



ANALYSIS OF THE UN 2023 UPDATED DRAFT LEGALLY BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS

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ABSTRACT

The Updated Draft of the Legally Binding Instrument (LBI) on Business and Human Rights released by the Chair of the Intergovernmental Working Group in 2023 does not significantly deviate from earlier versions of the LBI. Many changes streamline the text and contain some welcome clarifications. However, some changes also make the text less ambitious. In this regard, the frequent references to domestic law and the respective qualifications of the provisions are problematic. In addition, the Updated Draft also contains a number of changes which seem problematic from the perspective of victim's rights and the protection of human rights, in particular the deletion of certain references, principles and obligations. The Updated Draft also maintains a number of provisions and approaches which have already been assessed as problematic in the context of previous drafts, in particular the Third Draft. However, the document also contains some improvements.

I. INTRODUCTION

While a number of states – mostly of the Global North – have been adopting mandatory due diligence laws in recent years¹ and the European Union is about to adopt a new Directive on Corporate Sustainability Due Diligence (EU CSDDD)², there is currently no binding international legal instrument with a specific focus on the impact of businesses and their activities on human rights. To fill this gap, many governments from Global South countries alongside many social movements and civil society organisations have been calling for an international human rights treaty addressing this issue. An open-ended intergovernmental working group (OEIGWG) was established by the UN Human Rights Council to elaborate a Legally Binding Instrument on transnational corporations and other business enterprises with respect to human rights in 2014.³

This Working Group will hold its 9th session from 23 to 27 October 2023 and continue its negotiations on a Legally Binding Instrument (LBI) based on an Updated Draft released by the Chair of the Working Group in July 2023.⁴ While the Updated Draft built on previous versions of the Draft LBI, it contains some noticeable changes. These seem to be aimed at facilitating consensus among the states engaged in the negotiations, but they also have implications for the protection of human rights and access to remedy of persons affected by business activities. While some changes are to be welcomed from that perspective, others can have negative consequences.

The present study analyses the Draft LBI with a particular view on the changes between the Updated Draft and the Third Draft of 2021. The study focusses on legal liability, access to remedy, human rights and environmental defenders, the concept of due diligence, and the impact of the LBI on trade and investment policies. After a brief summary of the development of the LBI until the release of the Updated Draft (II.), the study provides an overview of the main changes introduced by the Updated Draft (III.). It then moves towards a detailed analysis of various aspects of the LBI which include proposals for textual revisions. (IV.). The study concludes with a summary of its main findings (V.).

¹ Surya Deva, Mandatory human rights due diligence laws in Europe: A mirage for rightsholders? *Leiden Journal of International Law* 2023, 36(2), 389-414; Markus Krajewski, Kristel Tonstad, Franziska Wohltmann, Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction? *Business and Human Rights Journal* 2021, 6(3), 550-558.

² European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

³ Human Rights Council, Resolution 26/9, Elaboration of an international Legally Binding Instrument on transnational corporations and other business enterprises with respect to human rights, 14 July 2014, A/HRC/RES/26/9.

⁴ Updated Draft Legally Binding Instrument (clean version) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, available at <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf>.

II. DEVELOPMENT OF THE LEGALLY BINDING INSTRUMENT UNTIL JULY 2023

In the Resolution 26/9, the Human Rights Council decided “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.” The open-ended intergovernmental working group (OEIGWG) has had eight sessions and a number of intersessional activities so far. While the first two sessions were dedicated at informal discussions and information exchange and the third session focussed on an “Elements Paper”, the OEIGWG focussed on concrete draft texts since its Fourth Session. Previous Drafts have been analysed elsewhere.⁵

The Third Revised Draft of the LBI was published on 17 August 2021 and subject of the discussions and debates during the Seventh Session of the OEIGWG which took place from 25 to 29 October 2021. One of the outcomes of that session was the establishment of a Group of Friends of the Chair composed of Azerbaijan (Eastern Europe), France and Portugal (Western Europe and others), Indonesia (Asia-Pacific), Cameroon (Africa) and Uruguay (Latin America and Caribbean).

Unlike in previous years, the Chair-Rapporteur did not prepare a new draft based on the proposals made during and after the Seventh Session, but suggested some proposals on selected articles of the LBI.⁶ The proposals submitted by States and The Chair Proposals served as a basis of the debates and negotiations during the Eighth Session which took place from 24 to 28 October 2022.

Between April and June 2023, a number of intersessional consultations facilitated by the Friends of the Chair and supported by the OHCHR were held among states.⁷ Based on these consultations and proposals the Chair prepared and published an Updated Draft of the Legally Binding Instrument which will be the subject of the Ninth session of the OEIGWG in October 2023.

⁵ See inter alia the contributions to the Cambridge Core Blog series available at <https://www.cambridge.org/core/blog/tag/bhrj-treaty/>.

⁶ Suggested Chair proposals for select articles of the LBI (6 October 2022), 24 October 2022, A/HRC/WG.16/8/CRP.1.

⁷ No regional consultation was convened by Cameroon. Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Compilation of the outcomes of the Friends of the Chair intersessional consultations, in line with the note verbale of 2 March 2023, <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-compilation-outcomes-friends-chair-intersessional-consultations.pdf>.

III. GENERAL ASSESSMENT OF THE UPDATED DRAFT

1. OVERVIEW OF STRUCTURE AND CONTENTS

Like the previous drafts of the Legally Binding Instrument, the Updated Draft of July 2023 maintains the structure and main contents of its predecessors and does not add any new articles or changes to the order and contents of existing articles. This reflects that the discussions during the Eighth Session of the OEIGWG and during the intersessional consultations followed the structure of the Third Draft and were based on an article-by-article discussion of the text. All proposals made by States focused on concrete textual changes of existing articles. Even though some states – in particular the Western European and other States group – expressed a preference for less binding approaches and considered the Draft LBI as too “prescriptive”,⁸ no State or group of States has so far proposed a concrete alternative to the LBI or suggested a fundamentally different approach. As a result, the Updated Draft is in many ways identical or very similar to the Third Draft and assessments of the Third Draft as well as the LBI as a whole remain applicable to the Updated Draft.

The LBI comprises of a preamble and 24 articles. Articles 1-3 contain definitions, the purpose and scope of the LBI. Articles 4 and 5 address the rights and protection of victims which underline the victim-centred approach of the LBI. Article 6 addresses preventive measures, while Articles 7 to 11 focus on remedies with a specific focus on legal liability as well as procedural and substantive questions concerning judicial remedies. Articles 12 to 14 address international (judicial) cooperation and consistence with international law. Articles 15 to 24 are mostly of an institutional and technical character concerning such issues as the establishment of a special oversight committee, but also protocols, dispute settlement, amendments, reservations as well as entry into force and denunciation.

It should also be noted that the Updated Draft – like all previous versions of the LBI – does not contain any specific and direct obligations for corporations. Even though direct obligations for companies were part of the discussions in the early days of the OEIGWG, the draft texts have always only specified obligations for State Parties. The Updated Draft does not deviate from this approach.

2. MAIN CHANGES COMPARED TO THE THIRD DRAFT

As pointed out above, the Updated Draft does not introduce any significant new provisions or delete any important parts of the LBI. Consequently, most changes are small, but not insignificant. The Updated Draft streamlines and clarifies a number of issues.

For example, throughout the text references to “obligations of companies” are replaced with the term “responsibilities” of companies.⁹ This is in line with the terminology of the United Nations Guiding Principles (UNGPs) which contain obligations for states and responsibilities for corporations. It also reflects the general approach of the LBI not to introduce binding obligations for companies.

The Updated Draft added a new definition of the term “adverse human rights impact” in Article 1.3, of “remedy/effective remedy” (Article 1.9) and “relevant State agencies” (Article 1.10). The Updated Draft also includes a definition of “Human Rights Due Diligence” in Article 1.8 which is based in the

⁸ Compilation of the outcomes of the Friends of the Chair intersessional consultations (above note 2), p. 5.

⁹ See Preambular Paragraphs (PP) 12 and 19 and Article 2 a.

definition previously contained in Article 6.3 of the Third Draft. With its definitions, the Updated Draft contributes to a clearer understanding of human rights doctrine: The term “adverse impact” is the general term which includes human rights abuses by corporations and human rights violations by States. The Updated Draft also clarifies that remedies need to correspond to the adverse impact. In other words, remedies are required both in the case of human rights violations (by States) and abuses (by companies).

Another useful clarification is the introduction of the term “value chain” in the definition of “business relationship” in Article 1.6. This underlines that business relationships are not restricted to direct contractual or corporate relationship but include the entire value chain. This approach is also in line with the UNGPs which is another evidence of the attempt to align the LBI more closely with the UNGPs as called for by the EU and other States of the Global North.

In addition to changes aimed at clarifying and streamlining the provisions of the LBI, other changes introduce new aspects. For example, the Updated Draft introduces specific references to the rights of children.¹⁰ The vulnerability of children in the context of business activities has been pointed out by various stakeholders in the past. The additional reference reflects the fact that the vulnerability of children differs from those of women or other vulnerable groups such as indigenous peoples or migrant workers.

