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Proposing a Relative Enforcement Mechanism for the Treaty on Business and Human Rights

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Abstract

An Intergovernmental Working Group is established by the Human Rights Council to adopt a treaty on Business and Human Rights. According to the draft treaty the enforcement mechanism relies on a treaty body working through a reporting-based mechanism. In this article the enforcement mechanism of the treaty is analysed through the progressive model of accountability presented by Gupta and Van Asselt. It also takes further the analysis based on the progressive model by Nadia Bernaz of the enforceability measures adopted within the treaty. The enforceability of the treaty is further discussed in this article and a relative enforcement mechanism is proposed. The proposal includes structural changes within the treaty body and inclusion of the role of non-state entities for more efficient enforcement.

Key words: Business and Human Rights, Draft Treaty on Business and Human Rights, Human Rights, Human Rights Treaty Bodies, Treaty Enforcement.

Introduction:

The Human Rights Council (HRC) in 2014 passed a resolution establishing an Intergovernmental Working Group (IGWG) to negotiate 'an international legally binding framework on the issue of

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human rights and transnational corporations and other business enterprises'.[1] The resolution was adopted in a very arduous manner with 20 member states in favour,[2] 14 member states opposing[3] and 13 abstaining to vote.[4] The adoption depicted a difference of opinion and approach with regard to the regulation of business activities at international level, with mostly the developed states against the resolution. The states against the resolution wanted the development of norms through soft law mechanism in pursuance of the United Nations Guiding Principles on Business and Human Rights (UNGPs).[5] The call for treaty making might have been looked upon as reopening of the battle for a hard law against the Transnational Corporations (TNCs).[6] The forum chosen might well have been contentious as it was involved in previous failed attempts on the similar issues in the past.[7] The process, in addition, was initiated after a widespread acceptance of the UNGPs specifying the roles of states and business entities in a soft manner. Against this backdrop, the treaty making process officially started in 2015 as mandated by resolution 26/9.[8] Four drafts of a proposed binding treaty and an optional protocol have been released ever since for the furtherance of the negotiations.[9]

The treaty *inter alia* will be dealing with one basic question related with the accountability of the business entities. Accountability may well be defined and approached differently,[10] including the accountability of business entities. In this regard Gupta and Van Asselt proposed a progressive model of accountability exploring two basic themes of accountability i.e. answerability and enforceability.[11] It have been further explored by dividing it into five elements constituting relations, standards, judgements, sanctions and redress.[12] The first three elements can be used to gauge the level of answerability and the remaining two to gauge enforceability in any system of accountability. Nadia Bernaz applies these elements (by further breaking them down accordingly) to four model accountability systems in international human rights law.[13] After analysing the models she proposes a progressive model of accountability for the proposed treaty on regulating business entities. Nadia Bernaz clarifies that the issue of answerability i.e., who will be responsible, to whom the responsibility is owed and the threshold (for what the accountability may arise) is well settled in the draft treaty.[14] The answerability issues are also well settled in

the major human rights treaties (International bill of rights and the core ILO conventions). The answerability elements are then further dependent upon the enforcement measures that the states adopt to comply with its duty to protect, respect and fulfil human rights. In a similar manner the draft treaty also rely upon the states in the enforceability part. A direct enforcement against the business entities is not foreseen in the draft treaty, the enforceability will be through obligating the states to provide accessible remedies. Nadia Bernaz points out that a treaty body would directly monitor how states meet their obligations and hence indirectly monitor the business entities.[15] This portion of enforceability of the draft treaty needs further exploration. Keeping in view the role of the treaty body, it is proposed in this article that in order for the draft treaty on business and human rights to be effective the enforceability part (related with the treaty body) must be different from the other human rights treaties. The human rights treaty bodies are designed to regulate the member states to protect, respect and fulfil their human rights responsibilities for actions mostly happening within their territory or under their jurisdiction.[16] Although, through treaty interpretation the treaty bodies have referred to the responsibility of the states to regulate private entities,[17] and on some occasions the extraterritorial responsibility of states to protect human rights by regulating business entities is also established;[18] this seldomly is established in practise. This responsibility is also not established directly but is referred to and admitted through treaty interpretations. The extraterritorial responsibility of states in the proposed treaty on business and human rights will be direct, unlike other human rights treaties. It will have to diminish the confusion that the UNGPs created in its principle 2 (specifically in its commentary) by stating that presently states are 'not required by international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction'.[19] The treaty body formed under the treaty on business and human rights will also have an additional task of regulating state behaviour for actions taking place outside their territory/jurisdiction involving state and non-state business entities. Keeping in view this complexity, the role of the non-state organs – i.e. Non-Governmental Organisations (NGOs) and International Organisations (IOs) – in assisting the states to establish a viable

enforceability mechanism is considered in this article. Encouraging this role of non-state organs within the treaty is proposed after analysing the role that they have played in making the business entities compliant with the human rights norms through different mechanisms as discussed in this article.

In the progressive model of accountability, the part of enforceability (sanctions and redress) remains the duty of a state party. The monitoring of the enforceability by the states will be done through a treaty body. First part of this paper deals with the monitoring role of the treaty body, keeping in view and analysing the treaty bodies of other human rights treaties. This role is analysed according to the treaty compliance traits of the states, especially towards the human rights treaties. The response against the call for reforms of the human rights treaty bodies is taken as a guideline and the proposed treaty body in the draft treaty is analysed under these guidelines. As pointed out the proposed treaty on business and human rights will also deal with the extraterritorial wrongs (actions) committed by the business entities thereby the enforceability will require co-operation between states in different capacities. Keeping in view this requirement it is proposed that the treaty body shall have a hybrid role of monitoring as well as facilitating the enforceability process. The second part of this article deals with the role of the treaty body as a facilitator of the enforceability process. As it is understood that under the progressive model the rules are to be enforced against the business entities thereby the corporate practise of compliance with human rights norms needs to be analysed. The role of different organisations is thereby studied for understanding the possibility of creating any non-state organ reporting to the treaty body in order to fulfil its role of facilitator. The role of a facilitator rather then enforcer is advocated because human rights treaties with a stronger enforcement mechanism are considered as a threat by the states.[20]

