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List of Abbreviations

ARP	Office of the High Commissioner for Human Rights Accountability and Remedy Project
BIAC	Business and Industry Advisory Committee to the OECD
BITs	Bilateral investment treaties
CESCR	Committee on Economic, Social and Cultural Rights
Draft Code	United Nations Draft Code of Conduct on Transnational Corporations
GC	General Comment
ECOSOC	Economic and Social Council
EU	European Union
FCTC	World Health Organisation Framework Convention on Tabacco Control
FDI	Foreign direct investment
GATT	General Agreement on Tariffs and Trade
GEP	Group of Eminent Persons
ICC	International Chamber of Commerce
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IGWG	Intergovernmental Working Group
ILO	International Labour Organization
IOE	International Organisation of Employers
ISDS	Investor-State Dispute Settlement
NAFTA	North American Free Trade Agreement
NAPs	National Action Plans
NGOs	Non-governmental organisations

NIEO	New International Economic Order
Norms	Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
SRSG	Special Representative of the Secretary General
TNCs	Transnational Corporations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNHRC	United Nations Human Rights Council
UNGP	United Nations Guiding Principles on Business and Human Rights
USD	United States Dollars
WBCSD	World Business Council for Sustainable Development
WTO	World Trade Organisation

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1. Introduction

1.1 Research Background

1.1.1 Accountability gaps in current human rights system

Human Rights are realised under international human rights law, which obliges States to ensure the rights of individuals within their jurisdiction. However, this State-based framework for the protection and promotion of human rights is facing difficulties in the era of globalization.[1] Among others, one of the challenges is the fact that human rights abuses committed or assisted by transnational corporations (TNCs) are becoming prevalent.[2]

In the current legal framework, a State that hosts TNCs operations in its territory (the 'host State') is primarily responsible for securing human rights of individuals against abuses committed by those TNCs on the soil of that State.[3] However, holding TNCs accountable could be very challenging for host States, due to TNC's complex structure[4] and cross-border character.[5] Moreover, TNCs' strong economic power often makes it difficult for host States to comply with their human rights obligations, as they cannot compete with them. This is especially the case for States that have poor governance and weak economic power.[6] Trade and investment agreements exacerbate such a trend, constraining host governments' ability to uphold human rights while providing strong protections for the rights of TNCs.[7] There are also some States that are not willing to

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[1] Smita Narula, 'International Financial Institutions, Transnational Corporations and Duties of States'

[2] Robert McCorquodale and Penelope Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 The Modern Law Review 598, 619.

[3] Narula (n 1) 137.

[4] Tineke Lambooy, Aikaterini Argyrou and Mary Varner, 'An Analysis and Practical Application of the Guiding Principles on Providing Remedies with Special Reference to Case Studies Related to Oil Companies' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business* (Cambridge University Press 2013) 368 <http://ebooks.cambridge.org/ref/id/CBO9781139568333A025> accessed 3 July 2017.

[5] Olivier De Schutter, 'Towards a Legally Binding Instrument on Business and Human Rights' [2015] Available at SSRN 2668534 41–43 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668534> accessed 29 June 2016.

[6] Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 Journal of Business Ethics 493, 494; Narula (n 1) 138.

[7] For example, both Narula (n 1) and McCorquodale and Simons (n 2) argues that the stabilization clause commonly seen in agreements between foreign investors and host states or bilateral investment treaties

regulate TNCs or even are in complicit with TNCs on human rights abuses, amid a global competition to attract foreign investments.[8]

These elements result in accountability gaps, where the victims of corporate human rights abuse have no access to justice, while TNCs enjoy their impunity.

1.1.2 Attempts to establish 'binding obligations' on TNCs

Establishing a binding instrument that regulates the activities of TNCs at the international level has been considered as a way to address these accountability gaps. In fact, at the United Nation (UN) level, there have been several attempts made toward this aim.

The first attempt was the *UN Draft Code of Conduct on Transnational Corporations*,[9] negotiated as early as the 1970s.[10] The second was the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*,[11] which was presented in 2003.[12] Both of them provoked heated debates among States, and ultimately failed to be realised.[13]

What has been achieved so far at the UN level is the *UN Guiding Principles on Business and Human Rights (UNGP)*,[14] the most authoritative statement of the human rights responsibilities of corporations. However, it remains non-binding and its

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hinders the host state to enact new regulation for the protection of human rights. Narula also addresses that in order to secure a TNC's investment, weaker states accept terms and conditions that are 'often more responsive to a TNC's shareholders and the need to increase profits than the rights of host communities'.

[8] Bernaz (n 6) 494; Narula (n 1) 138-139; Karin Lukas, *Labour Rights and Global Production* (NWV - Neuer Wiss Verl 2013) 94–95, 111.

[9] United Nations Commission on Transnational Corporations, 'Draft U.N. Code of Conduct on Transnational Corporations' (1983) 22 International Legal Materials 192.

[10] Karl P Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) 16 The Journal of World Investment & Trade 11.

[11] Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN.Doc E/CN.4/Sub.2/2003/12/Rev.2.

[12] Pini Pavel Miretski and Sascha-Dominik Bachmann, 'UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: A Requiem, The' (2012) 17 Deakin L. Rev. 5, 7.

[13] Sauvant (n 10) 55; Miretski and Bachmann (n 12) 9.

[14] United Nations Human Rights Council (UNHRC), 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework'' (21 March 2011) UN Doc A/HRC/17/31.

implementation 'largely depend on […] corporate good will'.[15]

Against such background, in June 2014, the UN Human Rights Council (UNHRC) adopted Resolution 26/9 to establish an 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'.[16] However, this newest attempt may face similar challenges as its predecessors, since the vote for the Resolution was already 'sharply divided',[17] reflecting polarised positions of States.[18]

1.2 Research Question

The work of the IGWG may result in closing or reducing the existing accountability gaps by developing and adopting a binding treaty that regulates the activities of TNCs. However, it will likely be a challenge for the IGWG to gain the sufficient support from States to realize a binding instrument.

In fact, Ruggie, the drafter of the *UNGP*, warns that the work of the IGWG may only achieve: nothing after a decade or even longer negotiation; or a treaty that no developed countries ratify, and is thereby limited in its effect.[19]

In view of such predictions, the author formulates a research question as follows:

Is it possible for the IGWG to produce a legally binding instrument that is effective enough to hold TNCs accountable, and at the same time, feasible in terms of

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[15] Bernaz (n 6) 493-494.
[16] UNHRC, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (14 July 2014) UN.Doc A/HRC/RES/26/9 para. 1.
[17] John Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty' (2014) 8 IHBR Commentary 1 <http://www.ksg.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf> accessed 1 May 2017.
[18] It was adopted by vote of 20 to 14, with 13 abstentions. The member states voted in favour were: Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Viet Nam. The member states voted against were: Austria, Czechia, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America. The member states abstained were: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates.
[19] Ruggie (n 17) 6.

gaining support from enough States to be realised and bring actual effects on the ground?

The author considers that the treaty needs to enhance victims' access to justice in order to be 'effective', because 'the possession of rights is meaningless without mechanisms for their effective vindication'.[20] At the same time, the instrument has to be 'feasible', in terms of gaining support from enough States so that the outcome can be legislated as a binding treaty and bring actual effects on the ground.

In order to answer this question, the author reviews past attempts to establish a binding regulation alongside the discussions at the IGWG to identify challenges, opportunities and options for the establishment of a binding treaty with regard to business and human rights.

1.3 Structure and Methodology

This thesis consists of four parts.

Chapter one presents the research background and the research question and explains the structure and methodology.

Chapter two analyses three past initiatives at the UN level with regard to international standard setting over the issue of business and human rights, namely: the *UN Draft Code of Conduct on Transnational Corporations*;[21] the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*;[22] and the *UN Guiding Principles on Business and Human Rights (UNGP)*.[23] It is relevant to review these three initiatives, as the first two tried to establish a set of *binding* norms that regulate activities of TNCs, while the third initiative, although non-binding, is the most authoritative statement of the human rights responsibilities of corporations at this time and the discussion at the IGWG often refers to it. After briefly introducing the history of the negotiations and the development of the contents unfolded,

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[20] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1977) 27 Buff. L. Rev. 181, 185.
[21] United Nations Commission on Transnational Corporations (n 9).
[22] Sub-Commission on the Promotion and Protection of Human Rights (n 11).
[23] UNHRC (n 14).

the author examines arguments for and against these initiatives, put forward by various stakeholders, such as States, civil society organisations and the business sector. Subsequently, the author analyses the key reasons why the first two attempts failed and the last one succeeded. These analyses over three attempts provide useful insights to examine the possibility of legislating the proposed binding instrument at the IGWG.

Chapter three introduces discussions over the proposed binding treaty. After providing a brief background, it gives an overview of States' positions, civil society and business sector regarding this proposed treaty. Subsequently, it elaborates on key issues in the discussion, such as the relationship with the *UNGP*, the coverage of the treaty, possible concrete contents, enforcement mechanisms as well as how to proceed with the negotiation. It also analyses stakeholders' positions over each issue and examines the possibility for reaching agreements. Furthermore, it also considers the effectiveness of concrete proposals in terms of holding TNCs accountable.

Finally, in Chapter four, the author concludes the thesis with a summary of main findings and recommendations towards an effective and feasible treaty.

To accomplish this, the author has undertaken a desk-based literature review. It will be both empirical and legal, as the analysis will base itself on a qualitative research of documents as well as international human rights law and legal analysis. The main sources are the reports of, and documents submitted to, the IGWG, as well as related secondary literature written by academics and civil society organisations. In addition, the online videos and audio recordings of the discussions held at the UNHRC / the IGWG are also examined. Due to limited language abilities, the author relies on the official simultaneous interpretation of these sources into English.

2. Frameworks for Business and Human Rights: Historical Development

Since the 1970s, several attempts to regulate the behaviour of TNCs have been made at the UN level.[24] Aiming to compare the discussions over those past attempts to the current debate on the proposed binding treaty, this chapter reviews negotiations of three

[24] De Schutter (n 5) 7.

of these attempts, namely the *UN Draft Code of Conduct on Transnational Corporations* (*Draft Code*),[25] the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (*Norms*),[26] and the *UN Guiding Principles on Business and Human Rights* (*UNGP*).[27] It is relevant to examine the negotiations of the first two attempts (the *Draft Code* and the *Norms*), as these actually tried to establish a set of 'binding' regulations over TNCs.[28] Meanwhile, the *UNGP*, which is a 'non-binding' instrument,[29] is still pertinent to review, as it is 'seen as most authoritative statement of the human rights duties or responsibilities of States and corporations adopted at UN level'[30] and it has a strong influence over the current discussions of proposed binding treaty.[31]

In order to limit the scope of this thesis, other initiatives such as the *UN Global Compact*[32] and the *Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises*[33] will not be reviewed, as they are voluntary initiatives, whereas the IGWG is trying to produce a binding treaty. In addition, other measures developed at the UN agencies, including the International Labour Organization (ILO) will not be reviewed either, as their coverage is limited to specific rights (e.g. labour rights) and do not encompass the entire spectrum of Human Rights, as the work of IGWG does.

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[25] United Nations Commission on Transnational Corporations (n 9).
[26] Sub-Commission on the Promotion and Protection of Human Rights (n 11).
[27] UNHRC (n 14).
[28] Sauvant (n 10) 46; Miretski and Bachmann (n 12) 9.
[29] De Schutter (n 5) 14.
[30] ibid 13.
[31] For example, stakeholders who are reluctant about this binding treaty often stress their commitment to the implementation of the UNGP. See Chapter 3 for further details.
[32] '[A] voluntary initiative based on CEO commitments to implement universal sustainability principles and to take steps to support UN goals', quoted from the website of the UN Global Compact. UN Global Compact, 'About the UN Global Compact' <https://www.unglobalcompact.org/about> accessed 30 June 2016.
[33] Organisation for Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (OECD 2011) <http://public.eblib.com/choice/publicfullrecord.aspx?p=797696> accessed 6 June 2016.

2.1 UN Draft Code of Conduct on Transnational Corporations

2.1.1 Historical Context

This section examines the negotiations of the *UN Draft Code of Conduct on Transnational Corporations (Draft Code)*, the first attempt within the UN to regulate the behaviour of the TNCs, by reviewing the context in which the negotiations started, how the negotiations progressed and the reasons why they failed.

To begin with, this subsection reviews the historical context of 1970s, in order to understand the political momentums that led toward establishing regulations with regard to TNCs.

In the 1970s, the question of how to deal with the impacts of TNCs became an important international agenda,[34] as it was one of the biggest concerns of newly decolonized developing countries[35] that started to speak out in international fora at that time.[36] The interference by the International Telegraph and Telephone Corporation, a TNC from the United States, in Chile's domestic policy that contributed to the overthrow of the democratically elected Chilean president Salvador Allende was one of the emblematic events in this context.[37]

Reflecting such growing attention by States towards TNCs, in 1972, the Economic and Social Council (ECOSOC) decided to appoint a Group of Eminent Persons (GEP) to study TNCs' role and impact on the process of development especially in developing countries.[38] Based on a report submitted by this GEP, the UN Commission on TNCs and the UN Centre on TNCs (UNCTC) were established in 1974.[39] One of the main functions of the UNCTC was formulating a Code of Conduct dealing with TNCs.[40]

It was also in 1974 that the developing countries succeeded in passing a Resolution[41] at

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[34] Sauvant (n 10) 13–14; Tagi Sagafi-nejad and John H Dunning, *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Indiana University Press 2008) 48–49.
[35] Sauvant (n 10) 13–14; Sagafi-nejad and Dunning (n 34) 48–52.
[36] Sauvant (n 10) 14.
[37] ibid 13; Sagafi-nejad and Dunning (n 34) 41–43.
[38] Sagafi-nejad and Dunning (n 34) 52.
[39] ibid 86, 90, 91.
[40] ibid 90–91.
[41] United Nations General Assembly (UNGA), 'Declaration on the Establishment of a New International

the UN General Assembly (UNGA) to establish a New International Economic Order (NIEO) with support of the socialist countries.[42] The declaration on the establishment of the NIEO also reflected a strong attention towards TNCs, as it called for

> '[r]egulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries'.[43]

The Programme of Action for NIEO also addresses that '[a]ll efforts should be made to formulate, adopt and implement an international code of conduct for transnational corporations'.[44]

Concurrently, the issue of nationalization of assets of foreign investors by the developing countries was also under the spotlight.[45] The developing countries saw it as 'a means through which they could assert their newly proclaimed sovereignty over national resources'[46] and nationalizations were at their peak at the early 1970s.[47] Therefore, for developed countries, it became important to develop certain measures to protect their investors abroad and they considered the *Draft Code* a good tool for this purpose.[48]

Furthermore, trade unions in developed countries were putting pressure on their governments to take action over issues of TNCs, as they feared the activities of TNCs, especially an expansion of international production networks, which could impact their collective bargaining powers. With both internal and external pressure from trade unions and developing countries, developed countries were keen to legitimize TNCs.[49]

It was in such a context where the negotiation of the *Draft Code* began.

