

# One step further towards global regulation of business

Report of the third session of the UN working group on a binding instrument on transnational corporations and other business enterprises with respect to human rights (“treaty”)

by Karolin Seitz

In 2014, following a resolution initiated by Ecuador and South Africa, the Human Rights Council of the United Nations (UN) decided by a majority vote for the establishment of a process to create a human rights treaty to regulate business activity.<sup>1</sup> In 2015 and 2016 the first two sessions of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) took place, and between October 23 and 27, 2017 the working group convened for the third time. More than 100 states and 200 representatives of civil society organizations participated in the third session, during which draft

elements for a treaty presented by the Chair-Rapporteur of the OEIGWG were discussed. The draft elements include suggestions on state obligations, prevention, effective remedy, jurisdiction, international co-operation, and enforcement mechanisms. Despite persistent efforts by certain states to block the process, the march towards a binding treaty will continue. The Chair-Rapporteur will now hold informal consultations on the way forward and prospectively prepare a zero draft of the treaty up to the fourth session (expected in October 2018). Governments and other actors can hand in comments on the draft elements up to the end of February 2018.

The number of countries participating in the open-ended intergovernmental working group is steadily increasing, with 60 countries participating in the first session of the working group in 2015, 80 in the second session in 2016, (now including Germany), and over 100 countries in 2017. While the European Union (EU), the United States (US), Australia and other industrialized countries tried to block the resolution initiating the treaty process in 2014 the EU and its member states, as well as Switzerland, Norway, Japan and Australia, eventually decided to take part in the sessions of the intergovernmental working group, at least as observers.

elements for the prospective treaty based on discussions at the previous sessions.<sup>3</sup> The draft elements included suggestions on state obligations, prevention, effective remedy, jurisdiction, international co-operation, and enforcement mechanisms. The third session’s programme of work was structured around these issues and several experts from academia, civil society and business very invited to give inputs to the respective subjects.

A final panel provided space for testimonies by representatives of victims of human rights abuses by business enterprises.

During the first two sessions the scope and format of the future treaty were discussed generally.<sup>2</sup> Three weeks prior to the third session, the Chair-Rapporteur of the intergovernmental working group, Ecuadorian Ambassador Guillaume Long, presented

## Global call for participation demonstrates to be effective

Prior to the third session, numerous politicians and civil society organisations called on state representatives to participate constructively in the OEIGWG.

<sup>1</sup> See the resolution of the Human Rights Council A/HRC/RES/26/9.

<sup>2</sup> See the reports of the first and second session at [www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx](http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx).

<sup>3</sup> Cf. Chairmanship of the OEIGWG (2017).

The Ministers for Foreign Affairs of the G77 and China met at the UN in New York on 22 September 2017 and declared their support for the UN working group in their Ministerial Declaration.<sup>4</sup>

On September 13, 2017, the European Parliament issued a ninth resolution in support of the treaty process and called on all states and the EU “to engage actively and constructively in the on-going work of the UN’s open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.”<sup>5</sup>

Several national parliaments, *inter alia*, in France, Spain, Germany and Uruguay had discussed the treaty process and an inter-parliamentary statement, signed by more than 250 parliamentarians from around the world, asked their governments to engage constructively in the process.<sup>6</sup> On October 22, a World Parliamentary Forum was convened in Geneva to debate the treaty process.<sup>7</sup>

In another initiative, 245 French parliamentarians wrote a letter to French President Emmanuel Macron asking him to support the process towards a binding treaty and to take a leading role in this regard within the EU.<sup>8</sup> Answering an oral question in the Assemblée Nationale, the French Minister of Foreign Affairs Jean-Yves Le Drian responded that France would actively participate in the discussion around a treaty in the UN and suggested that the French law on vigilance could be a reference for the treaty.<sup>9</sup> The French “Loi de Vigilance” having been adopted in March 2017 requires large companies to publish and implement a due diligence plan that identifies and prevents environmental and human rights risks along the entire value chain. A breach of these due diligence requirements may lead to liability in the event of damage. Furthermore the Minister Le Drian declared that France was determined that such a treaty should come into force.