Access to an effective remedy for the persons effected by abuses related with business activities is a major part of the states' duty to protect against business related human rights abuses.[21] The state of accessible remedies seems unfathomable in these issues and require prompt efforts to make them according to the international standards.[22] This article proposes an answer to the question of what can be an acceptable and viable enforcement mechanism for better

enforceability within the treaty on regulating business entities? The enforcement includes the stages of sanctions and redress, for the establishment of sanctions it is pertinent to know the violators through monitoring and then redressal through different methods adopted within the states own legal systems. It is argued that a BHR treaty requires an enforcement mechanism which addresses the human rights issues related with the business entities albeit if the enforcement mechanism remains state centric. This paper focuses on a viable and acceptable enforcement mechanism for both states and the business entities. A mere enforcement of human rights through the human rights treaty bodies is already being practised and there is no need of a separate treaty if the approach for enforcement will remain the same.

Learning from the Call for Reforms in Human Rights Treaty Bodies:

The material impact of a multi-lateral treaty relies deeply upon the compliance by its state parties. In case of non-human rights treaties, the states comply because the treaty provides for mutual benefits of the member states (trade or services etc.).[23] The disputes arising out of these treaty obligations are mostly settled through different dispute settlement mechanisms. The mechanisms of dispute settlement include resolution through giving jurisdiction to the International Court of Justice or any arbitration tribunal. The United Nations Convention on the Law of the Sea (UNCLOS) 1982 is a prime example whereby both these options are taken into consideration. Some treaties are signed under the auspices of an International Organisation (IO) which is then given the power of enforcement of the treaty signed under its charter.[24] The enforcement mechanism or body in these cases is the integral part of the IO. A common example is the treaties concluded under the World Trade Organisation (WTO); these treaties are enforced through a dispute settlement body and the retributive actions for non-compliance with the decisions of such body are part of the WTO charter.[25] One of the reasons why the state parties to such treaties show compliance is the proper enforcement and dispute resolution mechanism. In addition, there are two major compliance theories explaining why states comply with treaty obligations. Firstly, the compliance is related with the will of the state, which is mostly dependent upon its self-interest.[26] The self-interest relates to benefits of compliance which

may be called as positive interest. Secondly, states comply because the aftereffects of the non-compliance might not be good for the reputation of a state.[27] This also refers to benefits, but we may consider these as negative benefits. For instance, avoiding the negative effects of retribution in cases of non-compliance. We can add the sanction and redress (enforceability) part of the treaty as a major pointer for compliance under this theory. Thereby, it can be argued that if the benefits (positive or negative) of compliance with the subject matter of a treaty outweigh its cost, then states are expected to abide by the treaty.[28] This effect of benefit (positive and negative) related with non-compliance of the treaty can be gauged through the draft of the treaty, specifically in its enforcement mechanism (analysing the sanction and redress part). In cases of the human rights treaties (except for the regional), the enforcement mechanism is referred to as a soft enforcement mechanism. The mechanisms are created within the treaties known as the treaty bodies. Some enforcement mechanisms derive their authority from the United Nations (UN) charter and are formed through a resolution by a principal organ of the UN; these are called as charter-based enforcement mechanisms.[29] We will analyse the treaty-based enforcement mechanisms to know whether these soft mechanisms challenge state compliance keeping in view the above-mentioned benefit theories (the theories are called benefit theories only for the purpose of this article).

The treaty-based enforcement mechanism relies on the reports submitted by the state parties. Currently, there are ten treaty bodies established through different international human rights conventions.[30] All of these treaty bodies monitor the compliance of the state parties by examining the compliance report submitted by the states. This process of self-submission and has proven very exhausting both for states and the committees. The report submission by the member states due to multiple reasons is a scarce accomplishment.[31] For instance, according to the latest available statistics 81% of the state parties to the human rights conventions have reports overdue against them in 2019.[32] Even if the reports are submitted in time, the review of the reports is a slow process, the backlog in October 2019 was 183 reports.[33] Further, the UNGA report points out that the quality of the experts within the committees and the inaccurate information provided in the reports

are main reasons for inefficiency of the treaty bodies.[34] Thereby, the process based on self-accountability by states and a report based review mechanism do not pass the compliance test of benefit theories.

Apart from the procedural anomalies of the committee its composition and selection process can also be termed against the benefit theories. Therefore, the neutrality, independence and inefficiency of these treaty bodies have long been questioned. It can be noted that the overall memberships of all the human rights treaty bodies is composed of people from the executive branch of a state.[35] In addition to this the executive officers of the treaty bodies are also members of the executive branch of their respective states.[36] The membership ratio from the regional point of view is also alarming, i.e. the total membership of all the committees consists of 65 percent members from the European states, and the rest are divided among other regions.[37] Similarly, if membership of the individual committees is analysed most of these show disproportionalities.[38] In addition, only the Optional Protocol on Convention against Torture (OP-CAT) and the Convention for the Protection of All Persons from Enforced Disappearance (CED) expressly set independence and impartiality as a condition of membership, and the Convention on Migrant Workers (CMW) requires only impartiality.[39] The ICCPR, on the other hand, is the only treaty that obligates the appointed members to make a solemn declaration whereby they commit themselves to fulfil the mandate impartially and conscientiously.[40] Thereby, the subjective impartiality (through solemn declaration and expressing within the convention) alongside the objective impartiality (through the representation within the committees) is rarely practised within the human rights treaty bodies. The impartiality and equal representation may also be enhanced through the selection criteria of the committee members. Another issue relates with the expertise of the members with the subject matter they are dealing with. The importance of the experts for an efficient treaty body is of a critical nature. Its importance has also been testified by the UN High Commissioner for Human Rights.[41] Hence, the questions regarding the impartiality and professionalism of the committees prove another hindrance in fulfilling the requirement set by the benefit theories for state compliance.

