

# *Developments in the Field*

## *Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session*

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### I. INTRODUCTION

The first session of the open-ended intergovernmental working group (OEIGWG) on transnational corporations and other business enterprises with respect to human rights took place in Geneva during 6–10 July 2015. The mandate of the OEIGWG is set in Human Rights Council Resolution 26/9, adopted in June 2014: ‘to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.<sup>1</sup> The first two (annual) sessions of the OEIGWG are meant to be broad constructive discussions about the scope and content of the prospective treaty.

This first session, which was relatively well attended, raised expectations, especially from a wide array of civil society organizations, despite concerns of a likely boycott of the process by Western states. After all was said and done, the first session could be described as a qualified success. Although state participation was low and many discussions proved more political than legalistic, there was some meaningful progress. This article reviews the debate during this first meeting, describing the meeting itself, recounting the main substantive debates, and discussing the process and challenges going forward.

### II. THE MEETING ITSELF

The first session of the OEIGWG was dedicated to the ‘content, scope, nature and form’ of the instrument and was meant to ‘collect inputs ... from States and relevant

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<sup>1</sup> UN Doc A/HRC/RES/26/9 (2014).

stakeholders on [the] possible principles, scope and elements'.<sup>2</sup> Held in the famous Human Rights and Alliance of Civilizations Room in UN Geneva's *Palais des Nations*, this first session began on 6 July 2015 with a video statement delivered by High Commissioner for Human Rights Zeid Ra'ad Al Hussein and a statement by the Deputy High Commissioner Flavia Pansieri. Shortly afterwards, the meeting elected the Chairperson-Rapporteur who was to oversee the remainder of the OEIGWG. Unsurprisingly, Ambassador María Fernanda Espinosa (Permanent Representative of Ecuador, the main sponsor of Resolution 26/9) was elected unopposed.

The first, and main, controversy of the session occurred when Chair Espinosa opened up debate for the adoption of the session's programme of work. The draft programme proposed seven panel discussions, each covering a different aspect of the OEIGWG mandate. The representative of the European Union (EU) objected to the draft, proposing that: (i) there should be an additional panel entitled, 'Implementation of the UN Guiding Principles on Business and Human Rights: A Renewed Commitment by All States', and (ii) 'TNCs and other business enterprises' should be changed to 'TNCs and *all* other business enterprises' in the text of the programme of work.<sup>3</sup> After most of the states present disagreed with the second proposal, Chair Espinosa called for a break in the session to conduct consultations in order to find a solution to the impasse.

After several hours of private negotiations between states, the meeting was reconvened, and it seemed clear that an agreement could not be reached. States were willing to add a new panel on the commitment to implement the UN Guiding Principles (UNGPs); however, they did not agree to alter the text in the programme to refer to 'all' other business enterprises. Participating states were not keen on an alternative proposal that had been tested with delegations during the lunch break (presented by the EU but originating from an unknown source), which would have added a footnote to the programme of work stating: 'This programme of work does not limit the scope of this intergovernmental working group, taking into consideration several calls to cover transnational corporations as well as all other business enterprises'.

In the end, the original draft programme of work was adopted with the addition of a new first panel on the implementation of the UNGPs.<sup>4</sup> Each day, there were to be two panels. Experts on each panel topic would first present their views on the issue, and then states would intervene, followed by national human rights institutions (NHRIs) and non-governmental organizations (NGOs). Each panellist was allowed closing remarks to clarify certain issues and answer any questions that were raised.

Following its failure to alter the text of the programme of work, the EU did not join the remainder of the session. Many other states were also absent, and others (including some European states) sat silently in the room (many represented only by low-ranking officials

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<sup>2</sup> Ibid.

<sup>3</sup> The second proposal of the EU was meant to challenge a footnote in the preamble of Resolution 26/9 that states that 'other business enterprises' excludes local businesses. The EU had conditioned its participation on four parameters, one of which was that deliberations not be limited to the regulation of only transnational corporations. 'European Perspectives on Business and Human Rights' (19 March 2015), *Permanent Delegation of the European Union to the UN Office and other International Organisations in Geneva*, [http://eeas.europa.eu/delegations/un\\_geneva/press\\_corner/all\\_news/news/2015/20150323\\_bus\\_and\\_hr\\_en.htm](http://eeas.europa.eu/delegations/un_geneva/press_corner/all_news/news/2015/20150323_bus_and_hr_en.htm) (accessed 14 August 2015).

<sup>4</sup> The adopted programme of work can be found at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/PoW.pdf> (accessed 14 August 2015).

or summer interns). Fifty-nine states attended the first day; however, only 35 remained by midweek.<sup>5</sup> Only a handful of states were responsible for almost every intervention: Bolivia, Cuba, Ecuador, Venezuela, China, Pakistan, Russia, and South Africa. Mexico, Brazil, Argentina, Ghana, and Namibia made sporadic interventions.

