioritize women’s rights over indigenous rights? Is that a “gross abuse” Does doing so violate Article 1 of the treaty which requires “avoiding causing or contributing to adverse human rights impacts”? The desire to impose severe civil and even criminal penalties on businesses that don’t comply with these highly ambiguous and vague standards is more than troubling.

The lack of specificity, vague standards, and bizarre outcomes are the primary reason why in practice, courts and other enforcement bodies are reluctant to find liability in many of these cases. It should be noted, however, that the fact that claimants are given the opportunity to litigate these claims in courts is a “remedy” in itself, even if they do not ultimately prevail on their claims.

The US Ninth Circuit Court of Appeals, for example, found that it could not rule on a claim of a violation of the international norm prohibiting systematic racial discrimination because the norm was not “sufficiently specific and obligatory”.⁵

⁴ UNGP Guide at 14. The disclaimer that “Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.” Only adds to the confusion given the contradictory language contained elsewhere. UNGP Guide at 1.

⁵ *Sarei, et al., v. Rio Tinto* (9th Cir. October 25, 2011), at 36, *available at*

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Moreover, the court found that “the international norm prohibiting systematic racial discrimination has been given no further content through international tribunals, subsequent treaties, or similar sources of customary international law.”⁶

Similarly, a French appellate court found that corporations could not be found liable for violating provisions of the UN Global Compact⁷ because its application “is at the companies’ entire discretion” and “it is an item of reference only, consequently, failure to abide by its principles cannot be invoked as proof of a breach of international laws.”⁸ Like ethical codes, the court found that the “Global Compact expresses values that the companies wish to see their personnel apply during the course of their work for the company” containing “only recommendations and rules of conduct and do not create any obligations or commitments to the benefit of the parties who may wish to see them observed.”⁹

The case of *Flomo v. Firestone* from the US Seventh Circuit Court of Appeals provides the best example as to why it is nearly impossible for courts to impose liability under the standards laid out in the UNGPs and promoted in business and human rights frameworks.¹⁰ In the lawsuit, the claimants charged Firestone with utilizing child labor on a rubber plantation operated by a subsidiary in Liberia in violation of customary international law. The appellate court affirmed the dismissal of the case by a lower court. In its opinion, the court expresses several issues relating to the vagaries of customary international law and international human rights obligations.

At the outset, the court noted that the “concept of customary international law is disquieting in two respects. First, there is a problem of notice: a custom cannot be identified with the same confidence as a provision in a legally authoritative text,” and “[s]econd, there is a problem of legitimacy—and for democratic countries it is a problem of democratic legitimacy. Customary international legal duties are imposed by the international community . . .”¹¹

The court next examined whether child labor is indeed prohibited by customary international law based on the sources relied upon by the plaintiffs including the Convention on the Rights of the Child (CRC) and several ILO conventions such as the Minimum Age Convention. The plaintiffs cited to Article 23(1) of the CRC that a child has a “right not to perform ‘any work that is likely to be hazardous or to

<http://cdn.ca9.uscourts.gov/datastore/opinions/2011/10/25/02-56256.pdf>

⁶ *Id.*

⁷ A voluntary code for companies of ethical and human rights standards and a precursor to the UNGPs.

⁸ <http://www.intjewishlawyers.org/main/files/Versailles%20Court%20of%20Appeals%20ruling%20doc%20English%20.pdf>

⁹ *Id.*

¹⁰ *Flomo v. Firestone Natural Rubber, Co.*, 643 F.3d 1013 (7th Cir. 2011),

<http://www.leagle.com/decision/In%20FCO%2020110711083.xml/FLOMO%20v.%20FIRESTONE%20NAT.%20RUBBER%20CO.,%20LLC>

¹¹ *Id.*

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interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.” The court, however, was unable to apply that provision in a concrete manner commenting, “That's much too vague and encompassing to create an international legal norm.”¹²

Turning to the ILO Conventions, the court emphasized that their “recommendations ‘create[no enforceable obligations;’ and that ‘[g]iven the diversity of economic conditions in the world, it's impossible to distill a crisp rule from the three conventions.’ Examining the ILO Minimum Age Convention, the court found that although the convention says that children under 14 should not be allowed to do more than “light work”, it could not apply that standard because “the concept of light work is vague, and it must vary a great deal across nations because of variance in social and economic conditions.”¹³