In view of the above-mentioned anomalies the United Nations High Commissioner for Human Rights in 2009 gave a call to states, treaty bodies and other stakeholders to reflect on proposals for a more effective treaty body system.[42] This initiated a multi-stakeholder consultation process aimed at strengthening the treaty bodies known as the Dublin process. The process included statements issued by non-state entities such as treaty body members, National Human Rights Institutes (NHRIs), civil society and other experts.[43] The process was enhanced by the involvement of the states and a resolution was passed in the UN General Assembly in April, 2014 for strengthening and enhancing the effective functioning of the human rights treaty bodies.[44] The OHCHR also recommended that the state parties to the human rights treaties should take some actions for improving the efficiency of the treaty bodies.[45] The same has been endorsed with recommendations for improvements by the report of the UN Secretary General to the UN General Assembly in 2020.[46] The recommendations included *inter alia;*

a) Selection of subject related experts for the committees including equitable geographical distribution,
b) No member from government executive branch shall be elected as a member of a committee,
c) The term of a member of a committee shall be limited,
d) The nomination process for the committee membership shall be improved,
e) Those members shall be selected who have limited professional engagements so that he/she can give enough time to his work as a member of the committee.

These recommendations can address the administrative aspect of the problems related with impartiality and lack of professionalism in the treaty bodies. They can also be helpful in the formation of any human rights treaty body. The formation of the proposed committee under the draft treaty on business and human rights is discussed considering these recommendations in part V of this paper. However, the recommendations only focus on improvement of the administrative process and do not consider the enhancement of the powers of the committee. In addition, the recommendations also do not emphasise upon the issue of credibility of the facts provided by the state parties within their reports. As a matter of practise the

committees sometimes adhere to information received from Non-Governmental Organisations (NGOs) and International Organisations (IOs), but that is done on random basis. The involvement of NGOs and IOs in the process build up a compliance pressure upon the states, in according to the benefit theories. For instance, the Universal Periodic Review (UPR) mechanism used by the human rights council is more effective because of this political pressure build up by the NGOs.[47] In order to adhere to the benefit theories and ensure enforceability through compliance the role of NGOs and IOs should also be enhanced. In case of a business and human rights treaty (proposed) wherein transnational activities are to be regulated the role of NGOs and IOs become more important.

Enhancing the Role of Non-State Entities:

The status of the enforceability of human rights norms where business entities are involved can be very challenging. The direct regulation of business entities (specifically the TNCs) has seen a harsh criticism in the past which ended up in the soft law document of 'Guiding Principles on Business and Human Rights'.[48] This is why a state-based enforceability mechanism is proposed in the treaty. This enforceability mechanism will provide better results in cases where the business entities co-operate. Business entities tend to follow rules which lead to profit making.[49] The consumer pressure and sometimes labour force challenges the corporate way of engagements in cases of gross violations of human rights, this threatens their profit making and result in reactions by the business entities.[50] The reactions has been noted as corporate social responsibility initiatives taken by business entities on voluntary basis for self-regulation. This pattern of self-regulation and compliance depicts that the businesses also follow the benefit theory. Thus, the enforceability of business and human rights treaty through states will efficiently work if it benefits the states and the business entities collectively. Any restrictions on business (in a particular sector) will be complied with if it is applied to all business entities. The treaty body must facilitate and create an environment where the human rights violation within specific sectors of business is identified, and a collective action is proposed for compliance. For this purpose, the examination of voluntary certification authorities privately regulating a particular sector of industry can be helpful. In

addition, the compliance by businesses with the voluntary codes will be examined to show the compliance pattern of businesses.

(i) Voluntary Codes and Certification:

There are certification regimes which exist to legitimise the products as being manufactured through ethical production mechanisms. These regimes use terms such as 'social-labelling' and 'fair-trade', for instance, they label the products as 'fair-trade', 'eco-friendly' or 'organic'. The labelling is done by a multi-stakeholder organisation like Fair-trade Labelling Organisation International (FLO) which is an organisation for setting fair-trade standards.[51] *Compa* explains that the private certification regimes are 'stakeholder' codes which involve multiple actors i.e. company officials, trade unionists, human rights activists, religious leaders, consumer and community organizations, and other social forces.[52] Many of these certifications require further verification by an external agency contracted by the certification agency. It is observed that it can be used in devising a treaty body to facilitate the states in ensuring corporate compliance with human rights.

The voluntary or self-regulatory compliance by businesses may be used to know why businesses want to show that they comply with the human rights norms. There are different categories of codes of conduct created for the self-regulatory compliance by businesses. Compliance with the different kind of codes of conduct rely upon the category to which it belongs. If the code is adopted by an intergovernmental organisation, then the mode of its implementation is defined within the organisations code. For instance, the OECD code introduced the National Contact Points (NCPs) system for enforcement, thus the members would follow the procedure mentioned in the NCPs. Secondly, a multi-stakeholder code would depend upon the efficiency of the stakeholders involved, for instance, the Fair Labour Association (FLA) is responsible for the monitoring of their code of conduct.[53] *McCrudden* divides these self-regulatory codes into three categories setting standards on the basis of i) setting minimum standards regarding conditions of work within a company and its associates, ii) involvement in the promotion of human rights within the community in which it operates and iii) ethical criteria for guiding a company's investment.[54] The standards are mostly set up by the stakeholders in the developed states, despite their expected application within the developing states.[55] For

instance, the OECD guidelines are argued to have overlooked the social considerations of the developing countries.[56] It is safe to say that these codes do not follow one pattern of rights protection rather they depend upon the nature of organisation they follow.