In contrast to the lacklustre participation by states, other stakeholders were more active. The expert panellists included a range of international organizations, employers, NHRIs, NGOs, scholars, and practitioners. A notable absence was that of trade union representation. To Chair Espinosa's credit, ample time was given to NGO interventions during each panel's debate. The inclusiveness of such a range of stakeholders and the depth of their contributions was considered a high point of the week.<sup>6</sup>

### III. SUBSTANTIVE DEBATES

Over the course of the week, there were eight panels addressing the following topics: (i) implementation of the UNGPs; (ii) principles of the treaty; (iii) scope of enterprises covered by the instrument; (iv) scope of human rights covered by the instrument; (v) obligations of states to guarantee respect of human rights, including extraterritorial obligations; (vi) enhancing the responsibilities of corporations to respect human rights, including prevention, mitigation, and remediation; (vii) legal liability of corporations; and (viii) access to remedy. The following section focuses on debates around the scope of the treaty with respect to the coverage of entities and the violations to be addressed, the legal liability of corporations, and remedies.

#### A. Scope of Enterprises

The first major debate during the opening session regarded the scope of business enterprises that the treaty should cover. Resolution 26/9 called for a treaty to regulate the activities of 'transnational corporations and other business enterprises'. However, presumably to gain enough votes to pass, a footnote was placed in a preambular paragraph of Resolution 26/9 stating, "'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'.<sup>7</sup>

Although this issue was to be debated during panel three on 'scope', some discussion occurred in the context of the EU's second proposed change to the programme of work. The EU had suggested adding the word 'all' before 'other business enterprises' in the text of each panel, though it did not receive sufficient support. The EU's proposal and subsequent drawn-out debate was qualified as obstructionist by some<sup>8</sup> despite the fact

<sup>5</sup> Doug Cassel, 'Treaty Process Gets Underway: Whoever Said it Would Be Easy?', *Business & Human Rights Resource Centre* (13 July 2015), <http://business-humanrights.org/en/treaty-process-gets-underway-whoever-said-it-would-be-easy> (accessed 14 August 2015).

<sup>6</sup> Carlos Lopez, 'International Talks on a Treaty on Business & Human Rights: A Good Start to a Bumpy Road', *Business & Human Rights Resource Centre* (24 July 2015), <http://business-humanrights.org/en/international-talks-on-a-treaty-on-business-human-rights-a-good-start-to-a-bumpy-road> (accessed 14 August 2015).

<sup>7</sup> UN Doc A/HRC/RES/26/9 (2014).

<sup>8</sup> See, e.g., Rebecca Bucherer, 'Day 1, Morning: IGWG on TNCs and other Businesses: No Agreement Reached, Consultations Are Continuing | RIDH's blog', *Treaty Alliance* (6 July 2015), <http://www.treatymovement.com/un-eng/2015/7/6/igwg-on-tncs-and-other-businesses-no-agreement-reached-consultations-are-continuing-ridhs-blog> (accessed 14 August 2015).

that ‘most NGOs, several expert panelists, and [International Organization of Employers] business representatives’ agreed that the ‘treaty should cover all business enterprises’.<sup>9</sup> Indeed, victims do not care and often do not know whether a transnational or local company infringes their human rights, and corporations can easily structure their enterprise so as to act through locally incorporated subsidiaries. The International Commission of Jurists forcefully argued in a paper released before the first meeting that a footnote in the preamble could not limit the scope of discussions or the outcome of negotiations.<sup>10</sup>

Regardless, nearly every state that spoke up during the debate on the programme of work voiced the opinion that the EU’s proposal would change the mandate given by Resolution 26/9. Some argued that a treaty that regulated purely domestic entities would infringe their sovereignty. Additionally, certain states argued that transnational corporations can avoid their obligations by hiding in different jurisdictions while domestic companies are always subject to local laws; thus, only the former should be regulated at the international level.

The issue of the scope of enterprises to be covered by the treaty is far from resolved, although the debate in fact showed a diversity of views. This is likely to remain one of the stickiest issues in the process.

### **B. Scope of Human Rights**

A second debate on ‘scope’ revolved around which human rights violations the treaty should cover. Central to the debate was whether the treaty should address all human rights violations or only gross violations. Surprisingly, there seemed to be universal consensus among all speakers at the OEIGWG that the treaty should be as broad as possible, covering all human rights and violations thereof. Multiple states stressed the universal, interdependent, and interrelated nature of all rights. Furthermore, many stakeholders suggested that the treaty should place a special emphasis on vulnerable groups, such as indigenous populations, children, women, and those with disabilities.