At least with regard to participation, the numerous calls showed effectiveness. With 101 States present, the working group reached a new record in attendance. There was however a marked variation in the style of participation among the States.

### During the third session the following countries participated:

Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Bolivia, Botswana, Brazil, Burundi, Central African Republic, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czechia, Democratic Republic of the Congo, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Côte d’Ivoire, Jamaica, Jordan, Kazakhstan, Kenya, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malta, Mauritania, Mexico, Monaco, Morocco, Mozambique, Myanmar, Namibia, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Qatar, Republic of Korea, Republic of Moldova, Russian Federation, Rwanda, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, Somalia, South Africa, Spain, Sudan, Sweden, Syrian Arab Republic, Switzerland, Thailand, The Former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Arab Emirates, United Kingdom, Uruguay, Venezuela, Zambia.

The initiators of the treaty process, Ecuador and South Africa received significant support from a number of Latin American States, including Bolivia, Cuba, Uruguay and Venezuela, as well as from the African Group, represented mainly by Namibia and Egypt. Support for the process was also shown from several Asian countries, mainly the Philippines and Indonesia.<sup>10</sup> All these states actively participated in the discussion of the working group, supported the presented draft elements to a large extent.

All member states of the BRICS participated in the third session and stated (with the exception of Russia) to support the treaty process generally.

Brazil stressed the importance of international cooperation in jurisdictional matters, better access to remedy and the need to address all businesses, while transnational corporations (TNCs) would have special features that would require special mechanisms. It further highlighted that due diligence would be an important tool to prevent human rights abuses.

Despite having voted for resolution 26/9 to be adopted in 2014, Russia maintained a position that it was too early to be discussing a treaty. Nonetheless, it raised several questions and asked for clarification on several of the draft elements – for example with regard to the proposal to establish legal liability of

4 Cf. [www.g77.org/doc/Declaration2017.htm](http://www.g77.org/doc/Declaration2017.htm), para. 141, 142.

5 Cf. Resolution of the European Parliament (2017/2028(INI)), para. 70.

6 Cf. [www.bindingtreaty.org](http://www.bindingtreaty.org).

7 Cf. <https://bindingtreaty.org/wp/2017/>.

8 Cf. [www.dominiquepotier.com/fr/lettre-ouverte-au-president-de-la-republique/actualites-1.html](http://www.dominiquepotier.com/fr/lettre-ouverte-au-president-de-la-republique/actualites-1.html).

9 Cf. <https://twitter.com/AssembleeNat/status/920275961202982913>.

10 Cf. oral statement by Indonesia on item 4 “General Statements” ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/Indonesia-Generalstatement.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/Indonesia-Generalstatement.pdf)).

business entities. Such a proposal would go against Russian law, claimed the representative, as there only individuals could be held legally liable.

While China stated that it would need more time to consult internally on the draft elements, it underscored the need for international cooperation, citing the UN Convention against Transnational Organized Crime. India was among the more passive states attending, but underscored the need to better regulate TNCs.

In this year's session a number of countries showed a more supportive attitude towards the whole process compared to previous years. Chile and México acknowledged the complementarity between the UN Guiding Principles on Business and Human Rights (UNGPs), as Switzerland already did in 2016. México supported the EU's position on several points, such as with regard to a broad scope of the treaty, suggesting that it should focus not only on TNCs but should cover all business enterprises. It, however, welcomed binding obligations with respect to due diligence, access to remedies and preventive measures.

Singapore actively participated in the discussion and asked for clarification of several aspects of the draft elements while saying that it needed more time to consolidate its position.