Economic Order' (1 May 1974) UN Doc. A/RES/3201(S-VI).
[42] Sauvant (n 10) 15; De Schutter (n 5) 6.
[43] UNGA (n 41) para.4 (g).
[44] UNGA, 'Programme of Action on the Establishment of a New International Economic Order' (1 May 1974) UN Doc. A/RES/3202(S-VI) V.
[45] Sauvant (n 10) 46.
[46] De Schutter (n 5) 7.
[47] Sauvant (n 10) 14.
[48] ibid 20–27; De Schutter (n 5) 7; Sagafi-nejad and Dunning (n 34) 94.
[49] Sauvant (n 10) 26, 30.

2.1.2 Overview: Brief History of the Negotiation and States' Positions

The negotiations of the *Draft Code* started January 1977 in the Intergovernmental Working Group on a Code of Conduct.[50] The objective of this negotiation was to develop a comprehensive instrument that 'define[s] the entirety of relations between governments and TNCs'[51] and eventually adopt it by consensus.[52] It made progress until the early 1980s,[53] and by the time the Working Group presented the *Draft Code* composed of 71 provisions to the UN Commission on TNCs in 1982, two-third of the provisions had been already agreed upon.[54] However, the negotiation did not make much progress after 1983,[55] and by the beginning of 1990s, it became rather clear that no consensus was possible on the *Draft Code*.[56] Finally in 1993, the ECOSOC adopted a Resolution that put a formal end of the negotiations.[57]

One of the peculiarities of the *Draft Code* was that it contained not only provisions that regulated the activities of TNCs but also provisions that defined the treatment of TNCs by the States in which they operate.[58] This reflected different underlying interests on the *Draft Code* between groups of States as explained in the previous subsection; while developing countries were in favour of the *Draft Code* that regulated TNCs in order to minimize any negative impacts caused by TNCs, developed countries sought to establish protections for their investors in developing countries by setting up standards that defined the conducts of host country governments towards foreign investors.[59] Ultimately, it was a compromise for the *Draft Code* to contain provisions on both regulation and protection, in order to bring these two groups together.[60] However, this gave the *Draft Code* wide scope, including an extremely complicated and technical

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[50] ibid 38.
[51] ibid 19.
[52] ibid 20.
[53] ibid 51.
[54] United Nations Commission on Transnational Corporations, 'Information Paper on the Negotiations to Complete the Code of Conduct on Transnational Corporations' (1983) 22 International Legal Materials 177 para 22.
[55] Sauvant (n 10) 51–52.
[56] ibid 50.
[57] ibid 55.
[58] United Nations Commission on Transnational Corporations (n 9). Paragraph 6 to 46 are about regulation and paragraph 47 to 54 deals with treatment.
[59] Sauvant (n 10) 20–27; De Schutter (n 5) 7; Sagafi-nejad and Dunning (n 34) 94.
[60] Sauvant (n 10) 41; De Schutter (n 5) 7.

issue of international investment.[61] Regulating provisions were rather focused on protecting the sovereign authority and policy space of host governments from TNCs than to secure human rights.[62] In fact, the paragraphs that dealt with issues related to human rights were limited to: paragraph 13 that addresses 'respect for human rights and fundamental freedoms', in particular, dealing with anti-discrimination as well as equality of opportunity and treatment; and paragraph 14 concerning business behaviour in relation to apartheid in South Africa and its illegal occupation of Namibia.[63] Aside from these, the *Draft Code* contains paragraphs in relation to anti-corruption, consumer protection and environmental protection.[64]

The interests of developing and developed countries were in conflict with each other; on one hand, developing countries preferred provisions on protection for foreign investors to be weak in order to keep their national policy space,[65] and on the other hand, developed countries did not want to have strong regulations that could dictate their firms' actions.[66] Meanwhile, Socialist countries took the side of developing countries in order to give Western countries a difficult time. At the same time, these socialist countries challenged the definition of TNCs, in order to prevent their state-owned enterprises from being regulated by the *Draft Code*.[67] These issues remained contentious throughout the negotiations. The legal nature of the *Draft Code*,[68] the question of nationalization[69] and the definition of the term 'transnational corporation'[70] were among the issues raised. The legal nature of the *Draft Code* was subject of debates as developing countries insisted that the regulating provisions to be binding and the treatment provisions to be non-binding, while developed countries demanded the

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[61] Sauvant (n 10) 45, 46, 56. For instance, according to the United Nations Commission on Transnational Corporations (n 9), developed countries attempted to include provisions on equitable and non-discriminatory treatment (para. 48) and access to international arbitration (para. 56).
[62] United Nations Commission on Transnational Corporations (n 9).
[63] ibid para.13, 14.
[64] ibid para. 20, 37-43.
[65] Sauvant (n 10) 20–21; De Schutter (n 5) 7.
[66] Sauvant (n 10) 46.
[67] ibid 21.
[68] ibid 46.
[69] De Schutter (n 5) 7; Sauvant (n 10) 46.
[70] Sauvant (n 10) 15, 21, 22, 49.

opposite.[71] Both of these country groups showed similar attitudes towards the strength of the implementation mechanism; that developing countries demanded a strong mechanism over regulating provisions and a weak mechanism over treatment provisions, whereas developed countries again wanted the opposite.[72] The issue of nationalization was similarly disputed: developing countries insisted on dealing with the matters of compensation and the settlement of disputes under domestic law, when developed countries demanded them to be dealt with under international law.[73] As for the definition of TNCs, developed countries lead by the US argued against socialist countries and reasoned that the *Draft Code* should cover all firms, including socialist countries' State-owned enterprises.[74]

Despite such divided positions of States, the Chairman of the Working Group stated in 1983 that 'the Group was frequently closer to agreement than the text of the *Draft Code* suggests', as 'the Group has done a good deal of negotiating on compromise solutions' regarding 'the five or six hard core difficulties', which includes issues indicated above.[75] However, due to changes in 'macro-economic and political circumstances', no consensus was reached in the end.[76]

2.1.3 Key Reason for Not Reaching a Consensus

Sauvant suggests that the most important reason why the negotiations failed was that the overlapping interest towards the formulation of the *Draft Code* that existed in the beginning of the negotiation was lost towards the end of the process.[77] He analyses that it happened because 'regulatory, economic and political macro-level circumstances' changed during the more than decade long negotiation.[78] In particular, the following changes were important:

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[71] ibid 46–47; United Nations Commission on Transnational Corporations (n 9). In the draft, the words 'should' and 'shall' were juxtaposed for regulating provisions. As for treatment provisions, quite a number of brackets were observed, which showed severe degree of disagreement.
[72] Sauvant (n 10) 48.
[73] ibid 46; United Nations Commission on Transnational Corporations (n 9) para. 54, 56.
[74] Sauvant (n 10) 48.
[75] United Nations Commission on Transnational Corporations (n 54) para. 24.
[76] Sauvant (n 10) 62.
[77] ibid 56. As for the 'overlapping interest', see the first subsection of this section.
[78] ibid.

1) Developing countries changed their view on foreign direct investment (FDI) facilitated by TNCs. FDIs went '[f]rom being a 'bad thing' [to] a 'good thing' for development' after the debt crisis started in early 1980s, as non-debt-creating finance such as FDIs became more attractive.[79] Growth shown by some East Asian countries that utilized the FDI and non-equity forms of foreign participation furthered the shift.[80] Moreover, the collapse of the socialist camp from the late 1980s to early 1990s also deprived developing countries of the socialist model of development.[81] In addition, the debt crisis and the disintegration of the socialist camp weakened the bargaining power of developing countries during international negotiations.[82]

2) Developed countries lost their interest in the *Draft Code*, as they started to protect their investors through other means, such as bilateral investment treaties (BITs).[83] The number of BITs that had been negotiated reached 371 by the end of the 1980s, which increased to 1,862 by the end of the 1990s.[84] Such agreements often provide binding standards for the host States on treatment of foreign investors, accompanied with a dispute settlement procedure through international arbitration.[85] It is worth noting that the negotiation of the North American Free Trade Agreement (NAFTA) also started in 1990[86] and the Uruguay round of the General Agreement on Tariffs and Trade (GATT) that lead to the creation of the World Trade Organisation (WTO) was held from 1986 to 1994[87]. Indeed, in the 1980s, with Prime Minister Thatcher of the United Kingdom and President Regan of the US, the free market principle became dominant, which made the *Draft Code* that was supposed to regulate TNCs 'anachronistic and unacceptable' for developed countries.[88] Moreover, the internal

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[79] ibid 59–60; Sagafi-nejad and Dunning (n 34) 119.
[80] Sauvant (n 10) 59–60.
[81] ibid 60.
[82] De Schutter (n 5) 7; Sauvant (n 10) 58.
[83] Sauvant (n 10) 57.
[84] ibid.
[85] ibid.
[86] North American Free Trade Agreement (NAFTA), 'About NAFTA' <http://www.naftanow.org/about/default_en.asp> accessed 24 June 2017.
[87] World Trade Organisation (WTO), 'The WTO in Brief - 1' <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm> accessed 24 June 2017.
[88] Sauvant (n 10) 54, 58.

pressure exerted by trade unions towards the governments of developed countries to regulate TNCs eased after other international guidelines (although non-binding) were adopted, such as the OECD Guidelines[89] in 1976 and the ILO Tripartite Declaration in 1977.[90]

Considering these changes, Sauvant argues '[a]s the 1980s progressed, the window of opportunity –if there had indeed been one – closed for a comprehensive United Nations Code'.[91]

In addition, Sauvant states that the attempt to make the *Draft Code* binding contributed to its failure.[92] Sagafi-nejad and Dunnin also consider one of the main reasons for the failure of the *Draft Code* to be the insistence of proponents on the 'binding' nature, given the divisive debate over the legal status of the *Draft Code*.[93]

2.1.4 Summary of the *Draft Code*

The key features and lessons to be learned from the negotiation process of the *Draft Code* can be summarised as follows:

1) The *Draft Code* tried to address both regulations over the conduct of TNCs and the treatment of TNCs by host country governments; it was good to bring States with different positions together, but it made the scope of the *Draft Code* too wide and too complicated to manage.

2) There was an international political will to develop the *Draft Code* until the early 1980s, as both developing and developed countries had a vested interest in its success. However, it was difficult to sustain this momentum as political / economic circumstances changed. In other words, the political will of States is necessary to develop international regulations over TNCs and the emergence of such a political will was influenced by political / economic circumstances.

3) The pressure from non-governmental organizations (i.e. trade unions) contributed to

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[89] OECD (n 33).
[90] International Labour Office, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (4 ed, International Labour Office 2006).
[91] Sauvant (n 10) 61.
[92] ibid 56.
[93] Sagafi-nejad and Dunning (n 34) 111.

a certain extent to mobilise a political will for the development of the *Draft Code*. However, the actors in the negotiations were primarily States.

4) Although there was political momentum, it was still difficult for developed countries to accept a 'binding' instrument for TNCs.

2.2 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

2.2.1 Brief History of the Development

This section reviews the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (*Norms*), the second attempt at the UN level to provide a framework to regulate corporate behaviour.

To start with, this subsection provides a brief history of the development of the *Norms*.

In the 1990s, international trade rules were further liberalised and FDI inflows to developing countries increased.[94] Simultaneously, human rights violations committed by TNCs and the impunity they enjoyed attracted some attention from the international community, especially with the occurrence of some landmark cases.[95] Civil society was also very active globally, calling for a more humane process of globalization.[96]

Responding to growing concerns over the conduct of TNCs,[97] the UN Sub-Commission on the Promotion and Protection of Human Rights[98] established in 1998 a Working Group to examine the working methods and activities of transnational corporations.[99] One of the mandates of this Working Group was to make recommendations and proposals about TNCs, in order to ensure that TNCs' working methods and activities

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[94] David Kinley and Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6 Human Rights Law Review 447, 457.
[95] ibid. Kinly and Chambers indicate cases such as Shell accused of human rights violation in Nigeria as well as BP in Colombia in the 1990s. They also refer to Bhopal court procedure started in the 1990s after the disaster at the Union Carbide plant in India in 1984.
[96] De Schutter (n 5) 8.
[97] David Weissbrodt, 'Business and Human Rights' (2005) 74 U. Cin. L. Rev. 55, 64.
[98] At that time, it was called the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The name was changed in 1999. See footnotes of Miretski and Bachmann (n 12) 7; Kinley and Chambers (n 94) 456.
[99] Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Fiftieth Session' (30 September 1998) UN.Doc E/CN.4/Sub.2/1998/45 30-32.

promoted human rights and were in line with the economic and social objectives of host countries.[100] The Working Group prepared the *Norms*,[101] which was approved by the Sub-Commission in 2003.[102] However, it met fierce opposition from many States and majority of business community.[103] Subsequently, in 2004, the former UN Commission on Human Rights, parent body to the Sub-Commission, resolved that 'as a draft proposal, [the *Norms*] has no legal standing and that the Sub-Commission should not perform any monitoring function'.[104] It also requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to compile a report that examined the scope and legal status of the *Norms*.[105] In 2005, the report by the OHCHR reaffirmed that the *Norms* 'has no legal standing'.[106] The *Norms* was eventually abandoned.[107]

2.2.2 Important Traits

The important traits of the *Norms* can be summarised as follows:

First, the *Norms* was designed to be a 'non-voluntary' set of principles that impose direct obligations on corporations.[108] Although it emphasised that 'States have the primary responsibility' to realise human rights, including to ensure that TNCs respect the human rights of others, paragraph one of the *Norms* clearly declared that '[w]ithin their sphere of activity and influence', corporations 'have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights'.[109]

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[100] ibid.
[101] Sub-Commission on the Promotion and Protection of Human Rights (n 11).
[102] David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 The American Journal of International Law 901, 904; Weissbrodt (n 97) 67.
[103] Miretski and Bachmann (n 12) 8–9; Kinley and Chambers (n 94) 457–459.
[104] Commission on Human Rights, 'Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights' (22 April 2004) UN Doc E/CN.4/DEC/2004/116.
[105] ibid.
[106] Commission on Human Rights, 'Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights' (15 February2005) UN.Doc E/CN.4/2005/91 9.
[107] Miretski and Bachmann (n 12) 8; Weissbrodt and Kruger (n 102) 913; Larry Catá Backer, 'Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law' (2005) 37 Columbia Human Rights Law Review 140–141 <http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=695641> accessed 17 June 2017.
[108] Miretski and Bachmann (n 12) 8; Weissbrodt and Kruger (n 102) 913.
[109] Sub-Commission on the Promotion and Protection of Human Rights (n 11).

