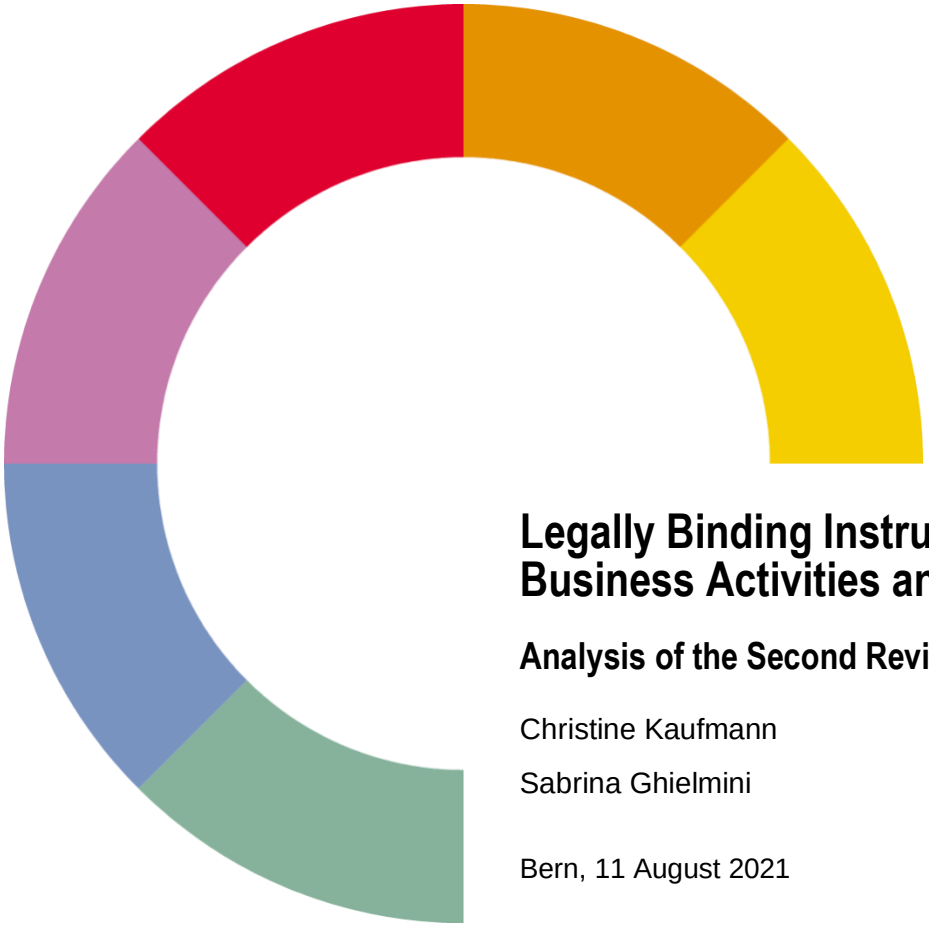

Legally Binding Instrument on Business Activities and Human Rights

Analysis of the Second Revised Draft

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ABBREVIATIONS

Art.	Article
CC	Classified Compilation of Swiss Federal Legislation
Cf.	confer
ECHR	European Court of Human Rights
ILO	International Labour Organization
lit.	litera (letter)
SME	small and medium-sized enterprises
LugC	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of October 30, 2007 (Lugano Convention, SR 0.275.12)
OECD	Organisation for Economic Co-operation and Development
OECD Guidelines	OECD Guidelines for Multinational Enterprises
OEIGWG	Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
para.	paragraph

ABSTRACT

The Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights (OEIGWG), established by the United Nations in 2014, has been working for several years on drafting an internationally binding treaty for regulating the activities of businesses with regard to the respect of human rights. The second revised draft, published on August 6, 2020, is now being debated by state governments and in civil society.

The SCHR was commissioned by the Swiss Federal Government to analyse the new draft and has concluded that it contains no fundamental changes compared with the previous draft in terms of either concept, content or structural composition. The changes mainly consist of numerous adjustments to details. As a result, the new draft is more closely aligned with the United Nations Guiding Principles on Business and Human Rights and better integrated into the wider regulatory environment.

However, it remains unclear what conceptual approach the proposed binding instrument (treaty) will follow: will it delegate the task of implementation to states or introduce directly applicable standards? The draft contains numerous specific provisions regarding not only the conditions for liability, but also the issues of procedural law. For further debate, it would be helpful if these specific provisions in the 2020 draft or its successor, which will likely be published in 2021, could be checked for their consistency with the legal context in Switzerland and international instruments applicable to Switzerland.

