

Procedure and Format

Options for an UN Treaty on Business and Human Rights

by Harris Gleckman¹

In 2014, following a resolution initiated by Ecuador and South Africa, the Human Rights Council of the United Nations (UNHRC) decided by a majority vote to establish a process to create a human rights treaty to regulate business activity.² Since 2015, the open-ended inter-governmental working group on transnational corporations (TNCs) and other business enterprises (OBEs) with respect to human rights (OEIGWG) has convened three times, and substantial discussion about the scope and content of the prospective treaty has taken place.³ It is now time to explore the possible forms of such an instrument and set out the options for the way forward in the process. Good rules and procedures can make treaty negotiations move more effectively forward and open doors to getting the best advice and text into an agreement.

The substance of an agreement and the procedures to achieve that agreement are closely inter-connected. Consequently, this paper has three parts. The first and second parts look at the choice of contents and format of the agreement. The third part provides options for the institutional settings needed with regard to a bureau, the HRC Secretariat, the relationship to other UN entities and processes, and the financial questions to be solved. It also elaborates on the options for the drafting process itself with regard to the drafting of the text, the structure, and the timetable of negotiations. The third part further assesses the options for participation of civil society organizations and business.

Before exploring some of the options for negotiating a prospective binding instrument, the following aspects on negotiation rules and procedures at the UN should be taken into consideration:

- » No two negotiations for a treaty, convention, or major policy declaration follow the same rules.
- » There are formal rules, informal rules, unwritten rules, and new practices and rules created during each major negotiation. Over the past 25 years, experimentation with new rules and practices has become commonplace.

- » One formal rule is that only governments vote. Some negotiations support majority voting, some apply a consensus decision-making system based on a 'no objection' by any government to the Chairs proposal, and some use unanimous agreement but call it 'consensus decision-making'.
- » One informal rule is that all practices are ok, providing that no government objects. Governments which see the need to take advantage of the best thinking in a room may well be more relaxed to have a flexible interpretation of any rule, as long as it is understood that it does not 'represent a precedent', which of course it does.
- » One unwritten rule is 'nothing is agreed until everything is agreed'. Consequently the longer and more complicated the text, the greater the possibility that differences on some section of the text can obstruct the approval of the text as a whole.

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² See the resolution of the Human Rights Council A/HRC/RES/26/9.

³ See report on the third session, Seitz (2018).

- » One way to create new rules is to simply start a new practice until it becomes a formal rule, an informal rule or an unwritten rule.

1. CONTENT:

What should be in the treaty, and how should it be structured?

The substance of an agreement and the procedures to achieve it are closely interconnected.

In September 2017, Ecuadorian Ambassador Guillaume Long, Chair-Rapporteur for the third session of the UN working group, proposed a collection of ten elements as key components for a new treaty based on discussions at the previous sessions (see Table below for the list of the draft elements). Numerous civil society organizations have also made comprehensive proposals for elements of the prospective treaty.⁴ The Peoples Treaty, for instance, drafted by the Corporate Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity proposed a different structure. It also begins with a first chapter on the general framework, followed by a section on transnational corporations' obligations, states' obligations within the scope of this treaty, obligations of official international economic and financial institutions and regarding trade and investment agreements, international monitoring and enforcement mechanisms, international cooperation mechanisms for investigations, enforcement of rulings and jurisdiction, access to justice and remedy, mechanisms of participation in the present treaty, and a final chapter on final provisions.⁵

The first political choice is to decide how the prospective treaty should be structured, and which key elements it should include. Based on informal consultations and comments made by states on the draft elements, Ecuador announced that it intended to evaluate the political support for different proposals and develop a draft legally binding instrument to be presented at the fourth session of the UN working group in October 2018.⁶

Elements for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights (29 Sept 2017)

1. General framework
2. Scope of application
3. General obligations
4. Preventive measures
5. Legal liability
6. Access to justice, effective remedy and guarantees of non-repetition
7. Jurisdiction
8. International cooperation
9. Mechanisms for promoting, implementation and monitoring
10. General final provisions

Source: Chairmanship of the OEIGWG (2017).

2. FORMAT:

What type of agreement should be drafted?