The codes of conducts are monitored through a variety of ways. There are certification regimes which exist to legitimise the products as being manufactured through ethical production mechanisms. These regimes use terms such as 'social-labelling' and 'fair-trade', for instance, they label the products as 'fair-trade', 'eco-friendly' or 'organic'. The labelling is done by a multi-stakeholder organisation like Fair-trade Labelling Organisation International (FLO) which is an organisation for setting fair-trade standards.[57] *Compa* explains that the private certification regimes are 'stakeholder' codes which involve multiple actors i.e. company officials, trade unionists, human rights activists, religious leaders, consumer and community organizations, and other social forces.[58] Many of these certifications require further verification by an external agency contracted by the certification agency.

(ii) Business Compliance with Voluntary Codes:

With variations of transnational CSR codes of conduct the legitimacy of these codes vary; for instance, some codes represent genuine attempts to improve labour standards, while others are simply used to tackle public outrage.[59] For instance, some corporations which joined the Global Compact allegedly joined just for the purpose of point scoring. Thus, the self-regulatory initiatives or the voluntary codes allegedly became an attempt to deceive the public into believing the responsibility of an irresponsible industry.[60] The term "greenwash" was carved for depicting such double standards of corporations.[61] These allegations can be related to the lack of prominent monitoring mechanisms attached with the codes of conduct.[62] They are also often criticized for being excessively controlled by the industry itself and are the product of corporate bias. For instance, two unions UNITE and the AFL-CIO opted to leave the FLA partnership. The unions were dissatisfied with its failure to require a living wage and infrequent monitoring, as well as, the fact that the FLA permitted production in countries that neglect worker rights.[63] In order to be certified a corporation is subject to monitoring for compliance by these certifying organization. These certification regimes have succeeded in replacing corporate self-

regulation because of the obvious conflict of interest, and inherent lack of credibility.[64] However, these certifying organs have created a choice of monitoring for the corporations.[65] They need to be systemised and the principles upon which they certify corporations shall be unified, otherwise their existence will not make any difference for betterment. The obvious fact is that this private regulation is always voluntary and often self-regulated; thereby it tends to be selective in the rights it covers.

The main source of enforced compliance with the codes of conduct is building up the consumer activism for preferring ethically produced products. This is an unrealistic and short-termed approach because consumer and investor preferences change.[66] The NGOs and unions have the ability to publicize non-compliance and identify the corporations not complying with the codes of conduct. Thus, the lifeline of the model is the vigilance of NGOs and their ability to present things in public.[67] The outcome of which might be consumer boycott leading to loses for the corporations. Corporations may withdraw from some states as an act of self accountability because of unethical practises prevalent in that state but on the contrary other competitors would be ready to step in. The experience with oil companies like *Talisman* and *Total* leaving in Sudan but BP and Exxon immediately stepping into their shoes is a case that illustrates this point.[68] Moreover, because such voluntary initiatives by definition are not legally binding; thus a company is not obliged to honour commitments it makes in any voluntary mechanism.[69] In fact, in USA the corporate lawlessness is widespread, many labourers are illegally ousted every year by corporations, and at the same time, it presents a 'socially responsible' image.[70] Moreover, the access to the reports through which the corporations depict its responsible image is mostly controlled by them and is difficult to verify.[71] The legally binding nature of a voluntary code will be a prime reason of its failure; for the success of a code it is essential for it to be legally unenforceable.[72]

The voluntary codes of conduct can be useful for the corporations to comply with the international norms; however, they cannot be used as a tool for gauging corporate complacency or as an accountability measure. During the second session of the OEIWG Susan George pointed out that codes of conduct do not necessarily make their way to subsidiaries or down the supply chain of a

transnationally operating corporate group.[73] These codes may vary from corporation to corporation and show an inconsistency even in dealing with an issue of the same nature. Thus, the TNCs include particular norms within its code which are of direct interest to the corporation, rather than a commitment for the promotion of international norms.[74][75] These codes of conduct are not very useful in authoritarian countries. For instance, in the absence of independent workers organisations in these states, it is nearly impossible to secure the labour rights. In terms of compliance, the existing mechanisms of corporate accountability are absolutely voluntary; lack of compliance with human rights norms is not followed by any civil, criminal, or social consequences. Because of this voluntary nature these private regulatory authorities has mostly neglected human rights violations in areas more profitable transnational businesses. According to a research on the working conditions within a computer manufacturing industry in China which supplies goods to TNCs like IBM, Dell, Sony, Samsung etc. (who have company codes of conducts and high propaganda); it was found that the suppliers were violating all international and national standards for working conditions.[76]

(iii) Using the Experience of Voluntary Codes for Model BHR Treaty:

The basic question arises if we can gain something from the experience of these certification authorities while drafting a treaty body? CSR has its own importance and it indulge the corporations in voluntary activities which are in public interest. However, the duties which are assigned to states shall not be incorporated within the code of conducts for corporations. The rules shall separate the function of the state and corporations as *Levitt* argues that, "*Government's job is not business, and business's job is not government*".[77] The international law shall develop to an extent where such division is maintained within the states and corporations. The role of these 'soft laws' and other relevant code of conducts might be helpful in such development of the international law. In preparation for drafting almost all human rights treaties, the UN begins with declarations, principles, or other soft law instruments. Such steps are necessary to develop the consensus required for treaty drafting.[78] As *Dinah Shelton* asserts that soft law instruments are adopted easily and may be adopted as a 'precursor'

to a treaty.[79] Following the soft law model the voluntary codes of conduct make way for a successful binding regulation as they start to build consensus.[80] Moreover, soft laws can be used as a tool for negotiators and those who set up international agendas.[81] The experience from the voluntary codes and organs can be forwarded to the treaty making process, in order to assist the treaty body a separate organ can be given the powers of reporting on human rights conditions, empowering and supporting the victims, tracing evidence and providing technical guidance to state institutions.