Most of the 22 EU member states attending, such as Germany, did not actively contribute to the debates and were most of the time represented only by interns. As in the previous sessions, the EU spoke on behalf of its member states. When a few member states intervened directly, notably Belgium, Netherlands, Spain, Sweden and UK, it was only in the agenda item "voices of the victims", and they simply reinforced the EU's position and highlighted the need to protect human rights defenders.<sup>11</sup> France was the only more active EU member state. Under agenda item 4 on preventative measures, the French delegate presented the French "Loi de Vigilance".<sup>12</sup>

The EU maintained its general scepticism towards the whole process and continually complained about the way the process had been led by the

Ecuadorian Chair-Rapporteur. The EU representative repeatedly claimed that it had not been possible to prepare a common position on the draft elements in time as the document had been presented only three weeks prior to the third session.<sup>13</sup> In its numerous oral statements during the following days, the EU therefore only raised questions with regard to the draft elements, while always stating that these questions should not be interpreted as evidence of any formal position on the document.

Invited panellist, Lola Sánchez, member of the European Parliament, stated that the EU delegate did not represent her and her colleagues from the European Parliament. She publicly chided the EU representative, saying that the position he was putting forward during the OEIGWG was totally contrary to that held by the European Parliament. While the European Parliament had stated its support for the treaty process already in nine resolutions, the presented EU position was, she claimed, obstructionist and cynical.<sup>14</sup>

More than 200 representatives of civil society organizations from the Treaty Alliance participated actively in the debates. They delivered numerous oral statements and handed in more than 15 written submissions<sup>15</sup> with detailed comments. They also organised more than 12 side events in the UN Palais des Nations while a range of activities and workshops were organized outside by the Global Campaign to Dismantle Corporate Power.

### **Start delayed again: dissent on the programme of work**

The proposed programme of work for the third session was not able to be agreed before the start of the session and discussions on it continued during the first day.<sup>16</sup> In a situation similar to that in the first session of the intergovernmental working group in 2015, the EU opposed the adoption of the programme of work and thereby blocked the start of the substantial debates. As during the second session, the EU delegate requested to insert a footnote in the programme of work, which would state that the discussions should not be limited to TNCs

11 Cf. oral statement by the Netherlands on panel "The voices of the victims" ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/Netherlands-Panel.Voicesofvictims.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/Netherlands-Panel.Voicesofvictims.pdf)).

12 Cf. oral statement by France on panel 4 "Preventative Measures" ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/France-Subject4.Preventivemeasures.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/France-Subject4.Preventivemeasures.pdf)).

13 Cf. oral statement by the EU on item 4 "General Statements", p. 3 ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/EUOpening\\_remarks.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/EUOpening_remarks.pdf)).

14 Cf. oral statement by Lola Sánchez on subject 1 "General Framework" ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/LolaSanchez\\_GeneralFramework.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/LolaSanchez_GeneralFramework.pdf)).

15 Cf. [www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/WrittenContributions.aspx](http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/WrittenContributions.aspx).

16 Cf. Final Programme of Work ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/PoW.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/PoW.pdf)).

only, but include all other business enterprises. The EU further asked for a separate time slot to be dedicated to a discussion of the implementation of the UNGPs. After intense debates, the second proposal was agreed by the participating countries and a new slot was included. However, the first proposal was rejected by the majority of the states, with South Africa and several other states arguing that the question about the scope of the treaty should be discussed in the dedicated slot on scope on Tuesday morning and not decided in advance.

### Consensus and divergence on content

After the delayed start, substantial debates on the draft elements took place. Compared to the previous session, the participating states made more informed contributions.

While some states and most of the civil society organizations declared the draft elements to provide a good basis for further negotiations, other states were more critical. Virtually all agreed that the draft elements would need clarifications in several aspects, such as on the scope of the treaty and with regard to legal liability.<sup>17</sup>

The draft elements did not seek to define ‘transnational corporations’ but instead sought to regulate any business activity that had a transnational nature. Whilst this was an innovative turn it would still need to be clarified when exactly a business activity has a transnational character. It would also need to be clarified whether or not the human rights abuse had to result specifically from the transnational activity in order to be covered by the treaty. The proposed scope would include branches, subsidiaries, affiliates or other entities directly or indirectly controlled, but does not mention suppliers, buyers or other business partners.