The second political choice is what type of agreement governments should enact. A treaty can be (a) one where all major elements are worked out during the negotiation process and approved by ratification in a minimum number of countries; (b) one that is a framework convention where detailed provisions and implementation arrangements are done after the initial ratification process; and (c) one where the negotiators and potential ratifying countries involve all UN member states or just those that are more committed to and more likely to adopt a new treaty. Each of these choices is described in more detail below.

A. A treaty with detailed sections on all elements.

The draft elements presented by Ecuador and the Peoples Treaty are both written in the spirit of a convention with detailed sections. The UN Convention against Corruption (UNCAC) can be considered as precedent for such a detailed convention.

In the Ecuadorian draft elements, there are five detailed sections plus the introductory and concluding sections. As each of the detailed sections is a groundbreaking conceptual position, delegations

4 Cf. www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/WrittenContributions.aspx.

5 Cf. www.stopcorporateimpunity.org/wp-content/uploads/2017/10/Treaty_draft-EN1.pdf.

6 Cf. Chair-Rapporteur (2018).

would need to solve a range of politically, legally and procedurally difficult issues, all of them against the backdrop that any enforcement of rules, investigations, or claims for jurisdiction will most likely benefit citizens and businesses in one group of countries and be costly for businesses in another group of countries.

The fifth section of the draft elements would define legal obligations for actions that could result in civil liability, for actions that could result in administrative liability, and for actions that could result in criminal liability. The section would also have to define those circumstances that could be subject to extra-territorial jurisdiction.

In short, each of the five substantive sections is an almost independent treaty negotiation in and of itself. Negotiating one agreement covering all these subjects will be a complex process that will require sufficient negotiation time for each 'separate' treaty subject as well as time for unexpected issues that link these sections.

Once the substantive sections of a treaty are on their way to agreement, the negotiators will turn their attention to the concluding sections. In the draft elements presented, this includes Section 9. Three main issues will need to be decided in this phase: (1) how to keep the treaty up to date with on-going developments after the treaty is ratified; (2) what happens when a party to the treaty does not implement the agreement; and (3) what role a prospective secretariat of the new treaty body or the HRC Secretariat should play in implementing the agreement.

On the first question, delegations will need to decide if they prefer to have a self-executing agreement (one that is premised on the view that the agreement is clear enough that governments can implement it domestically without further need for intergovernmental debate) or if they should include a provision and ground rules to establish an on-going Conference of Parties (the 'COP') that meets regularly after the adoption of the treaty. On the second question, delegations will need to decide if the agreement is without sanctions on the parties (as in the Paris Agreement of the UN Framework Convention on Climate Change, UNFCCC), if periodic public peer review, perhaps by an independent party, will ensure appropriate implementation, or if (as in the case of the Montreal Protocol on Substances that Deplete the Ozone Layer) there is a trust fund and a trade sanction provision. On the third issue, delegations will need to decide

if the treaty body secretariat will be asked to establish a complaints procedure or if they should be undertaking implementation surveys and preparing proposals for advancing the goals of the agreement.

The potential complexity of a detailed agreement is also one of its potential strengths. A public negotiation process over a number of years allows the issues to get aired in a regular pattern over an extended period of time. It also means that the evolution of new international law is made in a deliberative manner, examining issues, and the consequences of particular solutions to these issues sufficiently well that when the agreement does come into force it will be able to operate effectively.

Even if a final text is not adopted, the public debate on the range of key issues can force action in a number of different countries and encourage regional agreements to incorporate some of the provisions, drawing on the experiences and knowledge gained from the international negotiations on the substantive issues. Each time that the negotiations sessions are held, government officials in Geneva and in capitals, civil society organizations, the international media, and university research bodies will be prompted to take another look at the issues on the agenda for that session and take positions on matters they might not otherwise have considered sufficiently urgent without the demands of participating in an ongoing international negotiation.

The downside of a detailed treaty, particularly one in an area with little related international precedents, is that it is more likely for governments to identify more chapters and paragraphs which they disagree with and which can prevent the adoption of a draft text (one of the unwritten rules). The case of the Code of Conduct on Transnational Corporations of the former UN Centre on Transnational Corporations (UNCTC) (1975-1992) is illustrative. Even though the negotiators had agreed in principle that the Code would not be binding and would be self-executing, disagreements on three provisions (by the UNCTC Secretariat's estimate, less than 5% of the text), prevented the text from being transferred to the UN Economic and Social Council (ECOSOC) and the UN General Assembly for adoption.