With regards to the ILO’s Worst Forms of Child Labor which prohibits "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children," the court found that this standard, “is still pretty vague, in part because no threshold of actionable harm is specified, in part because of the inherent vagueness of the words "safety" and ‘morals.’” Moreover, because this provision is qualified by Article 4(1) in that "the types of work referred to under Article 3(d) shall be determined by national laws or regulations or by the competent authority," the court believed it “sounds like forswearing the creation of an international legal norm” rather than imposing one.¹⁴

Looking at the specific facts of the case, the court noted that the company does not employ children directly. Yet, it found that the high pay (under Liberian standards) and quotas imposed on workers gave an incentive to enlist wives and children to help, and the company may have turned a blind eye to children working on the plantation. The court, however, couldn’t determine if “because the fathers of the children on the plantation are well paid by Liberian standards, even the children who help their fathers with the work are, on balance, better off than the average Liberian child.” As a result, this did not amount to a violation of law by the company.

As these cases demonstrate, the problem is not the absence of remedial frameworks, or an international instrument, but rather that unsupportable legal theories are being advanced. As John Ruggie, himself, has commented, current efforts “embody such extensive problem diversity, institutional variations, and conflicting interests across and within states that any attempt to aggregate them . . . would have to be pitched at such a high level of abstraction that it is hard to imagine it providing a basis for meaningful legal action. Yet much of the Geneva debate continues at this abstract level.”¹⁵

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ John G. Ruggie, “A Business and Human Rights Treaty Update,” May 1, 2014, *available at* http://www.business-humanrights.org/media/un_business_and_human_rights_treaty_update.pdf

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Unfortunately, rather than solving these on-going issues, the Zero Draft Treaty seeks to entrench them.

Corporate Duties

A related but equally significant issue underlying the Zero Draft Treaty is whether corporations are bound by the duties contained in international human rights and IHL conventions. There is also significant disagreement globally as to whether and the extent to which corporations owe duties to third parties and whether they can be held liable for State violations under an “aiding and abetting” theory.

It is axiomatic, but bears repeating that the international human rights and humanitarian law treaties bind States. As reiterated in the UNGPs, “States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime.”¹⁶

Yet, the UNGP Commentary claims that “[t]he responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.”¹⁷ Principle 13 of the UNGPs states that business enterprises have the “responsibility” to “prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” The Commentary goes on to say that this includes both “actions and omissions”.

While these statements may reflect noble sentiments, they do not reflect the existing law in many, if not most countries, nor do they offer workable standards for corporations. And embedding such sentiments into a legally binding instrument under concepts like “due diligence” will not solve these problems.

One would be hard pressed to support the statement that a corporation (or anyone for that matter) has an obligation to engage in or refrain from conduct “that exists over and above compliance with national laws and regulations.” Just as the content of “human rights” is often indefinite, so too are these attempts to define corporate duty under the guise of “due diligence”.

Article 9 of the treaty is indicative. 9.1 mandates that states parties obligate all TNCs to “undertake due diligence obligations throughout such business activities.” 9.2 offers several ways in which due diligence must be carried out: monitoring, identifying impacts, prevention, and report. Each provision raises a host of problems.

¹⁶ UNGP Guide at 7.

¹⁷*Id.* at 13.

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Regarding monitoring, companies are not only required to monitor the human rights impact of its business activities” of itself, but all subsidiaries, entities under “indirect and direct control or directly linked to its operations, products or services.” It is hard to imagine how this standard could even be carried out. How could a company even begin to define entities under its “indirect control” or “directly linked to its operations, products or services”?

Companies under 9.2.b. are required to identify and assess any actual or potential human rights violations that may arise through their own activities or entities directly or indirectly under control or directly linked to operations, products or services. Besides being impossible, how would a company even know that they had satisfied such a provision?

Similarly, 9.2.c. obligates companies to prevent human rights violations when such prevention might not be in its control in any way. It is also unknown what the draft means by obligating a company to provide “financial contribution where needed”.