Another interesting change is that Articles 4 and 5 on the rights and protection of victims are not only further specified, but also include the right to request precautionary measures added (Article 4.4) and a corresponding obligation in Article 5. While this addition may seem of a detailed nature, it is not irrelevant as precautionary measures are situated at the intersection of preventive and remedial measures. They are typically applied if a situation which may lead to a violation of rights is imminent.

The changes in Articles 6 to 14 are analysed in greater detail in the next chapter of this study.

IV. SPECIFIC ANALYSIS OF SELECTED ASPECTS

1. LEGAL LIABILITY (ARTICLE 8)

A. CRIMINAL, CIVIL, AND ADMINISTRATIVE LIABILITY

While the Updated Draft loses subtle references to direct human rights obligations for businesses¹¹ (replacing references to “obligations” present in the former Preamble and Article 2.1 (b) of the Third Draft with the word “responsibilities” in equivalent provisions), the Updated Draft requires States Parties, in line with the Third Draft, to establish “a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities” (Article 8.1). The ability to hold businesses liable for human rights abuses that arise out of their business activities is one of the driving factors behind the proposal for a LBI to regulate businesses’ activities and therefore one of the most debated provisions within the various drafts.

¹⁰ See PP 9 and Article 2 “gender-responsive, child-sensitive and victim-centred”.

¹¹ Surya Deva, ‘Treaty Tantrums: Past, Present and Future of a Business and Human Rights Treaty’ [2022] Netherlands Quarterly of Human Rights 9.

Article 8 of the Updated Draft largely follows the Suggested Chair Proposals of select articles, and therefore contains noticeable changes compared to the Third Draft. This is reflected by the introduction of many qualifiers which subject the principles laid out in the Updated Draft to the domestic legal systems of States Parties. Paragraphs 2 and 3 start with “Subject to the legal principles of the State Party”, while paragraphs 2, 4 and 5 contain the mention “consistent with its domestic legal and administrative systems.”

The Third Draft by comparison only contained one qualifier of that nature under former Article 8.8 (“Subject to their legal principles”) when requiring States Parties to establish under their domestic law the criminal or functionally equivalent liability of legal persons for human rights abuses that amount to criminal offenses under international human rights law. The increased reference to domestic law qualifiers under the Updated Draft can reflect the difficulty among States to agree on unified liability rules, given these typically vary significantly across legal systems. **Regardless, the Updated Draft marks a step back on this matter, as States Parties can modify domestic legal principles to qualify their compliance with liability requirements under the relevant paragraphs of Article 8.** There is also considerable uncertainty as to which domestic legal principles can override the principles laid out in these paragraphs.

Aside from the increased reference to domestic law qualifiers, the Updated Draft does contain some improvements on the topic of liability. Article 8.1 for example makes it clear that States Parties are required to establish liability for human rights abuses that may arise from “business activities or relations, including those of transnational character”. In the previous Third Draft and the Suggested Chair Proposals, the transnational character seemed to only apply to business activities (see former Article 8.1 of the Third Draft “...for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships.”). The Updated Draft therefore makes it clear that liability should concern both domestic and transnational business relationships, in addition to domestic and transnational business activities.

Article 8.2, in line with the Suggested Chair Proposals, explicitly mentions “criminal, civil, or administrative” liability, and is in this regard clearer than the Third Draft, which indirectly mentioned all three types of liability by reference to types of sanctions in former Article 8.3. Commentators had previously noted that while the reference to all three types of liability is a welcomed improvement on the text of the Third Draft, the Suggested Chair Proposals, and by extension the Updated Draft which is identical on this matter, gave priority to civil liability, without providing more information relevant to the notions of criminal or administrative liability for businesses.¹² For example, the Updated Draft remains silent on the administrative authorities that could be in charge of investigating allegations of abuse and the relevant sanctions when considering administrative liability. Similarly, the Updated Draft remains rather general on the topic of criminal liability mentioning the possibility of “criminal liability, or its functional equivalent, of a legal or natural person” under Article 8.4, without providing any further information on relevant rules regarding the conditions for liability and the specific requirements which prosecutorial authorities should follow (aside from the provision on Mutual Legal Assistance in Article 12).

This isn’t to say that the Updated Draft remains completely silent on the matter. The draft does provide some guidance on criminal liability under Article 10.1 regarding statutes of limitations (more on this below), by providing a list of the most serious crimes recognized under international law: “human rights abuses which constitute the most serious crimes of concern to the international community as a whole, including war crimes, crimes against humanity or crimes of genocide.” This explicit list had been present in the 2019 Revised Draft under former Article 6.7 (a) but had disappeared from the 2020 Second Revised Draft and the Third Draft. Its reintroduction provides, to a limited extent, a bit more guidance and legal certainty on the types of crimes which should give rise to liability.¹³

¹² Humberto Cantú Rivera, ‘Binding Treaty Negotiations: Considerations on Legal Liability and Access to Justice’ (*Business & Human Rights Resource Centre*, 20 October 2022), <https://www.business-humanrights.org/en/blog/the-business-and-human-rights-binding-treaty-negotiations-some-considerations-on-legal-liability-and-access-to-justice/>, accessed 9 September 2023.

¹³ Virginie Rouas, ‘Achieving Access to Justice through an International Treaty on Business and Human Rights’, *Achieving Access to Justice in a Business and Human Rights Context* (University of London Press 2022) 356 <https://www.jstor.org/stable/j.ctv293p4bn.14>.

B. DUE DILIGENCE AND LEGAL LIABILITY

The Updated Draft remains silent on the relationship between due diligence and legal liability for businesses. The Third Draft sought to strike a balance between avoiding creating a “due diligence defence” to legal liability and enabling States to create incentives for businesses to implement due diligence requirements, which could involve to some extent avoiding liability.¹⁴ Former Article 8.7 provided that “[h]uman rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability...”.

This provision disappeared from the Suggested Chair Proposals and remains absent from the Updated Draft. This marks again a step back, since States Parties would be able under the terms of the Updated Draft to create a due diligence defence, whereby the fact that a business complies with specific human rights due diligence requirements prevents it from being held liable in case of human rights abuses that arise from its business activities or relationships. States should consider reintroducing a provision that clarifies the relationship between due diligence and liability and provides limits to its use as a defence to liability.

It is suggested that an Article 8.7 be included as follows:

“When determining the liability of a natural or legal person for human rights abuses that may arise from their business activities or relationships, the competent court or authority can take into account whether the person undertook adequate human rights due diligence measures in accordance with Article 6, but compliance with applicable human rights due diligence standards shall not absolve from liability ipso jure.”

C. JOINT LIABILITY ALONG GLOBAL VALUE CHAINS

The Updated Draft, like previous drafts, does not directly address the question of joint or several liability. Furthermore, it does not include an explicit provision addressing the question of when a business can be held liable for harms caused by others. The Third Draft provided more clarity on this matter, with former Article 8.6 requiring States to ensure a business’ liability for human rights abuses caused by persons it controls, manages or supervises, or for human rights abuses it should have foreseen but failed to take adequate measures to prevent. By remaining silent on this matter, the Updated Draft is much weaker in ensuring that domestic legal systems provide mechanisms to hold parent companies or buyers accountable for the human rights abuses in their business activities and business relationships. This also means that the Updated Draft does not include a rebuttable presumption of control, which civil society supports to help establish the liability of businesses for human rights abuses caused by companies in their value chains or in their corporate groups.¹⁵ These questions therefore remain exclusively regulated by domestic law.

The Updated Draft does address situations of corporate complicity in a broad sense. Article 8.3 (b), following the wording from the Suggested Chair Proposals, provides that businesses shall be held liable for “aiding, abetting, facilitating, and counselling the commission of human rights abuse.” Article 8.4(c) further specifies that this liability is not contingent upon the establishment of the liability of the main

¹⁴ Markus Krajewski, ‘Analysis of the Third Draft of the UN Treaty on Business and Human Rights’ (CIDSE 2021) 13, <https://www.cidse.org/wp-content/uploads/2021/10/EN-Binding-Treaty-legal-analysis.pdf>, accessed 31 August 2023.

¹⁵ FIDH, ‘Preliminary Comment to the Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ (2019) 5, https://www.fidh.org/IMG/pdf/fidh_preliminary_legal_position_on_the_draft_lbi_on_tncs_and_obes_2019_1_.pdf, accessed 9 September 2023.

perpetrator for the unlawful act. The Updated Draft provides more clarity on this concept by listing the different ways in which a business can be complicit in human rights abuses, whereas the Third Draft only referred to “complicity in a criminal offense” under former Article 8.10. This improved precision in language is, however, tempered by the domestic law qualifiers in both paragraphs 3 and 4 of Article 8, meaning that while the Updated Draft provides more guidance in content to States Parties, it also gives them the option to “opt out” through their domestic legal principles.

