

United Nations negotiations for a binding treaty on transnational corporations and human rights: an eighth session without significant improvements

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The last session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights took place in Geneva on 24-28 October 2022. This article seeks to outline some of the highlights of this session, the eighth one in the negotiation process.

In June of 2014, the UN Human Rights Council adopted the Resolution 26/9, drafted by Ecuador and South Africa, whereby it was decided on the establishment of an open-ended intergovernmental working group (IGWG) mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights. Since then, the international community has closely and expectantly observed the development of this process, the most relevant at the global level since the publication of the UN Guiding Principles on Business and Human Rights (UNGPs).

In this eight-year period, the IGWG has held eight annual meetings and four draft documents have been published. The last of these, known as the Third Revised Draft, was published in 2021. Despite the high expectations for this 8th session, the discussions did not result in a fourth draft of the document. Overall, it was a session with little substantive progress in which the nature of the process itself and discussion about the way of working were too much in the spotlight.

This round of negotiations was dominated by the unrest generated by the presentation of an informal proposal to the IGWG. Weeks before the start of the session, Emilio Rafael Izquierdo Miño, Permanent Representative of Ecuador to the United Nations Office at Geneva and Chair-Rapporteur of the IGWG, sent to the stakeholders a text including suggested proposals for select articles of the legally binding instrument, with particular attention to Articles 6-13. It was also suggested that this document could serve as a basis for the negotiations that were to take place in October, together with the third revised draft including the concrete textual suggestions made by States during the seventh session. The idea of placing a unilateral proposal and a document resulting from more than seven years

of negotiations on the same level of importance during the negotiations generated great unease and was widely rejected by representatives of civil society and various states, based on allegations of lack of transparency. This position was well reflected in the Palestinian representative's general statement, one of the most vocal ones in the process and widely supported by civil society organisations and States of the Global South:

[...] the proposals presented on October 6 threaten to undermine the progress achieved through the years and reflected in the 3rd revised legally binding instrument, the proposals in front of show total disrespect and disregard to the effort made by states, civil society and affected communities.[...] We stress that the third revised draft shall remain the only basis for negotiations and it has been widely accepted as a viable basis for the negotiations that reflects the lessons learned from victims' experiences and challenges they face to access remedy and justice.^[1]

Several interventions in the first three days, in which it was scheduled to discuss articles 6-13, deviated from the planned themes and focused on questioning the nature of the document presented by the Chair, which hampered substantial progress. Due to this high level of dissatisfaction expressed by the different representatives, the Chair announced that his proposal for articles would no longer be used as a working document and that from then on the discussions would focus exclusively on the third draft.

The remainder of the session was dominated by a trend that had already marked previous negotiations rounds. In particular, most of the home States of large corporations have expressed a view in favour of consolidating the UNGPs, a soft law instrument that does not create any binding obligations, and argue that a future legally binding instrument will have major implementation problems. For example, the UK and Australia stated that they could not support the current text and did not participate in the negotiations at all. Other States have also expressed opposition to the process but continue to be engaged, leading to the paradox that much of the negotiations are dominated by parties that do not pursue the adoption of a binding treaty, or show no sign of willingness to sign or ratify it if adopted. This was reflected in the initial General Statements of several States. The most prominent advocate of this approach has been the United States, which considers that the best way to address this issue is through domestic law and has centred all the interventions around the idea of "softening" the document as much as possible:

[...] we continue to believe that a less prescriptive approach, more akin to a framework agreement, that builds upon the UNGPs and is developed in collaboration with, and ultimately reflects principles broadly supported by diverse stakeholders provides the best way forward. More prescriptive elements could be addressed through optional protocols to such an instrument.^[2]

The EU, which does not have a consensual negotiating mandate, also defended the adequacy of the UNGPs and expressed doubts as to whether this instrument could result in globally accepted standards that could be practically implemented by States.^[3] Portugal also aligned itself with the EU position, while acknowledging that the global normative framework for the protection of human rights in relation to business also requires harder commitments,^[4] for which the form of a legally binding instrument might be the most appropriate.^[4] Russia and China, on the other hand, continue to oppose the process head-on. Russia argues that the current discussions are not taking into account their concerns and claims that the actual draft is going beyond the scope agreed in resolution 26/9.^[5] China, as usual, defends the right to development as the most important human right and welcomes corporate contributions to it, without assessing or taking into consideration the potential human rights violations that such a development may entail.^[6]

Besides all these political complexities, the very design of the working methods complicates the progress. During the discussion of the different articles, States and other participants make their proposals for amendments. Sometimes States support and align themselves with other suggestions, but on several occasions they defend totally opposing and incompatible positions. Coupled with the fact that no voting or decision-making takes

place, the result is a wish list of the various participants, often contradictory and conflicting. For example, the parties are still far from reaching a consensus on the scope of the document, covered in Article 3 of the third revised draft. Some argue for the need to include *all business activities*, the wording used in the third draft, while others advocate for including only those with a transnational character. There was also a lack of consensus on Article 11, which addresses the applicable law. The Chair and other States proposed its deletion, while some voices, such as Mexico or Palestine, vehemently defended the need to keep the provision.

At last, it was agreed that the IGWG would continue its work and that by June 2023 at the latest, an updated draft should be presented with the input received at the eighth session. The contradictory nature of these submissions and the lack of agreement on core issues overly burdened the work of the group.

The general feeling that remains after the conclusion of this round of negotiations is that further challenges lie ahead, and States should continue negotiating on the basis of the updated third revised draft only. Common ground is far from being reached and it seems difficult to crystallise the efforts into a text that would encompass the support and ratification of a large number of States. One of the potential risks of the negotiating process is that the proposals of countries representing the largest economies would contribute to water down the content of the Treaty to such an extent that its existence would probably become meaningless.

*This blog post has been prepared in the framework of the research project IC1019/22/000010 – The potential of mandatory human rights and environmental due diligence laws to address violence against human rights and environmental defenders.

[1] The General Statement of Palestine is available at:

<https://www.ohchr.org/sites/default/files/documents/issues/transcorporations/session8/submissions/2022-10-25/stm-IGWG-session8-state-stateofpalestine.pdf>.

[2] The General Statement of the United States is available at:

<https://www.ohchr.org/sites/default/files/documents/issues/transcorporations/session8/submissions/2022-10-27/stm-IGWG-session8-state-usa.pdf>.

[3] The General Statement of the European Union is available at:

<https://www.ohchr.org/sites/default/files/documents/issues/transcorporations/session8/submissions/2022-10-27/stm-IGWG-session8-igo-eu.pdf>.

[4] The General Statement of Portugal is available at:

<https://www.ohchr.org/sites/default/files/documents/issues/transcorporations/session8/submissions/2022-10-25/stm-IGWG-session8-state-portugal.pdf>.

[5] The General Statement of the Russian Federation is available at:

<https://www.ohchr.org/sites/default/files/documents/issues/transcorporations/session8/submissions/2022-10-25/stm-IGWG-session8-state-russianfederation-ru.pdf>.

[6] The General Statement of China is available at

<https://www.ohchr.org/sites/default/files/documents/issues/transcorporations/session8/submissions/2022-10-25/stm-IGWG-session8-state-china-zh.pdf>.

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