Many states, including the EU, Russia and Mexico questioned the proposal to give primacy to human rights obligations over the obligations of trade and investment agreements. Would this be legally possible and are there any precedents in international law? Would it be necessary to re-negotiate trade and investment agreements? Some states however, such as Uruguay supported this proposal.

Some states, including the EU member states, as well as the business representatives, pointed to the lack of implementation of existing international agreements and questioned the added value of a treaty in this regard. The EU stated, for instance:

*How can victims expect to have access to justice and to remedy in cases of abuses related to business activities in a state where the legislation fails to comply with existing international human rights law? In a state where the judiciary system is not independent? In a state where corruption impacts negatively on the fulfilment of all human rights? If a new legal instrument were to be created why would victims believe that those states currently failing to protect human rights would implement the new obligations?<sup>18</sup>*

Baskut Tuncak, UN Special Rapporteur on Hazardous Substances and Wastes, speaking on the panel on implementation stated that with the right monitoring mechanisms, the treaty would have the potential to improve accountability in the so-called “internal-external” gap (states promoting human rights abroad while ignoring the needs and rights of their own people) as well as the “external-internal” gap (states taking steps to mitigate risks to human rights at home, while failing to do so abroad).<sup>19</sup>

Most states agreed that urgent action was needed to strengthen access to justice. But opinions diverged on the best process and the political means to tackle the problem. In this context, the EU highlighted the “Accountability and Remedy Project” of the UN Office of the High Commissioner on Human Rights (OHCHR) which explicitly reaffirmed the UNGPs and which was established by resolution 26/22 in June 2014 only one day after resolution 26/9 on the treaty process was adopted. According the EU, recent resolutions in this regard have shown that effective and pragmatic steps can be taken without delay to ensure accountability and access to remedy.

Many states, including the EU, considered further international cooperation in cross-border cases as well as preventative measures such as human rights due diligence as essential components.<sup>20</sup>

17 Cf. oral statement by Brot für die Welt, CIDSE, Global Policy Forum, MISEREOR, Südwind Austria, SOMO on subject 2 “Scope of application” ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/SocialServiceAgencyProtestantChurchGermanyetal.-Subject2.Scopeofapplication.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/SocialServiceAgencyProtestantChurchGermanyetal.-Subject2.Scopeofapplication.pdf)).

18 Oral statement by the EU on panel “The voice of the victims”, p. 3 ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/EU-Panel.Voicesofthevictims.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/EU-Panel.Voicesofthevictims.pdf)).

19 Cf. oral statement by the Special Rapporteur on human rights implications of hazardous substances and wastes on panel 4 “Preventive Measures” ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/BaskutTuncakSubject4.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/BaskutTuncakSubject4.pdf)).

20 Cf. oral statement by the EU on item 4 “Debate on the UNGPs”, p. 3 ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/EUGeneral\\_statement.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/EUGeneral_statement.pdf)).

In a joint statement 14 civil society organizations called to integrate a gender approach into the treaty. This would mean an analysis of how businesses may have different impacts on women or men, as a result of their different gender-based social, legal, cultural roles and rights. They argued:

*This approach is thus essential to the very purpose of the prospective treaty if it is to put the concerns of rights holders at the centre and to effectively ensure the prevention, protection and remediation of business-related harms for all.*<sup>21</sup>

In particular, they called for the treaty to include mandatory gender impact assessments for business operations, as well as gender sensitive justice and remedy mechanisms. They also suggested that it was necessary to ensure respect, protection and an enabling environment for women human rights defenders.

Some states reaffirmed the concerns raised by civil society organizations with regard to undue influence exerted by corporations and their lobby organizations and asked for preventative measures. According to the civil society organization Corporate Accountability, the prospective treaty should include a provision, equivalent to Article 5.3 of the World Health Organization's Framework Convention on Tobacco Control that requires that "In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law."<sup>22</sup>

In this context, other organizations raised their concerns with regard to the unprecedented five year partnership recently agreed between the OHCHR and Microsoft, given the potential influence of corporations on the OHCHR's independence. As part of the agreement, that was announced on May 16, 2017, Microsoft will provide a grant of USD 5 million to support the work of the UN OHCHR as well as establish an information dashboard that will allow the aggregation of data on specific countries and types of rights violations.