The certification authorities mentioned above have become a tool for businesses to avoid its human rights responsibilities. These initiatives are ineffective and inadequate, unless backed by relevant legislation.[82] *Klein* asserted that, "corporate codes of conduct […] are not democratically controlled laws, not even the toughest self-imposed code can put the multinationals in the position of submitting to collective outside authority".[83] Thereby, if the businesses are interested in doing good to the society voluntarily then the greatest good to the society will be towards supporting greater accountability.[84] As *Bendell* points out that opposing accountability or regulation on the pretext of being a responsible enterprise in one way or the other will amount to opposing law against murder because one believe that he won't kill anyone.[85] With regard to the consumer choice of choosing responsibly made products or vice versa, why shall we allow consumers to choose from products made with social responsibility and vice versa; and why not make sure that all products within international markets are produced responsibly. Thereby the work of the certification authorities shall now officially turn from CSR to BHR. This role can only be managed by a treaty while including specialised certification authorities in helping the treaty body in achieving goals related with BHR. For this cause the draft treaty have failed to propose any specific tool which fortify this purpose. In addition, the state parties shall also be facilitated in knowing and performing their obligations. States acting as home states and host states to the business entities will have different obligations according to the draft treaty. The certification authorities can be helpful to the states in two basic ways. Firstly, it can highlight the best practises adopted by industries in specific fields and other states may adopt those practises. Secondly, it can highlight areas where the businesses should not get

involved because of gross violations of human rights prevailing in business practises. The home states party to the treaty will then be under an obligation to act against the businesses who engage in activities in these areas.

IV) Proposing a Balanced Enforcement Mechanism:

The basic purpose of adopting a treaty for regulating all business entities is to enhance the accountability process. The objective of the draft treaty is not based upon the achievement of economic goals but to address the challenges to human rights from business operations. The effectiveness of such a treaty relies profoundly upon providing an access to 'effective' remedies against any violations. The remedy is sometimes claimed against a non-state transnational entity or an entity much higher in financial power then the claimants, thereby the role of a state becomes more important. A treaty to classify this role of a state requires a 'strong' enforcement mechanism. Stronger enforcement mechanisms are precise and binding, for example, it will contain a formal grant of power to a committee or a court to engage in authoritative, institutionalized, and legally binding decision-making.[86] Moreover, a strong enforcement mechanism is composed of members who are 'officially empowered by states to interpret and apply the rule of law, and control resources that can be used to prevent abuses or to punish the offenders'.[87] On the other hand weak enforcement mechanisms lack clear obligations, precision, and a precise delegation of authority or responsibility.[88] As the powers to enforce a treaty lies with the state parties through its national systems, a mechanism within a treaty to monitor and facilitate the enforcement process is required. Based on discussion made above two basic requirements must be fulfilled in a treaty which tends to regulate business entities through states for human rights violations. Firstly, an improved composition of the treaty body; secondly, the need of specialised organisations to facilitate the enforcement process.

a) Composition of the Treaty Body:

As discussed, the treaty body is required to facilitate the enforcement and monitoring of a treaty. The composition of such a body plays a vital role in its overall efficiency. Based on the experience of human rights treaty bodies as discussed in section II above; the composition as proposed in the draft treaty is discussed

and explored below in order to calculate whether the proposed treaty body fulfils the mentioned criteria;

1. *Selection of subject related experts for the committees*:

The draft treaty uses the word expert for the member of the committee,[89] it also mentions that the member shall have 'recognised competence in the field of human rights, public international law or other relevant fields'.[90] This is a positive step towards selection of committee members. The scope of the treaty is to regulate the business entities for violations of human rights,[91] as there are numerous human rights treaties with specific focus the term experts need to be narrowly interpreted. In context (object and purpose) of this treaty the expert should mean a person having practical knowledge of human rights in the context of the operations (national and transnational) of business entities. Moreover, a balance of experts in different fields of human rights – in context of most human rights violations in business operations – is essential for a balanced approach. For this purpose, it is suggested that the term expert in narrowly defined in the nomination process (further discussed below in point 4)

2. *No member from government executive branch shall be elected as a member of a committee*:

There is no mention of excluding members from the governments executive branch to serve as an expert in the committee. This is very important for maintaining an unbiased and efficient work of a treaty body. A clause should be included that no one from a governments executive branch shall be nominated for becoming a member (expert).

3. *The term of a member of a committee shall be limited:*

The draft treaty proposes a four years term with a chance of a re-election for one term if nominated again. It is recommended that the re-election of a member may not be allowed and the length of membership be increased to five years. The member will be focused more on his/her tasks rather than focusing on nomination.

4. *The nomination process for the committee membership shall be improved:*

The nomination process of the committee members in the draft treaty is retained the same as in other human rights treaty bodies i.e., by state parties to the treaty.[92] With no definition of an expert provided in the draft treaty the states may nominate anyone with

stronger political affiliations based on the experience of other human rights treaty bodies. Thereby, the nomination process must be scrutinised, and the term expert defined. It is proposed that the United Nations specialised agencies on Labour, Environment and Human Rights be involved in the nomination process.[93] It can be achieved by direct or indirect process of nomination by these agencies. In case of the direct nomination half the members shall be nominated by these agencies and the rest by the member states. In any case there should only be one nominated member from a member state. Alternatively, there should be a quota of experts i.e., one third members shall be expert in labour rights, one third in environmental protection and the rest generally in human rights. Alternatively, these members (experts) may be nominated by the states directly but the nomination is scrutinised by the specialised agencies for their expertise in the specific area.