Accordingly, unlike traditional human rights instruments where States are the sole human rights duty-bearers,[110] many of the paragraphs of the *Norms* were structured to identify '[t]ransnational corporations and other business enterprises' as the subject, and a binding 'shall' language was used to describe their obligation.[111]

Second, as David Weissbrodt, one of the drafters of the *Norms*[112] indicates, '[a]lthough not voluntary, the *Norms* are not a treaty'.[113] According to him, it was meant to be a 'soft law' instrument that restates international legal principles applicable to companies and '[t]he legal authority of the *Norms* derives principally from their sources in treaties and customary international law'.[114]

Third, as elaborated in its commentary, the duties of corporations articulated by the *Norms* include:

> 'to use due diligence in ensuring that their activities do not contribute *directly or indirectly* to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware' [emphasis added by author].[115]

This means that '[w]ithin their sphere of activity and influence',[116] corporations are obliged not only to refrain from interfering with others' enjoyment of their rights, but also to use their influence over their business partners to ensure that those partners would also refrain from committing human rights abuses.[117]

Fourth, as the title of the document shows, the scope of the application of the *Norms*

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[110] Miretski and Bachmann (n 12) 33.
[111] Sub-Commission on the Promotion and Protection of Human Rights (n 11). Out of 23 paragraphs of the Norms, 16 contain the following set of words: '[t]'ransnational corporations and other business enterprises shall --.'
[112] Weissbrodt and Kruger (n 102) 904.
[113] ibid 913.
[114] ibid.
[115] Sub-Commission on the Promotion and Protection of Human Rights, 'Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN.Doc E/CN.4/Sub.2/2003/38/Rev.2 para. 1(b).
[116] Sub-Commission on the Promotion and Protection of Human Rights (n 11) para. 1.
[117] Weissbrodt and Kruger (n 102) 911; Miretski and Bachmann (n 12) 24; De Schutter (n 5) 10; Kinley and Chambers (n 94) 470.

was not limited to TNCs but included all business entities.[118] Weissbrodt explains that while TNCs attract special attention since they can move their operations over national borders or exercise political / economic power over governments and thereby avoid their responsibility over human rights abuse,[119] applying the *Norms* only to TNCs could be regarded as discriminatory.[120] In addition, the term 'transnational corporation' was intentionally broadly defined,[121] in order to prevent TNCs from shirking their responsibility by changing their corporate structures.[122] Having this catch-all approach, the concept of 'sphere of activity and influence' was important, in order to minimize the burden for small businesses to comply with the *Norms*.[123]

Fifth, the *Norms* encompassed a wide range of human rights, citing a number of international standards, including soft law instruments.[124] In concrete terms, the *Norms* addressed corporations' obligations in relation to: the right to equality of opportunity and treatment,[125] the right of security of persons,[126] the rights of workers,[127] economic, social and cultural rights and civil and political rights.[128] Indeed, the human rights covered by the *Norms* were significantly wider and were described in more detail compared to the *Draft Code*[129] or other voluntary initiatives.[130] In addition, the *Norms*

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[118] Weissbrodt and Kruger (n 102) 909; Miretski and Bachmann (n 12) 22–23.
[119] Weissbrodt and Kruger (n 102) 909; Weissbrodt (n 97) 65.
[120] Weissbrodt (n 97) 65.
[121] Weissbrodt and Kruger (n 102) 909; Miretski and Bachmann (n 12) 22–23. The *Norms* defined a TNC as 'an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries-whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively', whereas '[t]he phrase "other business enterprise" include[d] any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity'. Sub-Commission on the Promotion and Protection of Human Rights (n 11) para. 20, 21,
[122] Weissbrodt and Kruger (n 102) 909; Weissbrodt (n 97) 65.
[123] Weissbrodt and Kruger (n 102) 910; Weissbrodt (n 97) 66.
[124] Sub-Commission on the Promotion and Protection of Human Rights (n 11) Preamble; Miretski and Bachmann (n 12) 24; Weissbrodt and Kruger (n 102) 912.
[125] Sub-Commission on the Promotion and Protection of Human Rights (n 11) para. 2.
[126] ibid para. 3, 4.
[127] ibid para. 5-9. Including the right to safe and healthy working environment, the right to adequate remuneration as well as the right to collective bargaining.
[128] ibid para. 12. The rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression are explicitly mentioned in the paragraph.
[129] United Nations Commission on Transnational Corporations (n 9). In the *Draft Code*, only paragraph

included paragraphs that indicate obligations of corporations with regard to respect for national sovereignty and the rule of law,[131] the avoidance of corruption,[132] consumer protection[133] and environmental protection.[134]

Sixth, the *Norms* included some provisions for its implementation. To begin with, corporations were requested to internalise the *Norms* by incorporating it in their internal rules of operations as well as in their business contracts or agreements with their partners.[135] They were also asked to periodically evaluate and report their performance.[136] As for monitoring, periodic monitoring and verification mechanisms by the UN and other international or national bodies were stipulated.[137] It suggested to include non-governmental organisations (NGOs) into such monitoring processes as well.[138] Meanwhile, States were asked to prepare legal and administrative framework in order to ensure corporations' adherence and implementation of the *Norms*.[139] In addition, the *Norms* also contained a paragraph that obliged corporations to provide reparations to the persons, entities and communities who were harmed when corporations fail to comply with the *Norms*.[140]

2.2.3 Reactions Towards the *Norms* by Stakeholders

The *Norms* aroused divided reactions. The main supporters of the *Norms* were NGOs, academics and human rights advocates.[141] It is worth noting that some leading TNCs also supported the *Norms*[142] and a group of TNCs including Hewlett-Packard and Novartis even participated in the project to 'road-test' the *Norms* in their own

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13 addressed 'respect for human rights and fundamental freedoms'. In concrete terms, it only addressed about 'equality of opportunity and treatment'.

130 Weissbrodt and Kruger (n 102) 912.

131 Sub-Commission on the Promotion and Protection of Human Rights (n 11), para. 10.

132 ibid para. 11.

133 ibid para. 13.

134 ibid para. 14.

135 ibid para. 15.

136 ibid para. 15, 16; Sub-Commission on the Promotion and Protection of Human Rights (n 115) para. 15(d)

137 Sub-Commission on the Promotion and Protection of Human Rights (n 11) para. 16; Backer (n 107) 106.

138 Sub-Commission on the Promotion and Protection of Human Rights (n 11) para. 16.

139 ibid para. 17.

140 ibid para. 18.

141 Commission on Human Rights (n 106) para. 19; Backer (n 107) 163.

142 Weissbrodt (n 97) 73.

business.[143] The supporters welcomed the *Norms*, as it was 'the most comprehensive' initiative dealing with business and human rights and could assist States meeting their obligations to protect human rights from corporate abuse.[144] They also found it useful for companies, as it would provide them a tool to evaluate their activities.[145] Moreover, they emphasised that it drew 'the right balance between the obligations of States and companies', as it reaffirmed 'the role of States as primary duty bearer' and indicated secondary responsibilities of companies.[146] Furthermore, they argued that the *Norms* attempted to 'deal with the situation where a company is operating in a State which is unwilling or unable to protect human rights' by identifying direct obligations applicable to business, while offering 'the possibility of remedy to victims'.[147]

On the contrary, majority of business sector and business groups, notably the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE), opposed the *Norms*.[148] The business alliances effectively lobbied States and many developed countries, such as the United States and Australia, expressed concerns about the *Norms*.[149] The opponents criticised the *Norms* for its attempt to impose human rights obligations directly on business, arguing that it was 'baseless and a misstatement of international law', as 'only States have legal obligations under international human rights law'.[150] They also pointed out that by imposing such duties upon companies, the *Norms* would allow States to 'avoid their own responsibilities', while obliging businesses to play roles that are more suited to governments, such as

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[143] Miretski and Bachmann (n 12) 13; Weissbrodt (n 97) 73. According to the footnote 34 of Miretski and Bachmann, the business that participated this initiative besides above two companies were: ABB, Barclays Bank, National Grid Transco, Novo Nordisk, MTV and The Body Shop International, Gap Inc and Statoil.

[144] Commission on Human Rights (n 106) para. 21.

[145] ibid.

[146] ibid.

[147] ibid.

[148] ibid para. 19; International Chamber of Commerce (ICC) and International Organization of Employers (IOE), 'Joint views of the IOE and ICC on the draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights"' (ICC and IOE, 1 March 2004) <http://www.reports-and-materials.org/IOE-ICC-views-UN-norms-March-2004.doc> accessed 30 April 2017; Miretski and Bachmann (n 12) 27–28; Kinley and Chambers (n 94) 457–459.

[149] Commission on Human Rights (n 106) para. 19; Miretski and Bachmann (n 12) 30–34; Kinley and Chambers (n 94) 457–458.

[150] Commission on Human Rights (n 106) para. 20.

making balancing decisions to reconcile different societal needs in the course of implementing some rights.[151] Indeed, in the eyes of the opponents, a mandatory approach of the *Norms* was a 'major shift away' from existing voluntary initiatives without a proper justification.[152] They further criticised the process of how the *Norms* was developed: that not only did the Sub-Commission have 'no authority' to create such a standard, but also those standards were developed and adopted 'wholly without consideration for the views of States'.[153] In addition, the opponents argued that the *Norms* stipulated legal duties on business that 'go beyond the standards applying to States', since the *Norms* imposed obligations on business that derive from treaties which their host State might not have ratified.[154] As for the content, the opponents claimed that it was 'vague and inaccurate', drawing on an example that it was partly based on documents that were not considered to have 'the state of international human rights law', such as recommendations.[155] They further argued that the *Norms* was too vague to be used as a standard to measure compliance against it.[156] The implementation provisions were also attacked as 'burdensome'.[157] Furthermore, the opponents criticised that the style of the *Norms* was 'unduly negative towards business'.[158]

Meanwhile, developing countries tended not to express their position openly during the consultation process in 2004 except Cuba, which explicitly welcomed the *Norms*.[159]

2.2.4 Key Reasons for Not Being Adopted

As described above, the *Norms* failed to be adopted at the former UN Commission on Human Rights,[160] facing strong opposition from many States[161] and the business

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[151] ibid.
[152] ibid.
[153] United States Mission to International Organizations, 'Note Verbale from the OHCHR of August 3, 2004 (GVA 2537)' (30 September 2004) <http://www2.ohchr.org/english/issues/globalization/business/docs/us.pdf> accessed 12 July 2017; Backer (n 107) 180. However, Kinley and Chambers indicated that States were actually encouraged to submit comments during the drafting process. Kinley and Chambers (n 94) 462–464.
[154] Commission on Human Rights (n 106) para. 20.
[155] ibid.
[156] ibid.
[157] ibid.
[158] ibid.
[159] Miretski and Bachmann (n 12) 31–32.
[160] Commission on Human Rights (n 106).

sector.[162]

Miretski and Bachmann as well as Backer suggest that one of the reasons why the *Norms* triggered fierce opposition from States was that it 'questioned the very essence of the state-centred doctrine'.[163] More concretely, it can be argued that the *Norms* challenged States' authority in two ways:

First, the *Norms* could undermine the central role of States to adopt and implement international human rights standards in their territories. The *Norms* requested corporations to integrate its provisions into their internal rules and into their business contracts with their partners, including States.[164] By doing so, the *Norms* attempted to develop a system to implement a wide range of international human rights standards through the private law of contract.[165] This meant that some human rights standards could be implemented by corporations in a State, regardless of whether that State ratified treaties in relation to those rights or not.[166] Furthermore, under the *Norms*, a corporation could be obliged to 'use their influence in order to help promote and ensure respect for human rights'[167] against a State, even when that State lawfully refused to comply with the treaties in which those rights were enshrined.[168] In this way, as Backer analyses, the *Norms* had the potential to threaten States' 'monopoly of control over decisions to adopt and implement international norms within their territories' and thereby encountered strong opposition from States.[169]

Second, the *Norms* could be used as a basis for the creation of new customary international law that would eventually bind States. Backer indicates that some standards stipulated in the *Norms* contradicted domestic corporate laws in many States.[170] For instance, the *Norms* adopted the 'enterprise liability' model, where a

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[161] ibid para. 19; Miretski and Bachmann (n 12) 30–34; Kinley and Chambers (n 94) 457–458.
[162] Commission on Human Rights (n 106) para. 19; ICC and IOE (n 148); Miretski and Bachmann (n 12) 27–28; Kinley and Chambers (n 94) 457–458; Weissbrodt (n 97) 70–72.
[163] Miretski and Bachmann (n 12) 39; Backer (n 107) 179–180.
[164] Sub-Commission on the Promotion and Protection of Human Rights (n 11) para. 15.
[165] Backer (n 107) 106, 142–151.
[166] ibid 182–183; Miretski and Bachmann (n 12) 28.
[167] Sub-Commission on the Promotion and Protection of Human Rights (n 115) para. 1(b).
[168] Backer (n 107) 106; Miretski and Bachmann (n 12) 28.
[169] Backer (n 107) 180–181; Miretski and Bachmann (n 12) 39–40.
[170] Backer (n 107) 164–176.

parent company could be held liable for harms caused by its subsidiaries, even when they had different legal personalities.[171] The laws of many States, on the contrary, do not take this approach, and outside of some exceptional circumstances, do not recognise related companies comprised of different legal entities as one.[172] According to Backer, instead of trying to harmonize these contradictions with domestic corporate laws, the drafters tried to change corporate behaviours through the incorporation of the *Norms* into their mandatory contracts / internal rules, which could eventually serve as a basis to establish new customary international law that would overturn domestic corporate law.[173] Further, as Backer argues, this methodology of establishing new 'custom' through incorporation of the *Norms* into private contracts could be used as means of hardening non-binding soft law instruments into binding customary international law,[174] since the *Norms* based itself not only on hard laws but also on soft laws.[175] Indeed, the *Norms* could potentially lead to the use of corporate action as 'a source of, and evidence of the acceptance of, customary international law-making'.[176] Naturally, States found this aspect of the *Norms* a threat to their sovereignty and opposed it,[177] since once a new customary international law would be established, it would bind all State actors.[178]

As for the business sector, Miretski and Bachmann highlight two aspects of the *Norms* that were particularly problematic for this group:[179] First was that under the *Norms*, companies could be held liable not only for their direct actions but also for possible human rights violations committed by their business partners.[180] Second was that companies would be obliged to provide reparation to those affected when they failed to comply with the *Norms*.[181] Most notably, businesses' partners also include States, thus, potentially obliging business to provide reparations for actions committed by State

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[171] ibid 145.
[172] ibid 170.
[173] ibid 164–176.
[174] ibid 184–188.
[175] Sub-Commission on the Promotion and Protection of Human Rights (n 11) Preamble.
[176] Backer (n 107) 186.
[177] ibid 186–187.
[178] ibid 151.
[179] Miretski and Bachmann (n 12) 29–30.
[180] ibid; Kinley and Chambers (n 94) 448–449.
[181] Miretski and Bachmann (n 12) 29–30.

actors.[182] Indeed, it is understandable that these aspects worried the business sector.[183]

In addition, the logic behind the 'non-voluntary' character of the *Norms* allowed space for criticism.[184] As stated above, the drafters claimed that the *Norms* was developed as a 'restatement of international legal principles applicable to companies',[185] while its legal authority that made it 'non-voluntary' was derived from its sources in treaties and customary international law.[186] However, it was debatable whether the existing legal principles could be interpreted in such a way,[187] enabling the opponents to attack the *Norms*[188] as 'baseless and a misstatement of international law'.[189] Simultaneously, its vagueness prompted further criticism.[190] For instance, the *Norms* stressed that 'States have the primary responsibility' to secure human rights and limited the duties of TNCs to 'their sphere of activity and influence',[191] but they did not clearly define this 'sphere of activity and influence'.[192] Such lack of clarity gave another reason for the opponents to attack the *Norms*.[193]

2.2.5 Summary of the *Norms*

The key features of and the lessons to be learned from the *Norms* can be summarised as follows:

1) The scope of the *Norms* was ambitious, as: a) it tried to directly impose human rights obligations upon corporations, making them accountable for both direct and

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[182] ibid.
[183] ibid.
[184] ibid 9–10.
[185] Weissbrodt and Kruger (n 102) 913.
[186] ibid.
[187] For instance, in his report regarding the *Norms*, Ruggie pointed out that 'with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles' that directly bind corporations. UNHRC, 'Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 February 2006) UN.Doc E/CN.4/2006/97 para. 60.
[188] Miretski and Bachmann (n 12) 9–10.
[189] Commission on Human Rights (n 106) para. 20. The IOC and the ICC also criticised the *Norms* on this matter, stating that the *Norms* 'not only misrepresents the fundamental legal point, it has ignored the nature of the UN human rights treaties'.
[190] Miretski and Bachmann (n 12) 10; UNHRC (n 187) para. 66-68.
[191] Sub-Commission on the Promotion and Protection of Human Rights (n 11) para. 1.
[192] Kinley and Chambers (n 94) 469; De Schutter (n 5) 10; Miretski and Bachmann (n 12) 25; UNHRC (n 187) para. 67.
[193] Miretski and Bachmann (n 12) 467; UNHRC (n 189) para. 66-68.

indirect involvement in abuses; b) it encompassed a wide range of rights, including rights deriving from soft laws; and c) it stipulated implementation mechanisms and possibility to provide reparations to victims.