Regarding 9.2.d and 9.2.e, companies are required to assess risks to individuals and communities and to carry out meaningful consultations with “relevant stakeholders”. What do these provisions even mean? How broadly must a company define individuals and communities and stakeholders? How would a company know if it acted sufficiently?

9.2.g. obligates state parties to ensure that the enact “effective” national procedures to “enforce compliance” with these obligations. Again, no clarity is provided regarding what would be considered “effective” or sufficient to “enforce compliance”.

Armed Conflict vs. Systemic Abuse

Article 15.4 of the Zero Draft treaty states that “Special attention shall be undertaken in the cases of business activities in conflict-affected areas including taking action identify prevent and mitigate the human rights related risks of these activities and business relationships and to assess and address the heightened risks of abuses.”

It is unclear why business activities in conflict-affected areas require special attention. Business activity in areas under conflict are often a critical way for civilians to maintain any sense of normalcy and to mitigate the harms caused by conflict. Moreover, gross human rights abuses can and usually do occur even in the absence of armed conflict.

Human rights conditions in Saudi Arabia, Iran, and North Korea are prime examples. It is more than strange that the “business and human rights” frameworks rarely discuss curtailing corporate operations in Saudi Arabia or holding companies liable for the gross abuses committed against women (among many others) in the Kingdom. By preferencing armed conflict situations, millions of people subjected to daily gross abuses are ignored and excluded from the efforts to craft effective remedies.

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Counterproductive Us vs. Them Paradigm

The Zero Draft Treaty, and business and human rights initiatives in general, are premised on a counterproductive “us vs. them” paradigm, pitting businesses on one side and victims, and “civil society” on the other.

Article 15.3 of the draft clearly reflects this flawed view: “In policies and actions pursuant to this Convention Parties shall act to protect these policies and actions from commercial and other vested interests of the [business sector] in accordance with international law.” The IGWG report also notes that and many of the delegations that spoke during the 4th session “recognized the importance of civil society as a driving force behind the process” and how they raised the issues of the “unfair power imbalance between companies and rights holders, the growing power of companies vis a vis states, and the increased scope of rights granted to companies” without “corresponding obligations” and the lack of effective regulation in conflict and post-conflict settings.” The report also notes how many NGOs “disagreed that business should be given a greater voice and warned against corporate capture of the process.

This adversarial approach makes it much more difficult to further cooperative approaches. This paradigm also often masks the narrow policy agendas of those advancing it and complicates the creation of effective and productive remedies. It is simply false to characterize the business community as being uninterested in protecting human rights and to frame the issue as one of “Davids” (NGOs and civil society) battling the corporate “Goliaths”. It also ignores the major contributions played by business in enhancing development and improving economic standards of living throughout the world.

In contrast to the facile view that for-profit business is bad, and civil society is all good, NGOs and civil society actors also represent self-selecting communities of narrowly defined interests. They are not elected by the democratic polity and are generally not subjected to accountability measures or checks and balances.

While many NGOs and civil society actors may not have a profit motive, they do certainly wish to stay in business, maintain their operations, and increase their donations, influence, and power. Like businesses, these groups are not democratically elected and are only beholden to their members and donors, just as businesses are accountable to their shareholders. Unlike businesses, however, NGOs are subject to much fewer and less onerous reporting mechanisms and regulations, meaning they operate in a realm of greater secrecy than businesses, often without transparency or accountability.

In addition, NGOs set their own agendas and priorities according to their own ideological and political viewpoints, which lead to selective advocacy without regard to gravity, the public interest, and other considerations. NGOs are able to press for causes without having to do the difficult work of balancing the rights and concerns of

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many constituencies as States must.¹⁸ They can promote policies without regard to procuring the necessary financial resources required.

