

Business and Human Rights. Progress and challenges in the negotiation of an international treaty

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In June 2014, the United Nations Human Rights Council – the main UN body dealing with human rights issues – passed a resolution to start an inter-governmental process towards the adoption of an international treaty on business and human rights. Resolution 26/9 created the Open-Ended Intergovernmental Working Group (IGWG). It was opened to all members of the UN and mandated to ‘elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.

The decision to start the elaboration of a treaty was not taken without controversy and strong opposition, largely from Western countries, which argued that it was too early to start working on a binding instrument and/or that the United Nations Guiding Principles on Business and Human Rights were a sufficient regulatory framework to address the issues and concerns about accountability. Despite this opposition, a majority of countries, mostly from the South and including India and China, voted in favour and adopted the resolution.

The process towards a binding instrument has naturally raised high expectations. It is the first truly intergovernmental process in the area of business and human rights. Most previous initiatives focused on broader development issues or were run by individual experts. Between 1997 and 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights (a subsidiary body of the former Commission on Human Rights) under-

took work to define a set of human rights standards applicable to transnational corporations (TNCs) and other business enterprises (OBEs). The work of the Sub-Commission on the topic concluded with its adoption of the draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights in 2003. Neither the Commission nor subsequently the Human Rights Council took further action on ‘the Norms’ (as the instrument came to be known). Although the Norms were seen by many as contentious, they nonetheless inspired further work in this field within the United Nations and opened the path for recent developments.

The first two sessions of the IGWG (2015 and 2016) were dedicated to the holding of constructive debates about the scope, content and structure of the instrument, which in international law is simply referred to as an international treaty. Resolution 26/9 mandated the Chair of the IGWG to produce a document with the “elements of a draft treaty”, for substantive negotiations to be held during the third session.

First text debated by the working group

At the third session of the IGWG from 23 to 27 October 2017, states and other stakeholders (a large and diverse civil society movement, trade unions and business associations attending the session) had before them a document with “Elements of a draft

international legally binding instrument”, which they were supposed to discuss in substance. Instead, significant parts of the session were dedicated to general and procedural matters and the substantive discussion of the various issues was in fact limited to a handful of states that included Russia, Brazil, South Africa, Namibia, Mexico, Bolivia and Ecuador, with occasional interventions by others. Interventions by EU member states and other Western countries present in the room were confined to preliminary observations and the formulation of questions.

The session ended with a mixed outcome and many questions. On the one hand, it reaffirmed the commitment of many actors (states and mostly civil society organisations) on the option of having a treaty, now supported by the elaboration of elements of the treaty. On the other hand, it raised many questions about the continuation of the process and the available options. In addition, it revealed crucial challenges that have to be addressed within the next twelve months or less, before the possible fourth session of the IGWG.

Future steps in the process still to be defined

The tangible outcome of the third session is a report by the Chairperson-Rapporteur. This kind of report usually ends with conclusions and recommendations that are adopted by the plenary. This time, the outcome report ends with various recommendations from the Chair and a separate section headed “Conclusions”. Only the latter were adopted by the plenary. One first question that arises is to whom these recommendations are addressed and what possible action will be taken on them in the future. Among other recommendations, the Chair calls for the holding of a fourth session where a draft treaty will be presented and discussed. But without explicit endorsement by the plenary, there is uncertainty as to when, if at all, those actions or events will take place.

The discussion about the final report’s Conclusions and Recommendations that took place during the last day of the IGWG third session was the occasion for the exchange of sharply opposing views about the treaty process and its future. The raising by Western and other governments of procedural questions about the need for a new Human Rights Council resolution to renew the IGWG mandate or authorise budgetary appropriations for future sessions of the IGWG conceals substantive challenges about the process – challenges which the same governments have been raising for some time and which need to be addressed on their merits. The current state of play even calls into question the viability of the process: will a fourth session happen? Will it discuss a draft treaty or continue with the debate on “elements of a

draft treaty”? Will the mandate of the IGWG remain the same? These questions and the answers to them revolve around the debate on two or three key issues relating to the substance and scope of the treaty.

Debate on the scope of the treaty

Since the adoption of Resolution 26/9 in June 2014 by majority vote in the Human Rights Council, a good number of states and civil society groups have expressed deep concern about the scope of the future treaty. The reason is its restriction to transnational corporations and other business enterprises, re-branded for this purpose as those having “activities of a transnational character” and excluding those “established under domestic law”. A footnote to Resolution 26/9 purports to define the meaning of “Other business enterprises” as follows: “‘Other business enterprises’ denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.”

This restriction of business enterprises to those with transnational activities in the “Elements” document presented to the third session creates political and legal problems of a fundamental nature. For instance, it will be impossible to create criminal responsibilities solely for companies that have transnational activities while excluding those that do not. Fundamental criminal law principles and, more generally, constitutional principles in most countries forbid such discriminatory application of criminal law. In general, different treatment of companies, without objective and reasonable justification, would run counter to international standards on non-discrimination and equality under the law. Politically, Western states and the business community believe that a treaty so conceived and limited to transnationals will in practice be exclusively targeted at companies based or domiciled on their territory while leaving most companies in other regions untouched.