Therefore, at this stage, it seems that there is agreement that the treaty should, in principle, address the whole spectrum of human rights. Some participants argued that there should be different consequences depending on the violation, but it is unclear how such differentiation would be implemented.

### **C. Legal Liability for Business Enterprises**

The seventh panel addressed the legal liability of businesses, in particular what should be the standards for corporate legal liability and for what conduct. Given the breadth of this topic, the discussion was unfocused, and several different points were raised.

Many stakeholders agreed that the treaty should regulate how to establish liability between different actors in the corporate enterprise, including parents, subsidiaries, and supply chain partners; however, specifics were not discussed. A panelist and multiple NGOs suggested that parent companies should be held liable for subsidiaries’ harms unless the parent could demonstrate that it took genuine preventative steps or could not

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<sup>9</sup> Cassel, note 5.

<sup>10</sup> International Commission of Jurists, ‘The Scope of a Legally Binding Instrument on Business and Human Rights: Transnational Corporations and Other Business Enterprises’ (May 2015), <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/Global-Report-ScopeBusinessTreaty-2015.pdf> (accessed 14 August 2015).

have known about the subsidiaries' actions. A few NGOs suggested that liability should extend to those financing corporate abuse; however, a panellist noted that there might be problems establishing the appropriate *mens rea* of financiers.

Given the diversity among states' legal systems and their approach to how to impose liability for legal entities, it was suggested that the treaty leave flexibility to states on whether to impose criminal, civil, or administrative liability for corporations. One panelist contended that international law already requires the criminalization of certain conduct, and, in any new treaty, states should impose criminal penalties or something equivalent on legal entities. Regardless, there seemed to be agreement across stakeholders that holding legal entities responsible for harms should not foreclose the possibility of also holding natural persons liable.

Some states asked how this treaty would interact with investment and trade treaties. One panellist suggested that the treaty could require states to include provisions recognizing human rights in subsequent investment treaties.

In the end, there seemed to be agreement that the treaty should regulate the liabilities of all actors making up a business enterprise and that the treaty should provide for a mix of criminal, civil, or administrative liability. Exactly how the treaty will do this is unclear.

#### D. Remedies

The final panel focused on building mechanisms to increase access to remedy and judicial co-operation. As with the issue of legal liability, this was a broad topic and much was said.

Nearly everyone in the room acknowledged the main barriers to victims' access to a remedy. Legally, these barriers are issues with jurisdiction and the corporate veil; procedurally, the main barriers are access to discovery and the ability to bring class action suits; and practically, the lack of legal aid presents a big challenge for prospective plaintiffs.

Several stakeholders thought that the treaty should lift jurisdictional hurdles to bringing suit, particularly in home states. Some argued for a complementary model in which home state courts could assert jurisdiction if the host state was unwilling or unable to provide access to a remedy. Many acknowledged the need for the treaty to address the inequality of power between corporations and victims and to guarantee legal aid to victims of corporate abuse.

Additionally, many states and NGOs thought that it would be useful to explore the idea of creating some international forum to receive complaints regarding human rights violations by corporations. Whether this means an international tribunal remains to be seen. Overall, there was some agreement on what the treaty should or could address. This may allow for a more focused and nuanced debate in subsequent meetings.

### IV. THE ROAD AHEAD

The second session of the OEIGWG is to be held sometime in 2016.<sup>11</sup> As with the first session, it is supposed to cover the content, scope, nature, and form of the proposed

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<sup>11</sup> Draft Report of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (10 July 2015) para. 90, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Draftreport.pdf> (accessed 14 August 2015).

treaty. In the report adopted *ad referendum* at the end of the first meeting, Chair Espinosa recommended that ‘informal consultations with governments, regional groups, intergovernmental organizations and UN mechanisms, civil society, as well as other relevant stakeholders, be held ... before the second session’.<sup>12</sup>

Such consultations should aim to increase state and stakeholder participation going forward. If a treaty is to successfully regulate corporate abuse and benefit the victims of such abuse, it will need broad support, particularly from those Western states that are home to most transnationals. In this regard, there should be further debate regarding the scope of enterprises to be covered and the legal force of the footnote to Resolution 26/9.

Stakeholders should also focus their positions before the next session. Many issues were raised during the substantive debates of the first meeting, but in order for talks to progress, the contours and contents of the debates should be refined so stakeholders can form more concrete positions in the next rounds.

## V. CONCLUSION

While the first session of the OEIGWG had its downfalls, it established a general framework that will be useful going forward. The level of state participation was limited but respectable, and business presence was to be noted as well as trade union absence. Now that particular issues are put on the table, states have time to reflect and to develop their positions, and perhaps those states that sat on the sidelines will speak up during the next session.

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<sup>12</sup> Ibid.