## The business lobby defends its seat at the table

The business sector was represented by the US Chamber of International Business (USCIB), the International Chamber of Commerce (ICC), the International Organization of Employers (IOE) and the law firm Littler Mendelson. They participated actively in the third session. In more than 12 oral statements they presented their joint position paper.<sup>23</sup> Furthermore the Secretary-General of the IOE and a lawyer from Littler Mendelson were invited to speak on the panels regarding "General Obligations" and "Jurisdiction". In their interventions, they stated clearly, that they did not support the draft elements, as they believed they represented "a big step backwards" and that "they jeopardised the crucial consensus achieved by the UN Guiding Principles on Business and Human Rights (UNGPs), whose spirit and wording they undermine."<sup>24</sup>

They claimed that the draft elements were "counterproductive" for the business and Human rights agenda, and that they presented a "misguided approach". In particular, they highlighted their opposition to the proposal of direct human rights obligations on business enterprises under international law. They also claimed that the draft elements focused too much on TNCs and not on other business enterprises. Furthermore, they argued that the proposal to introduce legal liability of TNCs for activities within their supply chains would be a "major breach" of the UNGPs and would "risk dampening investment flows to industrialized, emerging and least development economies."<sup>25</sup> In general they argued that the draft elements would "break the consensus achieved by the UNGPs" and would lead to confusion by blurring the respective duties and responsibilities of states and business enterprises. They were adamantly against the proposals on the primacy of human rights over trade and investment regimes, extraterritorial jurisdiction and the reversal of the burden of proof.

In its first intervention, the ICC made its right to participate in the negotiations clear, highlighting the observer status which had been granted to them by the UN General Assembly in November

21 Written statement by WILPF and 13 other organizations, p. 1 ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/WILPF\\_JointStatement.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/WILPF_JointStatement.pdf))

22 Cf. oral statement by CA on subject 1 "General Framework" ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/CAI-Subject1.Generalframework.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/CAI-Subject1.Generalframework.pdf))

23 Cf. written statement by BIAC/FTA-BSCI/ICC/IOE ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/BIAC-FTA-BSCI-ICC-IOE.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/BIAC-FTA-BSCI-ICC-IOE.pdf))

24 Ibid, p. 1

25 Ibid, p. 1

2016.<sup>26</sup> Their representative asked states to consider the business perspective and suggested further multi-stakeholder dialogues as part of “the fabric of business and human rights.”<sup>27</sup>

The IOE even warned that “in terms of the Global Partnership launched in 2015 [referring to the Agenda 2030], it [the treaty process] could also interfere with the momentum of the private sector working with governments and civil society to implement the SDGs.”<sup>28</sup>

Hogan Lovells, a multinational law firm and powerful lobbyist for corporate interests co-headquartered in London and Washington, D.C., stated that the discussion of the third session of the OEIGWG lacked focus and did not leave room for consensus to emerge. Three of the firm’s lawyers summarize the third session of the OEIGWG as follows:

*One cause for celebration was the widening of the discussion to include active participation from the EU and some business organisations (such as the International Chamber of Commerce and the International Organisation of Employers), compared to the first two sessions which had been dominated by states from the “Global South” and NGOs. This gives hope that the treaty will be drafted in a way that is fair to businesses, and not simply designed to punish them.*

*In principle, a treaty has the potential to promote human rights and level the playing field for businesses, ensuring that businesses who respect human rights are not disadvantaged by doing so. However, any treaty should reflect the fact that businesses and their personnel have rights too. A treaty must contain provisions which are sufficiently clear to allow businesses to regulate their conduct.*<sup>29</sup>

Hogan Lovells has, *inter alia*, advised Shell in defending lawsuits brought in the London High Court by members of the Bodo community in relation to two oil spills in the Niger Delta.<sup>30</sup>

## The process continues

From Thursday afternoon onwards, the atmosphere became increasingly tense as most of the contributions in the plenary included proposals and expectations on how the process towards a binding treaty should continue.

