

# THE WAY AHEAD FOR THE TREATY PROCESS ON TRANSNATIONAL CORPORATIONS WITH RESPECT TO HUMAN RIGHTS

LUIS ESPINOSA-SALAS<sup>1</sup>

## BACKGROUND

On 26 June 2014, the United Nations Human Rights Council (UNHRC) adopted resolution [A/HRC/RES/26/9](#) (resolution 26/9), which established an open-ended intergovernmental working group with the mandate to elaborate an international legally-binding instrument on transnational corporations (TNCs) and other business enterprises with respect to human rights.

Notwithstanding the fact that the debate on how to better control the actions of TNCs regarding human rights has been included in different fora of the multilateral agenda for more than 40 years, and the fact that in this period some attempts have failed in the intention to issue general international rules on this respect, such as the UN Code of Conduct<sup>2</sup> and the Norms on the responsibilities of TNCs and other business enterprises with regard to human rights,<sup>3</sup> until now the only proposals have been restricted to the adoption of non-binding rules, such as the UN Guiding Principles on business and human rights (UNGPs), endorsed by the same UNHRC,<sup>4</sup> or the International Labour Organization (ILO) Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration).<sup>5</sup> Efforts have included regional or other initiatives limited to groups of countries, such as the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.<sup>6</sup>

<sup>1</sup> Luis Espinosa-Salas is a Counsellor at the Permanent Mission of Ecuador to the United Nations in Geneva, and is Ecuadorian head negotiator to the open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. He writes here in a personal capacity

<sup>2</sup> For a detailed reference about the Code of Conduct process of negotiation, see: Khalil Hamdani and Lorraine Ruffing, 'United Nations Centre on Transnational Corporations: Corporate conduct and the public interest', Routledge, 2015.

<sup>3</sup> The Norms were adopted by the Sub-Commission on the Promotion and Protection of Human Rights on 13 August 2003 via document E/CN.4/Sub.2/2003/12/Rev.2, but later, in its resolution 2004/116, adopted on 20 April 2004, the then Commission on Human Rights decided that such document "has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard."

<sup>4</sup> Human Rights Council, resolution A/HRC/17/4, 'Human rights and transnational corporations and other business enterprises', adopted on 6 June 2011.

<sup>5</sup> This Declaration was adopted by the ILO Governing Body in November 1977, and was amended in 2000 and 2006. At the time of writing, a new process of amendments is taking place, and a renewed version will be delivered during 2017.

## THE RESOLUTION

In this very general framework, Ecuador, together with South Africa and other co-sponsors, presented resolution 26/9 to the consideration of the UNHRC members at the 26<sup>th</sup> session of the Council, held in Geneva from 10 to 27 June 2014, based on the need to work on common binding rules to provide better options of justice for those who are or have been real or potential victims of corporate abuses of human rights.

Due mainly to political considerations, resolution 26/9 was adopted with 20 votes in favour, 14 against and 13 abstentions. Comments have been raised about this fact, as it is said that there was no consensus to reach this adoption, and this argument has been used to try to undermine the mandate contained in resolution 26/9. In this regard, it is important to underline that the 47 members of the UNHRC have two democratic mechanisms by which they can adopt resolutions: either by consensus or by vote. It must also be taken into account that in the UNHRC language and procedures, consensus does not mean unanimity, but only the lack of a public and official opposition to an initiative. At the UNHRC, consensus reflects a common feeling of comfort of its members, and if it is not reached, UNHRC members may vote on a resolution, with a single majority needed for its adoption. Around 30 per cent of resolutions are adopted by vote at the UNHRC,<sup>7</sup> and they have the same treatment as those adopted by consensus. Apart from resolution 26/9, other important resolutions adopted by vote include for instance, resolution 32/2, on the protection against violence and discrimination based on sexual orientation and gender identity (SOGI resolution)<sup>8</sup> and 31/32, on protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights,<sup>9</sup> both of which have been duly implemented by the UNHRC.