2) Civil society welcomed the *Norms*, along with some business and some States. However, it faced vocal opposition from many developed States and majority of businesses, while most developing countries remained silent. It ultimately failed to be adopted. This shows that in order to adopt such an initiative, support from a certain number of States is necessary. At the same time, it was observed that non-State actors, such as NGOS and businesses played an important role in mobilizing opinion for and against the *Norms*, underlining their growing presence in the field of international law-making.

3) The key reasons why the *Norms* met strong oppositions could be summarised as follows: First, the *Norms* had implications that could undermine States' supremacy over corporations, which caused the strong opposition from the States. It attempted to develop a system where corporations could be obliged to implement a wide range of human rights norms in the territory of a State without the State's consent. It was also possible for the *Norms* to oblige corporations to impose human rights obligations upon States. Moreover, the *Norms* could change corporates' behaviour and use it as a basis to establish new customary international laws. In this way, the *Norms* could overturn any States' corporate laws that were inconsistent with the *Norms*. With the same methodology, it could also harden soft law instruments that were included in the *Norms*, effectively making them binding upon States. Second, majority of the business sector found the *Norms* troubling, since the *Norms* could hold corporations accountable for the acts of States, to the extent that corporations could even be obliged to provide reparation for them. Third, the *Norms* attempted to establish direct obligations upon corporations and claimed this to be a 'restatement of international legal principles applicable to companies'[194]. Actually, it was debatable if existing international law could be interpreted in such a way. Those who did not agree with the drafters' interpretation of existing international legal

[194] Weissbrodt and Kruger (n 102) 913.

framework called the *Norms* 'baseless and misstatement of international law'[195], challenging its legal premise.

In view of the above, the direct imposition of human rights obligations upon corporations itself may not necessarily be the reason why the *Norms* failed to be adopted. In this case, it was rather that certain elements, such as the scope of rights, the implementation system and the duty of due-diligence of corporations in relation to a third party, especially in relation to a State, that led to implications that States and businesses deemed unacceptable. In addition, if it was developed as a new treaty, discussions over the premise of the *Norms* could have been avoided.

2.3 UN Guiding Principles on Business and Human Rights

2.3.1 Brief History of the Development

This section reviews the *UN Guiding Principles on Business and Human Rights (UNGP)*, the business and human rights initiative that followed the *Norms*, and, as this sub-chapter explains, the only initiative to be endorsed.

In April 2005, soon after the report of OHCHR reaffirmed that the *Norms* had 'no legal standing',[196] the former UN Commission on Human Rights requested the Secretary General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises,[197] in order to 'start the process afresh'[198] and to 'move beyond the stalemate [debate over the *Norms*]'.[199] The mandate of this Special Representative of the Secretary General (SRSG) included: 'to identify and clarify standards of corporate responsibility and accountability', and 'to elaborate on the role of States in regulating and adjudicating the role of transnational corporations and other business enterprises'.[200] John Ruggie, a Harvard professor who

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[195] Commission on Human Rights (n 106) para. 20.
[196] Commission on Human Rights (n 106) 9.
[197] Commission on Human Rights, 'Promotion and Protection of Human Rights' (15 April 2005) UN Doc E/CN.4/2005/L.87.
[198] John Ruggie, 'Opening Remarks at Mandate Consultation with Civil Society' (11-12 October 2010) < www.reports-andmaterials.org/Ruggie-remarks-consultation-civil-society-11-Oct-2010.pdf> accessed 22 June 2017.
[199] UNHRC (n 187) para. 55.
[200] Commission on Human Rights (n 197) para.1.

was involved in the development of the *UN Global Compact* initiative,[201] was appointed as the SRSG.

In 2008, the SRSG published the *UN Protect, Respect and Remedy Framework* (*Framework*),[202] which was developed as a 'conceptual and policy framework'[203] aiming to provide 'an authoritative focal point around which the expectations and actions of relevant stakeholders could converge'.[204] It was unanimously welcomed[205] by the UNHRC, the successor of the former UN Commission on Human Rights, marking the first time that a UN human rights body comprised of States (as opposed to experts) agreed to welcome a proposal that promoted human rights responsibilities of business.[206]

Responding to the request made by the UNHRC, in 2011, the SRSG presented the *UNGP*,[207] which aimed 'to provide concrete and practical recommendations' for the implementation of the *Framework*, in order to 'operationalize' it.[208] Again, the UNHRC unanimously endorsed[209] the *UNGP*. At the same time, it established a Working Group on the issue of human rights and transnational corporations and other business enterprises to succeed the work of the SRSG, with a mandate to promote dissemination and implementation of the *UNGP*.[210]

Reflecting this, a number of countries agreed to develop their National Action Plans

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[201] UN Global Compact, 'Our Governance' <https://www.unglobalcompact.org/about/governance> accessed 22 June 2017.
[202] UNHRC, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5.
[203] ibid 1.
[204] UNHRC (n 14) para. 5.
[205] UNHRC, 'Resolution 8/7. Mandate of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises' (18 June 2008) UN Doc A/HRC/RES/8/7.
[206] Karin Buhmann, 'Navigating from "Train Wreck" to Being "Welcomed": Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business* (Cambridge University Press 2013) 54 <http://ebooks.cambridge.org/ref/id/CBO9781139568333A011> accessed 22 June 2017.
[207] UNHRC (n 14).
[208] UNHRC (n 14) para. 9.
[209] UNHRC, 'Resolution 17/4. Human rights and transnational corporations and other business enterprises' (6 July 2011) UN Doc A/HRC/RES/17/4.
[210] ibid para.6.

(NAPs) to disseminate and implement the *UNGP*.[211] It was also taken up by intergovernmental organisations and international financial institutions. Most notably, the OECD aligned their Guidelines for Multinational Enterprises with the *UNGP*. The number of companies that reported their effort to align with the *UNGP* has been increasing, while NGOs and workers' organisations started to use it as an advocacy tool.[212]

2.3.2 Important Traits

This subsection reviews the important traits of the *Framework* and the *UNGP*, such as their methodology, objective and contents.

Methodology: Principled pragmatism coupled with a consultative approach

In his interim report published in 2006, the SRSG concluded that he would abandon the *Norms*, since the 'divisive debate over the [*Norms*] obscure[d] rather than illuminate[d] promising areas of consensus and cooperation'.[213] In the same report, he declared that he would approach his mandate with 'principled pragmatism', that is,

> 'an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most - in the daily lives of people'.[214]

Together with this 'principled pragmatism', what made his approach distinct was the emphasis on consultations with various stakeholders as a step forward building consensus among them.[215] As Miretski and Bachmann point out, the SRSG seemed to learn a lesson from the failure of the *Norms*, bearing in mind that the new initiative on

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[211] Office of the United Nations High Commissioner for Human Rights (OHCHR), 'State National Action Plans' <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> accessed 4 July 2017.
[212] John Ruggie, 'Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization' 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474236> accessed 4 July 2017.
[213] UNHRC (n 187) para. 69.
[214] ibid para. 81.
[215] David Bilchitz and Surya Deva, 'The Human Rights Obligations of Business: A Critical Framework for the Future' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business* (Cambridge University Press 2013) 10 <http://ebooks.cambridge.org/ref/id/CBO9781139568333A009> accessed 14 June 2017.

business and human rights 'had to be acceptable to all affected stakeholders'.[216]

Objective: Close the governance gaps by supporting coherent and concert approach of all actors

The SRSG identified 'governance gaps' created by globalisation as the root cause of the challenges with regard to business and human rights.[217] According to him, these gaps 'between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences' permitted 'wrongful acts by companies of all kinds without adequate sanctioning or reparation'.[218] Therefore, the objective of the *Framework* was to help close these gaps.[219]

The SRSG stressed that in order to achieve this objective, it was necessary to understand the complexities and dynamics of globalisation.[220] Accordingly, he highlighted the following issues as contributing factors: the bilateral investment treaties that on one hand expanded the rights of TNCs, while on the other hand constrained the ability of host States to enact regulations;[221] the legal framework that made it difficult to hold a parent company accountable for wrongdoings committed by its subsidiaries as well as for harms occurring in its global supply chains;[222] host States' incapacity and unwillingness to regulate TNCs, amid the international competition to attract foreign investments; and home States' reluctance to regulate overseas activities of their corporate nationals, since they either did not have a good understanding over the extraterritorial implications of national regulations, or they were concerned about the potential loss of investment opportunities for those companies or about the possible relocation of headquarters to other countries.[223]

The SRSG analysed that such competitive dynamics could hamper both States and corporations to act individually to close the governance gaps. Thus, it was necessary for

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[216] Miretski and Bachmann (n 12) 35.
[217] UNHRC (n 202) para. 3.
[218] ibid.
[219] UNHRC, 'Business and human rights: further steps towards the operationalization of the "Protect, Respect and Remedy" framework' (9 April 2010) UN Doc A/HRC/14/27 para. 2.
[220] UNHRC (n 202) para. 10.
[221] ibid para. 12.
[222] ibid para. 13.
[223] ibid para. 14.

all social actors, governments, companies and civil society to take 'coherent and concerted approaches'.[224] The *Framework* was developed to support such 'cumulative progress'.[225]

Contents: State duty to protect, corporate responsibility to respect and greater access to remedy

In order to achieve the above objective, the SRSG developed a model that rested on three pillars: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access by victims to effective remedy.[226] The SRSG explained that the State duty to protect and the corporate responsibility to respect existed independently, but the three principles were intended to complement and mutually reinforce each other to achieve progress.[227] An overview of each principle is provided as follows:

'The State duty to protect human rights' requires States to take actions in order to protect individuals against human rights abuse by other parties.[228] This duty is derived from 'the very core of the international human rights regime'[229] and through the *Framework* and the *UNGP*, the SRSG elaborated specific measures that States were recommended to take in order to protect human rights against corporate abuse.[230] In addition to general measures to ensure that companies respect human rights,[231] States were advised: to integrate their human rights obligations throughout their policy areas, such as trade and investment; and to ensure that States' institutions, the multilateral institutions that they are members of, and companies to which they provide substantial support, to which they outsourced public services, and with which they have business

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[224] ibid para. 17.
[225] UNHRC (n 219) para. 5.
[226] UNHRC (n 14) para. 6.
[227] UNHRC (n 202) para. 9, 55.
[228] Manfred Nowak (ed), *All Human Rights for All: Vienna Manual on Human Rights* (Neuer Wiss Verl Recht [u.a] 2012) 270.
[229] UNHRC (n 202) para. 9.
[230] UNHRC (n 219) para. 1.
[231] General measures include: enforcing and harmonizing laws to ensure corporations to respect human rights; providing effective guidance to corporations; and monitor how corporations address human rights impacts. UNHRC (n 14) Guiding Principle (GP) 3.

transactions act accordingly when they carry out their mandates.[232] For instance, it was recommended to preserve the domestic policy space when they concluded trade and investment agreement, so that they could adequately introduce necessary regulations in order to keep up with their human rights obligations.[233] In addition, specific recommendations were made in relation to companies operating in conflict-affected areas, particularly on how States could prevent them from being involved in gross human rights abuses.[234]

'The corporate responsibility to respect' means: not to infringe on the rights of others; and to address the adverse impacts that may occur.[235] This responsibility includes preventing and mitigating human rights impacts generated through a company's business relationships with other parties, even when the corporation in question has not contributed to those impacts.[236] The scope of human rights under this responsibility covers the 'entire spectrum of internationally recognized human rights'.[237] This responsibility applies to all companies in all situations.[238] In order to comply with this responsibility, the SRSG recommended that corporations act with due diligence, that is: to take steps 'to become aware of, prevent and address adverse human rights impacts'.[239] In concrete terms, companies are requested: to carry out actual and potential human rights impact assessments; to integrate and to act based on the findings;

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[232] ibid GP 1-10. More concretely, the *UNGP* recommends States: to take additional steps to ensure companies owned, controlled, or supported (e.g. through export financing) by States to respect human rights (GP 4); not to relinquish their human rights obligations under international law when they outsource public services to companies (GP 5); to promote respect for human rights when they conduct commercial transactions with companies, such as public procurement (GP 6); to uphold their human rights obligations throughout their policy areas, such as trade and investment, and to ensure respective States' institutions act accordingly when they carry out their mandates (GP 8); not to undermine their policy and regulatory abilities when they pursue business-related policy objectives with others, such as concluding trade or investment treaties (GP 9); and uphold and promote the obligation to protect when they act as members of multilateral institutions (GP 10).

[233] ibid GP 9.

[234] ibid GP 7.

[235] ibid GP 11.

[236] ibid GP 13.

[237] ibid GP 12. The SRSG recommended, at minimum, the companies should refer to the international bill of rights (the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*) as well as the eight ILO fundamental conventions. He further advised that companies might need to consider additional standards, such as instruments with regard to the rights of specific groups and humanitarian law.

[238] ibid GP 14.