B. A framework convention

The Vienna Convention for the Protection of the Ozone Layer, Convention on Biological Diversity, and the UNFCCC can all serve as examples of framework agreements, with the Montreal Proto-

col, the Cartagena Protocol, and the Kyoto Protocol, respectively, negotiated and adopted to implement these three conventions.

If the draft Ecuadorian elements presented were used as the basis for a framework convention, the treaty would have the following provisions: 1. General Framework; 2. Scope of application; 3. General obligations; 9. Mechanisms for promoting, implementation and monitoring; and 10. General final provisions. The remainder of the draft element provisions could later become matters decided by the Conference of Parties or separate operational protocols, like those used in the conventions cited above.

The advantage of a framework convention is that negotiators can articulate broad principles and practices that should be followed without having to clarify all the implementation requirements and legal consequences of the broad principles. Any adopted framework treaty could for the first time clearly establish binding rules that will require transnational corporations and other business enterprises to respect human rights in their operational activities and that TNCs and other business enterprises become subject to international law. This would fundamentally change the international landscape as there have so far been no binding conventions governing TNCs, let alone TNCs and human rights. However, the fact that governments are opting for a framework convention without the implementation elements does not make the negotiating process any simpler.

For example, a binding framework treaty would still have to decide who is obliged to respect the provisions of the treaty: governments, TNCs, TNCs and other business enterprises, or some hybrid combination. In other words, should the principles include direct obligations on governments with no direct obligations on TNCs, direct obligations on both governments and TNCs or on TNCs and other business enterprises?

A second reason for why even negotiating a framework convention will be challenging is that the qualification of the principles is often at the heart of the matter. If one asserted that TNCs were expected to follow all international human rights laws, this principle might need to be qualified by saying which statements in existing international human rights law that require states to act now apply to TNCs or that as international human rights law is indivisible, how certain provisions could apply to states and other provisions only to TNCs.

Thirdly, governments have to decide on how the implementation procedures and the further explanation of the legal principles are to be developed. In the three examples above, the protocols were separately negotiated and submitted to governments for a separate round of ratification. However, the Montreal Protocol itself created an innovative procedure for supplementing the ozone-depleting chemicals referred to in the annex, with an agreement that the COP could ‘amend’ the annex without going back to governments to ratify changes in the agreement. In the case of a new agreement on TNCs other business enterprises and human rights, this approach could mean that the framework convention could include as annexes all the provisions that governments are now able to agree and that future sessions of a COP can supplement the annexes whenever there is a newly agreed obligation on business enterprises or other parties.

C. A universal or a plurilateral agreement

Almost all international treaties and conventions are drafted with the expectation that they could be ratified by all UN member states. Ratification processes vary by country. One way or another, each country has a final approval step before any treaty or convention becomes legally binding on them. Negotiators have this in mind when they examine a provision. Along with the other provisions in the text, is it one that is likely to pass through their national ratification processes?

They also have in mind an earlier step in the approval process: Will the text be acceptable to their Ambassador and Foreign Minister when the text emerges from a UN negotiating group and goes for approval by the next higher intergovernmental body (in this case the Human Rights Council) and later by the General Assembly? As it is a strong statement that all governments have adopted new additions to international legally binding law, this universal open process is the operating international norm. Even when the universal approach is used, a government will still have a final opportunity during the ratification process to announce how it seeks to limit or interpret key provisions of the treaty.

In the trade regime, there are occasions when the negotiators know from the start that there is not universal support for an agreement, no matter what the provisions themselves say. In these cases, governments may negotiate from the beginning a plurilateral agreement with only the group of countries which the negotiators believe may be able to ratify the final document.

They can opt for this route for three reasons: (1) The lead negotiators recognize that they are working on a subject that is more important to some countries than it is to other countries and that, if the countries with a lower level of interest in the topic of the agreement participate in the negotiations, they are likely to drag out the process without any benefits to those who consider the subject an important matter for international agreements. (2) The lead negotiators want a ‘high level ambitious’ agreement which may not be desired by most other governments. (3) If governments which are not likely to ratify the agreement are involved in the negotiation they may well spend time watering down the agreement on the pretext that they might get a text that could be ratified, but intending the final text to be too weak to become effective.