2. ACCESS TO JUSTICE AND REMEDY (ARTICLES 7, 9-11)

Improving access to remedy is one of the key objectives which the LBI is meant to address. The structure of the Updated Draft remains similar to that of the Third Draft, with Articles 7, 9, 10 and 11 addressing access to remedy and procedural matters. In practice, procedural matters are at the centre of many hard-fought legal battles between affected groups and businesses and have played a predominant – if not exclusive – role in landmark transnational litigation to date.¹⁶ The Updated Draft provides more legal certainty on certain procedural matters but marks a step back from the Third Draft on some of the most contentious issues, in particular regarding jurisdiction.

A. JURISDICTION (ARTICLE 9)

The Updated Draft follows closely the Suggested Chair Proposals on the matter of jurisdiction, with only minor textual adaptations. Article 9.1 identifies the jurisdictions which are competent to hear cases that fall within the scope of the LBI. The principles laid out are similar though not identical to the Third Draft. Article 9.1 establishes the competence of the jurisdiction where the human rights abuse took place and where the relevant harm was sustained, whereas former Article 9.1 under the Third Draft referred to the jurisdiction where the human rights abuse occurred and/or produced effects and where an act or omission contributing to the abuse occurred. Both the Third Draft and the Updated Draft therefore establish jurisdiction where the harm occurred, but the Updated Draft is arguably slightly vaguer than the Third Draft when it comes to the jurisdiction of the State Party where the act or omission which led to the harm, the causal or originating event, took place. An expansive interpretation may lead to assume that this is covered by the concept of “human rights abuse”, but the Updated Draft could provide more legal certainty by specifying that both the State where the causal event and the State where the subsequent harm occurred are competent to hear cases.

It is suggested that Article 9.1 (a) be reworded as follows:

“the human rights abuse took place, in whole or in part, including acts or omissions that led to the abuse, within the territory or jurisdiction of that State Party;”

The Updated Draft, in line with the Third Draft, provides for the more traditional competence of the jurisdiction where the defendant business is domiciled and where the claimant victim resides (Article 9.1 (c) and (d)).

¹⁶ Many landmark decisions on parent company liability are actually decisions on jurisdiction and not merits, such as *Vedanta v Lungowe* in front of the UK Supreme Court or *Nevsun Resources v Araya* in front of the Supreme Court of Canada; this has also been the main point of contention in all cases brought to date under the French Duty of Vigilance Law since its enactment in 2017, see for example Joseph Byomuhangi, ‘Voluntary Measures Will Not Curb Corporate Impunity, a Legally Binding Instrument Is Essential’ (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/blog/voluntary-measures-are-not-enough-to-curb-corporate-impunity-a-legally-binding-instrument-is-essential>, accessed 10 September 2023.

Where the Updated Draft marks a difference from the Third Draft is on the issue of *forum non conveniens*, a common law doctrine whereby a court declines competence to hear a case on the ground that another jurisdiction is better placed to hear the case. Former Article 9.3 under the Third Draft explicitly rejected this doctrine (“Courts [...] shall avoid imposing any legal obstacles, including the doctrine of *forum non conveniens*”). This doctrine is often seen as a strategic procedural defense for businesses looking to either lengthen legal proceedings or to have the case decided in a less favorable jurisdiction for the claimant.¹⁷ The Updated Draft takes a much more measured approach on the matter. The new Article 9.3 no longer explicitly mentions the doctrine of *forum non conveniens*, but rather alludes to it without prescribing a clear prohibition for States Parties: “decisions by relevant State agencies [...] shall respect the rights of victims in accordance with Article 4, including with respect to: (a) the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter.” It is also noteworthy that Article 9.3 includes a domestic law qualifier (“consistent with its domestic legal and administrative systems”), meaning that a State Party which incorporates the doctrine of *forum non conveniens* in its legal system is not necessarily in breach of the requirements from Article 9.3 of the Updated Draft. That State Party will have to balance the exercise of this doctrine with the rights of the victim guaranteed under Article 4 of the LBI, which includes “the right to fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice.”

In practice, Article 9.3 would substantively guarantee the same rights to a victim as an explicit rejection of the doctrine of *forum non conveniens*, but opens the door to lengthy judicial proceedings at the jurisdictional stage as claimants will have to argue that the more appropriate forum does not guarantee their rights under Article 4. It was clear from the debates during the 7th OEIGWG session that this issue was a point of contention between States, with China opposing the explicit rejection of the doctrine of *forum non conveniens*, whereas Palestine and Namibia supported to keep it. Egypt and Mexico provided more nuanced wording, either reminding some of the requirements which an alternative forum should verify (“including the doctrine of *forum non conveniens* unless an adequate alternative forum exists that would likely provide a timely, fair, and impartial remedy” in Egypt’s submission), or drawing on the legitimacy of judicial proceedings (“States Parties shall ensure that the doctrine of *forum non conveniens* is not used by their courts to dismiss legitimate judicial proceedings brought by victims” in Mexico’s submission).

It is suggested that Article 9.3 be reworded as follows:

“State Parties shall take such measures as may be necessary, ~~and consistent with its domestic legal and administrative systems,~~ to ensure that decisions by relevant State agencies relating to the exercise of jurisdiction in the cases referred to in Article 9.1 shall respect the rights of victims in accordance with Article 4, including with respect to:

(a) the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter;

or

(b) the length of judicial proceedings and evidentiary burden placed on victims;

(c) the coordination of actions as contemplated in Article 9.4.”

¹⁷ Doug Cassel, ‘Progress in the Newest UN Draft Treaty on Business and Human Rights’ (Business & Human Rights Resource Centre, 25 August 2020), <https://www.business-humanrights.org/en/blog/progress-in-the-newest-un-draft-treaty-on-business-and-human-rights/>, accessed 10 September 2023.

Another omission which will likely be deplored by civil society is a reference to the doctrine of *forum necessitatis*, where a court recognises its jurisdiction in exceptional cases where no other court is reasonably available to the victim. The Third Draft provided grounds for the recognition of *forum necessitatis* where there was a sufficient link with the State Party concerned, under former Article 9.5. This provision disappeared from Article 9 in the Suggested Chair Proposals, a move that was criticised by commentators,¹⁸ but which has nevertheless been maintained in the Updated Draft.

Finally, Article 9.4 of the Updated Draft covers coordination between the judiciaries of different States Parties seized by related proceedings, an important procedural issue meant to avoid conflicting judgments across jurisdictions. This is a welcomed addition compared to the Third Draft, which only addressed the issue of joining codefendants to a claim (former Article 9.4). The guidance in the Updated Draft remains, however, rather minimal, the LBI now only stating that “relevant State agencies of each State shall consult one another with a view to coordinating their actions”. Explicit rules on staying legal proceedings when another court is already seized, or joining subsidiaries and other codefendants to claims against the parent company can help speed dispute resolution and avoid contradictory decisions.¹⁹

B. APPLICABLE LAW (ARTICLE 11)

Whilst the Suggested Chair Proposals had recommended removing Article 11 on the applicable law, the Updated Draft maintains nearly the same provisions as the Third Draft on this topic, with only minor textual adaptations. The maintenance of a provision on the applicable law to claims that fall under the scope of the LBI is a welcomed development of the Updated Draft compared to the Suggested Chair Proposals. Rules of private international law vary from one domestic system to another and can therefore lead to different outcomes depending on the jurisdiction where proceedings take place. The LBI thus provides a unique opportunity to unify rules of private international law in claims concerning business accountability for human rights abuses.

Article 11 distinguishes between the law applicable to the procedure in paragraph 1 and the law applicable to the substance (or merits) in paragraph 2. Whilst procedural matters are governed by the law of the court seized with the matter, the victim has a choice of law for matters of substance: the victim can choose between the law where the acts or omissions have occurred or produced effects or the law where the business alleged to have committed the acts or omissions is domiciled. This choice of law gives the opportunity for the victim to choose the most protective legal regime. This is particularly useful in scenarios where companies domiciled in countries with stringent legal standards engage in business activities in countries with less protective legal regimes. Article 11.2 could however provide more legal certainty if the drafters used “shall” instead of “may” to describe the rule. As it currently stands, “all matters of substance [...] may [...] be governed” by the choice of laws offered to the victim. This suggests that States Parties could choose another rule of private international law to determine the law applicable to substantive matters. In comparison, paragraph 1 on procedural matters uses the verb “shall” therefore making it clear that only the law of the court seized of the matter is applicable.

It is suggested that Article 11.2 be reworded as follows:

“All matters of substance which are not specifically regulated under this (Legally Binding Instrument) ~~may~~ **shall**, upon the request of the victim, be governed by the law of another State where: [...]”

¹⁸ Andressa Oliveira Soares, Manoela Carneiro Roland and Tchenna Fernandes Maso, ‘Negotiations over the International Treaty on Business & Human Rights: Challenges and Perspectives’ (*Business & Human Rights Resource Centre*), <https://www.business-humanrights.org/en/blog/negotiations-over-the-international-treaty-on-business-human-rights-challenges-and-perspectives/>, accessed 10 September 2023.

¹⁹ Rouas (n 3) 357.