I. INTRODUCTION

By Resolution 26/9 of June 26, 2014, the United Nations Human Rights Council established the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights (OEIGWG). The working group's mandate is the development of an internationally binding instrument regulating activities of businesses with respect to human rights.

To date, the OEIGWG has presented three drafts for a binding instrument (treaty): the Zero Draft of 2018, the Revised Draft of 2019, and finally the Second Revised Draft of 2020 (hereinafter "the 2020 draft").

As in the two preceding years, in 2020 the Swiss Federal Government commissioned the SCHR to carry out an analysis of the new draft treaty.[1] This paper summarises selected aspects of this analysis, focusing on the material provisions of the 2020 draft and the changes made in the new text. Particular attention was paid to the extent to which the UN Guiding Principles on Business and Human Rights (hereinafter "UNGP") and the OECD Guidelines for Multinational Enterprises (hereinafter "the OECD Guidelines") are taken into account. Additionally, emphasis is placed on how individual provisions are embedded in the regulatory environment, as well as the structure and internal coherence of the 2020 draft.

II. GENERAL REMARKS

1. Content and structural composition

The 2020 draft does not contain any fundamental changes compared with the 2019 draft. The basic concept as well as the content and composition of the binding instrument remain unchanged.

The core of the draft treaty remains the provisions on prevention, i.e. legal anchoring of mandatory human rights due diligence in Art. 6, and the legal liability of businesses (Art. 8). The only structural change concerns the long and unclear Art. 4 of the 2019 draft, which has been divided into three separate articles in the 2020 draft: Art. 4 (Rights of Victims), Art. 5 (Protection of Victims) and Art. 7 (Access to Remedy).

2. Basic approach

The basic approach of the draft treaty remains unclear. Is the aim to create a framework agreement setting down certain elements that will then require detailed definition and implementation at national level? Or is the treaty itself to contain detailed and directly applicable provisions? The 2020 draft contains elements of both these approaches, as illustrated by the provision on legal liability (Art. 8):

On the one hand, Art. 8 para. 1 obliges states to make provisions in domestic law for legal liability of natural and legal persons conducting business activities where their activities or business relationships give rise to human rights abuses ("State Parties shall ensure that their domestic law

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1 For the analysis of the Zero Draft of 2018 see the SCHR paper: GHIELMINI/KAUFMANN; for the analysis of the Revised Draft of 2019 SCHR's brief analysis: GHIELMINI/SOLTANI.

provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, domiciled or operating within their territory or jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships"). This provision leaves considerable latitude for detailed implementation at the national level. On the other hand, however, Art. 8 para. 7 addresses the legal liability of natural and legal persons for human rights abuses committed by another natural/legal person with whom they have a business relationship. This provision lays down specific conditions of liability, and therefore, in contrast with Art. 8 para. 1, leaves only little latitude for implementation at national level.

Therefore, prior to any debate on individual provisions, it would in principle be necessary to revisit the concept and intention of the convention.[2]

3. Alignment with the UNGP

Some changes made in the 2020 draft lead to a closer alignment with the UNGP:

– State-owned enterprises: The personal scope in the 2020 draft also includes "State-owned enterprises" (cf. the definition of "business activities" in Art. 1 para. 3), which corresponds to the scope of the UNGP.[3]

– "Human rights violations" and "human rights abuses": Following common terminology, the draft distinguishes human rights violations committed by states from human rights abuses involving non-state parties, such as businesses.[4] The first draft of 2018 did not distinguish between these terms and the 2019 draft consistently used the two terms together . The 2020 draft now introduces the required differentiation, consistently referring to "human rights abuses" in case of non-state actions. Some passages require further examination to determine whether "human rights abuses" may need to be supplemented with the term "human rights violations", to ensure the inclusion of state business-related activities (e.g. public procurement) (cf. for example Preamble para. 14 and 19).

– The concept of human rights due diligence (Art. 6) has again been more closely aligned with the UNGP and the OECD Guidelines (cf. next sectionIII.6).