The upside of a universal agreement, if one can get one, is that both home and host countries would be involved from the beginning of the implementation process. The upside of a plurilateral agreement is that a strong statement of international law can become an established fact and that subsequently other governments can join the high level agreement. The downside for a plurilateral agreement is that key TNCs may well threaten to leave host countries which have adopted an agreement on how to internationally settle cases of remedy from human rights abuses.

3. DRAFTING PROCESS: Which institutional settings are needed, how should the drafting process be structured, and which roles should different actors play?

Each intergovernmental body is the master of its own rules and procedures. The two exceptions are that a higher intergovernmental body can instruct a lower body to use various rules and procedures and that anything that requires the expenditure of UN resources has to be approved by the UN budget office and the UN General Assembly.

Many of the ground rules for the OEIGWG can be set by the working group itself. If there is a bureau (see below), then the Chair-Rapporteur and the bureau can work out a set of ground rules and procedures for the working group’s own approval. If any government in the OEIGWG or the HRC wishes, it can also make proposals for ground rules.

3.1 Institutional settings

The role of the bureau

A bureau can perform many functions. It can assist the Chair-Rapporteur to frame issues appropriately; it can convey to the Chair-Rapporteur concerns from regional groups or individual countries; it can serve as an on-going working platform between sessions of the OEIGWG; it can assist pre-negotiating the text before it appears in a formal document; and it can formulate compromises on the text and on procedures for approval by the OEIGWG. The bureau can also obstruct the functioning of the process by blocking decisions on crucial matters.

Current situation: The OEIGWG does not have a bureau.

Future options for the process: A bureau can be composed in a number of different ways. The most common format is to have the members elected by the UN’s regional groups. It is also possible for the Chair-Rapporteur with the support of the OEIGWG to propose (a) that the bureau consists of vice Chair-Rapporteurs who will lead in negotiating chapters of the treaty, (b) that the bureau as a whole will assist the Chair-Rapporteur in drafting proposed text for the treaty, (c) that the bureau includes as non-voting members technical legal advisors, and (d) that the bureau includes as non-voting members representatives of key non-governmental constituencies participating in the OEIGWG.

The role of the HRC Secretariat

The Office of the High Commissioner on Human Rights (OHCHR) serves as the HRC Secretariat and officially ‘serves’ intergovernmental meetings, responds to ‘requests’ to draft papers, provides ‘briefings’ on technical or legal issues and helps the Chair-Rapporteur identify participants for an intergovernmental meeting. However in practice, the HRC Secretariat is independent of the Chair-Rapporteur and can be considered as an independent actor in the negotiation process, even if this is not an officially recognized role.

Current situation: The HRC Secretariat is so far not holding any particularly supportive role in the process.

Future options for the process: The HRC Secretariat could be asked to (a) take on a range of tasks for which it needs to assign staff time (2–4 professional staff working on a convention part-time is

not unusual); (b) to retain consultants to prepare background papers on a series of specific topics that could assist the negotiation process; (c) to undertake a public educational effort to help the wider public recognize the necessity of the proposed treaty; (d) to seek and supervise extra-budgetary funds to assist groups of developing countries to send delegations from their capitals and/or to assist southern civil society organizations (CSOs) to attend the negotiations or (e) to convene retreats and special meetings for delegates and others active in the negotiation process to understand better the complexities of a proposed provision of the treaty and to develop a compromise text on that section.

Relationships with other UN processes and entities

No negotiation takes place in a void. Over the lifetime of the negotiations, there are intergovernmental negotiations (sometimes involving exactly the same delegates) on a trade matter that has human rights connections, on a General Assembly resolution that addresses the role of TNCs in implementing the Sustainable Development Goals (SDGs), or in a regional forum that impacts the willingness (or non-willingness) of delegations to address issues before the OEIGWG. In addition new public scandals about human rights abuses by business enterprises as well as social, political, economic or environmental crises can add urgency to or draw attention away from the negotiations.