[239] UNHRC (n 202) para. 56.

to track performance; and to communicate how impacts are addressed.[240] The SRSG explained that this 'responsibility' derives from social expectation.[241] Thus, it is not legally binding under international law.[242] Therefore, the SRSG used the term 'responsibility', in order to differentiate it from States' 'duty' to protect.[243] However, in cases of incompliance, the companies could be subjected to 'the courts of public opinion' and occasionally to charges in actual national courts, depending on States' regulations.[244]

'The need for greater access by victims to effective remedy' means to strengthen both judicial and non-judicial grievance mechanisms.[245] The SRSG emphasised its importance, since 'even the most concerted efforts cannot prevent all abuse, while access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness'.[246] Under this principle, States should: ensure the effectiveness of domestic judicial mechanisms, including to address legal, practical and procedural barriers that hamper the access to remedy by victims;[247] provide effective and appropriate non-judicial grievance mechanisms, alongside judicial means;[248] and facilitate access to non-State based grievance mechanisms.[249] Corporations are also requested to establish or participate in operational-level grievance mechanisms, aiming to address grievances early and directly, before they escalate.[250]

2.3.3 Key Reasons for Reaching Consensus

As reviewed above, both the *Framework* and the *UNGP* were adopted unanimously at the UNHRC.[251] In his report published in 2010, the SRSG himself analysed that 'principled pragmatism has helped to turn a previously divisive debate into constructive

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[240] UNHRC (n 14) GP 12.
[241] UNHRC (n 202) para. 9.
[242] UNHRC (n 219) para. 1.
[243] UNHRC (n 202) para. 9.
[244] ibid para. 54, 66.
[245] UNHRC (n 219) para. 55.
[246] UNHRC (n 202) para. 9.
[247] UNHRC (n 14) GP 26.
[248] ibid GP 27.
[249] ibid GP 28.
[250] ibid GP 29.
[251] UNHRC (n 205); UNHRC (n 210).

dialogues and practical action paths'.[252] Indeed, as opposed to the *Norms*, developed countries and the business sector warmly welcomed these initiatives.[253]

Bilchitz and Deva as well as Miretski and Bachmann point out that the *Framework* and the *UNGP* were successfully adopted because it was the strategic choice of the SRSG to develop initiatives that were acceptable for business and States.[254] They argue that such a choice was reflected in his methodology to include 'these actors in the drafting process, considering them crucial and fundamental for its success',[255] and the voices of the business sector were to a certain extent taken into consideration.[256] The SRSG indicated that the 'corporate responsibility to respect' was invoked by the 'largest global business organizations', including the IOE and the ICC.[257]

The key elements that led the work of the SRSG to unprecedented, unanimous endorsements are as follows:

First, the SRSG did not try to impose direct legal obligations, or 'duties', under international law upon corporations.[258] In his view, developing a treaty that articulated binding standards for corporations 'would be unlikely to get off the ground' and the treaty-making process could be 'painfully slow', whereas victims of human rights abuse needed immediate solutions.[259] Moreover, he limited the scope of responsibility applicable to companies only to 'respect', a negative responsibility not to infringe on the rights of others.[260] Other responsibilities to contribute positively towards the

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[252] UNHRC (n 219) para. 15.
[253] Carlos López, 'The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business* (Cambridge University Press 2013) 58 <http://ebooks.cambridge.org/ref/id/CBO9781139568333A012> accessed 28 June 2017.
[254] Bilchitz and Deva (n 215) 8; Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business* (Cambridge University Press 2013) 88 <http://ebooks.cambridge.org/ref/id/CBO9781139568333A013> accessed 29 June 2017; Miretski and Bachmann (n 12) 38.
[255] Miretski and Bachmann (n 12) 38.
[256] Bilchitz and Deva (n 215) 7.
[257] UNHRC (n 202) para. 23.
[258] Bilchitz and Deva (n 215) 15; Miretski and Bachmann (n 12) 35; Penelope Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3 Journal of Human Rights and the Environment 5, 10.
[259] John Ruggie, 'Treaty Road Not Travelled' May 2008 Ethical Corporation 42, 42.
[260] Bilchitz and Deva (n 215) 15; Miretski and Bachmann (n 12) 37.

realisation of human rights,[261] namely to 'protect' and to 'fulfil', were not included. The SRSG suggested that if these positive responsibilities were assigned to corporations, there would be cases where a company would fulfil the role of States without democratic legitimacy, disincentivising both the States' effort to meet their human rights obligations as well as threatening companies' economic performance.[262] As a result, the threshold of corporate responsibility set by the SRSG became rather low, making it easier for the business sector to accept.[263]

Second, the SRSG conformed with the State-centred doctrine.[264] The 'State duty to protect' was presented as a key principle, which existed independently from the 'corporate responsibility to respect'.[265] In this regard, the central role of States was well maintained, which partly helped make these initiatives 'politically viable'.[266] At the same time, allocating direct 'responsibility' to corporations complemented the 'State duty to protect'. With this, the *Framework* and the *UNGP* 'effectively abandoned *[S]tate exclusivity* in human rights matters'.[267] Furthermore, establishing the 'responsibility to respect' as 'the baseline for all companies in all situations'[268] enabled the *UNGP* successfully distinguish itself from other corporate human rights initiatives: adherence was no longer a matter of choice for a company or a home / host State.[269]

Third, the SRSG avoided taking clear positions on controversial issues.[270] For instance, on the issue of States' extraterritorial obligation to protect, the SRSG concluded that States were neither generally required nor prohibited to regulate the extraterritorial activities of business domiciled in their territory and / or jurisdiction under international

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[261] Bilchitz and Deva (n 215) 15.
[262] UNHRC (n 219) para. 62-65.
[263] Surya Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003) 19 Connecticut Journal of International Law 1, 15; Miretski and Bachmann (n 12) 37.
[264] Florian Wettstein, 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment' (2015) 14 Journal of Human Rights 162, 164; Miretski and Bachmann (n 12) 37.
[265] Miretski and Bachmann (n 12) 37.
[266] Wettstein (n 264) 164.
[267] ibid.
[268] UNHRC (n 202) para. 24.
[269] Wettstein (n 264) 165–166.
[270] Deva (n 254) 86.

law.[271] Likewise, the liability of a parent company for the activities of their subsidiaries was pointed out as one of the 'legal barriers' by the SRSG,[272] but 'no serious attempt was made to outline the kinds of steps that [S]tates could (and should) take to reduce these barriers'.[273] Another example is that he did not explicitly identify the exact scope and contents of the corporate human rights responsibility to respect:[274] instead, he stated that corporations have the responsibility to respect 'internationally recognized human rights', and advised corporations to look at, at a minimum, the international bill of rights,[275] together with the ILO core conventions.[276] He further suggested that depending on circumstances, it might be necessary for corporations to consider additional standards, such as instruments with regard to the rights of specific groups and humanitarian law.[277] All in all, it was not entirely clear which human rights corporations ought to respect as it could depend on the circumstances.[278] Furthermore, insofar as human rights treaties primarily deal with obligations of States, the mere reference to these treaties did not actually articulate the specific responsibility of corporations.[279] However, such ambiguities made reaching a consensus more feasible. It could be argued that through these ambiguities the SRSG succeeded in formulating corporate responsibility to cover 'the full spectrum of human rights'.[280]

Last, the SRSG highlighted the economic interest / risk for companies to respect/disregard human rights.[281] Instead of employing legal language, he discussed 'corporate responsibility' as a matter of 'social expectations' in a globalised market,[282] which partly led the business sector to accept the idea.[283] Indeed, he effectively

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[271] UNHRC (n 14) GP 2.
[272] ibid (n 7) GP 26.
[273] Bilchitz and Deva (n 215) 16–17.
[274] Deva (n 254) 86.
[275] The international bill of rights includes: The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.
[276] UNHRC (n 14) GP 12.
[277] ibid.
[278] López (n 253) 66.
[279] Deva (n 254) 87–88.
[280] Buhmann (n 206) 56.
[281] ibid 46, 53, 55.
[282] ibid 56.
[283] ibid.

illustrated the 'shared interest' for the 'business and human rights community' to uphold human rights.[284] The introduction of the concept of due diligence was also a 'game changer', enabling a shift from 'naming and shaming' to 'knowing and showing'.[285] In this way, the SRSG successfully presented business and human rights more appealingly, so that the business sector was incentivised to join.

2.3.4 Critiques Against the *Framework* and the *UNGP*

Although the work of the SRSG achieved an unprecedented consensus in the domain of business and human rights, it also attracted criticism from civil society[286] and academics.

First, in exchange for a broad support, the *UNGP* could only achieve a consensus over 'a smallest common denominator'.[287] Thus, its effectiveness is rather limited, especially when it comes to dealing with companies that are not willing to respect human rights.[288] In such cases, the *UNGP* has to rely on States to regulate and hold corporations accountable. This does not at all differ from the traditional human rights mechanism, which has proven in the past to be ineffective when States are unwilling or unable to take action, especially amid the global competition for attracting investments.[289] Indeed, as López argues, the *Framework* and the *UNGP* reached 'an outcome not entirely different from the point at which the process began'.[290] In relation to this infirmity, their non-binding nature[291] and weak monitoring mechanism[292] was

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[284] ibid 37.
[285] John Ruggie, 'Remarks by SRSG John Ruggie "The 'Protect, Respect and Remedy Framework: Implications for the ILO"' (3 June 2010) <http://www.ilo.org/wcmsp5/groups/public/%40ed_emp/@emp_ent/%40multi/documents/genericdocument/wcms_142560.pdf> accessed 22 June 2017.
[286] López (n 253) 58.
[287] Lukas (n 8) 163; Bilchitz and Deva (n 215) 12.
[288] Lukas (n 8) 24, 163; Wettstein (n 264) 166; Bilchitz and Deva (n 215) 13.
[289] Lukas (n 8) 163; Wettstein (n 264) 166; Bilchitz and Deva (n 215) 13.
[290] López (n 253) 77.
[291] ibid; Deva (n 254) 103; De Schutter (n 5) 14; International Commission of Jurists (ICJ) 'Needs and Options for a New International Instrument In the Field of Business and Human Rights' (June 2014) 17 <https://www.icj.org/business-and-human-rights-need-international-legally-binding-instruments-icj-report/> accessed 2 August 2017.
[292] Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business* (Cambridge University Press 2013) 160 <http://ebooks.cambridge.org/ref/id/CBO9781139568333A016> accessed 2 July 2017; De Schutter (n 5) 14; ICJ (n 291) 17.

criticised.

Second, the following concrete elements, among others, attracted criticism: 1) understating the States' extraterritorial obligation to protect, compared to the views of treaty bodies;[293] 2) leaving ambiguities as well as setting weak expectations[294] for the responsibilities of corporations in relation to other companies, such as subsidiaries, business partners, suppliers and sub-contractors; [295] 3) limiting the corporate responsibility only to 'respect', although the participation and contribution of companies are necessary to tackle some human rights challenges;[296] and 4) lacking the robustness and efficacy in measures to enhance victims' access to remedy, since it took a rather weak approach to improve States' judicial mechanism, such as using 'should' language (as opposed to mandatory 'must' language) to reduce barriers that could hamper victims' access to remedy,[297] while no sanction mechanism was introduced in case companies failed to provide their own grievance mechanisms.[298] From these critiques, it can be inferred that the SRSG did not take a strong approach to address issues that he himself highlighted as contributing factors to 'governance gaps'.[299]

Last, the process of developing the *Framework* and the *UNGP* was also criticised: it was said that the SRSG valued the voices of the business sector much more highly than the voices of civil society.[300] Deva and Bilichitz pointed out that such attitude of the SRSG enabled the business sector 'to negotiate narrow and non-binding human rights standards applicable to itself'.[301] They further criticized the SRSG for his limited engagement with people who claimed to be victims of corporate human rights abuse.[302]

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[293] De Schutter (n 5) 14–15; Daniel Augenstein and David Kinley, 'When Human Rights "Responsibilities" Become "Duties": The Extra-Territorial Obligations of States That Bind Corporations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business* (Cambridge University Press 2013) 294 <http://ebooks.cambridge.org/ref/id/CBO9781139568333A023> accessed 3 July 2017.
[294] For example, Lukas (n 8) points out that the SRSG used the wording 'mitigating human rights abuse' instead of 'ending the human rights violation', when explaining how a company should use its leverage over related companies when those companies are involved in a violation.
[295] Lukas (n 8) 31–33; De Schutter (n 5) 15–16.
[296] Wettstein (n 264) 170–171.
[297] Deva (n 254) 102.
[298] ibid 87.
[299] See, Chapter 2.3.2. to see those factors the SRSG indicated.
[300] Bilchitz and Deva (n 215) 7; López (n 253) 70; Miretski and Bachmann (n 12) 38.
[301] Bilchitz and Deva (n 215) 8.
[302] López (n 253) 69; Bilchitz and Deva (n 215) 10.

Moreover, it was also indicated that the said 'unanimous' adoption and endorsement of the *Framework* and the *UNGP* at the UNHRC was not quite unanimous, since the representative of South Africa declared that the country would not join the adoption of the *Framework*. The representative of Ecuador also implied the country's departure from the endorsement of the *UNGP*. Still, because those representatives did not call for votes, both the *Framework* and the *UNGP* were adopted by 'consensus'.[303] As for the endorsement of the *UNGP*, a number of NGOs and civil society groups represented in the UNHRC also expressed their concerns, along with some developing States.[304] In addition, some also articulated their worries about its 'push for alignment',[305] that '[t]he supposed comprehensiveness and authority of the [*UNGP*] [left] nearly no room for improvement or further development of additional standards and norms'.[306] The SRSG and his team made 'a concert effort […] to ensure that all other regulatory initiatives in the field of business and human rights […] embraced the conceptual tools advanced by the [*Framework*] and the [*UNGP*]', in order to achieve their goal to make the *Framework* and the *UNGP* an 'authoritative focal point'.[307] Countries that sponsored the work of the SRSG also insisted on precluding the possibility of reviewing and updating the *UNGP*.[308] In addition, it is indicated that after the *UNGP*, the discussion over the business and human rights issue was more focused on how to implement the *UNGP*, rather than on other foundational questions in the broader domain of this topic.[309]

2.3.5 Summary of the *Framework* and the *UNGP*

The key features of and the lessons to be learned from the *Framework* and the *UNGP* can be summarised as follows:

1) The *Framework* and the *UNGP* are not legal standards, but a 'conceptual and policy

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[303] López (n 253) 70–71.
[304] ibid 58.
[305] Bilchitz and Deva (n 215) 11.
[306] López (n 253) 60.
[307] Bilchitz and Deva (n 215) 11.
[308] López (n 253) 67.
[309] Wettstein (n 264) 178.

framework'[310] and 'concrete and practical recommendations' [311], that provide 'an authoritative focal point around which the expectations and actions of relevant stakeholders could converge'.[312] They successfully achieved an unprecedented consensus in the domain of business and human rights, thanks to the SRSG's 'principled pragmatism' coupled with a consultative approach to involve various stakeholders. Given the divisive debate over the *Norms*, it was a significant step in terms of bringing stakeholders together. Under this consensus, it is accepted that every company has the responsibility to respect all human rights.

2) It can be argued that the key reason behind the adoption of both the *Framework* and the *UNGP* at the UNHRC was the SRSG's strategic choice to develop them in a manner that was acceptable for business and States. Accordingly, the 'corporate responsibility' remained non-binding under international law, and the scope of the responsibility was limited to 'respect'. These elements set a low threshold of corporate responsibility and made it easier for the business sector to accept. Moreover, the SRSG reiterated the importance of 'State duty to protect', a concept embedded in the core of international human rights law. By doing so, he upheld the State-centred doctrine and making it easier for States to accept. Furthermore, the SRSG managed to avoid controversy by not taking a clear position over divisive issues. In addition, the SRSG highlighted the economic interest for companies to respect human rights, incentivising businesses to join the initiative.

3) Critiques indicate that the *Framework* and the *UNGP* were limited in effectiveness to hold companies accountable, especially when they were not willing to comply with them. It ultimately relies on States to regulate and hold companies accountable, even though it has already been seen in the past that the States are not always willing or capable to do so. The SRSG elaborated the steps that States were recommended to take to address such situations, but at the same time, left room for States to decide their actions. In addition, another problem arose due to its push for alignment, as it could hinder further initiatives to evolve in the business and human

[310] UNHRC (n 202) 1.
[311] UNHRC (n14) para. 9.
[312] ibid para. 5.

rights domain.

4) It is observed that the business sector succeeded in playing a significant role in defining the contours of standards that would apply to them. In the business and human rights field, they are now recognised as a 'crucial' stakeholder.

In view of the above, it can be argued that the achievement and the shortcomings of the *Framework* and the *UNGP* coincide with each other. Consensus was achieved because its provisions were acceptable for the business and States, but insofar as they were acceptable for the business and States, they were limited in effectiveness.