2 For another view of the basic concept, cf. for example: METHVEN O'BRIEN.

3 Cf. for example UNGP 4.

4 Cf. for example the terminology in the UNGP: OHCHR, FAQ UNGP 2014, p. 43.

III. REMARKS ON SELECTED PROVISIONS

1. Purpose (Preamble and Art. 2)

The purpose has been reformulated in the 2020 draft. Rather than referring generally to progress in human rights, it now refers specifically to the obligations of states in connection with human rights abuses by businesses and the responsibility of businesses to respect human rights.

2. Definitions (Art. 1)

2.1. Victims (Art. 1 para. 1)

The 2020 draft defines as victims "any person or group of persons who (...) have suffered harm (...) that constitute human rights abuse". The 2019 draft had defined victims as persons who "have suffered or have allegedly suffered human rights violation or abuse". With regard to implementation in national law, it makes sense that victimhood requires, among other things, harm or a violation of personal integrity.

In the 2020 draft, the definition of "victim" also includes family members, which largely corresponds to other human rights instruments. Accordingly, family members of direct victims, for example, are entitled, depending on the nature of the case, to lodge a complaint with the ECHR in their own right for a breach of the European Convention on Human Rights.[5]

A new element in the 2020 draft is the extension of victim status to "persons who have suffered harm in intervening to assist victims in distress or to prevent victimization". This phrasing specifically ensures coverage of human rights defenders, who are otherwise not explicitly referred to in the 2020 draft. This phrasing is unproblematic insofar as human rights defenders are not automatically regarded as victims unless they have also suffered harm. The phrase "have suffered harm" does, however, need to be made more specific to indicate that the reference is not to any form of harm, but specifically to harm in the context of business activities that constitutes a human rights abuse.

2.2. Business Activities (Art. 1 para. 3)

According to the 2020 draft, a business activity is "any economic or other activity undertaken by a natural or legal person, including State-owned enterprises, transnational corporations, other business enterprises, and joint ventures (...)".

Characterising business activities solely as "for-profit activities" would be too narrow, since this would exclude some activities that qualify as business activities under the OECD Guidelines in the practice of National Contact Points (e.g. National Contact Point of Switzerland cases on the WWF and on FIFA).[6] The definition in the 2020 draft is now broader, including not only for-profit activities, but also other forms of activity. The phrasing used in the draft is still somewhat imprecise, however.

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[5] GHIELMINI/KAUFMANN, p. 7.

[6] GHIELMINI/KAUFMANN, p. 3.

It would be clearer, and also in line with the OECD Guidelines, to use the terms “any for-profit or commercial activity”.

3. Territorial scope of the duty to protect

Changes have been made to the phrasing regarding the territorial scope of the duty to protect. The 2020 draft now stipulates that states’ duty to protect against human rights abuses by third parties (including businesses) refers to parties “within their territory or jurisdiction or otherwise under their control” (cf. Preamble para. 8, Art. 6 para. 1, Art. 6 para. 5 and Art. 8 para. 1). The 2019 draft had defined the territorial scope as “within their territory or otherwise under their jurisdiction or control”.

Under the UNGP, states’ duty to protect extends to their territory and/or jurisdiction. By adding the element of control (“or otherwise under their control”), the draft treaty goes further than the UNGP at least in terms of language. However, neither the First nor the Second Revised Draft offer a clear definition of “control”.

4. Personal Scope (Art. 3 para. 1)

The 2019 draft had already extended the binding instrument’s personal scope to include all business activities, rather than being restricted to transnational business activities as before. This corresponds to the scope of the UNGP and takes up a concern expressed by, among others, Switzerland.[7]

Rather than defining the scope in terms of the activities of an enterprise as done previously (in the 2019 draft: “all business activities, including particularly but not limited to those of a transnational character”), the 2020 draft defines the scope in terms of the enterprise itself: “all business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character” (Art. 3 para. 1).

Given that, in the 2020 draft, the scope of the binding instrument includes all enterprises, irrespective of their location and the geographical extent of their activities, the references in the 2020 draft to enterprise activities of a transnational nature are no longer necessary from a systematic point of view.

5. Material Scope (Art. 3 para. 3)

5.1. Human rights

The binding instrument’s material scope in Art. 3 para. 3 has been defined more precisely in the 2020 draft. Whereas the 2019 draft used general and somewhat imprecise language (“all human rights”), the 2020 draft refers to the internationally recognised human rights and fundamental freedoms as set out in the Universal Declaration of Human Rights and in customary law. Further fundamental human rights treaties and the ILO conventions apply if they have been ratified by the state in question.