Among the triggers for resolution 26/9, evidence showed - and still shows - the existence of gaps and imbalances in the current international human rights legal rules with respect to the relationship between human rights and corporations, particularly when dealing with victims' access to justice and effective remedy in cases of human rights abuses perpetrated by corporations. As evidence shows, a large proportion of those abuses remain in impunity, and non-binding rules, while useful, have not been enough to bring justice to victims. This reality contrasts with the broad protection provided to TNCs and other business enterprises via trade or investment treaties, which allow the corporate sector to claim against states for any measure they consider a real or potential menace to their profits, regardless of whether the measure was taken on behalf of the protection of the rights of the population. This happened when Uruguay adopted tobacco-control measures regulating the tobacco industry, in order to protect the health of its population, and was sued by the transnational Philip Morris.<sup>10</sup>

<sup>6</sup> The OECD Guidelines for Multinational Enterprises were adopted in 1976, and have been updated many times, most recently in 2011. Currently, 35 countries are members of the OECD.

<sup>7</sup> From session 22 (25 February to 22 March 2013) to session 31 (29 February to 24 March 2016) of the UNHRC, a total of 341 resolutions were adopted: 107 by vote (31.06 per cent) and the rest by consensus. Data obtained by the author from the UNHRC webpage, <http://www.ohchr.org/EN/Pages/Home.aspx>.

<sup>8</sup> Human Rights Council, resolution A/HRC/RES/32/2, 'Protection against violence and discrimination based on sexual orientation and gender identity', adopted on 30 June 2016, by 23 votes in favour, 18 against and six abstentions.

<sup>9</sup> Human Rights Council, resolution A/HRC/RES/31/32, 'Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights', adopted on 24 March 2016, by 33 votes in favour, six against and eight abstentions.

<sup>10</sup> The claim was presented by Philip Morris on the basis of Article 10 of the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, dated 7 October 1998. Due to the merits of the case, the arbitral tribunal decided on behalf of Uruguay. See: International Centre for Settlement of Investment Disputes (ICSID), award on Philip Morris Brands SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. versus Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, 28 June 2016.

## THE WORKING GROUP

Following resolution 26/9, the open-ended intergovernmental working group was established at the beginning of its first session, held in Geneva from 6 to 10 July 2015, and the second session took place from 24 to 28 October 2016.<sup>11</sup> Both were held under the chairmanship of Ambassador María Fernanda Espinosa, Permanent Representative of Ecuador to the UN in Geneva. The two sessions were structured in different panels covering the possible principles for a legally binding instrument, the implementation of the UNGPs, the coverage of the instrument with respect to its objective and subjective scope, the obligations of states, the responsibilities and liability of TNCs and other business enterprises, and the design of national and international mechanisms for access to remedy for victims of human rights abuses perpetrated by TNCs and other business enterprises.

The first and second sessions allowed participants to engage in constructive deliberations on the content, scope, nature and form of the future international instrument, as provided by operative paragraph 2 of resolution 26/9. This experience was not free of challenges, such as the absence of some parties during the first session, due mainly to concerns on the way in which the UNGPs would be taken into account in the treaty process, and based on issues such as the subjective scope of the legally binding instrument.

As for the first challenge, there is a growing convergence towards the view that both processes are mutually reinforcing and complementary, as the existence of binding regulations can be complemented by non-binding guidelines. Regarding the scope, the debate is based on the contents of the footnote to resolution 26/9, which expressly states that:

*“...other business enterprises” refers to “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.”*

While some parties support this view, others would like to see the inclusion of all business enterprises, without distinctions. Scholars and experts have contributed actively to provide possible ways forward on these concerns, but as usual in this kind of negotiating processes, as well as a reasonable legal and technical proposal, the political will of parties will play a major role in overcoming this challenge.