2.4 Preliminary Assessment

The issue of business and human rights has been on the international agenda since 1970s. However, as reviewed above, so far no effective mechanism that could hold TNCs accountable has been realised. The past attempts show the following:

1) There has been a consistent tendency that developed countries oppose strong regulation over TNCs, whereas the position of developing countries may swing. In all cases, it was clear that support from a certain number of States is necessary for the adoption of any initiative. It is worth noting that States' positions may change over time, so a long negotiation process could potentially close or open the window of opportunity, depending on geo-political situations.

2) The presence of non-State actors such as civil society and the business sector in international standard-setting in the domain of business and human rights is growing. Civil society contributed in setting the issue of business and human rights as an international agenda and continually advocated for stronger regulation of TNCs. The business sector, on the other hand, has generally opposed strong regulations. They are often able to use their economic position to lobby States and influence their positions. In addition, they are considered as an important stakeholder in these discussions.[313] Both of these factors allow business sector to have a substantial influence over the final outcome.

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[313] UNHRC, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (9 February 2007) UN Doc A/HRC/4/035 para. 53.

3) Attempts to establish 'binding' regulations over corporations have failed so far, but being 'binding' itself may not be the only reason behind those failures. The State-centred doctrine matters to States and establishing direct binding obligation onto corporations may interfere with this doctrine, inflicting strong resistance by States.

These lessons learned over three attempts provide useful insights for succeeding initiatives.

3. Current Discussion over a Binding Treaty

This Chapter reviews the on-going discussion over the proposed binding treaty at the Intergovernmental Working Group (IGWG).

3.1 Background

To start with, this section reviews the background of this initiative, including the reasons behind Ecuador's commitment, a brief pre-history before the tabling of a draft Resolution at the UNHRC that called for the establishment of the IGWG, the discussion at the UNHRC before the adoption of the draft Resolution and analysis by some academics on States' positions upon the adoption.

3.1.1 Texaco / Chevron Case in Ecuador

Before elaborating on the initiative lead by Ecuador calling for a legally binding treaty on business and human rights, the author believes it is relevant to touch upon the Texaco / Chevron case in Ecuador, as it would help understanding Ecuador's commitment towards this initiative.

The northern region of Ecuadorian Amazon called *Oriente* was known for its rich biodiversity.[314] It was home to some 500,000 people, including eight different groups of indigenous people.[315] The United States oil company Texaco operated in the region

[314] Center for Economic and Social Rights, 'Rights Violations in the Ecuadorian Amazon: The Human Consequences of Oil Development' (1994) 1 Health and Human Rights 82, 84.
[315] ibid; Miguel San Sebastián and Anna Karin Hurtig, 'Oil Exploitation in the Amazon Basin of Ecuador: A Public Health Emergency' (2004) 15 Revista panamericana de salud pública 205, 205.

from 1964 to 1990 together with its partners.[316] As the sole operator,[317] Texaco was in charge of all of the 365 wells that were drilled.[318] The company also opened at least 1,000 pools in the rain forest.[319]

The Ministry of Foreign Affairs and Human Mobility of Ecuador claims that during its operation, Texaco 'decided to deliberately apply outdated techniques in order to obtain greater economic benefits'. Moreover, the company: dumped 'all kind of waste […], such as crude oil, water and toxic sludge' to pools; burnt some of these pools together with the vegetation; and 'poured an immeasurable amount of oil and toxic elements into rivers and channels'. Overall, it claimed that Texaco is 'responsible for spilling no less than 15.8 billion gallons (59.9 billion litres) of waste oil and 28.5 million gallons (108 million litres) of crude oil in the Amazon' and '[m]ore than 2 million hectares of the Ecuadorian Amazon were affected' by it.[320] Concurrently, the health of people living in close proximity to the concession was negatively impacted. Several studies suggest higher occurrence of diseases and symptoms such as: cancer in men, women and children, abortion, dermatitis and skin mycosis in the region.[321] The contamination also impacted the life of indigenous people, whose life and culture were heavily dependent on the natural habitat and resources there.[322]

Attempting to hold the company accountable, a group of people from the region sued the company at the District Court of the United States in 1993.[323] The case continued after Texaco merged with Chevron in 2001.[324] In 2002, the Court dismissed it on the

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316 Ministry of Foreign Affairs and Human Mobility of the Republic of Ecuador, 'The Dirty Hand of Chevron: the Worst Environmental Disaster in History' (2014) 3 <http://www.cancilleria.gob.ec/wp-content/uploads/2015/04/folleto_ingles1.pdf> accessed 21 June 2017.
317 *Aguinda y ottos c. Chevron Corporation.*, Case No. 2003-0002 (Lago Agrio Court, 14 February 2011) 93.
318 Nathalie Cely, 'Balancing Profit and Environmental Sustainability in Ecuador: Lessons Learned from the Chevron Case' (2014) 24 Duke Envtl. L. & Pol'y F. 353, 361.
319 Ministry of Foreign Affairs and Human Mobility of the Republic of Ecuador (n 316) 5.
320 ibid 4-5.
321 San Sebastián and Karin Hurtig (n 315) 208.
322 Humberto Piaguaje Lucitante (Indigenous leader from the Siekopai community), 'Speech' (Speech at a public seminar 'Pluspetrol Peru and Chevron Ecuador: Impacts on indigenous communities and avenues for access to remedy and justice', Amsterdam, 24 November 2015) <http://justice5continents.net/fc/viewtopic.php?t=1104> accessed 21 June 2017.
323 *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).
324 Chevron, '1980-2001' <http://www.chevron.com/about/history/1980/> accessed 22 June 2017.

basis of *forum non conveniens*, that the case should be heard in Ecuador and not in the United States.[325] Eventually, people from *Oriente* region filed another lawsuit against Chevron in Lago Agrio, Ecuador in 2003.[326] Finally, on 14 February 2011, the Court ruled against Chevron,[327] ordering the company to pay more than 8.6 billion United States dollars (USD), in order to restore: the environment of the contaminated area; the health of people; and the culture of the indigenous peoples. It also ordered Chevron to issue a public apology, or the amount of the compensation would be doubled.[328] This judgment was upheld by the National Court in 2013, yet the Court halved the damages to 9.5 billion USD that once escalated to 19 billion USD in 2012.[329]

However, the company refused to comply with the judgment by the Ecuadorian Court, calling it 'a product of fraud'.[330] The fact that the company no longer had any asset in Ecuador also made the enforcement of the judgement difficult.[331]

In fact, Chevron had filed cases against the Government of Ecuador in 2006 and 2009, at the Permanent Court of Arbitration at The Hague, based on the BIT between the U.S. and Ecuador, which was signed in 1993, a year after Texaco had exited Ecuador.[332] In January 2011, the Court issued interim measures that ordered the Ecuadorian government 'to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron]'.[333] Later in August 2011, the Court awarded Chevron 96 million USD,[334]

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[325] *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478-79 (2d Cir. 2002).
[326] Aguinda and others, 'Lawsuit for Alleged Damages Filed to Before the President of the Superior Court of "Nueva Loja" in Lago Agrio, Province of Sucumbios; On May 7, 2003, By 48 Inhabitants of the Orellana and the Sucumbios Province' (7 May 2003) < http://chevrontoxico.com/assets/docs/2003-ecuador-legal-complaint.pdf> accessed 22 June 2017.
[327] *Aguinda y ottos c. Chevron Corporation*.
[328] Antoni Pigrau, 'The Texaco-Chevron Case in Ecuador: Law and Justice in the Age of Globalization' (2014) 5 Revista Catalana de Dret Ambiental 14 <http://www.rcda.cat/index.php/rcda/article/view/491> accessed 21 February 2016; Cely (n 318) 364.
[329] Pigrau (n 328) 20; Cely (n 318) 364.
[330] Chevron, 'Ecuador's High Court Ignores Fraud, Upholds Judgment Against Chevron' <http://www.chevron.com/chevron/pressreleases/article/11132013_ecuadorshighcourtignoresfrauduphold sjudgmentagainstchevron.news> accessed 22 June 2017.
[331] Pigrau (n 328) 26.
[332] Ministry of Foreign Affairs and Human Mobility of the Republic of Ecuador (n 316) 7.
[333] *Chevron Corporation and Texaco Petroleum Company v. Ecuador.*, PCA Case No.2009-23 (Order for Interim Measures) (Arbitration Tribunal, 9 February 2011) (E) <https://www.italaw.com/sites/default/files/case-documents/ita0167.pdf> accessed 21 July 2017.

which Ecuador paid with interest of 16 million in 2016.[335] According to Reuters, the head of the Ecuadorian Central Bank said 'we don't agree with how these international mechanisms work [...] however, we are respectful and we [fulfil] our international obligations'.[336]

The lawsuits in relation to Texaco / Chevron in Ecuador are not limited to the ones reviewed above,[337] but these are enough to describe the difficulties faced by both the government of Ecuador and the victims. It demonstrates the complexities of how governments hold a company accountable when a company refuses to comply with the judgement of a national court, and in the event that a company is found guilty, the challenge of enforcing this decision, especially when there is no longer any asset of that company in that territory to be seized. Furthermore, it illustrates how far the investor-State dispute settlement could interfere with State sovereignty, to the extent that it could 'order' a State to suspend the enforcement of the judgement made by the national court, and it could even sanction a State for handing down a judgement against a corporation. Insofar as the trade and investment agreements often allow wide interpretation to provide strong protection for investors, and dispute settlement procedures are equipped with strong enforcement mechanisms,[338] Investor-State Dispute Settlement (ISDS) procedures not only pose a serious threat against to States' national policy space in terms of their compliance with their human rights obligations, but also challenge domestic rule of law and the right of victims to access to remedy.

It was against this background that Ecuador took the lead in calling for a legally binding instrument on transnational corporations.

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[334] Chevron, 'Chevron Awarded $96 Million in Arbitration Claim Against the Government of Ecuador' <https://www.chevron.com/stories/chevron-awarded-96-million-in-arbitration-claim-against-the-government-of-ecuador> accessed 21 July 2017.

[335] Alexandra Valencia, 'Ecuador Pays $112 Million Award to Chevron - Central Bank' (*Reuters*, 23 July 2016) <http://www.reuters.com/article/ecuador-chevron-idUSL1N1A908V> accessed 21 July 2017.

[336] ibid.

[337] Pigrau (n 329) and Cely (n 318) provide detailed information over those lawsuits. Also one can find a lot of information from both side on website of ChevronToxico (http://chevrontoxico.com/) and Chevron (http://www.chevron.com/ecuador/).

[338] Narula (n 1) 34.; Juan Hernández Zubizarreta, 'The new global corporate law' (2016) 10 <https://www.tni.org/files/download/01_tni_state-of-power-2015_the_new_global_corporate_law-1.pdf> accessed 21 June 2017.

3.1.2 First Statement in 2013

In June 2013, a group of countries consisting of the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador delivered a Statement at the UNHRC, calling for 'a legally binding framework to regulate the work of [TNCs] and to provide appropriate protection, justice and remedy to the victims'.[339] While welcoming the endorsement of the *UNGP*, they stated that it was just a 'first step' and it would remain to be so without a binding instrument. They pointed out that the soft law instruments including the *UNGP* as well as their weak monitoring mechanisms 'fell short of addressing properly the problem of lack of accountability regarding [TNCs] worldwide and the absence of adequate legal remedies for victims'.[340] Therefore, they proposed to elaborate on an international legally binding instrument that

> 'would clarify the obligations of [TNCs] in the field of human rights, as well as of corporations in relation to States, and provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to prosecute effectively those companies'.[341]

This move was strongly supported by a number of civil society organisations, forming a global coalition named Treaty Alliance (or Global Movement for A Binding Treaty).[342] They mobilised their network to collectively advocate for the establishment of a working group for the elaboration of the future binding treaty.[343]

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[339] Ecuador, 'Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council' (September 2013) <https://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf > accessed 29 April 2017.
[340] ibid.
[341] ibid.
[342] Treaty Alliance, 'Treaty Alliance' <http://www.treatymovement.com/> accessed 14 July 2017.
[343] Treaty Alliance, 'Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises' (November 2013) < https://static1.squarespace.com/static/53da9e43e4b07d85121c5448/t/59120caaa5790ad8728e1285/1494355115520/2013+Bangkok+Joint+1st+Statement.pdf> accessed 14 July 2017. Statements by many NGOs are available at the website of Business and Human Rights Resource Centre, 'Statements, initiatives & commentaries'< https://business-humanrights.org/en/binding-treaty/statements-initiatives-commentaries> accessed 14 July 2017.

3.1.3 Adoption of a Resolution 26/9 at the UNHRC in 2014

In June 2014, at the 24th session of the UNHRC, Ecuador and South Africa presented a draft Resolution on the '[e]laboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', intending to establish 'an open-ended intergovernmental working group on a legally binding instrument'.[344] Its footnote delineated the 'other business enterprises' as 'all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law', clarifying that the focus of the proposed treaty would be on TNCs.[345] The draft Resolution was co-sponsored by Bolivia, Cuba and Venezuela.[346]

In his introductory speech, the representative of Ecuador stressed that the victims of corporate human rights abuse were only protected by mere voluntary norms, while TNCs enjoyed strong legal protection that guaranteed their operations and profits. He recalled that both Ecuador and South Africa suffered from harms caused by corporate activities and sympathised with millions of victims around the world,[347] indicating that most of them were still waiting for just compensation. Therefore, he underlined the need for a legally binding instrument in order to provide binding legal protection for the victims.[348] The representative of South Africa also emphasised that it was imperative to provide legal protection and effective remedies to the victims across the globe, especially for those who reside under the jurisdiction of States where domestic legal protections were either weak or absent.[349]

In fact, at the same session, Argentina, Ghana, Norway and Russian Federation tabled

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[344] UNHRC, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (25 June 2014) UN Doc A/HRC/26/L.22/Rev.1.
[345] ibid.
[346] UNHRC, 'Report of the Human Rights Council on its twenty-six session' (11 December 2014) UN Doc A/HRC/26/2 para. 178.
[347] As the examples of emblematic cases, he referred to Bhopal in India, Rana Plaza in Bangladesh, Shell in Nigeria and Chevron in Ecuador.
[348] Ecuador, 'Oral Statement' (Oral Statement at 37th Meeting 26th Regular Session UNHRC A/HRC/26/L.22/Rev.1 Vote Item:3, UN WEB TV, 26 June 2014) <http://webtv.un.org/search/ahrc26l.22rev.1-vote-item3-37th-meeting-26th-regular-session-human-rights-council/3643474570001?term=A/HRC/26/L.22/Rev.1#> accessed 14 July 2017. Transcribed by the author.
[349] ibid.

another draft Resolution on '[h]uman rights and transnational corporations and other business enterprises'.[350] One of the aims of this draft was also to improve the access to effective remedy for the victims,[351] yet it firmly based itself on the *UNGP*.[352] This draft Resolution was initially co-sponsored by 18 other States across the globe,[353] whereas 25 more States subsequently joined the sponsors.[354]

The main sponsors of these two Resolutions apparently negotiated each other to converge their drafts, but failed. The representative of Ecuador explained that the two groups made effort to achieve a consensus, but they had different opinions. He acknowledged that Ecuador had been supporting the implementation of the *UNGP*, but it was vital for them to enhance human rights protection through a legally binding instrument. The representative stated that because they could not get a priority on their Resolution for the binding treaty from the other group, they were presenting two different Resolutions.[355]

