

The Blueprint of a Hanging Garden over Ruins: Comments on the “Zero Draft” of the Business and Human Rights Treaty

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From the perspective of international legislation process on such an extremely complex topic as business and human rights, the Zero Draft is an important step forward, seemingly providing many people with another possibility different from the UNGPs. Apparently, if such a binding international document could be formulated and then widely ratified and accepted by a majority of States within a reasonable time frame, it would certainly expedite and popularize national legislations imposing obligations on enterprises to prevent human rights abuses, as well as to provide necessary remedies when such abuses actually happen, thereby promoting the long-term development of human rights-friendly businesses. In the context of increasing impacts of business on human rights, this is undoubtedly a beautiful vision like a hanging garden.

However, whether in terms of the aims and purposes (or its necessity) of the intended treaty on business and human rights, its scope of application, or its definition of victims and their rights, jurisdiction and application of laws, or the legal liabilities, prevention and implementation mechanisms in it, the Zero Draft not only exposes, but also creates many controversies, confusions and estrangements, some of which seem to be irreconcilable. Therefore, during the past few Working Group meetings, in the face of various issues related to the treaty, there have not only been strong disagreements between developed and developing countries, but have also emerged disagreements and confrontations within developing countries, between countries, social organizations and industries, and among social organizations that focus on different issues.¹ For example, although the world’s major trade union organizations

¹ Human Rights Council: “Report on the second session of the open-ended intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights”, A/HRC/34/47(2017);

issued a joint statement to “welcome the publication of the zero draft”², the industry represented by the International Organization of Employers (IOE), the International Chamber of Commerce (ICC) and the OECD Business Advisory Board successively issued position papers against the treaty, stating that “it represents a huge step backwards, undermines the broad consensus achieved by the UNGPs by blurring the roles of governments and companies, creates unnecessary confusion, and absorbs attention away from UNGPs implementation.”³ The international reality of this split, together with the theoretical controversies and dilemmas in the draft provisions, are now demonstrating an unfortunate scene of a ruin-like international consensus.

Therefore, at least for the time being, the treaty process of business and human rights within the UN system has torn the hard-won consensus of the international community based on the refinement and implementation of the UNGPs, meanwhile, it has not established the broader and solid international consensus needed by the formulation and implementation of a treaty. In fact, as an outcome of compromise, non-governmental organizations, international trade union organizations, and even States that have supported the treaty process are not satisfied with the status quo of the draft, so in the future they may set higher expectations for the treaty, as well as put more pressure on it. This undoubtedly will further fragment the ruined international consensus.

As Professor John G. Ruggie has pointed out in his open letter to the Intergovernmental Working Group, in the field of business and human rights, “Success—not on paper but on the ground—demands deep reflection, good will, and a constructive process that searches for consensus in the knowledge that real change

Human Rights Council: “Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights”, A/HRC/37/67(2018).

² IndustriALL, ITUC, UNI global union, etc. “ZERO DRAFT of the Legal Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (the Binding Treaty): Trade Union Comments”, https://www.ituc-csi.org/IMG/pdf/comments_treaty_final.pdf (Last visited January 30, 2019).

³ IOE, ICC, OECD-BIAC, “UN Treaty Process on Business and Human Rights: Response of the International Business Community to the ‘Elements’ for a Draft Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights”, p. 10, <https://cdn.iccwbo.org/content/uploads/sites/3/2017/10/business-response-to-igwg-draft-binding-treaty-on-human-rights.pdf> (Last visited January 30, 2019).

requires it.”⁴ At present, the common ground for business and human rights, on which all parties are based and intend to take positive actions, may be more about how to improve the capacity of countries to deal with the governance gap regarding influences of businesses, how to propel businesses to spontaneously and proactively manage impacts on human rights throughout their operations and supply chains, and how to promote the creation of inclusive and constructive dialogue and cooperation mechanisms among various stakeholders. These may be areas where future drafts of the treaty of business and human rights should focus on and come up with feasible solutions.

Notes:

1. The above excerpt is the “Conclusion and recommendation” part of the paper, *The Blueprint of a Hanging Garden over Ruins: An Analytical Study on the “Zero Draft” of the Legally Binding Instrument on Business and Human Rights of the United Nations*, in Chinese language, to be published in the Chinese Yearbook of International Law (2018), run by the Chinese Society of International Law, and published by the Law Press, Beijing, forthcoming April 2019.
2. This piece was translated by Ms. Fu Lanke, student of the 2018 class of the Human Rights Master Program of Peking University Law School, and was reviewed by Dr. Liang Xiaohui.

⁴ John Ruggie, “‘Guiding Principles’ for the Business & Human Rights Treaty Negotiations: An Open Letter to the Intergovernmental Working Group”, p. 4, https://bhrrc.org/sites/default/files/documents/Guiding%20Principles%20for%20Treaty%20Negotiations_Open%20Letter%20from%20Professor%20John%20Ruggie.pdf (Last visited January 30, 2019).