Other issues have also captured attention in the debate and will need more reflection and discussion. They refer to the scope of the human rights to be included; the obligations of states, including extraterritorial obligations; the legal

---

<sup>11</sup> See: Human Rights Council, document A/HRC/31/50, ‘Report of the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument’, distributed on 5 February 2016, <http://bit.ly/2pFjbAW>; Human Rights Council, document A/HRC/34/47, ‘Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights’, distributed on 4 January 2017, <http://bit.ly/2qzAgAa>.

## GUEST ESSAYS

# CIVIL SOCIETY & THE PRIVATE SECTOR

liability and responsibility of TNCs towards human rights; and the need for national and international mechanisms for access to remedy. These are challenges that lie ahead, which will need careful management in the negotiations.

The second session had a broader and more significant participation, showing that the process has gained momentum and traction, and expectations have grown. Paragraph 3 of resolution 26/9 states that the Chairperson-Rapporteur of the working group “should prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session.” This third session has been scheduled to take place in Geneva, from 23 to 27 October 2017, and while the mandate is “open-ended” in nature, and therefore there is not a specific date or period to achieve its objective, it is foreseeable that the process will last as long as the political will of parties may want to find common grounds of understanding.

### THE ROLE OF CIVIL SOCIETY AND OTHER PARTNERS

It is worth mentioning that besides the support of states, civil society, particularly through the Treaty Alliance, has played a crucial and active role on behalf of the process, showing conviction and hope that a legally binding instrument can help to avoid or reduce cases of corporate impunity. In this field, strong attention has been paid to the protection to be provided to vulnerable groups, such as women and girls, children, persons with disabilities and indigenous peoples, among others, as they are usually the most affected by business enterprises’ abuses. Among the many actions taken by civil society organisations on behalf of the process, they have advocated for a binding treaty, raised awareness among governments, and have also contributed substantively to the debate with sound legal and theoretical proposals which have been shared publicly in the first and second sessions of the Working Group, as well as in other events organised on all the continents.

Other stakeholders in this process have been international and intergovernmental organisations, national institutions of human rights, trade unions, business enterprises, victims of corporate abuses and their lawyers, scholars, experts and students. All of them have participated in accordance with the rules of the UNHRC for this kind of working group, and their voices have enriched the discussions.

It is also worth clarifying that the treaty process does not have any intent to affect investment, trade, or the contribution the private sector makes to the economy of countries. The purpose, on the contrary, is to provide a set of clear, general and common rules that will provide predictability and transparency when doing business, while respecting human rights at the same time, everywhere the activities take place. As evidence shows, serious business

CIVIL SOCIETY,  
PARTICULARLY  
THROUGH THE  
TREATY ALLIANCE,  
HAS PLAYED A  
CRUCIAL AND  
ACTIVE ROLE ON  
BEHALF OF THE  
PROCESS

enterprises are not against a binding treaty,<sup>12</sup> as it is in their interest to play with the same rules, and to avoid unfair competition from those who increase their profits at the expense of child labour, labour exploitation, environmental damage, slavery or semi-slavery working conditions, forced land evictions, menaces, torture and even killings, among many other violations of human rights.<sup>13</sup>

Under this very general framework, the way forward is envisaged as a necessary, timely, constructive and inclusive exercise where states and other relevant stakeholders will participate in a democratic manner, and will contribute to fill in the current gap in the international rules of human rights. Moreover, it will contribute options to better protect internationally those who historically have been affected by the abuses of TNCs and other business enterprises.

---

<sup>12</sup> See: 'The Road from Principles to Practice. Today's challenges for business in respecting human rights', The Economist Intelligence Unit, 2015.

<sup>13</sup> Among the many books and documents about human rights abuses perpetrated by transnational corporations, a recommended book is 'Juger les Multinationales', Eric David and Gabrielle Lefèvre, Éditions Mardaga, 2015. This book includes short summaries and legal commentaries of cases involving TNCs such as Chevron/ Texaco, Coca-Cola, DoeRun/ Renco, Glencore, Monsanto, Nestlé, Pacific Rim, Samsung, Shell, Syngenta and Union Carbide, among others.