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# THE WAY AHEAD FOR THE TREATY PROCESS ON TRANSNATIONAL CORPORATIONS WITH RESPECT TO HUMAN RIGHTS | LUIS ESPINOSA SALAS<sup>1</sup>

## O CAMINHO A SER PERCORRIDO PELO PROCESSO DO TRATADO EM CORPORAÇÕES TRANSNACIONAIS E DIREITOS HUMANOS

In June 26<sup>th</sup>, 2014, the Human Rights Council of the United Nations (HRC) adopted resolution A/HRC/RES/26/9<sup>2</sup> (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 transnational corporations regarding human rights has been included in the multilateral agenda for more than forty years in different fora, and the fact that in this period some attempts have failed in the purpose to issue general international rules on this respect, such as the United Nations Code of Conduct<sup>3</sup> and the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights,<sup>4</sup> until now the only proposals have restricted to the adoption of non-binding rules, such as the United Nations Guiding Principles on business and human rights (UNGPs), endorsed by the same HRC,<sup>5</sup> or the International Labour Organization (ILO) Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration).<sup>6</sup> These efforts have included regional

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<sup>2</sup> Human Rights Council, resolution A/HRC/26/9 "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", adopted on 26 June 2014. Link: <[http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/26/9](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9)>.

<sup>3</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, Taylor and Francis Group publishers, London and New York, 2015.

<sup>4</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>5</sup> Human Rights Council, resolution A/HRC/17/4 "Human rights and transnational corporations and other business enterprises", adopted on 6 June 2011.

<sup>6</sup> This Declaration was adopted by the ILO Governing Body in November 1977, and has been amended in 2000 and 2006. Currently, a new process of amendments is taking place, and a renewed version will be delivered during 2017.

or other initiatives limited to groups of countries, such as the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.<sup>7</sup>

In this very general framework, Ecuador, together with South Africa and other co-sponsors, presented resolution 26/9 to the consideration of the HRC members at the twenty-sixth session of the Council (Geneva, 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 by 20 votes in favor, 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 forty-seven Members of the HRC have two democratic mechanisms to adopt resolutions: either by consensus or by vote. It must also be taken into account that in the HRC language and procedures, consensus does not mean “unanimity”, but only the lack of a public and official opposition to support an initiative. At the HRC, consensus reflects a common feeling of comfort of its Members, and if it is not reached, HRC members may vote a resolution and a single majority is needed for its adoption. Moreover, around thirty percent of resolutions are adopted by vote at the HRC,<sup>8</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, 32/2, on the “Protection against violence and discrimination based on sexual orientation and gender identity”<sup>9</sup> (SOGI resolution) or 31/32, “Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights”,<sup>10</sup> both of them which have been duly implemented by the HRC.

Among the triggers for resolution 26/9, evidence showed – and still does – 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 big part of those abuses remain in impunity, and non-binding rules, while useful, have not been enough

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<sup>7</sup> The OECD Guidelines for Multinational Enterprises were adopted in 1976, and have been updated many times, the last one in 2011. Currently, 35 countries are members of the OECD.

<sup>8</sup> To confirm this number, since session 22 (25 February to 22 March 2013) to session 31 (29 February to 24 March 2016) of the HRC, a total of 341 resolutions were adopted; 107 by vote (31.06%) and the rest by consensus. Data obtained by the author from the HRC webpage, <<http://www.ohchr.org/EN/Pages/Home.aspx>>.

<sup>9</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 favor, 18 against and 6 abstentions.

<sup>10</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 favor, 6 against and 8 abstentions.

to bring justice to victims. This reality contrasts with the broad protection provided to transnational corporations 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, no matter if the measure was taken on behalf of the protection of the rights of the population, as it 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>11</sup>

Following resolution 26/9, the open-ended intergovernmental working group was established at the beginning of its first session, held at Geneva, from 6 to 10 July 2015,<sup>12</sup> and the second session took place from 24 to 28 October 2016,<sup>13</sup> both under the chairmanship of Ambassador María Fernanda Espinosa, Permanent Representative of Ecuador to the United Nations 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 the 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 one, 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 in the contents of the footnote of resolution 26/9, which expressly states that “Other business enterprises” refers to “all business enterprises

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<sup>11</sup> The claim was presented by Philip Morris on the basis of Article 10 of the Agreement between the Swiss Confederation and the 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.

<sup>12</sup> See: Human Rights Council: “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”, document A/HRC/31/50, distributed on 5 February 2016, link: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/018/22/PDF/G1601822.pdf?OpenElement>.

<sup>13</sup> See: Human Rights Council: “Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights”, document A/HRC/34/47, distributed on 4 January 2017, link: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/000/94/PDF/G1700094.pdf?OpenElement>.

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 the inclusion of all business enterprises, without distinctions. Scholars and experts have contributed actively to provide possible ways out to these concerns, but as usual in this kind of negotiating processes, together with a reasonable legal technical proposal, political will of Parties will play a major role to overcome this challenge.

Other issues have also captured attention in the debate and will need more reflection and discussion. They refer to the scope of human rights to be included; the obligations of States, including extraterritorial obligations; the legal liability and responsibility of TNCs towards human rights; and the need for national and international mechanisms for access to remedy. These are also challenges that lie ahead and will need a careful management in the negotiations.

The second session had a broader and significant participation, showing that the process has gained momentum and traction, and the expectancies have grown, as 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", as provided in paragraph 3 of resolution 26/9. In fact, the 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.

It is worth to mention 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 in the contribution that a legally binding instrument may mean to avoid or reduce cases of corporate impunity. In this field, strong attention has been put in the protection to be provided to vulnerable groups, such as women and girls, children, persons with disabilities, indigenous peoples, among others, as they are usually the most affected by business enterprises' abuses. Among the many actions taken by the civil society organizations on behalf of the process, they have advocated for a binding treaty, raising awareness among governments, but they 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 organized in all the continents.

Other stakeholders in this process have been international organizations, intergovernmental organizations, 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 to the rules of the HRC for this kind of working groups, and their voices have enriched the discussions.

It is also worth to clarify that the treaty process does not have any intention to affect neither investment, nor trade, nor any way in which the private sector may

contribute to the economy of countries. The purpose on the contrary, is to provide a set of clear, general and common rules which will provide predictability and transparency when making businesses, respecting human rights at the same time, everywhere the activities take place. As evidence shows, serious business enterprises are not against a binding treaty,<sup>14</sup> as it is in their interest to play with the same rules, and to avoid an unfair competition with those who increase their profits at the expense of child labor, labor exploitation, environmental damage, slavery or semi-slavery working conditions, forced land evictions, menaces, tortures and even killings, among many other violations to human rights.<sup>15</sup>

Under this very general framework, the way forward is envisaged as a needed, 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, but moreover, it will contribute with options to better protect internationally those who historically have been affected by the abuses of transnational corporations and other business enterprises.

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<sup>14</sup> See: The Economist Intelligence Unit: "The Road from Principles to Practice. Today's challenges for business in respecting human rights", 2015.

<sup>15</sup> Among the many books and documents about human rights abuses perpetrated by transnational corporations, a recommended book is "*Juger les Multinationales*", Éditions Mardaga, Brussels, 2015, written by Eric David and Gabrielle Lefèvre. This book includes short summaries and legal commentaries of cases involving transnational corporations such as Monsanto, DoeRun/Renco, Pacific Rim, Glencore, Chevron/Texaco, Shell, Union Carbide, Samsung, Syngenta, Nestlé, Coca-Cola, among others.



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