In response, the United States and the member States of the European Union (EU) criticised Ecuador and South Africa for this act. The representative of the United States stated that they were 'extremely disappointed' that this draft Resolution was tabled. He stressed that 'it [would] unduly polarise these issues, taking us back ten years'. While admitting that it was necessary to improve access to remedy, the representative stated that they had not given enough time to States to implement the *UNGP*. He further argued that the initiative for the binding treaty would actually undermine the effort to implement the *UNGP*, as it would create competition between the two. Moreover, he stressed that corporations were not subject to international law and questioned how the

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[350] UNHRC, 'Human Rights and transnational corporations and other business enterprises' (23 June 2014) UN Doc A/HRC/26/L.1.
[351] ibid Preamble.
[352] De Schutter (n 5) 4.
[353] UNHRC (n 346) para. 247. The co-sponsoring States were: Andorra, Australia, Austria, Bulgaria, Colombia, France, Georgia, Greece, Guatemala, Iceland, India, Lebanon, Liechtenstein, Mexico, New Zealand, Serbia, the former Yugoslav Republic of Macedonia and Turkey.
[354] ibid. The States joined the sponsors were: Belgium, Bosnia and Herzegovina, Côte d'Ivoire, Croatia, Cyprus, Denmark, Estonia, Finland, Hungary, Indonesia, Ireland, Luxembourg, Netherlands, Portugal, Qatar, Senegal, Sierra Leone, Slovenia, Spain, Sweden, Switzerland, Thailand, Tunisia, Ukraine and United States.
[355] Ecuador (n 348).

new instrument could apply to them.[356] Concurrently, the representative of Italy, speaking on behalf of the EU, expressed regret that Ecuador and South Africa proceeded without reaching a consensus with the other group. He indicated that this would polarise the debate, whereas collective action was needed to ensure further progress. Another concern was expressed on the issue of the binding treaty focusing on only TNCs and 'all business enterprises that ha[d] a transnational character in their operational activities'[357], excluding domestic enterprises.[358] The representative of the United Kingdom also stressed that this issue of business and human rights was fundamentally an issue of 'national rule of law, within individual States', implying that it was not the issue of international law.[359] In addition to the above States, Japan and Ireland expressed their intention to vote against the draft Resolution.[360]

Meanwhile, the representative of India showed explicit support for Ecuador and South Africa, stating that the initiatives toward a binding treaty and the implementation of the *UNGP* were not mutually exclusive, but complementary to each other. He explained that the *UNGP* had limited impact on victims and it was important to hold TNCs accountable when they violated human rights. It was also stressed that international community must step in, in case States were unable to enforce national laws and hold TNCs accountable.[361]

The representative of China also stated that they would vote in favour of the draft Resolution, but with a more nuanced attitude than India. The representative explained

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[356] Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva, 'Explanation of Vote: A/HRC/26/L.22/Rev.1 on BHR Legally-Binding Instrument:Statement by the Delegation of the United States of America' (26 June 2014) < https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/> accessed 14 July 2017.

[357] UNHRC (n 344) footnote.

[358] European Union (EU), 'Oral Statement' (Oral Statement at 37th Meeting 26th Regular Session UNHRC A/HRC/26/L.22/Rev.1 Vote Item:3, UN WEB TV, 26 June 2014).

[359] United Kingdom, 'Oral Statement' (Oral Statement at 37th Meeting 26th Regular Session UNHRC A/HRC/26/L.22/Rev.1 Vote Item:3, UN WEB TV, 26 June 2014).

[360] Japan, 'Oral Statement' (Oral Statement at 37th Meeting 26th Regular Session UNHRC A/HRC/26/L.22/Rev.1 Vote Item:3, UN WEB TV, 26 June 2014); Ireland, 'Oral Statement' (Oral Statement at 37th Meeting 26th Regular Session UNHRC A/HRC/26/L.22/Rev.1 Vote Item:3, UN WEB TV, 26 June 2014).

[361] India, 'Oral Statement' (Oral Statement at 37th Meeting 26th Regular Session UNHRC A/HRC/26/L.22/Rev.1 Vote Item:3, UN WEB TV, 26 June 2014).

that China was open to initiatives that would promote business and human rights issue alongside the *UNGP*. She also stated that given 'disparities among countries in terms of economic development and level of judicial systems and systems of enterprises, [as well as] different historical and cultural backgrounds', the 'formulation of international legal instrument is complex and important issue' and thus 'it [was] necessary to carry out detailed and in depth study' and the process should be 'gradual, inclusive and open'. [362]

Eventually, the United States requested a vote for its adoption of the Resolution, although Ecuador appealed for the adoption by consensus.[363]

Finally, the Resolution was adopted by 20 votes in favour to 14 votes against, with 13 abstentions.[364] The adopted Resolution 26/9 decided to establish an open-ended intergovernmental working group, with a mandate 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[365] It was also decided to have the first session in 2015 before the 30th session of the UNHRC.[366]

The 20 States that voted in favour of the Resolution were: (by region, where developed countries are marked with a *) [367]

Africa	Algeria, Benin, Burkina Faso, Congo, Côte d'Ivoire, Ethiopia, Kenya, Morocco, Namibia, South Africa
Americas	Cuba, Venezuela
Asia	China, India, Indonesia, Kazakhstan, Pakistan, Philippines, Viet Nam
Europe	Russian Federation*

[362] China, 'Oral Statement' (Oral Statement at 37th Meeting 26th Regular Session UNHRC A/HRC/26/L.22/Rev.1 Vote Item:3, UN WEB TV, 26 June 2014).
[363] United States, 'Oral Statement' (Oral Statement at 37th Meeting 26th Regular Session UNHRC A/HRC/26/L.22/Rev.1 Vote Item:3, UN WEB TV, 26 June 2014).
[364] UNHRC (n 346) para. 182.
[365] UNHRC (n 16) para. 1.
[366] ibid para. 4.
[367] UNHRC (n 346) para. 182; United Nations Statistics Division, 'Standard country or area codes for statistical use (M49)' <https://unstats.un.org/unsd/methodology/m49/> accessed 14 July 2017.

The 14 States that voted against were: (by regional group, where developed countries are marked with a *)[368]

Asia	Japan*, Korea
Americas	United States*
Europe	Austria*, Czechia*, Estonia*, France*, Germany*, Ireland*, Italy*, Montenegro*, Romania*, former Yugoslav Republic of Macedonia*, United Kingdom*

The 13 States that abstained were: (by regional group, where developed countries are marked with a *)[369]

Africa	Botswana, Gabon, Sierra Leone
Americas	Argentina, Brazil, Chile, Costa Rica, Mexico, Peru
Asia	Maldives, Kuwait, Saudi Arabia, United Arab Emirates

As seen above, most of the States that voted in favour of the Resolution were developing countries and transition economies, while the most of the States that voted against the Resolution were developed countries.[370] It was also observed that the Latin American countries were more split, compared to the African countries.

This adoption was warmly welcomed by many NGOs, which had shown strong support before and during the 24th session of the UNHRC.[371] In fact, they played a crucial role in the tabling and the adoption of the Resolution.[372] However, some NGOs such as Human Rights Watch[373] and Amnesty International[374] showed concern that the

[368] ibid.
[369] ibid.
[370] ibid.
[371] Treaty Alliance, 'Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse' (May 2015) <https://static1.squarespace.com/static/53da9e43e4b07d85121c5448/t/590a4cd029687f2f54e6519c/1493847249469/2nd+Statement.pdf> accessed 14 July 2017.
[372] Nadia Bernaz and Irene Pietropaoli, 'The Role of Non-Governmental Organizations in the Business and Human Rights Treaty Negotiations' [2017] Journal of Human Rights Practice 1, 2,4.
[373] Human Rights Watch, 'Dispatches: A Treaty to End Corporate Abuses?' (1 July 2014) <https://www.hrw.org/news/2014/07/01/dispatches-treaty-end-corporate-abuses> accessed 14 July 2017.
[374] Amnesty International, 'Amnesty International position on the new UN process to elaborate a legally

proposed treaty was only focusing on TNCs and excluding local companies, 'even though any company can cause problems'.[375]

Meanwhile, the business sector expressed strong concerns over the adoption of Resolution 26/9. The IOE, one of the biggest network of the private sector, issued a statement that the organisation '**deeply regret**[ted] the adoption' of the Resolution that 'ha[d] broken the unanimous on business and human rights achieved three years ago with the endorsement of the [*UNGP*]'. They further stated that the vote was '**a genuine setback** to the efforts underway to improve the human rights situation and access to remedy' and that the UNHRC '**returned to approaches which have failed** in the past' [bold in the original].[376] The ICC also stated that they were 'deeply disappointed' that the Resolution was adopted, since 'the treaty would seriously undermine the implementation of the [*UNGP*] and risk shifting the responsibility to protect human rights from states to the private sector'.[377]

In contrast, the other Resolution that was initially sought to combine with the Resolution 26/9 was adopted by consensus on the following day,[378] requesting the United Nations High Commissioner for Human Rights (UNHCHR) to 'facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses'.[379]

3.1.4 Repeating the Past?

The division between the developing and developed countries over the Resolution 26/9 resembled the negotiations surrounding the *Draft Code*, which initially arose from the North-South debates during the NIEO era.

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binding instrument on business and human rights' (4 July 2014) < https://www.amnesty.org/en/documents/ior40/005/2014/en/> accessed 14 July 2017.

[375] Human Rights Watch (n 373).

[376] IOE, 'Consensus on business and human rights is broken with the adoption of the Ecuador initiative' (26 June 2014) < http://www.ioe-emp.org/index.php?id=1238 > accessed 14 July 2017.

[377] ICC, 'ICC disappointed by Ecuador Initiative adoption' (30 June 2014) <https://iccwbo.org/media-wall/news-speeches/icc-disappointed-by-ecuador-initiative-adoption/> accessed 14 July 2017.

[378] UNHRC (n 346) para. 252.

[379] UNHRC, 'Human rights and transnational corporations and other business enterprises' (15 July 2014) UN.Doc A/HRC/RES/26/22 para. 7.

In view of such a situation, John Ruggie, the former SRSG on Business and Human Rights, pointed out that the initiative 'look[ed] very much like a case of dysfunction redux', for not only the vote was 'deeply divided', but also '[t]he home countries of the vast majority of the world's transnational corporations opposed and are boycotting the proposed treaty negotiations, abstained, or in China's case signaled significant conditionality'.[380] Thus, he warned that the initiative would either fall apart after a decade or more long negotiation like the *Draft Code*; or be concluded without the ratification of major home countries, and thereby not binding to most of the TNCs.[381]

However, as De Schotter and Sauvant suggested, the investment trends in reality have changed drastically since the NIEO era. First, as De Schotter indicated, the 'old division of roles', where developed countries served as capital-exporters and developing/emerging countries as capital-importers is no longer relevant. At the time of adoption in 2014, FDI outflows from developing countries represented 35% of total FDI outflows of 1.35 trillion USD,[382] compared to 2% of 53.3 billion USD in 1985.[383] Second, as Sauvant pointed out, the number of TNCs that have headquarters in developing countries soared from 7,000 in the late 1960s to over 70,000, plus 30,000 in the emerging markets at the end of 2010.[384] This means that developing countries are now not only host States, but also home States to those companies. Third, the number of investor-State disputes where developed countries become respondents are increasing. According to Sauvant, it used to be assumed that only developing countries would be respondents of investor-State dispute settlement under investment/trade treaties, because the BITs used to be concluded only between developed and developing countries and there was little investors from the latter. This trend has changed since 1990s, when NAFTA made the United States and Canada as respondents of a number of disputes.[385] In fact, the cases brought against developed countries represented 40% of all cases in

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[380] Ruggie (n 17) 2.
[381] ibid 6.
[382] United Nations Conference on Trade and Development (UNCTAD) (ed), *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015) 30.
[383] Centre on Transnational Corporations (ed), *World Investment Report 1991: The Triad in Foreign Direct Investment* (United Nations 1991) 10.
[384] Sauvant (n 10) 64.
[385] ibid 73–74.

2014 and out of 42 known new cases in 2014, 5 were brought by investors from developing countries.[386]

Considering such changes on the ground, De Schotter argued that the voting tendency over the Resolution 26/9 could 'only be explained by the ghosts still haunting the corridors of memory',[387] that the initiative led by Ecuador and South Africa was deemed as an attempt to revive the old North-South division.[388] Indeed, as Sauvant argues, such change in interest situations on the ground may influence the ongoing discussion in coming years.[389]

3.2 Discussion at the First and Second Session of the IGWG

This section analyses the discussion held at the first and second session of the IGWG. It starts with reviewing the attendance and positions of key stakeholders. Subsequently, it takes a closer look on the discussions over key issues, in order to have an overview on the possible scope and contents of the proposed treaty. Furthermore, it examines the effectiveness of concrete proposals put forward during the discussions and the possibilities for stakeholders to come to agreement.

3.2.1 Overview of the Attendance and General Attitude

Resolution 26/9 dedicated first two session of the IGWG 'to conducting constructive deliberations on the content, scope, nature and form of the future international instrument',[390] before the actual negotiation started. Accordingly, the first and second sessions were held in Geneva, from 6 to 10 July 2015[391] and from 24 to 28 October 2016[392]. Because the IGWG was an 'open-ended' working group, it allowed the participation of all UN member States, non-member observer States, NGOs with

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386 UNCTAD (n 382) 112.
387 De Schutter (n 5) 44.
388 ibid 17.
389 Sauvant (n 10) 74.
390 UNHRC (n 16) para. 2.
391 UNHRC, 'Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument' (5 February 2016) UN.Doc A/HRC/31/50.
392 UNHRC, 'Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (4 January 2017) UN.Doc A/HRC/34/47.

ECOSOC consultative status, and others including national human rights institutions.[393]

3.2.1.1 States

60 UN member States attended the first session, whereas 80 member States participated in the second. Among non-member States, Palestine and the Holy See attended both.[394] The EU and its member States (besides France) left the first session in the middle of the second day, since their request to amend the Program of Work was rejected.[395] However, they participated in the whole program of the second session, as the amendment was accepted this time.[396] The concrete content of the amendment will be reviewed later.[397]

The list of participating member States are as follows.

The first session: (by regional group, where developed countries are marked with a *; the countries that voted in favour for the Resolution 26/9 with a (f), abstained with a (ab), against with a (a); EU member States with a (E); and countries that did not attend the second session with)[398]

Africa (10)	Algeria(f), Egypt, Ethiopia(f), Ghana, Kenya(f), Libya, Morocco(f), Namibia(f), South Africa(f), Tunisia
Americas (19)	Argentina(ab), Bolivia, Brazil(ab), Chile(ab), Colombia, Costa Rica(ab), Cuba(f), Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico(ab), Nicaragua, Peru(ab), Trinidad and Tobago, Uruguay, Venezuela(f)
Asia (17)	Bangladesh, China(f), Kuwait(ab), India(f), Indonesia(f), Iran,

[393] Bernaz and Pietropaoli (n 372) 2.
[394] UNHRC (n 391) para. 6; UNHRC (n 392) Annex I.
[395] UNHRC (n 391) para. 7; EU, 'Inter-Governmental Working Group (IGWG) on the elaboration of an international legally-binding instrument on transnational corporations and other business enterprises with respect to human rights: SUBMISSION OF THE EUROPEAN UNION' 6-7 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/EuropeanUnion.doc> accessed 24 July 2017.
[396] UNHRC (n 392) Annex I.
[397] See, Chapter 3.2.2.2.
[398] UNHRC (n 391); UNHRC (n 392); UNHRC (n 346) para. 182; United Nations Statistics Division (n 367); EU, 'Countries' < https://www.hrw.org/news/2014/07/01/dispatches-treaty-end-corporate-abuses> accessed 14 July 2017.