C. MEASURES TO REDUCE OBSTACLES TO ACCESS TO REMEDY (ARTICLE 7.4)

Article 7.4 of the Updated Draft provides a list of measures to reduce obstacles to access to remedy. These include alleviating the financial burden on victims, facilitating the production of evidence, ensuring fair and timely disclosure of evidence relevant to litigation or enforcement proceedings, and enabling the possibility of group actions. All these measures respond to key procedural issues which have been identified by civil society as significant barriers to access to justice for victims of corporate human rights abuses.²⁰

Regarding the alleviation of the financial burden on victims seeking remedy, Article 7.4 (a) of the Updated Draft follows the Suggested Chair Proposals and is an improvement from the Third Draft. Former Article 7.4 under the Third Draft mentioned ensuring “court fees and rules concerning allocation of legal costs do not place an unfair and unreasonable burden on victims” but didn’t provide a clear list of measures States Parties should consider, with the exception of “waiving certain costs in suitable cases.” The Updated Draft provides more explicit suggestions in comparison: “provision of financial assistance, waiving court fees in appropriate cases, granting exceptions to claimants in civil litigation from obligations to pay the costs of other parties”. Nonetheless, the wording uses the qualifier “for instance” indicating that this list is suggestive rather than prescriptive. States Parties therefore retain a margin of appreciation in terms of the exact measures they should adopt.

In this respect, it is perhaps regrettable that certain provisions on financial security within the Third Draft have disappeared from the Updated Draft. Former Article 8.5 under the Third Draft introduced the obligation for States Parties to require businesses to “establish and maintain financial security, such as insurance bonds or other financial guarantees, to cover potential claims of compensation”, which disappeared from the Suggested Chair Proposals and by extension the Updated Draft. This means the Updated Draft doesn’t provide as much security for victims of human rights abuses who try to seek compensation from businesses which can easily liquidate their assets in the relevant jurisdiction.

Regarding the production of evidence, Article 7.4 (a) of the Updated Draft tackles the question of the burden of proof. The fact the reversal of the burden of proof is still explicitly mentioned in the LBI will be welcomed by civil society which has campaigned for such a provision to better balance the asymmetry of power between victims of human rights abuses who can hardly have access to internal corporate documents and businesses who are best placed to document their decision-making process and due diligence procedures. The Updated Draft does not make the reversal of the burden of proof a necessary requirement, but rather lists it as an example of a useful measure to facilitate the production of evidence. The Suggested Chair Proposals arguably provided more textual clarity on what the reversal of the burden of proof could amount to practice. Suggested Article 7.3 (d) provided, as examples, “presumptions as to the existence of certain facts and the imposition of strict or absolute liability in appropriate cases”. More specificity on the reversal of the burden of proof could also help ensure that this requirement finds application in civil matters, but not criminal cases where the presumption of innocence (or equivalent principle) is a foundational rule of law requirement.

The possibility of group actions, mentioned in Article 7.4 (f) of the Updated Draft, is a marked improvement from the Third Draft which remained silent on the matter. The ability to join similar claims can help streamline legal actions and reduce costs. It has played a strategic role in some of the most famous business and human rights cases to date.²¹

Finally, Article 7, following the Suggested Chair proposals, loses any reference to the execution of foreign judgments, an issue which in tandem with the lack of obligations for businesses to provide financial security for claims against them may leave victims with little recourse to any form of

²⁰ FIDH, ‘Overcoming Barriers to Access to Justice for Corporate Human Rights Abuses’ (2023), <https://www.fidh.org/en/issues/business-human-rights-environment/business-and-human-rights/overcoming-barriers-to-access-to-justice-for-corporate-human-rights>, accessed 10 September 2023.

²¹ This was notably the case in the *Lungowe v Vedanta* case which create legal precedence on parent company liability in front of the UK Supreme Court.

effective remedy or compensation in practice.²² The Third Draft did address this issue in former Article 7.6 by reference to the “prompt execution of national or foreign judgments or awards”. The LBI would benefit from the reintroduction of this provision to avoid the coexistence of contradictory judgments internationally and improve victims’ ability to obtain the enforcement of judgements or awards against businesses in practice.

It is suggested that an Article 7.5 (d) be included as follows:

“(d) to ensure the recognition and prompt execution of national or foreign judgments or awards, in accordance with the present Legally Binding Instrument and the Rights of Victims under Article 4.”

D. STATUTE OF LIMITATIONS (ARTICLE 10)

Article 10 of the Updated Draft remains substantially similar to the Third Draft on the question of statute of limitations. Article 10.1 covers criminal liability and requires States Parties to not apply any limitation period to the most serious crimes of concern to the international community, this time explicitly listed as “war crimes, crimes against humanity or crimes of genocide”. It should be noted that the Updated Draft provides more legal certainty on this matter compared to the Suggested Chair Proposals which also included a domestic law qualifier within the same provision (“and consistent with its domestic and administrative systems”).

Article 10.2 covers all other legal proceedings and is essentially the same (but for minor textual adaptations) as the Suggested Chair Proposals. The Updated Draft requires that limitation periods be not unduly restrictive and that they respect the rights of victims. In this respect the LBI continues to stand out as an instrument that could contribute to the progressive development of international law on the question of statutes of limitations, particularly in civil matters.²³

E. SPECIFIC OBSTACLES FACED BY AT-RISK GROUPS (ARTICLE 7.1)

The Updated Draft doesn’t provide much more guidance to States Parties on measures to adopt to address the specific obstacles faced by at-risk groups, such as women, Indigenous Peoples, and human rights defenders when seeking remedy. Article 7.1 of the Updated Draft remains largely unchanged from the Third Draft, stating that “States Parties shall provide their relevant State agencies, with the necessary competence [...] to overcome the specific obstacles which women and groups in vulnerable and marginalized situations face in accessing such mechanisms and remedies.” The protection of at-risk groups is therefore highlighted in the very first provision dealing with access to remedy, but the LBI doesn’t provide more detailed guidance on the matter within the body of its prescription articles. The Preamble can therefore play an important role in further clarifying these concepts, in particular PP13, PP14 and PP15 which touch upon the role of human rights defenders, the specific impact of business-related human rights abuses on vulnerable and at-risk groups, and the need for States and business enterprises to integrate a gender perspective in all their measures respectively.

²² An example of this has been the difficulty for claimants in a class action lawsuit brought against Texaco (then acquired by Chevron) in Ecuador to enforce the a \$9.5 billion judgment against the company over a prolonged, multijurisdictional legal battle, see Business & Human Rights Resource Centre (2003) ‘Texaco/Chevron Lawsuits (Re Ecuador)’, <https://www.business-humanrights.org/en/latest-news/texacochvron-lawsuits-re-ecuador-1/>, accessed 10 September 2023.

²³ Cantú Rivera (n 2).

3. THE ROLE AND PROTECTION OF HUMAN RIGHTS AND ENVIRONMENTAL DEFENDERS

The Updated Draft of the LBI has placed more accentuation on the need for an enabling and safe environment for human rights defenders compared to previous versions but is still insufficient to adequately address the recognition and protection of human rights defenders. The thirteenth preambular paragraph of the Updated Draft emphasises that States are obliged to take all appropriate measures to ensure that human rights defenders and civil society actors have an enabling and safe environment in which they can freely exercise their role. This was not explicitly mentioned in the previous drafts and the emphasis on the State's duty to ensure an enabling and safe environment for human rights defenders in the preamble is a good step forward. However, the previous reference to the UN Declaration on Human Rights Defenders, together with the UN Declaration on the Rights of Indigenous Peoples and ILO Conventions, has been deleted and replaced with the phrase "other internationally agreed human rights declarations". It is important to note that the reference to certain human rights declarations, including the UN Declaration on Human Rights Defenders and the UN Declaration on the Rights of Indigenous Peoples, highlights their significant link with the provisions of the LBI.²⁴

Following this preambular paragraph, Article 5.2 obliges States to take appropriate and effective measures to ensure a safe and enabling environment for individuals, groups and organisations to protect human rights and the environment from threats, intimidation, violence, insecurity, harassment and reprisals. This statement remains the same as in earlier draft, however, compared to the third draft of the LBI, the term 'harassment and reprisals' has been added to the text of this article. As stated in the earlier analysis, the statements under this Article 5.2 could have been more elaborate in terms of defining human rights defenders as well as clarifying the specific measures that States should undertake to ensure the safety and empowerment of human rights defenders.²⁵ Article 5.2 of the Updated Draft contains the definition of human rights and environmental defenders, as it stipulates that States should protect individuals, groups and organisations that promote and defend human rights and the environment. Although the interpretation of the term 'human rights defenders' in Article 5.2 is consistent with the meaning in the UN Declaration on Human Rights Defenders, which refers to any person or group of persons peacefully engaged in the defence of human rights and the environment, the lack of precision in the terms can be problematic when it comes to recognising and legitimising certain human rights defenders, including those who may be challenged as 'non-traditional human rights and environmental defenders', such as company workers, artists, and health workers.²⁶

Certain amendments such as:

'persons, groups, and organisations that promote and defend human rights and environment regardless of the sex, age and profession' could be beneficial for recognising and bringing visibility to the all relevant human rights and environmental defenders.