According to the programme of work, the Chair-Rapporteur of the OEIGWG should draft a report of the third session of the OEIGWG which should be adopted ad referendum by the working group on Friday afternoon, the last day of the session. The conclusions and recommendations of the report were meant to set the way forward for the whole process in the coming years. The Chair-Rapporteur shared the draft conclusions and recommendations of the report with delegations on Thursday. On Friday afternoon, an informal session took place in order to discuss the draft conclusions and recommendations. It seems that some opposing forces considered it necessary to call on their allies to intervene. Having not participated in any of the sessions of the working group, a US delegate rushed into the informal consultation and stated their strong opposition towards the whole process and claimed that a new resolution was necessary to renew the mandate of the OEIGWG to continue work. Some states, such as Australia and Mexico also asked for a new resolution.

The majority of the states present, however, reaffirmed their support to the OEIGWG and stated that they did not see any need to renew the mandate. The representative of the OHCHR then spoke and clarified the situation: while the resolution 26/9 gave detailed specifications for only the first three sessions, it nonetheless gave a clear mandate to continue working until a binding treaty was developed. Therefore a new resolution would not be necessary now or at any time in the future.

Back in the plenary room the EU objected to the inclusion of mention of a fourth session in 2018 in the conclusions and instead proposed only “informal consultations” on the way forward.

The working group could finally agree on the following conclusions:

*(a) The Working Group welcomed the opening messages of the United Nations High Commissioner for Human Rights, Zeid Ra’ad Al Hussein and of the President of the Human Rights Council, Joaquín Alexander Maza Martelli, and thanked the Minister of Foreign Affairs of Ecuador, Minister María Fernanda Espinosa*

26 Cf. oral statement by ICC on item 4 “General Statements” ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/ICC-GeneralStatement.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/ICC-GeneralStatement.pdf)) and [www.globalpolicy.org/component/content/article/270-general/52926-worlds-largest-business-association-gets-direct-voice-in-un-decision-making.html](http://www.globalpolicy.org/component/content/article/270-general/52926-worlds-largest-business-association-gets-direct-voice-in-un-decision-making.html).

27 *Ibid.*, p.2

28 Oral statement by IOE on subject 8 “International Cooperation”, p. 2 ([www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/IOE-Subject8.Internationalcooperation.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/IOE-Subject8.Internationalcooperation.pdf))

29 Cf. <https://www.lexology.com/library/detail.aspx?g=9e9b67b0-8bb7-4c94-9cd3-12dca626676a>.

30 Cf. <https://www.hoganlovells.com/en/service/business-and-human-rights>.

*Garcés, and the Member of the French National Assembly, Dominique Potier, for their participation as keynote speakers. It also thanked the independent experts and representatives who took part in panel discussions, the interventions, proposals and comments received from Governments, regional and political groups, intergovernmental organizations, civil society, NGOs and all other relevant stakeholders, which contributed to the substantive discussions of this session.*

*(b) The Working Group took note of the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, prepared by the Chair-Rapporteur in accordance with operative paragraph 3 of HRC Resolution 26/9 and the substantive discussions and negotiations and the presentation of various views thereof.*

*(c) The Working Group requests the Chair-Rapporteur to undertake informal consultations with States and other relevant stakeholders on the way forward on the elaboration of a legally binding instrument pursuant to the mandate of Human Rights Council Resolution 26/9.<sup>31</sup>*

As the Chair-Rapporteur insisted on convening a fourth session of the OEIGWG in 2018 and to present a draft zero of the treaty, he outlined his own recommendations in a separate section:

*(a) Invite states and different stakeholders to submit their comments and proposals on the draft element paper no later than the end of February 2018.*

*(b) Present a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, on the basis of the contributions from States and other relevant stakeholders, at least four months before the fourth session of the Working Group, for substantive negotiations during its fourth and upcoming annual sessions until the fulfilment of its mandate.*

*(c) Convene a fourth session of the Working Group to be held in 2018 and undertake informal consultations with States and other relevant stakeholders on its programme of work.<sup>32</sup>*

## Conclusion

To summarise, the outcome of the third session was clear: The process towards a binding treaty will continue despite the persistent efforts by certain states to block it.