NGOs can also have a detrimental impact on those who do not fall within their advocacy agenda. Groups whose causes are not picked up by the larger NGOs often go ignored which may result in abuse or facilitate continuing violations. In some cases, NGOs may be representing “victims” groups that have financial and political motives that diverge from “human rights” justifications. Perhaps they are in conflict with a rival ethnic group over land and resources and choose to frame the narrative as one of “human rights” in order to garner PR or to obtain a political advantage over rivals.¹⁹

It is also a fallacy to claim that NGOs and civil society are less sophisticated than businesses or that they have less access to resources, particularly for litigation. NGOs are highly sophisticated and often well-financed. The Open Society Foundation, for instance, has an endowment of \$18 billion – dwarfing all but the very largest TNCs. They have adopted cutting edge communication and fundraising techniques. Most NGOs employ significant media and development staffs and hire top flight PR and marketing firms.²⁰ NGOs often include highly educated lawyers on their staffs and/or are able to garner pro bono help from the most prestigious law firms in the world.²¹

The case against Chevron for alleged pollution in Ecuador is a strong example of how the anti-business paradigm breaks down. In the case, residents of the Oriente region of Ecuador filed suit against Chevron for environmental damage that was allegedly caused by a subsidiary many years prior to Chevron’s purchase of the company. The Oriente residents were able to secure an \$18 billion dollar judgment against Chevron (reduced to \$9 billion) in Ecuadorian court.

¹⁸ David Davenport, “The New Diplomacy Threatens American Sovereignty and Values,” in *“A Country I Do Not Recognize”: The Legal Assault on American Values* 113, 119 (Robert Bork ed., 2005), available at http://media.hoover.org/documents/0817946020_113.pdf.

¹⁹ One example involves the activities of a landowner group in Papua New Guinea that is supposed to collectively advocate for the community in dealings surrounding the Porgera Joint Venture Mine, operated by Barrick. Some have alleged that the group’s leadership exploits grievances for their own financial benefit. April 5, 2013 letter from Human Rights Watch to Navi Pillay, http://www.business-humanrights.org/media/documents/company_responses/hrw-ltr-to-un-high-commissioner-pillay-re-porgera-barrick-5-apr-2013.pdf; see also <http://www.theglobeandmail.com/globe-debate/editorials/barrick-has-done-its-best-to-improve-human-rights-at-mine-in-papua-new-guinea/article8515017/>

²⁰ Aryeh Neier, Hopgood

²¹ Attorneys for HRW have law degrees from Harvard, University of California Berkeley, New York University, and Columbia University. The Center for Constitutional Rights includes lawyers of staff with degrees from Yale, Berkeley, Columbia, and Georgetown, and several have clerked for US federal court judges. Amnesty USA’s Executive Director has degrees from Harvard and NYU Law School. Earth Rights International’s Director is a graduate of the University of Virginia Law School. Other attorneys on staff have degrees from the University of Melbourne and Sydney, Cambridge University, London City University.

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Throughout the litigation process, the claimants were represented by attorneys in both Ecuador and the US, including the prestigious Patton Boggs firm. Several NGOs also assisted in their effort. They were able to secure millions of dollars in financing for their case and launched a multi-million dollar PR effort.²² This effort included the hiring of media professionals, the creation of websites, and advertisements, and the filming of a widely-viewed documentary.

According to the lead lawyer, “the team would initiate and/or utilize celebrities; non-governmental organization ‘pressure;’ the ‘Ecuador government – executive, and Congress;’ national, international, and Ecuadorian press; a ‘divestment campaign’ in which the team would seek to convince institutional investors to sell Chevron stock, and even a criminal case in Ecuador in its effort to obtain money from Chevron.”²³ They also launched lawsuits in multiple jurisdictions around the world in an effort to force the company into either a settlement or to pay the judgment. As noted by the main lawyer, “[T]his is not a legal case, this is a political battle that’s being played out through a legal case and all the evidence is in.”²⁴

It turns out, however, that the Ecuadorian judgment was the product of a massive fraud and racketeering scheme perpetrated by the claimants’ attorneys and others connected to the case against Chevron.²⁵ Following a lengthy trial in the US, a federal court judge issued a 500-page judicial opinion extensively documenting the scheme. The fraud committed by the claimants attorneys included coercing a judge, ghostwriting the Ecuadorian judicial opinion and promising to pay the judge \$500,000 to issue it, paying bribes, interfering with the independence of court-appointed officials, drafting fraudulent expert reports, and lying to US courts.²⁶ The claimants used a false damages claim to force the company into settlement and to harm the company’s share price. This false information was also presented to official government bodies.²⁷ When the fraud began to emerge, they also tried to exploit the law to prevent the production of damaging documents to their case.²⁸