²⁴ Jan Klabbers 'Treaties and Their Preambles' in Michael J. Bowman and Dino Kritsiotis 'Conceptual and Contextual Perspectives on the Modern Law of Treaties' (CUP 2018), 178.

²⁵ Krajewski (n 7), 20-21.

²⁶ Alice M. Nah, Karen Bennett, Danna Ingleton and James Savage 'Research Agenda for the Protection of Human Rights Defenders' 5(3) 2013 Journal of Human Rights Practice 401, 405.

Creating a safe and enabling environment must also ensure that human rights and environmental defenders can freely exercise their right to advocate on human rights and environmental issues as set out in the UN Declaration on Human Rights Defenders and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazu Agreement).²⁷ According to these instruments, States should not only protect the safety of human rights and environmental defenders, but also ensure the free exercise of their fundamental rights, including access to relevant human rights and environmental information and active participation in human rights and environmental matters, especially decision-making processes (so-called Access Rights).²⁸

On this issue, the Updated Draft sought to provide more concrete guidance to States by adding a section (d) to Article 6.2, which calls on states to take legislative, regulatory and other measures to promote the active and meaningful participation of individuals and groups in the development and implementation of laws and policies to prevent corporate involvement in human rights violations. In addition, the Updated Draft also includes the previous provision on the responsibility of businesses to engage in meaningful consultations with potentially affected groups and relevant stakeholders in section (d) of Article 6.4. However, these two sections of the Updated Draft cannot fully capture the fundamental rights of human rights and environmental defenders, including the “Access Rights” set out in the Declaration on Human Rights Defenders and the Escazu Agreement, the right to access, communicate and cooperate with private and public organisations on human rights and environmental issues.²⁹

It is suggested that section (d) to Article 6.2 be reworded as follows:

*“promote the ~~active and meaningful participation~~ **rights** of individuals and groups, such as trade unions, civil society, non-governmental organizations, indigenous peoples, and community-based organizations, **to access to information, communication, participation with private and public organisations related to** in the development and implementation of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse.”*

In terms of protection, the phrase “the reprisals and harassment” added to Article 5.2 of the Updated Draft could emphasise that States have an obligation to protect all persons who may be subject to reprisals. If reprisals also refer to human rights defenders who are harassed through strategic lawsuits against public participation (SLAPPs), this regulation could be further developed to clarify the obligations of States and business enterprises in relation to SLAPPs. The Updated Draft could be further developed to require States to adopt national anti-SLAPP laws and to condemn business enterprises involved in SLAPPs cases against human rights defenders. In addition, businesses should be required not to engage in SLAPPs harassment against human rights defenders and not to be involved in such incidents in their business relations.

Also, it is important to note that some human rights and environmental defenders are particularly vulnerable, including, those dealing with complex issues such as human rights violations related to extractive industries, land and the environment, as well as those with particular identities, such as

²⁷ The UN Declaration on Human Rights Defenders, adopted by UN General Assembly Resolution 53/144, 9 December 1998, UN Doc A/RES/53/144; Economic Commission for Latin America and the Caribbean, Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 2018, https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf (accessed on 31 August 2023).

²⁸ Palesa Maloisane & Jessica Lawrence “Nothing about us without us”: Focus on the 8th round of discussions of the UN Binding Treaty, Business and Human Rights Resource Centre Blog, (10 October 2022), <https://www.business-humanrights.org/en/blog/nothing-about-us-without-us-focus-on-the-8th-round-of-discussions-of-the-un-binding-treaty/> (accessed on 31 August 2023).

²⁹ Ibid, also UN General Assembly ‘Rio Declaration on Environment and Development’, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992), Principle 10.

women human rights defenders and indigenous peoples.³⁰ In this regard, the Updated Draft is limited with regard to the protection of vulnerable groups, as it has deleted the proposed provision calling on States to pay special attention to certain human rights defenders, including women human rights defenders and indigenous peoples, who are vulnerable in difficult circumstances, as should have been in the twelfth preambular paragraph of the Updated Draft.³¹ In addition, the Updated Draft also deleted the provision calling on business enterprises to pay particular attention to specific human rights defenders, as stated in section (c) of Article 6.4 of the previous draft. Nevertheless, the Updated Draft still contains the 14th preambular paragraph highlighting the special circumstances and vulnerability of certain rights holders, including women and girls, children, indigenous peoples, persons with disabilities, persons of African descent, older persons, migrants and refugees. However, it is unclear whether the term 'rights holder' includes human rights defenders or whether it refers primarily to victims of the negative impacts of corporate activities. Therefore, it can be argued that the Updated Draft is not sufficient to protect certain human rights and environmental defenders and that it needs to be modified with regard to the protection of certain human rights defenders, especially those of environmental defenders. Experts noted that the LBI needs to protect the threats and possible killings and murders of environmental defenders in the 'socio-environmental conflicts' caused by mining, oil and extractive business enterprises.³² The LBI should give greater recognition to the significant threats to environmental defenders in order to provide more effective protection by States.

It is also interesting to note that according to the text of the Updated Draft, ensuring the safety of human rights defenders is no longer the sole responsibility of the State. Article 6.4, section (e) stipulates that States must impose legally enforceable obligations on business enterprises to protect the safety of human rights defenders, journalists, workers and others, as well as persons who may be subject to retaliation. Under this section (e) of Article 6.4, companies appear to have a responsibility to protect the safety of human rights defenders, journalists, workers, members of indigenous peoples and others. The next draft could further clarify under what circumstances and how companies should protect the rights of human rights defenders. For instance, under the Updated Draft of the LBI, business enterprises should be explicitly obliged to use their leverage, especially their financial leverage, on weak States to protect human rights defenders.³³

4. DUE DILIGENCE (ARTICLE 6)

A. ENVIRONMENTAL DUE DILIGENCE

The Updated Draft has not made sufficient progress on the specific requirements for undertaking due diligence, as it remains vague and unclear on the due diligence requirements, in particular on the concepts of due diligence process, material scope and compliance. It deleted the earlier provisions that required companies to carry out specific measures under human rights due diligence in Article 6, but has included the definition of human rights due diligence in Article 1.8. This definition of the human rights due diligence falls short on specifying the human rights due diligence responsibilities of business enterprises compared to other international instruments.³⁴

³⁰ Karen Bennetta, Danna Ingleton, Alice M. Nah and James Savage 'Critical Perspectives on Security and Protection of Human Rights Defenders' (2015) 9(17) *The International Journal of Human Rights*, 886.

³¹ UN General Assembly 'Text of the third revised draft Legally Binding Instrument with textual proposals submitted by States during the seventh and the eighth sessions of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' 27 February – 31 March 2023 Un Doc A/HRC/52/41/Add.1, PP12 bis.

³² Martha Inés Romero, Pax Christi International 'Six key points from Latin America to consider to advance the binding treaty negotiations', Business and Human Rights Resource Centre Blog 6 October 2022. <https://www.business-humanrights.org/en/blog/six-key-points-from-latin-america-to-consider-to-advance-the-binding-treaty-negotiations/> (accessed on 1 September 2023).

³³ David Birchall 'The Role of Civil Society and Human Rights Defenders in Corporate Accountability' in Surya Deva and David Birchall 'The Research Handbook on Human Rights and Business' (Edward Elgar Publishing 2020).

³⁴ Nadia Bernaz and others, 'The UN Legally Binding Instrument and the EU Proposal for a Corporate Sustainability Due Diligence Directive; Competences, Comparison and Complementarity' (Friends of the Earth 2022) 13, <https://friendsoftheearth.eu/wp-content/uploads/2022/10/Complementarity-study-on-EU-CSDDD-and-UN-LBI-October-2022.pdf>, accessed 31 August 2023.

Also, in terms of material scope, the previous definition of adverse human rights impacts, which was intended to include direct and indirect harms, has been deleted. The omission of indirect harm means that the application of the LBI will be limited to certain actors, including parent companies and investors, who are normally associated with indirect harm.