Current situation: Unusually, the HRC has two subsidiary bodies that address TNCs, OBEs and human rights. In addition to the intergovernmental working group to elaborate a legally binding instrument (OEIGWG), in 2011, the HRC established the expert Working Group on the issue of human rights and transnational corporations and other business enterprises by Resolution 17/4. Its mandates were renewed in 2014 and 2017 and focuses mainly on the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs). It is rather atypical to have two intergovernmental processes running simultaneously under one parent body.

Future options for the process: The HRC could decide (a) to keep both processes working independently; (b) that the OEIGWG should concentrate on a formal solution to the remedy portion of the UN Guiding Principles on Business and Human Rights and that the yearly UN Forum on Business and Human Rights concentrates on the other principles of the UNGPs; (c) that both intergovern-

mental processes are merged with the negotiation for a treaty. It is also possible that the OEIGWG may want to establish formal connections to (a) the mandates of specific Special Representatives; (b) the World Trade Organization (WTO) and the UN Conference on Trade and Development (UNCTAD) on the potential trade-related aspects of the binding treaty; or (c) with the UN Department of Economic and Social Affairs (UN DESA) or other New York-based UN entities on how the treaty could help advance the SDGs.

Financial resources

Without adequate financial resources, it is unlikely that a new binding treaty on TNCs and human rights will come into existence.

Funding of the work of the OEIGWG can come from the regular UN budget and from extra-budgetary contributions to the HRC Secretariat from member states and other donors. Each of these sources of money can be used to cover different components of the cost of the negotiations.

Some items that could be financed from the core UN budget and/or extra-budgetary contributions from member states are resources for outreach work, support to Least Developed Countries (LDCs) to bring delegates to the inter-governmental negotiations, support to assist non-governmental organizations (NGOs) from developing countries in participating, extra staff time and/or consultants to draft and figure specific legal issues.

The UN budget process is largely independent from the policy-making process. The first implication of this is that different intergovernmental bodies design programs and formulate policies from those intergovernmental bodies that approve the financing related to these programs and policies. The UN budget is a two-year budget; the current budget covers expenses for 2018/2019. The explanation below is related to a new project from an intergovernmental body. The process for the development of the multi-year regular program budget for an office shares many of the same steps, but it takes place over the course of the first year of a new biennium budget.

In the case of the Human Rights Council, which is identical for other high-level intergovernmental bodies in the UN, the first step is to have a draft action that 'decides' that the Human Rights Council is going to take some action as an intergovernmental body (i.e. hold a meeting) or that it will 'request'

the Secretariat to do some work for that intergovernmental body (i.e. undertake a study). Once that draft is read for consideration by the intergovernmental policy body, the HRC Secretariat prepares a draft statement laying out the likely costs involved in meeting the intergovernmental request or decision. This draft includes estimates of the number of conference days needed, the amount of consultant services needed, the amount of temporary UN staff time needed, and the amount of UN staff travel expected. This internal HRC paper indicating the program budget implications of the proposed action by the intergovernmental body is then submitted to the UN budget office.

The UN budget office examines the HRC paper from two perspectives. First with regard to the question of whether the items and costs identified are necessary in the eyes of the UN budget office to meet the requirements of the proposed intergovernmental action; and second what the aggregate costs of other program budget implication statements from across the UN are that the UN is being asked to finance in a given year. After discussions between the HRC Secretariat staff and the UN budget office, the latter prepares a formal program budget implementation statement (PBI).

A representative of the HRC Secretariat presents this PBI to the intergovernmental meeting before a final vote is taken on the proposed action. The intergovernmental Human Rights Council meeting is not in principle allowed to discuss the contents or total budget statement. It is provided for information only.

If the intergovernmental body then goes forward and adopts the action, the PBI statement becomes the initial document for the final stages of the funding review process in the General Assembly. The General Assembly funding process starts with a discussion about the PBI by the major contributing donors to the UN in the Advisory Committee on Administrative and Budgetary Questions (ACABQ). The HRC Secretariat officer and the relevant UN budget officer introduce the PBI to the ACABQ and answer any of their questions on the proposed activity and its financing.

As the UN budget office, the ACABQ assesses the PBI with two different frameworks in mind. Firstly, is there any possibility of transferring previously appropriated funds in the HRC budget to implement the new intergovernmental resolution (the UN budget office may also make a similar review); and secondly, what impact will this individual PBI

proposal and the aggregate cost of PBIs generated from other intergovernmental bodies mean for the obligatory contributions of the member countries? While the ACABQ membership consists of government representatives of major donors, its views on the PBI are only recommendations to the UN General Assembly's Administrative and Budgetary Committee (Fifth Committee), whose membership reflects all the countries in the UN.