[7] SWITZERLAND, General remarks OEIGWG 2019.

In this respect, the 2020 draft falls short of the UNGP and the OECD Guidelines, which are based on the International Bill of Human Rights and therefore include the United Nations' International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, irrespective of ratification by a given state, and also refer to the core ILO conventions. The reference to the Universal Declaration of Human Rights in the 2020 draft is not particularly helpful, especially with regard to social and labour rights. Reference to the International Bill of Human Rights would be clearer and more pertinent.

5.2. Link to environmental law

The material scope as set out in Art. 3 para. 3 does not include (internationally recognised) environmental standards. Still, various provisions refer to environmental concerns and standards: in the definition of "human rights abuse" (Art. 1 para. 2), by including a right to environmental remediation (Art. 4 para. 2 lit. c), and listing an environmental impact assessment (Art. 6 para. 3 lit. a) as well as reporting on environmental standards (Art. 6 para. 3 lit. e) as part of enterprises' human rights due diligence. In principle, therefore, these provisions go beyond the material scope of the draft binding instrument.

Environmental standards and aspects of environmental rights may be relevant for the binding instrument if they are directly related to a human rights abuse, if for example the breach of an environmental standard amounts to a human rights abuse (e.g. right to life and health in a case of contaminated drinking water).

In the 2020 draft, the definition of human rights abuses (Art. 1 para. 2) now includes a reference clarifying this link between human rights and environmental standards. The provision defines "humans rights abuse" as follows: "(...) any harm committed by a business enterprise, through acts or omissions in the context of business activities (...) that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights" (emphasis by author). In order for the other references to environmental issues to be consistent with the scope of the binding instrument, the text would also need to indicate here that breaches of environmental standards are relevant where they are connected to human rights abuses. The scope of the convention does not include environmental standards where there is no connection with human rights abuses.

It is still not clear which environmental standards are to be covered by the term "environmental rights".

6. Human rights due diligence (Art. 6)

Art. 6 of the 2020 draft includes the obligation of states to implement mandatory human rights due diligence.

This provision fits in with a number of national and international developments. For example the UN Committee on Economic, Social and Cultural Rights stated in its General Comment No. 24 that the states' duty to protect in the area of business and human rights includes the positive obligation to incorporate human rights due diligence in legislation.[8] A number of states have already

[8] UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS , General Comment No. 24, line 16.

implemented this or have initiated legislative processes to this effect:[9] in Switzerland, the Responsible Business Initiative was rejected in a public vote on November 29, 2020. Since no referendum was taken, the indirect counter-proposal of the Swiss Parliament stipulating mandatory human rights due diligence for conflict minerals and child labour will now enter into force. In France, the Loi de Vigilance has been in place since 2017. In the Netherlands, a law stipulating mandatory due diligence with regard to child labour was passed in 2019 but not set in force, and in Germany a new supply chain due diligence law ("Lieferkettensorgfaltspflichtengesetz) passed in June 2021. Specific efforts towards the incorporation of human rights due diligence in legislation are also being undertaken at EU level.[10]

In the 2020 draft, some slight changes have been made to this provision, bringing the human rights due diligence obligation into line with the UNGP and OECD Guidelines:

– The four steps of human rights due diligence (Art. 6 para. 2 lit. a to d) have been adapted so that their content and structure now correspond to those of the UNGP and the OECD Guidelines. The 2019 draft had lacked the third due diligence step (monitoring the effectiveness of the measures implemented).

– According to the 2020 draft, human rights due diligence relates not only to an enterprise's own activities, but also its business relationships. The 2019 draft referred to "contractual relationships" in this context, which was too narrow a phrasing in comparison with the UNGP and the OECD Guidelines.[11]

– The 2020 draft also addresses in part the differentiation made in UNGP 13, which stipulates that enterprises are not only obliged to prevent human rights abuses, but also, depending on the nature of the case, to mitigate negative impacts on human rights (Art. 6 para. 1 and para. 2 lit. b). However, the 2020 draft still fails to distinguish between possible forms of involvement of enterprises with regard to human rights abuses in a manner corresponding to UNGP 13: 1) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur and 2) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[12]

The following provision has been newly added in Art. 6 para. 6: States must, in their national laws, provide sanctions for enterprises which fail to carry out human rights due diligence stipulated in national law (irrespective of any human rights abuse resulting from such neglect).