In addition to the qualification as an expert, the equality in distribution of experts according to the position of the state is also required. The draft treaty mentions equality based on geographical divisions.[94] The cases of human rights violations by business entities cannot be distributed according to geographical preferences. The related issues are mostly based on economic differences among the states.[95] Thereby, a parity of members may be reached if the distribution is made according to the income base of the states. States can be divided into lower income, middle income and high-income states criteria. This will be more feasible than the geographic distribution because the problems of business related human rights violations are more related with state economies, for example, the lower income states have a more vulnerable industry involved in the global supply chains.[96]

5. *Those members shall be selected who have limited professional engagements so that he/she can give enough time to their work as a member of the committee*:

This requirement is purely an administrative one and the nominating authority should keep this in view. The current draft does not have any specific clause fulfilling this criterion. It may be added to the nominating criteria that the person nominated must not have more than one office to take care of, otherwise the seriousness of the job as a member of the committee is compromised.

6. *Enhance follow up procedures by demanding reports from the states after 1-2 years of recommendations*:

One of the major flaws as highlighted in the human rights treaty bodies is the lack of follow up procedures by the committees. The draft treaty also proposes the same pattern of state reports without any follow up activities. The criteria for the scrutiny of the state reports may be devised in such a manner that the scrutiny is made issue wise by experts. The follow up can only be possible if the recommendations are very specific and pointing towards specific actions to be taken by the states.

b) Facilitating the States in Enforcement

It has been discussed that the voluntary certification authorities are not supplement to a viable accountability system. The experience suggest that the businesses are involved in different kinds of difficult national and transnational relationships. There are multiple stakeholders involved within the supply chains and different nature of human rights are at stake. Moreover, the transnational character of suspected violations involve different approach towards enforcement in these cases. This makes the role of third parties i.e. international organisations more important in facilitating the accountability process. For this reason it is thereby proposed that the treaty body should be allowed to create or empower an already existing authority to identify areas where gross violations of human rights take place. The authorities may be constructed under the supervision of the treaty body by the specialised agencies. The specialised agencies include International Labour Organisation (ILO), United Nations Environment Program and the UN Human Rights Council. The advantage of specialised agencies with experts being involved in the process will not only come up with identification of problems but facilitating the state parties with a solution to a particular issue.

A draft optional protocol to the draft treaty was also proposed to achieve the purpose of a facilitator.[97] It proposed a National Implementation Mechanism (hereinafter the Mechanism) for promotion, compliance, monitoring and implementation of the draft treaty. The basic responsibility of the Mechanism will be to facilitate the state parties in enforcement of the draft treaty. The mechanism in the role of a facilitator will be established by the states parties.[98] The facilitation will be done through information disbursement; co-

operation with national institutions, foreign international mechanisms and civil society organisations; and making recommendations to the competent authorities of the state party concerned.[99] The details of how the Mechanism will achieve this purpose is described – even though not in detail – in the draft optional protocol. It is not intended here to discuss the role the Mechanisms can play in facilitating the states in enforcement. One thing worth mentioning is that the idea of suggesting the Mechanism to play a role of facilitator inscribe the fact that it has been realised in cases of Business and Human Rights the role of a facilitator is important. It has been admitted in the article that the role of the states should be acknowledged as an enforcer of any business and human rights treaty. However, the role of the facilitator should come outside the ambit of the states as they have shown their vulnerability to enforce human rights specifically where transnational entities are involved. It is thereby proposed that the role of specialised agencies on human rights shall be given the role of a facilitator. The agencies can be given the role specified for the Mechanism along with additional role of identifying gross human rights violations in a particular business/industry (as the certification authorities). In addition to the identification, it can propose sanctions on businesses in a particular industry to the treaty body. Therefore, it is suggested that the Mechanism should be reviewed and the role of the human rights agencies should be enhanced in order to facilitate the accountability process within the treaty.

Conclusion:

The draft treaty on business and human rights is a way forward in enforcement of human rights against the violations committed by business entities. This opportunity should be materialised by enhancing the accountability process for the business entities. This is possible through improving the enforcement mechanism of the treaty. This article proposes changes within the composition of the treaty body based on the experience of human rights treaty bodies. Additionally, it is also proposed that the human rights agencies should be given a lead role in supporting the states to enforce the treaty. This proposal is based on the experiences of certification authorities helping the business entities to cope with human rights violations across the supply chains.

Notes:

[1] Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/RES/26/9, (26 June 2014), para 9.
[2] Algeria, Benin, Burkina Faso, China, Congo, Cote d'Ivore, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Phillipines, Russia, South Africa, Venezuela, and Vietnam voted in favour.
[3] Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, United Kingdom and the United States of America voted against the resolution.
[4] Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and the United Arab Emirates abstained.
[5] Olivier DE Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1 Business and Human Rights Journal 41.
[6] ibid.
[7] See for example the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003); and for the Commentary, UN Doc E/CN.4/Sub.2/2003/ 38/Rev.2 (2003). See also David Weissbrodt and Muria Kruger, 'Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2013) 97 American Journal of International Law 901.
[8] See Humberto Cantu, 'Negotiating a Treaty on Business and Human Rights: The Early Stages' (2017) 40 University of New South Wales Law Journal 23.
[9] The zero draft ahead of the 4th session in 2018, the revised draft ahead of the 5th session in 2019, the second revised draft in 2020, and a third revised draft in August 2021.
[10] See for example, Nadia Bernaz, 'Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty' [2020] Human Rights Review <https://doi.org/10.1007/s12142-020-00606-w> accessed 18 February 2022. at 3-5.
[11] Aarti Gupta and Harro van Asselt, 'Transparency in Multilateral Climate Politics: Furthering (or Distracting from) Accountability?' (2019) 13 Regulation & Governance 18. at 19.
[12] ibid. at 20.
[13] Bernaz (n 10).
[14] ibid.
[15] ibid. at 12.
[16] For Details See Oliver D Schutter, 'International Human Rights Law Cases Materials Commentary 3rd Edition | Human Rights | Cambridge University Press' <https://www.cambridge.org/pk/academic/subjects/law/human-rights/international-human-rights-law-cases-materials-commentary-3rd-edition?format=PB> accessed 17 May 2021. at 436-556.
[17] See for example Human Rights committee, 'General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13 (26 May 2004, para 8.
[18] See for example 1 Committee on Economic, Social and Cultural Rights, 'General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/ 2000/4 (2000), para. 39; Committee on Economic,