In the Fifth Committee, the HRC officer and the relevant UN budget officer again introduce the PBI. The Fifth Committee assesses the proposal with regard to the questions (a) are this activity and the budget costs really necessary; and (b) how does it fit within larger UN budget debates? The outcome of the Fifth Committee debate on the PBI, unlike the ACABQ, is a comprehensive budget recommendation to the UN General Assembly that balances the whole range of regional and national budget concerns.

Current situation: During the negotiations on the UN budget for 2018/2019 in the Fifth Committee at the end of December 2017, some member states, including the European Union (EU), tried to prevent the proposed resources for the continuation in 2018 of the OEIGWG – without success. Small core budget support for the OEIGWG in 2018 was secured. The budget only allows for a one-week meeting in 2018 and HRC staff for support work for that week. Currently, most NGOs provide resources to cover their own participation in the negotiations.

Future options for the process: As the entire UN system is facing a serious divergence between the responsibilities delegated by governments to it and its financial resources to fulfill these tasks, there will be a lot of pressure to limit the size of the OEIGWG budget and the growth of the overall UN budget. It is necessary to clearly define what should be financed from the regular UN budget, what could be financed by extra-budgetary grants to the HRC Secretariat for the work of the OEIGWG, and what could be financed by other donors, such as bilateral agency grants to CSOs to support the work of the OEIGWG.

3.2 Drafting options

Drafting the text

To negotiate a treaty, lots of preliminary, semi-final, and working drafts have to be drawn up. The initial proposal for the language of the treat-

ty can be prepared by the Chair-Rapporteur on her/his own initiative, by the UN Secretariat for the Chair-Rapporteur to submit on behalf of the Chair-Rapporteur, by the HRC secretariat on request from the OEIGWG, by members of a bureau, by any delegation or combination of delegations, and by non-governmental bodies who can convince a government to submit their draft as a working text. As the Chair-Rapporteur and, sometimes, members of the bureau will be involved in drafting potential compromise texts, it is often better if the first draft is not prepared by these delegates as well.

Once there is a working text for the agreement or for significant chapters of the agreement, delegations can request that the HRC Secretariat prepares a compilation text (reflecting all the interventions made by governments), a bracketed text (reflecting the additions and deletions proposed by individual governments as well as those provisions generally accepted by delegations), a text with options to resolve differences between positions, or a Chair-Rapporteur sponsored effort to recommend compromise text.

Current situation: The Ecuadorean Chair-Rapporteurs, drawing on the resources of their own delegation, have drafted elements of the prospective legally binding instrument and presented them three weeks before the third session of the OEIGWG in October 2017.⁷ They were based on the debates of the two previous sessions of the OEIGWG in 2015 and 2016. At the conclusion of the third session, the Chair-Rapporteur asked the OEIGWG for its support in permitting the Chair-Rapporteur to prepare a zero draft to be presented four months before the fourth session in October 2018. The OEIGWG instead asked the Chair-Rapporteur only to consult with governments on the way forward on the elaboration of a legally binding agreement.⁸

Future options for the process include (a) the Chair-Rapporteur can continue to prepare all major texts with the support of their delegation; (b) the Chair-Rapporteur can ask the HRC Secretariat to assist in preparing a draft text which the Chair-Rapporteur may use; (c) the Chair-Rapporteur can ask the HRC Secretariat to take the lead in drafting text on its own responsibility; (d) the Chair-Rapporteur can invite members of the prospective bureau to take responsibility to draft selected chapters of the text; or (e) the Chair-

Rapporteur can convene a high-level advisory panel to assist him/her with the drafting of sections of the text.

Structure of negotiations

Every 'issue' has some technical aspects and some political aspects and the boundary between the two is not clear. In the prospective treaty, there are lots of technical legal issues that arise from differences in national legal regimes, and there are lots of political issues arising from trying to write rules to govern globalization.

Current situation: The OEIGWG had one-week public sessions in 2015, 2016, and 2017.