While the provision on human rights due diligence does not provide any explicit exception for SMEs, their specific needs are addressed at various points in the draft. In Art. 6 para. 1, for example, it is explicitly stated that human rights due diligence should be proportionate to the size, the risks involved, and the nature and context of the business activities. This provision leaves considerable leeway with regard to national implementation. In addition, in Art. 6 para. 4 it is stated that SMEs are to be supported in their compliance with human rights due diligence requirements. These two provisions are consistent with UNGP 14.

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9 For an overview of current developments at national level: OHCHR, Mandatory Human Rights Due Diligence 2020.

10 EUROPEAN PARLIAMENT, Draft Report, 2020/2129(INL).

11 For further comments on "business relationships": NOLAN.

12 Cf. detailed treatment in: GHIELMINI/KAUFMANN, p. 13 ff.; and with regard to the 2019 draft: GHIELMINI/SOLTANI; also: CNDCH, Avis de suivi 2020, p. 9.

7. Legal liability (Art. 8)

Art. 8 of the 2020 draft addresses the legal liability of enterprises in terms of civil, criminal and administrative liability. As discussed above (cf. section II.2), an in-depth debate is needed on this provision: should states be mandated to implement it in their national legislation or should the binding instrument itself define specific conditions for liability?

This provision mixes aspects of civil, criminal and administrative liability. From a systematic point of view it would be desirable to have a clearer demarcation between these aspects. At the very least, for each paragraph it should be made clear whether it refers to one of these types of liability or to all of them.

Art. 8 para. 4 addresses criminal/administrative sanctions that are to be enshrined in national legislation. In the 2020 draft, this provision has been rephrased to make a clear link between human rights abuses and criminal or administrative law and to show that for the convention, not all human rights abuses constitute breaches of criminal or administrative law: "(...) criminal and/or administrative sanctions where legal or natural persons conducting business activities, have caused or contributed to criminal offences or other regulatory breaches that amount or lead to human rights abuses".

Art. 8 para. 7 includes requirements regarding an enterprise's liability for human rights abuses committed by other enterprises with which it has a business relationship. In contrast to Art. 8 para. 1, this provision sets down specific conditions for liability. Specifically, an enterprise is liable if it fails to prevent another enterprise with which it has a business relationship from causing or contributing to a human rights abuse. An enterprise is liable for enterprises that it legally or factually controls or supervises or if the enterprise in question "should have foreseen risks of human rights abuses in the conduct of their business activities or in their business relationship" and failed to take adequate measures to prevent the abuse.

The range of enterprises that could conceivably be held liable is very wide. All that is needed is the presence of a business relationship and either legal or factual control, supervision, or the foreseeability of the abuses. According to the current phrasing, exculpation should be possible if it can be demonstrated that all reasonable measures to prevent the human rights abuse were taken (cf. Art. 8 para. 7 and Art. 8 para. 8).[13]

Overall, Art. 8 of the 2020 draft remains unclear. The basic concept of the provision should be clarified and the provisions need to be organised more systematically. And if it is decided that the provision is also to lay down specific conditions for liability, these would need to be further debated and more clearly outlined.

8. Further remarks

There are a number of further important aspects/changes regarding the provisions on victims' rights (Art. 4), access to remedy (Art. 7), international jurisdiction (Art. 9), statute of limitations (Art. 10) and applicable law (Art. 11) :

[13] Cf. also: DE SCHUTTER.

8.1. Class actions

The 2020 draft re-introduces the possibility of class actions, although restricted to "appropriate cases" (Art. 4 para. 2 lit. d). Class actions had also featured in the 2018 draft, but not in the 2019 draft. Class action in this form does currently not exist in Swiss law. The new draft does not include the phrasing that appeared in the 2018 draft whereby victims could be represented without their explicit consent, which was problematic in terms of victims' rights.