On environmental and climate change issues, the Updated Draft has fallen behind previous drafts in addressing the issues of environmental damage and climate change. This is clearly reflected in the deleted formulations of the right to a safe, clean, healthy and sustainable environment and environmental and climate impact assessment in the texts of the Updated Draft. First, the earlier statement in the tenth preambular paragraph of the Third Draft that business has a role in promoting and supporting human rights, including the environment and climate, has been deleted in the Updated Draft. Second, the violation of the right to a safe, clean, healthy and sustainable environment was highlighted in the definition of human rights abuse in Article 1.2 of the Third Draft, but the Updated Draft removed the emphasis of the violation of this right from the definition of human rights abuse. Third, the previous statement that companies must regularly publish information on environmental and climate impact assessment, which was included in section (a) of Article 6.4 of the Third Draft, has been removed and only human rights impact assessment is included in the Updated Draft. In addition, some textual proposals made during the 7th and 8th sessions of the OEIGWG, including preambular paragraphs 13 and 14, which highlight the climate emergency and the role of business in implementing the international environmental treaties such as the UN Framework Convention on Climate Change, were not included in the Updated Draft.³⁵

The omission of these core statements on the environment and climate change impacts may indicate that the OEIGWG is sticking to its core mandate and focusing exclusively on human rights. As mentioned in the previous analysis, the mandate of the OEIGWG remains limited to international human rights, with the aim of “elaborating an international Legally Binding Instrument to regulate international human rights”.³⁶ Given the OEIGWG’s decision to relegate environmental issues to the background by removing critical references to the environment and climate change from the texts of the Updated Draft, it appears that companies do not have a clear obligation in the Updated Draft in relation to the human rights impacts of the environment and climate change when carrying out human rights due diligence responsibilities. Furthermore, this means that the precautionary principle, which was proposed in the earlier analysis of the Third Draft, has not even been included.³⁷

The recent recognition of the right to a safe, clean, healthy and sustainable environment underlines the “indivisibility” between human rights and the environment.³⁸ In particular, it highlights that “environmental degradation, climate change and unsustainable development are among the most urgent and serious threats to the ability of present and future generations to enjoy all human rights”, particularly the non-derogable absolute rights, including the right to life.³⁹ It is therefore crucial that the OEIGWG takes into account the inseparable nature between the environment and human rights and reflects this in the draft LBI, for if it fails to do so, it would undermine the full and effective protection of all human rights of humanity, including future generations. As noted in the previous analysis, the reference to the environment and climate change needs to be amended to highlight the right to a safe, clean, healthy and sustainable environment, as this right links human rights to the environment and signifies the environment and climate change on human rights.⁴⁰

In addition to the indivisibility of human rights and the environment, the UNGPs require companies to take into account all relevant internationally recognised human rights when assessing potential and actual adverse human rights impacts, and section (b) of Article 6.2 of the Updated Draft also requires

³⁵ UN General Assembly (n 10), PP14 bis.

³⁶ Krajewski (n 7), 21.

³⁷ Ibid.

³⁸ Human Rights Council, The human right to a safe, clean, healthy and sustainable environment, 5 October 2021, A/HRC/48/L.23/Rev.1.

³⁹ J. H. Knox, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 24 January 2018, UN Doc A/HRC/37/59.

⁴⁰ Krajewski (n 7), 21.

States to ensure that companies respect internationally recognised human rights and fundamental freedoms. This means that companies and States should not single out and ignore individual human right in their human rights policies and due diligence framework.⁴¹ The right to a safe, clean, healthy and sustainable environment is a standalone human right internationally endorsed and recognised by States. The UN Working Group on Business and Human Rights also recognises the importance of this right in its recently published information note on Climate Change and the Guiding Principles on Business and Human Rights.⁴² The Note highlights the special obligations of the States and responsibilities of corporations in relation to the climate change impacts on human rights.⁴³ These specific responsibilities in relation to the environment and climate change impacts, as set out in such a Note, should be further reaffirmed and consolidated in the LBI.

However, looking at some of the provisions in the Updated Draft, one gets the impression that the OEIGWG is sending mixed signals about the LBI's stance on environmental and climate issues. For example, the Updated Draft has retained the definition in Article 5.2 that includes environmental defenders alongside human rights defenders. Also, regarding the rights of victims of human rights violations caused by corporate activities, according to the statement in section (c) of Article 4.2, victims still have a right to environmental remediation and ecological restoration. If future LBI texts still incorporate these concepts such as environmental remediation in the context of victims' rights, they could also delve deeper into the obligations of States and responsibilities of companies when it comes to ensuring victims' access to remedy in relation to environmental damage and climate change impacts. Access to remedy for environmental damage requires a clear explanation of the substantive and procedural implications of environmental human rights. As stated in Article 5.2 of the Updated Draft, if victims have the right to environmental remediation and ecological restoration, the article should also refer the victim's substantive right to a safe, clean, healthy and sustainable environment, as well as the procedural rights, including the right to access environmental information and the right to participate in environmental decision-making processes.

Furthermore, section (f) of Article 6.4 of the Updated Draft still contains the statement that companies must take into account the rights of indigenous peoples, including free, prior and informed consent (FPIC). Indigenous peoples' rights cannot be separated from the issues of environment and climate change. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) articulates the special relationship between indigenous peoples and their land, emphasising their fundamental right to environmental self-determination, which grants them "the right to maintain spiritual relationships with the land, the right not to be forcibly displaced or dispossessed, the right to compensation for land taken or damaged, and the right to environmental conservation and protection".⁴⁴ Given the importance of these rights of indigenous peoples, States and business enterprises have an obligation to obtain the FPIC of indigenous peoples and local communities to the use of land for commercial activities.⁴⁵ Therefore, to indicate the responsibilities of companies to comply with the standard of FPIC of local communities and indigenous peoples, the environmental rights of indigenous peoples must be taken into account and reflected in the LBI.

These arguments show that the future draft of the LBI must have a 'dual focus' to concentrate on the issues of environment and climate change in addition to human rights, taking into account the inseparability of human rights and environment in order to have 'stronger protection' of all internationally recognised human rights, including the rights of vulnerable groups, especially indigenous peoples, who are at high risk of human rights violations due to corporate environmental damage.⁴⁶ Therefore, the future draft should not only reinstate the previous formulations, including the right to a safe, clean,

⁴¹ Principle 18, UNGPs Commentary.

⁴² Working Group on the issue of human rights and transnational corporations and other business enterprises Information Note on Climate Change and Guiding Principles on Business and Human Rights, June 2023, para 2. <https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf>.

⁴³ *Ibid*, para 5.

⁴⁴ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: Resolution, adopted by the General Assembly, 2 October 2007, A/RES/61/295 (UNDRIP) <https://www.refworld.org/docid/471355a82.html> (accessed on 5 September 2023).

⁴⁵ Dinah Shelton 'The Rights of Indigenous Peoples: Everything Old Is New Again' in A. Von Arnald, K. Von der Decken, & M. Susi (Eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (CUP 2020), 217, 230.

⁴⁶ Bernaz and others (n 28), 16.

healthy and sustainable environment, but also must elaborate on the specific obligations of the state and business in relation to the human rights impacts of the environment and climate change, including the highest attainable human rights, and clarify environmental due diligence in line with the latest international human rights standards.

In particular, the future draft of the LBI:

- should reinstate the previous statement in preambular paragraph 10 of the Third Draft, which includes recognition of the significant role of the private sector in mitigating climate change in times of emergency.
- should reinstate the previous recognition of **the right to a safe, clean, healthy and sustainable environment** within the definition of human rights abuse in Article 1.3 of the Updated Draft. In reintroducing this important right, the Updated Draft must highlight the indirect negative impact as a human rights violation, in addition to the direct impact.
- could alternatively highlight **human rights in the context of the environment and climate change** in Article 3.3 of the Updated Draft, which sets out the scope of the LBI.

Also, the current provisions on human rights due diligence in the Updated Draft, mainly contained in Articles 6.3 and 6.4, cannot fully cover both human rights or environmental due diligence, as environmental and climate due diligence requires companies to take different specific measures than human rights due diligence. For example, climate change due diligence includes both mitigation and integration measures. Both require companies to commit to reducing greenhouse gas emissions as part of their corporate activities and to integrate these commitments into their policies and activities.⁴⁷ The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines) contain more specific requirements for companies to conduct environmental due diligence.⁴⁸ For example, the chapter VI sets out the negative impacts on the environment that companies must address, including climate change, biodiversity loss, destruction of terrestrial, marine and freshwater ecosystems, deforestation, and others.⁴⁹ In addition, business enterprises must establish and maintain an environmental management system that takes into account all different types of environmental impacts and must be integrated into the risk-based due diligence obligations under the OECD Guidelines.⁵⁰ Compared to the UNGPs, the OECD Guidelines underline the specific actions that need to be taken as part of the environmental management system, namely continuous improvement and the establishment of a contingency plan for emergencies.⁵¹ The future provisions of the LBI should incorporate the standards of international frameworks such as the OECD Guidelines and specify companies' human rights and environmental due diligence (HREDD) obligations, including how to establish and manage a due diligence system that is compatible with both human rights and the environment. Specifically, the future draft of the LBI must not only reinstate corporate responsibility for reporting on environmental and climate impact assessments, but it must also contain precise provisions that strengthen corporate responsibility for the environment and climate change.

⁴⁷ Julia Dehm 'Beyond Climate Due Diligence: Fossil Fuels, 'Red Lines' and Reparations' (2023) 8(2) Business and Human Rights Journal, 156.

⁴⁸ Organisation for Economic Cooperation and Development (OECD) (2011) 'Guidelines for Multinational Enterprises on Responsible Business Conduct', 2023 edition. OECD Publishing Paris, Chapter VI. <https://doi.org/10.1787/81f92357-en> (accessed on 9 September 2023).

⁴⁹ Ibid, Preface to Chapter VI. Environment.

⁵⁰ Ibid, Article 1 of Chapter VI. Environment.

⁵¹ Ibid, Articles 4 and 5 of Chapter VI. Environment.