Future options for the process: If the OEIGWG bases its negotiations on the draft elements presented by Ecuador, a one-week session for the next five years would mean 25 sessions for negotiations. As there are 10 sections in the current draft elements proposal, this would mean that each chapter would have to have a preliminary read, a detailed second read, and a final conclusion in 2 ½ days. It is an understatement to say that this is unrealistic.

As a point of comparison, the Agenda 21, the outcome document of the UN Conference on Environment and Development in Rio de Janeiro in 1992, evolved over three years with one month of negotiating sessions, each time meeting in two parallel plenary sessions. The World Health Organization's (WHO) Framework Convention on Tobacco Control (FCTC) had around two weeks of plenary meetings twice a year plus three working groups.

There are two major options for the OEIGWG: to extend the single week annual sessions to two to three weeks a year and/or to host interim technical sessions on each set of technical issues in order to pre-negotiate potential solutions to these technical matters. The full annual sessions, involving delegations from capitals and Geneva-based missions, would review the work of the interim technical session (often termed *inter-sessionals*) and grapple with the outstanding political issues that need to be resolved in the treaty. The interim working sessions, one to two weeks per year, would allow time for the experts, in this case mostly those government officials based in Geneva missions, to attempt to devise solutions to some of the more complex technical matters.

A supplemental choice by the OEIGWG would be to move to more informal sessions to permit del-

⁷ Cf. Chairmanship of the OEIGWG (2017).

⁸ Cf. Chair-Rapporteur (2018).

egations to convey their own views, particularly where they have not received formal instructions on a particular provision. These more informal sessions, held in place of formal plenaries or as retreats, could have their own working papers and could involve external experts and members of civil society.

Calendar for negotiations

Control over the calendar is crucial. Too little time to review papers beforehand means that delegations cannot get adequate instructions from their missions or capitals. Too little time for plenary sessions means that crucial issues have to be delayed to subsequent sessions. Too much time between sessions means that participants, both governments and civil society organizations, forget where the discussions are on specific passages and have to almost start over again.

A second aspect of the control of the calendar is whether the OEIGWG or the HRC sets a target completion date or leaves the process to evolve according to its own internal dynamics. An interim reporting date, for instance of three years, would mean that the OEIGWG can get on with its work without stopping for annual reviews. A final completion date, for instance of five years, means that the negotiators may have a calendar-created urgency to complete their work in a timely manner.

Current situation: The HRC Secretariat has scheduled the fourth session of the OEIGWG for October 15–19, 2018. The OEIGWG asked the Chair-Rapporteur to consult informally with governments on the way forward. On the occasion of the presentation of the report of the third session of the OEIGWG to the HRC on March 8, 2018, Ecuador affirmed that it would host informal consultations with governments, academia, civil society organizations and business representatives and reiterated its view that it was prepared to present a draft text of the legally binding instrument four months before the fourth session.

Future options for the process: If there is a consensus from these consultations on how to proceed, the Chair-Rapporteur can report this to the HRC and seek their agreement with the related operational elements (e.g. timing of meetings, requests for staff support, etc.). If the HRC agrees with the consensus and the proposed operational elements, the budget implications of the operational elements will be addressed by the UN budget office and the General Assembly.

Amongst the calendar elements that could be included in the consensus recommendation is (a) a provisional date for completing the negotiations on the binding treaty; (b) a schedule for reporting from the OEIGWG to the HRC on the status of the negotiations; and (c) reference to how many days of sessions a year should be scheduled.

If there is no consensus from the consultation, the Chair-Rapporteur can report this to the HRC, which may (a) request that the Chair continue consultations, (b) accept the Chair-Rapporteur's own recommendation on how to proceed, a possibility if there are only a limited number of governments objecting to a consensus view of most governments; or (c) decide not to proceed further with a stand-alone treaty at this time.

3.3 Participation of other actors

Role of NGOs and CSOs

As an informal rule, it is widely understood that civil society organizations are part of the negotiation process for any treaty, convention, or major policy statement. Each event has to balance this informal rule with the formal rule that only governments take decisions. Each government may invoke formal rules in its own interest, depending on how they see civil society providing needed expertise, how it sees civil society advocating positions contrary to its national positions, how it considers civil society as providing positive publicity for the negotiations, and how it expects civil society to influence events in its own country.