Civil society organizations must remain vigilant. The further process will be negotiated not only in Geneva but also in other international policy fora. During the negotiations on the UN budget in the Administrative and Budgetary Committee of the General Assembly in New York end of December 2017, the EU tried to prevent the proposed resources for the continuation of the UN Working Group – without success.

The new Ecuadorian ambassador Luis Gallegos takes over the chairmanship of the UN working group early 2018. In 2014, Gallegos, an experienced diplomat, already initiated the resolution to establish the UN working group in the Human Rights Council.

In order to move forward, governments should prepare detailed comments on the draft elements by the end of February 2018. The Chair-Rapporteur plans to formulate a zero draft of the treaty that can be presented at the fourth session of the OEIGWG in 2018.

The Secretariat of the Human Rights Council has scheduled the fourth session of the UN Working Group for October 15–19, 2018. In the meanwhile, the Chair-Rapporteur should not only hold informal consultations on the way forward, but also develop a roadmap, that goes beyond the fourth session of the OEIGWG and sets out the steps until the treaty negotiations will be completed.

<sup>31</sup> Chair-Rapporteur (2018)

<sup>32</sup> Ibid.

## Further information

**Chairmanship of the OEIGWG (2017):** Elements for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

[www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs\\_OBEs.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf)

**Chair-Rapporteur (2018):** Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Advanced edited version (A/HRC/37/67).

[www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/A.HRC.37.67\\_EN.docx](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/A.HRC.37.67_EN.docx)

**Martens, Jens/Seitz, Karolin (2016):** The Struggle towards a UN Treaty. Towards global regulation on human rights and business. Berlin/Bonn/New York: Global Policy Forum/ Rosa Luxemburg Stiftung—New York Office.

[https://www.globalpolicy.org/images/pdfs/UN\\_Treaty\\_online.pdf](https://www.globalpolicy.org/images/pdfs/UN_Treaty_online.pdf)

**Treaty Alliance (2017):** IGWG 3rd Session - Notes recorded by civil society organisations involved in the Treaty Alliance.

<https://business-humanrights.org/sites/default/files/documents/Treaty%20Alliance%20Notes%20of%20States%20and%20Trade%20Associations%20Views%20%5B3rd%20IGWG%20Meeting%5D.pdf>

**Treaty Alliance Germany (2017):** Toward global Regulation on Human Rights and Business. Position paper of the Treaty Alliance Germany on the UN treaty process on transnational corporations and other business enterprises.

[https://www.globalpolicy.org/images/pdfs/Treaty\\_Alliance\\_Germany\\_position\\_paper\\_12-2017.pdf](https://www.globalpolicy.org/images/pdfs/Treaty_Alliance_Germany_position_paper_12-2017.pdf)

**United Nations General Assembly (2014):** Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Resolution A/HRC/RES/26/9.

[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)

**UNTV Webcast of the OEIGWG at:** <http://webtv.un.org/meetings-events/>

**Website of the OEIGWG:** [www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx](http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx)

**Website of the Treaty Alliance:** [www.treatymovement.com](http://www.treatymovement.com)

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**Global Policy Forum Europe e. V.**

Königstraße 37a, 53115 Bonn

Tel. +49(0)228 96 50 510

[europe@globalpolicy.org](mailto:europe@globalpolicy.org)

[www.globalpolicy.org](http://www.globalpolicy.org)

Contact: Karolin Seitz

**Author:** Karolin Seitz

**Editor:** Till Bender, Jens Martens

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##### Rosa Luxemburg Stiftung—New York Office

275 Madison Avenue, Suite 2114

New York, NY 10016

Tel. +1(917) 409 1040

[info@rosalux-nyc.org](mailto:info@rosalux-nyc.org)

[www.rosalux-nyc.org](http://www.rosalux-nyc.org)

Contact: Stefanie Ehmsen

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