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Some remarks on the third sessions of the Business and Human Rights Treaty Process and the 'Zero Draft'*

Algunas observaciones sobre el tercer período de sesiones del proceso del Tratado de Negocios y Derechos Humanos y el 'Zero Draft'

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Abstract

The process of creating an international legally binding instrument to regulate, under international law, the activities of transnational corporations and other business enterprises with respect to human rights, is slowly moving forward. Important and complex issues were addressed during the third session of the Intergovernmental Working Group, which was once more a forum of ideological and political confrontation. Nevertheless, the contours of a potential treaty are starting to become clearer, as a relative consensus on the measures that the instrument should include starts to crystallize. Substantial and procedural elements addressed during the third session have provided a large basis for discussion and analysis, while political and legal considerations are starting to appear more intensely as the process approaches the negotiation stage. In that regard, the 'zero draft' of the binding instrument provides States and other stakeholders with a starting point to negotiate one of the potential developments in the business and human rights field.

Key words: business and human rights; treaty process; Intergovernmental Working Group; transnational corporations; UNGPs.

Resumen

El proceso de crear un instrumento internacional jurídicamente vinculante para regular, bajo el derecho internacional, las actividades de las empresas transnacionales y otras empresas con respecto a los derechos humanos, comienza a avanzar lentamente. Diversas cuestiones, tanto importantes como complejas, fueron abordadas durante la tercera sesión del Grupo de Trabajo intergubernamental, que se convirtió nuevamente en un foro de confrontación ideológica y política. Sin embargo, los contornos de un eventual tratado empiezan a aclararse, conforme comienza a cristalizarse un consenso relativo respecto a las medidas que tal instrumento debería incluir. Los elementos sustantivos y procesales que fueron tratados durante la tercera sesión aportan una base amplia para la discusión y el análisis, mientras que distintas consideraciones políticas y jurídicas aparecen con mayor intensidad conforme

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la fase de negociación del proceso se aproxima. De tal forma, el 'borrador' del instrumento vinculante presenta a los Estados y otros actores interesados un punto de partida para negociar uno de los potenciales desarrollos del campo de las empresas y los derechos humanos.

Palabras clave: empresas y derechos humanos; tratado vinculante; Grupo de Trabajo intergubernamental; empresas transnacionales; Principios Rectores sobre las empresas y los derechos humanos.

1. Introduction

The third session of the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (hereinafter 'IGWG') took place between 23 and 27 October 2017, after two previous sessions where the potential scope and content of a business and human rights treaty were discussed. The third session,[1] as it will be explored in this article, had as its main objective to begin discussions on a draft instrument on business and human rights, on the basis of a document prepared by the Chairperson-Rapporteur of the Intergovernmental Working Group. While the aforementioned document was not the draft text of the instrument, it did provide a wide and interesting basis for States and other stakeholders to discuss, for a week, the potential options available that could be included in the text for negotiation. However, as this article will briefly discuss, many of the options presented in the document could be controversial aspects of a potential legally binding instrument, a situation that could lead to reticence or even open rejection from many States, taking into consideration the contentious nature of the IGWG during its initial sessions. In addition, considering that the future instrument would be a part of general international law, it is important to situate it within the current practice of States –and in any case, to aim for elements that can evolve with their general acceptance–, in order to achieve a resulting document that presents feasible traits for the development of international (human rights) law.

In addition, the recent publication of the draft instrument for negotiation calls for a short analysis on some of its most important provisions –the *core*, so to speak, of the draft instrument–, in order to analyze the initial choices made by the Chairperson-Rapporteur for the beginning of negotiations, which shall take place in October 2018. As it can be observed from this short introduction, the aim of this article is not to provide a scientific or theoretical analysis; rather, its humble intention is to provide some comments on the different aspects included in the document for the third session, to take a quick glance at the actual negotiations that took place during that session, and to take a first look at the draft instrument, in an effort to compare these instruments to the current status of several of its elements under international law. In this regard, a first section will address the 'Elements' document prepared for the third session; a second section will reflect on some of the reactions and contributions of States during the session vis-à-vis some of the controversial or central aspects included in the Elements document; and finally, a last section will briefly address some of the aspects contained in the draft instrument released by the Chairperson-Rapporteur in mid-July 2018, prior to the fourth session of the Open-Ended Intergovernmental Working Group.