It is suggested that:

- Article 1.8 of the Updated Draft, which defines human rights due diligence (HRDD), be reworded as **human rights and environmental due diligence (HREDD)**.
- section (a) of Article 18, which sets out companies' responsibility to identify and assess the company's human rights impacts, be amended to include **environmental risk assessments** to be consistent with the precautionary approaches set out in the Rio Declarations.
- the other sections of Article 18 of the Updated Draft, which includes the specific measures such as taking action, conducting monitoring and communicating on human rights impacts, include **environmental impacts alongside human rights**.
- Alternatively, the future draft of the LBI also include **separate provisions that essentially address climate change and environmental impact assessment, including precautionary principles and contingency plans** that are consistent with the principles of international environmental law.⁵²

B. PARTICIPATION OF STAKEHOLDERS

The Updated Draft has included in the definition of human rights due diligence under Article 1.8 that companies should communicate regularly and in an accessible manner with stakeholders, in particular affected or potentially affected persons, which was previously under section (d) of Article 6.3 of the Third Draft. This provision under section (d) of Article 1.8 highlights the "regular and accessible manner" in which companies communicate with relevant stakeholders. In addition to these requirements, the Updated Draft also requires companies to "meaningful consult" with stakeholders under Article 6.4, section (d). The word "meaningful" could have been clarified in the context of the LBI to save companies from a mere tick box exercise and allow for more effective engagement.

Also, the Updated Draft has somewhat, though not sufficiently, improved the human rights due diligence requirements for companies when it comes to taking into account the vulnerability and complexity of potentially affected persons and other rights holders. In addition to the statement requiring companies to pay particular attention to those at increased risk of vulnerability or marginalisation, as set out in section (c) of Article 6.4, the Article has added additional conditions requiring companies to comply with human rights due diligence. For example, according to section (b) of Article 6.4 of the Updated Draft, the company must carefully consider age and gender when identifying and assessing adverse human rights impacts on women and girls. Also, the Updated Draft also identifies in some detail the specific stakeholders to which the company must pay particular attention when conducting human rights due diligence. According to section (e) of Article 6.4, the companies should consider the safety and protection of human rights defenders, journalists, workers, members of indigenous peoples and others when conducting human rights due diligence. This specific provision could be further specified to give greater prominence to workers as important actors in the process of preventing, identifying and mitigating potential and actual adverse human rights impacts in the course of business.

The provisions of the Updated Draft are still insufficient to ensure meaningful and effective engagement of relevant stakeholders, including workers, trade unions and other stakeholders, in the human rights due diligence process. Stakeholder engagement in human rights due diligence requires companies to go beyond formal consultations with relevant parties, as it requires "active" and "equal" participation between relevant stakeholders and companies, and stakeholders' views must be taken

⁵² The OECD Guidelines, Chapter 6, for example, explicitly emphasise the responsibility of companies to carry out environmental and climate assessments in accordance with international environmental regulation, including the Rio Declarations.

seriously and taken into account in the actions taken.⁵³ Compared to the UNGPs, the OECD Guidelines contain more specific requirements for conducting due diligence and meaningful stakeholder engagement.⁵⁴ According to the commentary on the Guidelines, meaningful stakeholder engagement is the key component of the due diligence process and refers to a two-way, continuous engagement that should be done with accurate consideration of stakeholders' perspectives.⁵⁵ To ensure meaningful and effective stakeholder engagement, it is important to engage with stakeholders in a timely, accessible, appropriate and safe manner that identifies and removes any barriers to interaction with stakeholders in vulnerable or marginalised situations.⁵⁶ The draft LBI should take into account the OECD Guidelines on such detailed requirements for meaningful engagement with relevant stakeholders during the due diligence process and consider them in the future development of the due diligence provisions under Article 6.4 of the LBI. In particular, the "active, continuous and equal character" of participation needs to be emphasised in the provisions on stakeholder engagement under Article 6.4 of the LBI.

Section (d) of Article 6.4 of the Updated Draft, which sets out the responsibility of companies to meaningfully engage relevant stakeholders in the human rights due diligence process, needs to be explicitly worded as follows:

"~~meaningful consult~~ engage in continuous, active and two-way dialogue with all relevant, potentially affected groups and other ~~relevant~~ stakeholders in an equal manner, paying particular attention to the stakeholder perspective".

In particular, the phrase "all relevant stakeholders" should also be emphasised in meaningful stakeholder engagement.

5. TRADE AND INVESTMENT POLICIES

International trade agreements, such as the agreements of the World Trade Organisation or regional free trade agreements as well as international investment agreements have the potential to limit the ability of States to protect and fulfil human rights.⁵⁷ The problematic relationship between investment agreements and human rights was also highlighted by the Working Group on Business and Human Rights in their 2021 Report to the General Assembly.⁵⁸

Various remedies have been suggested to address and mitigate the potentially negative effect of trade and investment agreements on human rights. It has been argued that one approach would be to establish a primacy of human and environmental rights over obligations of trade and investment agreements.⁵⁹

While human and environmental rights can be seen as trumping trade and investment obligations from a policy perspective, formal hierarchies in a legal doctrinal sense are difficult to create through

⁵³ Karin Buhmann 'Human Rights and Meaningful Stakeholder Engagement' in Maria Bonnafous-Boucher and J.D. Rendtorff (eds) Encyclopedia of Stakeholder Management (Edward Elgar 2023) 153.

⁵⁴ OECD Guidelines (n 48), Chapter II, Article 15.

⁵⁵ Ibid, Commentary of the Chapter II, General Policies, para 28.

⁵⁶ Ibid.

⁵⁷ Markus Krajewski, Framing the Broader context of business and human rights: the impact of trade agreements on human rights, in: Surya Deva and David Birchall (eds), Research Handbook on Human Rights, 2020, p. 297; Jesse Coleman, Kaitlin Y. Cordes and Lise Johnson, Human rights law and the investment treaty regime, in: Surya Deva and David Birchall (eds), Research Handbook on Human Rights, 2020, p. 297.

⁵⁸ Human rights-compatible international investment agreements, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/76/238, 27 July 2021.

⁵⁹ Markus Krajewski, Ensuring the Primacy of Human Rights, Model clauses for a UN Treaty on transnational corporations, other businesses and human rights. Study commissioned by CIDSE, 2017, available here <https://www.cidse.org/2017/03/03/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies/>.

international agreements, because international agreements are generally seen of the same rank in the international legal system. Formal hierarchies only exist for human rights which are part of the so-called *ius cogens* (peremptory norms) such as the prohibition of slavery and torture or when human rights form part of obligations of States under the United Nations Charter (UNC) as per Article 103 UNC. While a treaty like the Legally Binding Instrument could establish the supremacy of human rights treaties over other treaties concluded by the respective parties⁶⁰, it could not establish an absolute formal hierarchy in the sense of Art, 103 UNC.

During previous sessions of the OEIGWG, the debate about the impact of the Legally Binding Instrument on international trade and investment agreements focussed on issues of the interpretation and implementation of existing agreements in accordance with human rights and drafting new or revising old agreements to ensure space for human rights. Such a “primacy in practice” can be included in the Legally Binding Instrument. If drafted and implemented wisely such primacy would be possible and necessary. In the Legally Binding Instrument the relationship between international trade and investment agreements are addressed in Article 14.5.

A. INTERPRETATION AND DISPUTE SETTLEMENTS OF EXISTING TRADE AND INVESTMENT INSTRUMENTS

The Zero Draft of the Legally Binding Instruments as well as the Second and the Third Revised Drafts differentiated between the interpretation and implementation of existing trade and investment agreements on the one hand and obligations for new agreements on the other hand.⁶¹ With regards to existing trade and investment agreements, the LBI requires State Parties to ensure that these agreements “shall be interpreted and implemented in a manner that does not undermine or restrict their capacity to fulfil their obligations” under the LBI “as well as other relevant human rights conventions and instruments”. This obligation remained more or less the same since the Second Draft. It establishes a clear obligation of the State Parties to the LBI to ensure that existing trade and investment instruments are interpreted in such a way that obligations of human rights treaties are not undermined or restricted. It should be noted that this obligation only extends to human rights as enshrined in international human rights legal instruments, i.e., international treaties and other internationally accepted instruments which constitute binding norms such as international documents codifying customary law. However, the primacy clause of Article 14.5. does not apply to human rights which are only protected by domestic law. It also does not apply to environmental rights unless they can be considered part of international human rights law. In this regard, the human right to a clean, healthy, and sustainable environment as recognised by the General Assembly in its Resolution of 26 July 2022.⁶²

The text of Article 14.5. does not specify how State Parties should ensure that trade and investment agreements are interpreted and implemented in accordance with human rights. In particular it does not contain any obligations of States concerning dispute settlement under trade and investment agreements. Such specific obligations could include the requirement to select arbitrators or members of a trade and investment dispute settlement body which are (also) experts of human rights, the explicit rights of States to raise counterclaims based on the failure of an investor to adhere to its human rights responsibilities or the possibility to grant affected stakeholders the right to intervene in such proceedings. If such measures are not included in the LBI text itself, it would be necessary to specifically mention them in a potential protocol on investment and trade agreements and business and human rights.

⁶⁰ Krajewski, above note, p. 27.

⁶¹ Article 13.6 and 13.7 Zero Draft; Article 14.5 a) and b) Second and Third Draft.