During the proceedings, it was also revealed that the claimants had secretly colluded with the Ecuadorian government to place full liability on Chevron. As noted in a September 2013 decision by an international arbitral tribunal, however, Chevron’s subsidiary had fully remediated its pollution in the 1990s and had received a certification by the government to this effect.²⁹ The government also had released the company from any further environmental claims.³⁰

²² p. 169

²³ p. 35, 360

²⁴ P. 31

²⁵ <http://www.theamazonpost.com/wp-content/uploads/Chevron-Ecuador-Opinion-3.4.14.pdf>

²⁶ <http://www.theamazonpost.com/wp-content/uploads/Chevron-Ecuador-Opinion-3.4.14.pdf> at 14.

²⁷ P. 57

²⁸ *Id.* at 127.

²⁹ <http://www.theamazonpost.com/wp-content/uploads/chevron-ecuador-bit-tribunal.pdf?>

³⁰ <http://www.theamazonpost.com/wp-content/uploads/chevron-ecuador-bit-tribunal.pdf?>

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According to the court findings, the attorneys used NGOs such as AmazonWatch to lobby officials, force shareholder divestment, and to submit complaints to the SEC.³¹ This included paying AmazonWatch to start a website containing deliberately misleading statements. Even after the March 2014 fraud judgment, AmazonWatch continues to post inflammatory articles against Chevron, such as a May 2014 piece, “What happens when an oil company actually chooses to be a sociopath #Antichevronday”.³²

Of course, it is without a doubt that there are many examples where corporations have contributed to human rights violations and even committed gross abuses. Yet, the victims are not always right and the corporations are not always guilty. The current discourse, as exemplified in the treaty, is heavily weighted against the business community. Both businesses and effected communities need to be treated with respect. A considerably more broad and pluralistic approach is needed and articles like 15.3 should be excised from the treaty.

Special Treatment for Certain Business Sectors

In addition to the pervasive anti-business paradigm in the Zero Draft Treaty process, it is also disturbing to read in the report that some delegations called for more “lenient treatment” of state-owned companies and recommended that developing countries should get “special consideration”. These requests underline much of the problems relating to the business and human rights sphere. State-owned companies should not get a free pass from human rights obligations simply because they are creatures of the state and ostensibly don’t have a private profit motive (though we imagine much of the funds from such enterprises corruptly end up in private hands). If anything, state – owned companies should be the standard bearers of improving working conditions and minimizing negative impacts. Similarly, developing countries should not be exempt. Many of business-related human rights problems stem from activities in developing countries where regulatory mechanisms, corporate governance, and respect for human rights is weak. If anything, the IGWG should look for ways to strengthen regulation and enforcement in developing countries rather than to give them a pass.

Conclusion

As described in this submission, many underlying theoretical flaws have marred business and human rights initiatives and are unfortunately embedded in the Zero Draft Treaty.

³¹ At 40-41.

³² <http://amazonwatch.org/news/2014/0522-what-happens-when-an-oil-company-actually-chooses-to-be-a-sociopath-antichevron-day>

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Rather than create a new all-encompassing legal instrument that would have little buy-in from countries where large TNCs are domiciled, or from the business sector, the IGWG would be better placed focusing its efforts on improving domestic business regulation in the global south – particularly as it relates to working conditions and environmental controls.

Therefore, we urge the IGWG to begin by analyzing specific economic sectors to evaluate the scope and types of human rights impacts and to ascertain whether there is in fact a problem in remedial frameworks. This evaluation should begin with examining both the environmental and labor sectors where the content of existing law and the scope of corporate duties are clearer.

In addition, this inquiry should proceed from as broad a base as possible with as wide a stakeholder group as possible. It is not enough to simply rely upon the same small groups of academics and NGOs who largely share the same viewpoints and agendas. The wider the consultations, the more likely there will be greater buy-in. All actors must be evaluated from the same critical perspective. Like businesses, the claims of NGOs and activist groups should not be exempted from scrutiny.

Respectfully Submitted,

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