Current situation: Only NGOs with ECOSOC consultative status can participate at the OEIGWG. The HRC takes the category of ECOSOC accredited NGOs very seriously. It is probably the only non-ECOSOC intergovernmental body that requires that civil society participate exclusively under ECOSOC access rules. Other UN entities establish special approval rules for NGOs which have a focused concern on the topic of the intergovernmental body or which can provide needed free technical expertise.

Future options for the process include (a) that the OEIGWG creates a special supplemental category for CSOs or social movement representatives which do not have ECOSOC consultative status; (b) that NGO participants are invited to contribute to a debate in an open and timely fashion; (c) that NGOs and CSOs can with the agreement of the Chair-Rapporteur have their studies and re-

ports circulated as conference room papers; and (d) that NGOs and CSOs are welcomed to observe informal consultations.

Role of business

Unlike non-governmental organizations, the private sector is not mentioned in the UN Charter of 1945. However, the International Chamber of Commerce (ICC) was one of the first business representatives that received ECOSOC-consultative status as an NGO already in 1946. Until the 2002 International Conference on Financing for Development in Monterrey, individual business enterprises were not officially invited to participate in UN system bodies in their own right. In the WHO Framework Convention on Tobacco Control (FCTC), governments adopted a different position. The tobacco industry was formally excluded from the negotiations and is subject to a provision in the WHO FCTC not to participate in national implementation of the convention.

For years, the business lobby has been able to prevent the setting of international binding rules on business and human rights.⁹ In the development of the UN Norms on the Responsibilities of Transnational and Other Business Enterprises with Regard to Human Rights, the sub-Commission in charge approved the text in 2003 and transmitted them to what was then the full Human Rights Commission. It was at this point that the business community organized its opposition to the voluntary principles and prompted the Human Rights Commission to bring the process that resulted in the UNGPs and the UN Forum on Business and Human Rights. The participation of business representatives therefore has to be carefully reflected in order to avoid undue influence and ensuring that the decision-making process remains independent and under control of governments.

Current situation: Currently businesses participate as members of the ICC and of the International Organization of Employers (IOE). Whereas the latter is registered as NGO with ECOSOC consultative status, the ICC was granted observer status by the General Assembly in December 2016. This status has formerly been reserved only for intergovernmental organizations or non-member states of the UN.

Future options for the process include (a) keeping the current practice that individual business organizations participate under the ICC or other ECOSOC-accredited business associations; (b) that businesses interested in participating are formally reviewed and accredited to the OEIGWG; or (c) that businesses and their business associations are formally excluded from the negotiation process. None of these options are straightforward. For example, it might be advantageous to accredit those business and professional associations that see the advantages for an improvement in international human rights law and could act as a counter-weight to those business and trade associations that will oppose any recommendations from the OEIGWG.

⁹ Martens, Jens (2014): Corporate Influence on the Business and Human Rights Agenda of the United Nations. Working Paper. Aachen/Berlin/Bonn/New York: Brot für die Welt/Global Policy Forum/MISEREOR, online https://www.globalpolicy.org/images/pdfs/GPFEurope/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf.

4. CONCLUSION

The Human Rights Council, like each intergovernmental body in the UN system, has ‘its own way of doing something’; its culture; its own informal and unwritten rules about how to go about advancing international human rights. These informal and unwritten rules, complemented by formal UN rules, provide a way for all parties to know what is ok to do in a given circumstance. Of course those governments which do not want to have a new binding treaty on TNCs, OBEs and Human Rights can use the rule-making process to create obstacles to the negotiations and even shut down the process from going forward under the Human Right Council.

Drafting a new convention or treaty is a major undertaking. It will define new elements of international human rights law, new standards that can be used to judge transnational behavior, and rules to provide ways that victims of human right abuses involving transnational corporations can seek compensation for the damages done.

In order to grapple appropriately with this task, the OEIGWG and the HRC will of course draw upon their own experiences with how to best structure the international negotiations. Governments and CSOs can contribute to this process by bringing into the HRC environment the best practices from other intergovernmental processes, whether they be those in other Geneva-based organizations, those in New York, those in Vienna, those in Bonn, or those in Nairobi.

Further information

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Website of the OEIGWG:

www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx

Website of the Treaty Alliance:

www.treatymovement.com

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