⁶² A/76/L.75.

B. REVISION OF EXISTING AND DRAFTING OF NEW TRADE AND INVESTMENT INSTRUMENTS

Unlike Article 14.5.a) of the Third Draft which was largely maintained in the Updated Draft, former Article 14.5 b) of the Third Draft was deleted. This provision stated that all “new bilateral or multilateral trade and investment agreements shall be compatible” with human rights obligations. This provision was of significant importance because it tried to address the tension between investment and trade agreements on the one side and human rights obligations on the other in the process of treaty-making. States would have been obligated to draft new investment and trade agreements in line with their human rights obligations. As a consequence of this deletion, there is currently no obligation of States to revise provisions in trade and investment policies that effectively limit the protection of human rights and the environment.

Deleting paragraph b of Article 14.5 from the LBI is therefore not only a significant deviation from previous drafts, but also highly problematic from a human rights perspective as the LBI fails to include an opportunity and obligation of States to undertake *ex ante* Human Rights Impact Assessment (HRIA) of trade and investment agreements before the beginning of negotiations and before their ratification, to draft investment and trade agreements in a human rights compatible way – including effective human rights and sustainability provisions – and to revise existing agreements. Drafting new and redrafting existing trade and investment agreements in a human rights compatible manner is a more effective way to limit or even avoid potentially negative effects of trade and investment agreements for human rights than the mere reliance on a human rights compatible interpretation and implementation. The deletion of Article 14.5 b) of the LBI therefore significantly weakens the ability of the LBI to ensure human rights and environmental “primacy in practice”.

It is not clear why the Chair-Rapporteur decided to delete this provision. In the version of the Updated Draft which includes track changes, the Chair-Rapporteur only writes that former Article 14.5.b) was “set aside after due consideration.” However, neither State Parties nor other stakeholders have suggested such a deletion. The deletion is also surprising as it is the only change in Article 14 at all.

It would be recommendable to:

reintroduce the clause of Art. 14.5 b) or a similar provision which ensures that States also have obligations when drafting new trade and investment agreements. It might even be an option to include an obligation of States to revise and if necessary to redraft any existing trade and investment agreements which could potentially limit the ability of States to fulfil their human rights obligations.

“(b). All new bilateral or multilateral trade and investment agreements shall be compatible with the States Parties’ human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.”

V. SUMMARY AND OVERALL ASSESSMENT OF THE UPDATED DRAFT

The Updated Draft of the LBI does not significantly deviate from earlier versions of the LBI, but contains some changes which are worth mentioning. While most changes introduced by the Updated Draft can be described as “legal scrubbing” and streamlining of the text, some changes are welcome clarifications. However, other textual changes make the text less ambitious. In this regard, the frequent references to domestic law and the respective qualifications of the provisions need to be mentioned. While these changes seem to be aimed at attracting consensus among the States, it can be questioned if the lowering of the level of ambition in terms of the protection of rights of victims and providing access to remedy is worth the price. The reactions of States during the 9th Session will be an indicator in this regard. It should also be noted that some additions were apparently included in the Updated Draft to satisfy particular states. For example, a reference to the contribution of companies to development and the Agenda 2030 was proposed by China. Again, it remains to be seen if these additions will increase the ambition of certain States to engage more deeply in the negotiations and their willingness to eventually also endorse the text of the LBI.

In addition to some minor and mostly editorial changes the Updated Draft also contains a number of changes which seem problematic from the perspective of victim’s rights and the protection of human rights. These include in particular the deletions of a reference to the execution of foreign judgments, the clarification that the fulfilment of due diligence obligations would not automatically exclude legal liability, the right to a safe, clean, healthy and sustainable environment and environmental and climate impact assessments, the requirement of special attention to certain human rights defenders and references to the UN Declaration on Human Rights Defenders, the UN Declaration on the Rights of Indigenous Peoples and ILO Conventions, and the compatibility of all new and revised trade and investment agreements with obligations under the LBI.

Furthermore, the Updated Draft maintains a number of provisions and approaches which have already been assessed as problematic in the context of previous drafts, in particular the Third Draft. Hence the critiques voiced in this context remains valid. Elements of the LBI in this regard are the lack of addressing joint or several liability and clarification of liability if the harm is caused by others or insufficient standards of meaningful and effective engagement of relevant stakeholders, in the human rights due diligence process.

Finally, it should be noted that the Updated Draft also contains improvements which should be maintained such as the possibility of group actions.

SPECIFIC RECOMMENDATIONS

<p>Preamble</p>	<p>The future LBI should reinstate the previous statement in preambular paragraph 10 of the Third Draft, which includes recognition of the significant role of the private sector in mitigating climate change in times of emergency.</p>
<p>Article 1. Definitions</p>	<p>The future LBI should reinstate the previous recognition of the right to a safe, clean, healthy and sustainable environment within the definition of human rights abuse in Article 1.3 of the Updated Draft.</p> <p>It is suggested that Article 1.8 of the Updated Draft, which defines human rights due diligence (HRDD), be reworded as human rights and environmental due diligence (HREDD).</p>
<p>Article 3. Scope</p>	<p>The future LBI could highlight human rights in the context of the environment and climate change in Article 3.3 of the Updated Draft, which sets out the scope of the LBI.</p>
<p>Article 5. Protection of victims</p>	<p>Article 5.2:</p> <p>Certain amendments such as <i>‘persons, groups, and organisations that promote and defend human rights and environment regardless of the sex, age and profession’</i> could be beneficial for recognising and bringing visibility to the all relevant human rights and environmental defenders.</p>
<p>Article 6. Prevention</p>	<p>It is suggested that section (d) to Article 6.2 be reworded as follows:</p> <p><i>“promote the active and meaningful participation rights of individuals and groups, such as trade unions, civil society, non-governmental organizations, indigenous peoples, and community-based organizations, to access to information, communication, participation with private and public organisations related to in the development and implementation of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse.”</i></p> <p>Section (d) of Article 6.4, which sets out the responsibility of companies to meaningfully engage relevant stakeholders in the human rights due diligence process, needs to be explicitly worded as follows:</p> <p><i>“meaningful consult engage in continuous, active and two-way dialogue with all relevant, potentially affected groups and other relevant stakeholders in an equal manner, paying particular attention to the stakeholder perspective”.</i></p> <p>In particular, the phrase “all relevant stakeholders” should also be emphasised in meaningful stakeholder engagement.</p>
<p>Article 7. Access to remedy</p>	<p>It is suggested that an Article 7.5 (d) be included as follows:</p> <p><i>“(d) to ensure the recognition and prompt execution of national or foreign judgments or awards, in accordance with the present Legally Binding Instrument and the Rights of Victims under Article 4.”</i></p>

<p>Article 8. Legal liability</p>	<p>It is suggested that an Article 8.7 be included as follows: <i>“When determining the liability of a natural or legal person for human rights abuses that may arise from their business activities or relationships, the competent court or authority can take into account whether the person undertook adequate human rights due diligence measures in accordance with Article 6, but compliance with applicable human rights due diligence standards shall not absolve from liability ipso jure.”</i></p>
<p>Article 9. Jurisdiction</p>	<p>It is suggested that Article 9.1 (a) be reworded as follows: <i>“the human rights abuse took place, in whole or in part, including acts or omissions that led to the abuse, within the territory or jurisdiction of that State Party;”</i></p> <p>It is suggested that Article 9.3 be reworded as follows:</p> <p><i>State Parties shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that decisions by relevant State agencies relating to the exercise of jurisdiction in the cases referred to in Article 9.1 shall respect the rights of victims in accordance with Article 4, including with respect to:</i></p> <ul style="list-style-type: none"> <i>(a) the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter; or</i> <i>(b) the length of judicial proceedings and evidentiary burden placed on victims;</i> <i>(c) the coordination of actions as contemplated in Article 9.4.</i>
<p>Article 11. Applicable law</p>	<p>It is suggested that Article 11.2 be reworded as follows: <i>“All matters of substance which are not specifically regulated under this (Legally Binding Instrument) may shall, upon the request of the victim, be governed by the law of another States where: [...]”</i></p>
<p>Article 14. Consistency with international law</p>	<p>It would seem recommendable to reintroduce the clause of Article 14.5 b) below or a similar provision which ensures that states also have obligations when drafting new trade and investment agreements. It might even be an option to include an obligation of states to revise and if necessary to redraft any existing trade and investment agreements which could potentially limit the ability of states to fulfil their human rights obligations.</p> <p><i>“(b). All new bilateral or multilateral trade and investment agreements shall be compatible with the States Parties’ human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.”</i></p>
<p>Article 18. Settlement of Disputes</p>	<p>It is suggested that:</p> <ul style="list-style-type: none"> • section (a) of Article 18, which sets out companies’ responsibility to identify and assess the company’s human rights impacts, be amended to include environmental risk assessments to be consistent with the precautionary approaches set out in the Rio Declarations. • the other sections of Article 18 of the Updated Draft, which includes the specific measures such as taking action, conducting monitoring and communicating on human rights impacts, include environmental impacts alongside human rights.



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