Social and Cultural Rights, 'General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/2002/11 (26 November 2002), para. 31. 22 Committee on Economic, Social and Cultural Rights, 'Statement on the Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural rights' E/C.12/2011/1 (20 May 2011), para. 5. 23 In addition to the Committee on Economic, Social and Cultural Rights, see, e.g., Committee on the Elimination of Racial Discrimination, Concluding Observations: Canada, CERD/C/CAN/CO/18, para. 17, and Concluding Observations: United States, CERD/C/USA/CO/6, para. 30; and Human Rights Committee, Concluding Observations: Germany, CCPR/C/DEU/CO/6, para. 16.

[19] See for example Schutter (n 5). At 45.

[20] Yvonne Dutton, 'Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms' (2012) 34 University of Pennsylvania Journal of International Law 1.

[21] UNGPs, principle 25 and its commentary.

[22] Human Rights Council, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse', Report of the United Nations High Commissioner for Human Rights A/HRC/32/19, 10 May 2016, at para 2.

[23] See for example, 'Law Among Nations: An Introduction to Public International Law' (*Routledge & CRC Press*) <https://www.routledge.com/Law-Among-Nations-An-Introduction-to-Public-International-Law/Taulbee-Glahn/p/book/9781138691728>.

[24] See the United Nations Convention on the Law of the Sea 1982, article 287.

[25] See the Understanding on rules and procedures governing the settlement of disputes (Annex 2) in the agreement establishing the World Trade Organisation (article 21).

[26] Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Revised edition, Princeton University Press 2005). at 99.

[27] See Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 California Law Review 1823.

[28] ibid. at 1865.

[29] The current charter-based mechanisms include the UN Human Rights Council and the universal periodic review working groups etc.

[30] The bodies include Human Rights Committee (CCPR), Committee on Economic Social and Cultural Rights (CESCR), Committee on Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Subcommittee on Prevention of Torture (SPT), Committee on the Rights of the Child (CRC), Committee on Migrant workers (CMW), Committee on Rights of Persons with Disabilities (CRPD), and the Committee on Enforced Disappearances (CED).

[31] Jan Lhotský, 'Human Rights Treaty Body Review 2020: Towards an Integrated Treaty Body System' (2020) Global Campus Open Knowledge Repository 41.

[32] UNGA, 'Status of Human Rights Treaty Body System', (2020) Report of the Secretary General A/74/643, para. 11 (hereinafter UNGA report).

[33] Ibid, para 14.

[34] Ibid, paras 69, 71 and 72.

[35] See The Independence of UN Human Rights Treaty Body Members, (Geneva: 2012) *Geneva Academy of International Humanitarian Law and Human Rights*, at 25, available at <http://www.geneva-

academy.ch/docs/expert-meetings/ga_inbrief_web(1).pdf>.
[36] Ibid. at 27.
[37] See
<https://www.ohchr.org/en/hrbodies/pages/electionsoftreatybodiesmembers.aspx
>.
[38] Ibid.
[39] Convention on Migrant Workers (CMW), Art 5(6).
[40] ICCPR, art 38.
[41] UNGA report (n 32).
[42] See OHCHR, High Commissioner Treaty Body Strengthening Process, available at <http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBSConsultations.aspx#tb> (last accessed on 01 March, 2021).
[43] See for instance, The Dublin Statement on the Process of Strengthening of the United Nations Human Rights Treaty Body System, 19 November 2009; see also Marrakech Statement on Strengthening the Relationship between NHRIs and the Human Rights Bodies System, (10 June 2010); The Poznan Statement on the reforms of the UN Human Rights Treaty Body System, 28-29 September 2010, available at <http://www2.ohchr.org/english/bodies/HRTD/docs/PoznanStatement.pdf> (last accessed on 6 January, 2022); and the Dublin statement on the Process of Strengthening the Human Rights Treaty Body System: Response by Non Governmental Organisations, November 2010.
[44] Strengthening and enhancing the effective functioning of the Human Rights Treaty Body System, G.A. Res. 68/268, UN Doc. A/RES/68/268 (April 9, 2014). For a review on all the joint statements and efforts from different stakeholders see High Commissioner Treaty Body strengthening Process, available at <http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBSConsultations.aspx#tb> (last accessed on 01
February, 2022).
[45] See OHCHR, Requirements and Implications of the Ongoing Growth of the Treaty Body System on the Periodic Reporting Procedures, Documentation and Meeting Time, Background Paper for the Informal Technical Consultation for State Parties to International Human Rights Treaties, Sion, Switzerland, 12-13 May 2011, at 74.
[46] UNGA report (n 32).
[47] Valentina Carraro, 'Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies' (2019) 63 International Studies Quarterly 1079.
[48] For more details see, Muhammad Asif Khan and Inayattullah Khan, 'Making Transnational Corporations more Responsible: A Human Rights Approach', (2017) 70 Journal of Law and Society 73-90.
[49] Muchlinski P.T., Multinational Enterprises and the Law (Oxford: Oxford University Press, 2007), at 36.
[50] Carroll, A. B. A history of corporate social responsibility: concepts and practices, in A. M. Andrew Crane, D. Matten, J. Moon, & D. Siegel (Eds.), *The Oxford handbook of corporate social responsibility* (New York: Oxford University Press 2008) at 19-46.
[51] See <http://www.fairtrade.net/>.
[52] Lance A Compa, 'Trade Unions, NGOs, and Corporate Codes of Conduct' <https://ecommons.cornell.edu/handle/1813/75133>.