2. The basis for the third session: the 'Elements' document

Resolution 26/9 of the Human Rights Council mandated the Chairperson-Rapporteur of the IGWG to develop a document containing "elements for the draft legally binding instrument for substantive negotiations… taking into consideration the discussions held at its first two sessions".[2] Both sessions addressed numerous issues,[3] ranging from jurisdiction and State responsibility, to potential civil, criminal and administrative liability regimes in relation to corporate conduct. In addition, other important questions were also covered, such as the horizontal and vertical scope of the potential instrument (adressing which rights should be covered by

1 For a short recapitulation of some aspects of the session, see Cassel, Doug, "The Third Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty", *Business and Human Rights Journal*, Vol. 3:2, 2018.

2 Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9 (26 June 2014), par. 3.

3 Cantú Rivera, Humberto, "Negotiating a Business and Human Rights Treaty: The Early Stages", *UNSW Law Journal*, Vol. 41(3), 2017.

the treaty in the first case, and which companies within a corporate group should be responsible for human rights violations committed within global supply chains, in the second case). In that sense, the 'Elements paper'[4] that was presented by the Chairperson-Rapporteur –barely a month in advance of the session, a situation that impacted on the possibility for delegations to adequately prepare for the session– with the intention of commencing negotiations included numerous substantive aspects (A), on the one part, as well as procedural possibilities (B), on the other part, with the aim of encouraging dialogue to bridge the important gap that so far has been the 'trademark' of the business and human rights treaty process. Nevertheless, one of the key aspects of the Elements paper was the fact that it included a large number of possibilities without any specific orientation, in an effort to favor dialogue among States and other stakeholders.

2.1. Substantive elements: rights and obligations for States and businesses

The Elements paper addressed an important number of substantive aspects, among them issues such as the scope of application (specifically which rights, acts and actors would be covered by it); general obligations for States, business enterprises and even international organizations; preventive measures that could be adopted in order to prevent human rights violations linked to business enterprises; and finally, aspects revolving around the issue of legal liability, focusing both on international responsibility and domestic liability for the different actors involved. While addressing each one of them in detail is beyond the scope of this article, some comments will be shared in relation to the potential options being presented to States by the Elements paper.

First of all, in relation to the scope of application, the Chairperson-Rapporteur divided it in two different aspects: an objective scope focusing on all human rights violations or abuses resulting from corporate activities that have a transnational character; and a subjective scope, where it is specifically mentioned that it "does not require a legal definition of TNCs and OBEs that are subject to its implementation, since the determinant factor is the *activity* undertaken by TNCs and OBEs, particularly if such activity has a transnational character."[5]

In relation to the objective scope, the Elements paper tries to ensure that all human rights violations are covered, which should be the main purpose of this instrument, considering the explicit recognition made in the UNGPs –and its acceptance by Member States of the Human Rights Council– that business enterprises have the capacity to impact on all human rights. The suggestion included in this section also addresses other important issues, such as labor rights, environment, or corruption. This broad approach is especially adequate, since many corporate-related human rights abuses –which regularly take place in developing countries– normally start as a result of violations to economic, social, and cultural rights, including the right to a healthy environment or to labor standards, which then, due to the interrelated and interdependent character of human rights, can also impact on other civil and political rights.

But an important aspect to ponder in this area is the way in which this potential treaty would operate, if such an option was followed: since the treaty currently being discussed is being considered so far as a stand-alone treaty –and an instrument that does not create by itself new human rights–, it would potentially rely on the human rights obligations that States have so far committed to uphold, which could then lead to a rather inequitable outcome in terms of State obligations vis-à-vis the different internationally-recognized human rights. As it is widely known, different human rights treaties have varying degrees of ratification;[6] thus, a stand-alone treaty simply making reference to other human rights (and in this case, not even to other international instruments *per se*) could then allow States to pick and choose –to some extent, at least– the rights that could be applicable under this new conventional regime, or would depend on their ratification of other international and regional instruments.[7] Of course, this is not the only possible

4 *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights.*

5 *Ibid.*, p. 4.

6 For example, both of the Covenants (on Civil and Political Rights and on Economic, Social and Cultural Rights) have a large amount of ratifications, as does the Convention on the Rights of the Child. But that is not the case for other treaties, such as the Migrant Workers Convention, or even of several protocols to the core human rights treaties.

7 *Cf.* Forteau, Mathias, "Les renvois inter-conventionnels", *Annuaire français de droit international*, Vol. 49, 2003, pp. 100-101, 104, where Professor Forteau explains that while the voluntary approach