

Comment on Article 9 (Applicable Law) of the Revised Draft of the Proposed Business and Human Rights Treaty

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The report of the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) stated:

*that the Chair-Rapporteur invite and encourage regional and political groups, intergovernmental organizations, national human rights institutions, civil society organizations and all other relevant stakeholders, as appropriate, to organize consultations at all levels, including in particular at the regional and national level, with a view to exchanging comments and inputs on the revised draft legally binding instrument.*²

Further to this recommendation, the British Institute of International and Comparative Law (BIICL) organized a European multi-stakeholders virtual consultation on the Revised Draft of the Proposed Business and Human Rights Treaty which took place on the 1st of July 2020. The following comment concerns Article 9 on the Applicable Law.

- **Exclusion of *renvoi***

Article 9.1 leaves the door open to *renvoi* which could prove problematic as *renvoi* can be "manipulated" to escape from the law otherwise applicable.³ The exclusion of *renvoi* is

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² Human Rights Council, 'Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', 43rd session, 9 January 2020, Paragraph 101(d), available at: https://ap.ohchr.org/documents/E/HRC/other/A_HRC_43_55%20E.pdf.

³ This comment was made by Eduardo Álvarez-Armas during European virtual consultation on the Revised Draft of the Proposed Business and Human Rights Treaty which took place on the 1st of July 2020.

predominant in private international law instruments.⁴ Excluding it explicitly in the Legally Binding Instrument would serve legal certainty. This could be done, for instance, by stating, in Article 9.1:

'Subject to the following paragraph, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court, **to the exclusion of its conflict of laws rules** '.

- **Clarification of Article 9.2 and introduction a choice-of-law provision in favour of the victim(s)**

Under Article 9.2, the competent court (forum) can decide to apply, as an alternative to its own domestic law, one of the three following domestic laws: 1) the *lex loci delicti commissi*, 2) the law of the place where the victim is domiciled, or 3) the law of the place where the defendant is domiciled), as the law governing 'all matters of substance regarding human rights law'. It is unclear what 'all matters of substance regarding human rights law' refers to, and it is therefore suggested that Article 9.2. be redrafted so as to provide for greater legal certainty. In addition, the choice between the various options of applicable law set out in the article is left to the forum (on the basis of its conflict of law rules) which is a step back compared to the Zero Draft which left the choice in the hands of the victim. Indeed, various studies have shown that the issue of the applicable law can constitute a significant barrier to accessing remedy for victims of human rights abuses,⁵ and have called for the introduction of choice-of-law provisions allowing the victims to make a choice between various options for the law governing this type of disputes. It is noted in this respect that choice-of-law provisions are not uncommon. They are often used in relation to parties that are considered too be weaker parties, such as consumers or employees.⁶ It is also the approach used in relation to environmental damage in Europe under the Rome II Regulation which allows the claimant to choose between the *lex loci damni* and the *lex loci delicti commissi*. It has been argued that offering a choice of law to victims would take into consideration the specific nature of the business-related human rights claims and redress the power imbalance between the parties, the victims usually being in a situation of particular vulnerability in relation to the multinational companies.⁷

In the Legally Binding Instrument, these elements could be incorporated, by stating for instance, that:

⁴ See for instance Regulation (EC) No 864/2007 of the European Parliament of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Article 24.

⁵ See for instance A. Marx, C. Bright and J. Wouters, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', Study requested by the DROI Committee, European Parliament (February 2019), at 112, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf).

⁶ Regulation (EC) No 864/2007 of the European Parliament of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Article 7.

⁷ Ibid., at 118.

'the law applicable to civil claims arising out of business-related human rights or environmental damage sustained by persons or property shall be governed by the domestic law of the competent court, unless the person(s) seeking compensation for damage choose(s) to base their claim on the law of another State where:

- a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or
- b) the victim is domiciled; or
- c) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled.

- **Domestic measures on human rights due diligence obligations as overriding mandatory provisions**

It is recommended to specify in the Legally Binding Instrument that the domestic measures on mandatory human rights due diligence adopted pursuant to in Article 5 should form the basis for overriding mandatory rules, so as to ensure their applicability in civil liability cases irrespective of the content of the applicable law. This would be particularly important to ensure their effectiveness in the situation in which the governing law is the law of a State that has not ratified or implemented the Legally Binding Instrument.

This could be done, for instance, by adding a last paragraph in Article 9 indicating that:

'the measures adopted on the basis of Article 5 **shall apply irrespective of the law applicable under private international law.**'