8.2. Forum-non-conveniens doctrine

A newly inserted provision explicitly prohibits application of the forum-non-conveniens doctrine (right of the court to decline jurisdiction), mainly found in the Anglo-Saxon law (Art. 7 para. 5 and Art. 9 para. 3). According to this doctrine, a court that should have jurisdiction to judge an action under the provisions of international civil procedure law can decline to act if it holds that in view of the relevant private and public interest, another court would be in a better position to decide the dispute. In Switzerland, the Federal Supreme Court has rejected the applicability of the forum-non-conveniens doctrine, inter alia with regard to the Lugano Convention (LugC).[14]

8.3. International jurisdiction (Art. 9)

Under the 2020 draft, international jurisdiction is determined by the place where the human rights abuse occurred (Art. 9 para. 1 lit. a), the place where the action or omission contributing to the human rights abuse occurred (Art. 9 para. 1 lit. b) or the domicile of the party against whom the allegation is made (Art. 9 para. 1 lit. c). The 2020 draft has added the place where the human rights abuse occurred as an element defining jurisdiction, but removed the domicile of the victim, which was a criterion in the 2019 draft. This largely brings the provision on international jurisdiction into line with the international jurisdiction provisions relevant for Switzerland for tort proceedings.

The definition of the domicile of a legal person in Art. 9 para. 2 of the 2020 draft now largely corresponds to the definition given in other instruments of international civil procedure law. In particular, the unusual definition of domicile on the basis of "substantial business interests" contained in the 2019 draft has been removed.

8.4. Statute of limitations (Art. 10)

The provisions on the statute of limitations are integrated into the wider regulatory environment. Thus the inapplicability of limitation to offences under international criminal law (Art. 10 para. 1) is based on Art. 29 of the Statute of the International Criminal Court. The provision whereby there should be reasonable time for the investigation and commencement of criminal proceedings or other legal proceedings (Art. 10 para. 2) is based on the prohibition on excessively restrictive statute of limitation periods according to the right to a fair trial (Art. 6 ECHR, Art. 14 UN Covenant on Civil and Political Rights).[15]

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14 BGE 129 III 295 E. 2.3.

15 GHIELMINI/KAUFMANN, p. 16.

8.5. Applicable law (Art. 11)

While Art. 11 para. 1 states that the law of the state that has international jurisdiction is to apply, Art. 11 para. 2 provides for the possibility of a unilateral choice of law. Under this provision, victims are able to demand the application of the law of the state in which the defendant has its domicile (Art. 11 para. 2 lit. b) or where the action or omission that lead to the human rights abuse occurred (law of the place of action or omission; Art. 11 para. 2 lit. a). The unilateral choice of law by the weaker party is a known concept in international private law.

8.6. Consistency with principles and instruments of international law (Art. 11)

Art. 14 para. 4 and Art. 14 para. 5 lit. a and b address the relationship between the binding instrument and other international treaties on related subjects:[16]

– Existing (older) treaties on the same subject-matter as the binding instrument (Art. 14 para. 4): With regard to the relationship between the proposed treaty and older treaties on the same subject-matter, the 2020 draft rightly refers to the relevant provisions of Art. 30 of the Vienna Convention on the Law of Treaties. The phrasing in Art. 14 para. 4, whereby earlier treaties on the same subject-matter apply only to the extent that they are compatible with the binding instrument, corresponds to Art. 30 para. 3 of the Vienna Convention and applies only if all parties to the earlier treaty are also parties to the binding instrument.

– Existing (older) treaties, including trade and investment agreements (Art. 14 para. 5 lit. b): These are to be interpreted and implemented in such a manner as not to undermine the obligations arising from the binding instrument and other relevant human rights treaties.

– New trade and investment agreements (Art. 14 para. 5 lit. b): When entering into new agreements, states must ensure that they are consistent with the obligations under the binding instrument and other relevant human rights treaties. This provision largely corresponds to UNGP 9, whereby states when entering into international treaties (e.g. an investment agreement) should ensure sufficient policy space to meet their human rights obligations.

IV. CONCLUSION

The 2020 draft does not contain any fundamental changes in terms of either concept or content and composition. The fundamental approach pursued by the draft binding instrument is still not clear: is the intention to delegate implementation to states, or is the binding instrument to set down specific, directly applicable standards, e.g. conditions for liability?

Generally speaking, it is commendable that numerous detailed adjustments have been made. The 2020 draft is more clearly aligned with the UNGP and the OECD Guidelines and is better integrated into the regulatory environment.

The 2020 draft contains numerous specific provisions not only on the conditions for liability (Art. 8), but also on procedural law (e.g. Art. 4, Art. 7, Art. 9, Art. 11 ff.). For the ongoing debate, it would be helpful to examine these specific provisions in the 2020 draft, as well as in the next draft

[16] Cf. also: GHIELMINI/KAUFMANN, p. 20.

expected in 2021, as to their fundamental consistency with Swiss law and the international instruments relevant for Switzerland.

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