[53] See <http://www.fairlabor.org/our-work>.
[54] Christopher McCrudden, 'Human Rights Codes for Transnational Corporations: The Sullivan and MacBride Principles', *Human Rights and Corporations* (1st edn, Routledge 2009).
[55] Compa (n 52).
[56] See e.g. Tully S., The Review of the OECD Guidelines for Multinational Enterprises, (2000)
International and Comparative Law Quarterly, at 395.
[57] See <http://www.fairtrade.net/>.
[58] Compa (n 52).
[59] Howitt R., "Preface", in Jenkins R., Pearson R. and Seyfang G. (eds.), Corporate Responsibility & Labour Rights: Codes of Conduct in the Global Economy, (London: Earthscan Publications, 2002), at xii-xvi.
[60] Peter N Grabosky and John Braithwaite (eds), *Business Regulation and Australia's Future* (Australian Institute of Criminology 1993).
[61] The term was used at the time of the UN Conference on Environment and Development (UNCED), held in Rio de Janeiro in 1992, to criticise large corporations for grossly exaggerating their environmental credentials. The Oxford English Dictionary defines it as "disinformation disseminated by an organization so as to present an environmentally responsible image." (The Concise Oxford English Dictionary).
[62] *Keller H.*, Corporate Codes of Conduct and Their Implementation: The Question of Legitimacy, in *Wolfrum R.* and *Roben V.* (eds.), Legitimacy in International Law, (Heidelberg: Springer Publications, 2008), 231.
[63] Richard N Block and others, 'Models of International Labor Standards' (2001) 40 Industrial Relations: A Journal of Economy and Society 258.
[64] Compa (n 52).
[65] Block and others (n 63).
[66] 'Integrative Linkage' <https://harvardilj.org/2007/01/issue_48-1_kolben/>.
[67] Compa (n 52).
[68] Jedrzej George Frynas, 'The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies' (2005) 81 International Affairs (Royal Institute of International Affairs 1944-) 581.
[69] Salil Tripathi, 'International Regulation of Multinational Corporations', (2005) Oxford Development Studies, at 118.
[70] Guy Ryder, 'The Promise of the United Nations Global Compact: A Trade Union Perspective on the Labour Principles' in Andreas Rasche and Georg Kell (eds), *The United Nations Global Compact: Achievements, Trends and Challenges* (Cambridge University Press 2010) <https://www.cambridge.org/core/books/united-nations-global-compact/promise-of-the-united-nations-global-compact-a-trade-union-perspective-on-the-labour-principles/7614B516BD338BC92C1CE3EC557C480B>.
[71] Fiona Mcleay, Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of Larger Puzzle,in Olivier de Schutter, 'Transnational Corporations and Human Rights - European University Institute' <http://link.library.eui.eu/portal/Transnational-corporations-and-human-rights/MmlJB2Rx1aY/>.
[72] Ralph G Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria' (2005) 13/3 Non-state actors and

human rights Non-State Actors and Human Rights / ed. by Philip Alston, ISBN 0199272816 177.
[73] Cantu (n 9).
[74] Mcleay, 'Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of Larger Puzzle', in *Schutter O.D.*, Transnational Corporations and Human Rights, (Oxford: Hart Publishing, 2006) 223.
[75] Ibid 232-233.
[76] See Wong, What Difference Does CSR Make to Development?, in UNRISD Conference on Corporate Social Responsibility and Development: Towards a New Agenda? (November 2003), at 19.
[77] Levitt, 'The dangers of social responsibility', in Beauchamp T.L. and Bowie N.E. (eds.), Ethical Theory and Business (138-141). (New Jersey: Prentice-Hall, 1979) (Original work published 1958), at 139.
[78] For a detail account see, Baade, in Horn N. (ed.), fn. 143, at 407; see also Fitzgerald E.V.K., Regulating Large International Firms, (19 March, 2004) United Nations Research Institute for Social Development, United Nations Research Institute for Social Development, UNRISD PB/04/1.
[79] Shelton D., Law Non-Law and the Problem of Soft Law and Chinkin C., Normative Development in the International Legal System, in Shelton D. (ed.), Commitment and Compliance – The Role of Non-Binding Norms in the International Legal System, (Oxford: Oxford University Press, 2000), at 13-14.
[80] Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies, (2002) International Council on Human Rights Policy, at 9.
[81] Reisman M., The Concept and Functions of Soft Law in International Politics, in Bello E. and Ajibola B.A. (eds.), Essays in the Honour of Judge Taslim Olawale Elias (London: Martinuss Nijhoff publishers, 1992), at 136.
[82] See articles in Jenkins R., Pearson R. and Seyfang G. (eds.), Corporate Responsibility & Labour Rights: Codes of Conduct in the Global Economy, (London: Earthscan Publications, 2002).
[83] Klein N., No Logo, (New York: Picador, 2002), at 437.
[84] Bendell J. and Murphy D.F., Partners in Time? Business, NGOs and Sustainable Development, (1999)
United Nations Research Institute for Social Development (UNRISD), at 60.
[85] Ibid.
[86] Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421. at 422-424.
[87] Jay Goodliffe and Darren G Hawkins, 'Explaining Commitment: States and the Convention against Torture' (2006) 68 Journal of Politics 358. at 359.
[88] Abbott and Snidal (n 86).
[89] Article 15(1)(a) of the Draft Treaty.
[90] ibid
[91] Ibid, preamble.
[92] Ibid, 15(1)(c).
[93] The specialised agencies are the International Labour Organisation, United Nations Environment Programme and the Human Rights Council.
[94] Article 15(1)(c) of the draft treaty.
[95] See for example, Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights', *Human Rights and Corporations* (Routledge 2009).

[96] See for example, Jernej Letnar Černič, 'Moving Towards Protecting Human Rights In Global Business Supply Chains' 36 Boston University Interational Law Journal 101.
[97] Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.PDF.
[98] Ibid, Article 1.
[99] Ibid, Article 3(1), 3(2) and 3(3).