The “Elements” document advocates a focus on the business activity (that is, activity of a transnational character) rather than on the nature of the corporation itself. In this way, the “Elements” paper makes an attempt to address the underlying substantive arguments behind the objections to the treaty scope, but it still does so in an unsatisfactory manner and the issue remains to be fully addressed in future negotiations.

Is a UN treaty complementary or a rival to existing instruments?

Another issue frequently raised in relation to the treaty process is its perceived or potential conflict

with the substance and process of the UN Guiding Principles on Business and Human Rights (UNGPs). It is difficult to assess this objection on its merits because it has hardly been articulated with clarity as a matter of substance, but looking at the content of the “Elements” paper and the submission by the International Organisation of Employers (IOE), one may understand the source of the objectors’ unease. Indeed, for some states (mainly Western), businesses and other organisations, it would be difficult to reconcile the UNGPs with a treaty that establishes international law obligations for companies as the “Elements” paper seems to propose. The UNGPs are predicated on the notion that business enterprises do not have human rights obligations under international law. IOE has argued that proposing those “direct” international obligations for corporations in fact takes the international debate back twenty years to the time when the UN Sub-Commission on Human Rights proposed international obligations for corporations in its “Norms and Principles of Human Rights applicable to TNCs and OBEs”, which the UNGPs purported to overcome. For many scholars, national delegates and civil society groups, the fact that a treaty creates obligations for corporations is a much-needed complement to the UNGPs, which propose no legal obligations, and establishes a healthy balance between the existing extensive rights granted to investors in many investment and trade agreements and new obligations for investors vis-à-vis human rights and the environment.

Procedural concerns

Another group of concerns about the treaty process expressed by some government delegates from North and South has to do with the procedural parameters so far observed, including by the Chair of the IGWG. Soon after the adoption of Resolution 26/9, a number of states expressed uneasiness at the prospect of having a Chair (Ecuador) that behaves in a partisan manner. An additional source of concern is the perceived lack of periodic consultations with states and other stakeholders and the opaqueness of the process so far. For instance, some diplomats have in an unofficial context queried how the “Elements” paper was produced, by whom and in consultation with whom. Others openly show dissatisfaction at the untimely release of the “Elements” paper, which did not allow them enough time to prepare to engage substantively. There seems to be a call for a Chairperson who is perceived to act transparently and impartially, representing the plenary rather than the interests of one particular country or group of countries and one who would deploy its energy and skills in building consensus among the various groups. The recent appointment of a new Ecuadorian ambassador to the United Nations in Geneva may impact the way in which consultations and negotiations are conducted. The new appointee, Ambassador Luis

Gallegos, a career ambassador with extensive experience in multilateral negotiations, is likely to change the style and content of discussions.

These and other questions are currently conveyed in the form of procedural objections and requests, such as the need for a new resolution, which, if consensus on key issues were to exist, would be easily solved. It is not surprising to see dissatisfied governments and stakeholders use the argument of a need for a fresh resolution about the treaty process to “push their envelope” and seek to fix a process that they see as broken.

Recommendations

It is clear that all actors have an important role to play and a responsibility to discharge in relation to the treaty process. The end of the third session marks the start of a period of re-accommodation and, hopefully, of normalisation of what is perceived by some as anomalous. In a sense, this is a time of “make or break” options and also a period where all options may be back on the negotiating table. Crucially, other alternatives and/or competing processes may be considered if agreement on substance and on ways of fixing the perceived flaws in the treaty process is not achieved.

The Chair and the sponsoring states would obviously do well to show more willingness to compromise. Objections and objectors to the treaty are a powerful force that must not be underestimated. The Chair needs to act more clearly and with determination as a consensus builder, spending time and resources in consultations with states and regional groupings. The recently appointed new ambassador of Ecuador to the United Nations in Geneva will have to measure up to the high expectations about his role.

The main sponsors, Ecuador and South Africa, need to address the challenges outlined above and be ready to take tough decisions and compromise on key issues such as the scope of the discussions. If Western and other countries’ involvement in the process, and eventual ratification of the treaty, are to be ensured, the scope of the treaty will have to be broadened. How broad it will be will depend on the terms of negotiations and final agreement over the next few months.

Having overcome internal financial and political challenges, Western (mainly EU) countries seem to be in a stronger position now than in previous years. But they are also under heavy pressure from institutions such as national parliaments and significant segments of civil society. Although the EU states have increasingly engaged in the process, they are far from expressing clear support for the objective of having a treaty and are even less inclined to engage

in discussions about the possible treaty content. However reasonable some of the EU arguments may sound, they are unlikely to attract broader support, including from civil society groups, unless the EU is clearly perceived as truly committed to the treaty process and is not using the arguments to delay or derail it. At present, it is not clear that Western countries as a bloc are favourable to the idea of having a legally binding instrument and some of them, such as the USA, Canada and Australia, remain openly and staunchly against it.

The very diverse group of civil society organisations that has so far provided the main support to the treaty process also needs to achieve clarity on the key issues outlined above and act responsibly in the context of the difficult negotiations ahead. Many social organisations show an uncompromising attitude and are openly aggressive in addressing government delegates – an approach which is regarded as improper conduct in diplomatic multilateral settings. The business community, for its part, should understand once and for all that accepting increased responsibilities at the international level, including a legally binding treaty that requires states to incorporate better and more robust measures to regulate business corporations, is a necessity nowadays and that their own interests and sustainability are at stake.

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