	Iraq, Malaysia, Korea(a), Myanmar, Pakistan(f), Philippines(f), Qatar, Singapore, Syrian Arab Republic, Thailand, Viet Nam(f)
Europe (14)	Austria(a)(E)*, Bulgaria(E)*, France(a)(E)*, Greece(E)*, Italy(a)(E)*, Latvia(E)*, Lichtenstein*, Luxembourg(E)*, Moldova*, Monaco*, Netherlands(E)*, Russian Federation(f)*, Switzerland*, Ukraine*

The countries that participated in the vote of the Resolution 26/9 and did not attend the first session were: (developed countries are marked with a *; EU member States with a (E) and EU candidate States with a (EC); and the countries that did not attend any session with)[399]

In favour	Benin, Burkina Faso, Congo, Côte d'Ivoire, Kazakhstan
Against	Czechia (E)*, Estonia(E)*, Germany(E)*, Ireland(E)*, Japan*, Montenegro(EC)*, Romania(E)*, United Kingdom(E)*, former Yugoslav Republic of Macedonia(EC)*, United States*
Abstaining	Botswana, Gabon, Maldives, Saudi Arabia, Sierra Leone, United Arab Emirates

The second session: (by regional group, where developed countries are marked with a *; the countries that voted in favour for the Resolution 26/9 with a (f), abstained with a (ab), against with a (a); EU member States with a (E); and countries that did not attend the second session with)[400]

Africa (16)	Algeria(f), Botswana(ab), Democratic Republic of Congo, Egypt, Ethiopia(f), Ghana, Kenya(f), Libya, Mauritania, Mauritius, Morocco(f), Namibia(f), Niger, Rwanda, South Africa(f), Tunisia

[399] ibid.
[400] ibid.

Americas (20)	Argentina(ab), Bolivia, Brazil(ab), Chile(ab), Colombia, Costa Rica(ab), Cuba(f), Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico(ab), Nicaragua, Panama, Peru(ab), Saint Kitts and Nevis, Uruguay, Venezuela(f)
Asia (21)	Bangladesh, China(f), Georgia, India(f), Indonesia(f), Iran, Iraq, Japan(a)*, Kazakhstan(f), Malaysia, Mongolia, Korea(a), Myanmar, Pakistan(f), Qatar, Saudi Arabia(ab), Singapore, Tajikistan, Thailand, Turkey, United Arab Emirates(ab)
Europe (22)	Austria(a)(E)*, Belarus*, Belgium(E)*, Czechia(a)(E)*, Finland(E)*, France(a)(E)*, Germany(a)(E)*, Greece(E)*, Ireland(a)(E), Italy(a)(E)*, Luxembourg(E)*, Netherlands(E)*, Norway*, Portugal(E)*, Romania(a)(E)*, Russian Federation(f)*, Serbia(EC)*, Slovakia(E)*, Spain(E)*, Switzerland*, Ukraine*, United Kingdom(a)(E)*
Oceania (1)	Australia*

The countries that participated in the vote of the Resolution 26/9 and did not attend the second session were: (developed countries are marked with a *; EU member States with a (E) and EU candidate States with a (EC); and the countries that did not attend any session with ☐) [401]

In favour	☐Benin, ☐Burkina Faso, ☐Congo, ☐Côte d'Ivoire, Philippines, Viet Nam
Against	☐Estonia(E)*, ☐Montenegro(EC)*, ☐United States*, ☐former Yugoslav Republic of Macedonia(EC)*
Abstaining	☐Gabon, Kuwait, ☐Maldives, ☐Sierra Leone

[401] ibid.

In view of the above and the statements made by delegations during the sessions, [402] the positions of States could be summarised as follows:

1) 20 States voted in favour of Resolution 26/9, but their degree of support seemed to vary from one another. Out of these 20 countries, it was only 13 countries that attended the both sessions. Out of these 13, 10 countries (Algeria,[403] Ethiopia,[404] Morocco, [405] Namibia, [406] South Africa, [407] Cuba, [408] Venezuela, [409] India, [410] Indonesia[411] and Pakistan[412]) expressed their explicit support for the initiative, whereas Kenya never took the floor, China continued to take an unclear position[413] and Russia explicitly stated that the country saw this initiative 'premature'.[414] The three Asian countries that voted in favour of the Resolution attended only one of the two sessions. Among those, Viet Nam and Kazakhstan remained silent, while the Philippines did not take a clear position but hinted at its support for the proposed

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[402] United Nations (UN), 'HRC WG ON TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 1ST SESSION' (UN Digital Recording Portal, 6 to 10 July 2015) <https://conf.unog.ch/digitalrecordings/#> accessed 14 July 2017, herein after 'Digital Recording 1st session'; UN, 'HRC WG ON TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 2ND SESSION' (UN Digital Recording Portal, 24 to 28 October 2016) < https://conf.unog.ch/digitalrecordings/#> accessed 14 July 2017, herein after 'Digital Recording 2nd session'. Transcribed by the author.

[403] See, for instance, Algeria, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 11:37).

[404] See, for instance, Ethiopia, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 11:20).

[405] Morocco, 'Oral Statement' (Oral Statement at the 1sr Session of the IGWG, UN Digital Recording portal, 10 July 2015 at 17:03).

[406] See, for instance, Namibia, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:36).

[407] See, for instance, South Africa, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:47).

[408] See, for instance, Cuba, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 11:43).

[409] See, for instance, Venezuela, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:45).

[410] India, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 7 July 2015 at 10:53).

[411] See, for instance, Indonesia, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:34).

[412] See, for instance, Pakistan, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:56).

[413] China, 'Oral Statements' (Oral Statements made during the 1st Session of the IGWG, UN Digital Recording portal, 6 to 10 July 2015)；China, 'Oral Statements' (Oral Statements made during the 2nd Session of the IGWG, UN Digital Recording Portal, 24 to 28 October 2016)

[414] Russia, 'Oral Statements' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording Portal, 6 July 2015 17:35).

treaty.[415] Although there were four African States that voted in favour of the Resolution, they did not attend any of the sessions, possibly reflecting their passive support. Likewise, Sri Lanka and Kyrgyzstan did not join any of the sessions, even though they were among the countries that issued the first joint Statement calling for the binding treaty in 2013.[416]

2) Besides the above ten countries, eight UN member States expressed their explicit support for the initiative during the sessions, namely Bolivia,[417] Egypt,[418] Uruguay,[419] Colombia,[420] El Salvador,[421] Peru,[422] Nicaragua[423] and Panama.[424] In addition, statements of the African group that expressed support to the initiative were delivered in the both sessions,[425] and as a non-member State, Palestine[426] also stated their explicit support. All in all, 19 member States including Ecuador,[427] one UN regional group (comprised of 54 States)[428] and one non-member State explicitly supported the initiative.

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[415] Philippines, 'Oral Statements' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording Portal,10 July 2015 at 16:47).
[416] UNHRC (n 391) para. 6; UNHRC (n 392) Annex I; Ecuador (n 339).
[417] See, for instance, Bolivia, 'Oral Statements' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording Portal, 8 July 2015 at 16:21).
[418] See, for instance, Egypt, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 10 July 2015 at 16:51).
[419] See, for instance, Uruguay, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 11:50).
[420] Colombia, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:59).
[421] El Salvador, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 28 October 2016 at 13:13).
[422] Peru, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:39).
[423] Nicaragua, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 9 July 2015 at 16:28).
[424] Panama, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 11:26).
[425] Algeria, 'Oral Statement on behalf of the African Group' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 6 July 2015 at 17:25); South Africa, 'Oral Statement on behalf of the African Group' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 11:09).
[426] See, for instance, Palestine, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 8 July 2015 at 16:22).
[427] Namely, Algeria, Ethiopia, Morocco, Namibia, South Africa, Cuba, Venezuela, India, Indonesia, Pakistan, Bolivia, Egypt, Uruguay, Colombia, El Salvador, Panama and Ecuador.
[428] UN, 'United Nations Regional Groups of Member States' <http://www.un.org/depts/DGACM/RegionalGroups.shtml> accessed 14 July 2017.

3) States such as Malaysia[429] and Brazil made positive comments on the initiative while not clearly stating their position. In fact, Brazil showed a more positive attitude in the second session compared to the first, as the country made a statement that Brazil viewed the initiative could 'contribute in the process of filling the existing gaps in the international framework on business and human rights',[430] whereas during the first session they simply stated they had not decided their position and made some comments on how the process should be carried out.[431]

4) Ten out of 14 States that voted against the Resolution 26/9 joined at least one of the sessions. Eight of them were EU member States (Austria, Italy, France, Czechia, Germany, Ireland, Romania and the United Kingdom) in addition to Korea and Japan. Only Korea and France joined both of the whole session. (Austria and Italy participated in the first session, but left on the second day together with other EU States). These States and the EU generally stressed the importance of implementing the *UNGP*,[432] implying their position against the initiative. The United States kept its statement made at the UNHRC and has not participated in any session.[433]

5) While Switzerland[434] seemed to take a close position to its fellow European countries by stating that the proposed instrument should not undermine the *UNGP* but should be complementary to it, States such as Mexico[435] and Argentina[436] also

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[429] Malaysia, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 13:02). The representative stated that Malaysia believed 'the IGWG process is a positive step towards further exploring innovative, practical and crucial aspects involving the governance of business and human rights agenda at the international level'.

[430] Brazil, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 11:39).

[431] Brazil, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 7 July 2015 at 10:47).

[432] EU (n 395); Korea, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 11:48); Japan, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:27).

[433] Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva (n 356).

[434] See, for instance, Switzerland, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 11:17).

[435] Mexico, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 26 October 2016 at 11:15). In fact, Mexico expressed its view that the effective implementation of the UNGP was the best way to move forward.

[436] Argentina, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 13:04).

underlined the usefulness of the *UNGP* and urged that the proposed instrument should be built upon those past efforts including the *UNGP*. All in all, five States and the EU explicitly stressed the importance of the implementation of the *UNGP* and thereby implied prioritising the *UNGP* over the establishment of the proposed treaty.

6) Ten of the States that participated in the first session did not participate in the second, but 30 new States joined from the second session, raising the number of participating States by 20. It is possible that this increase reflected growing interest in the initiative. Likewise, five of the developed countries[437] that attended the first session did not participate in the second, but 15 more developed countries joined from the second session, increasing the number of participating developed countries by ten. Besides the EU group, the developed countries that joined from the second session were: Australia, Belarus, Japan and Norway. Within the EU group, notably Germany and the United Kingdom joined from the second session. Accordingly, the number of G8 countries[438] that participated in a session increased from three[439] to six. With regard to the EU and its member States, it is worth noting that the European Parliament made a recommendation for them 'to engage in the emerging debate' in 2015, in between the first and the second session.[440] As Bernaz and Pietropaoli point out, these countries might have joined the process 'in order to weaken the draft',[441] yet it still showed that the initiative was significant enough to warrant their participation.

The States that participated in one of the sessions and not mentioned above were either: EU member States that aligned themselves with the position of the EU; States that did not make any intervention; or States that did not take a clear position on the initiative. The States' positions on concrete topics will be reviewed in next sub-chapter.

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[437] Namely Bulgaria, Latvia, Lichtenstein, Moldova and Monaco.
[438] OECD, 'GLOSSARY OF STATISTICAL TERMS: G8' <https://stats.oecd.org/glossary/detail.asp?ID=6806> accessed 27 July 2017.
[439] Including Italy, that left the first session on the second day.
[440] European Parliament, European Parliament resolution of 12 March 2015 on the EU's priorities for the UN Human Rights Council in 2015, 2015/2572(RSP), 12 March 2015 32.
[441] Bernaz and Pietropaoli (n 372) 9.

To sum up, out of 90 member States that participated in at least one session: 19 explicitly expressed their support for the initiative; two made positive comments on the proposed instrument; one stated that the initiative was premature; the EU along with five States expressed their enthusiasm for the *UNGP*; and others did not clearly express their position. In addition, one non-member State and one regional group expressed their support as well.

Again, it was observed that while the supporters of the proposed legally binding instrument were developing countries from Latin America, Africa and Asia,[442] developed countries that attended the session either backed the non-binding *UNGP* or made a negative comment on the initiative.

3.2.1.2 Civil Society

A number of civil society organisations joined the sessions and actively made interventions.[443] Many also submitted written contributions and organised side events.[444] Such active participation reflected their strong support of the proposed binding treaty.[445] Notably, from Treaty Alliance, more than 100 organisations participated in lobbying activities in Geneva for the first session.[446] Bernaz and Pietropaoli suggest that they could be a force in influencing the process of norms setting, as it is known that NGOs can have more influence when they lobby in coalition than act individually, and when they have expertise and knowledge about the issues in question. Treaty Alliance meets these conditions.[447] Bernaz and Pietropaoli also predict that while Treaty Alliance will continue making effort to influence the discussions in Geneva, national NGOs will lobby their own governments. In fact, according to Bernaz

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[442] Eight Latin American countries, six African countries and three Asian countries explicitly supported the initiative.
[443] UNHRC (n 391); UNHRC (n 392).
[444] OHCHR, 'First session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx> accessed 27 July 2017; OHCHR, 'Second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx> accessed 27 July 2017.
[445] Bernaz and Pietropaoli (n 372) 2–3.
[446] Treaty Alliance, 'History' < http://www.treatymovement.com/history/> accessed 27 July 2017.
[447] Bernaz and Pietropaoli (n 372) 4.

and Pietropaoli, the advocacy work of Treaty Alliance as well as some NGOs might have contributed to changing the position of the EU and its member States, ultimately resulting in their participation in the second session.[448]

Although the positions of each organisation on concrete matters might vary, many generally promoted issues such as: a better access to remedy through codification of extraterritorial obligation of home States,[449] removal of legal and procedural barriers,[450] and / or establishment of an international court/tribunal on business and human rights[451]; imposition of liability on corporations;[452] recognition of the liability of a parent company for the offences committed by its subsidiaries or business partners;[453] recognition of the hierarchical primacy of international human rights law over other international law, in particular trade and investment treaties;[454] and effective regulation of business activities throughout their operation.[455]

3.2.1.3 Business Sector

From the business sector, a group of business organisations, consisting of the IOE, ICC, the Business and Industry Advisory Committee to the OECD (BIAC), and the World Business Council for Sustainable Development (WBCSD), submitted several joint Statements to the IGWG.[456] In their first submission made in June 2015, these

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[448] ibid 8.
[449] UNHRC (n 391) para. 77; UNHRC (n 392) para. 128.
[450] UNHRC (n 391) para. 105; UNHRC (n 392) para. 47, 128.
[451] UNHRC (n 391) para. 105 ; UNHRC (n 392) para. 34, 91.
[452] UNHRC (n 391) para. 29.
[453] UNHRC (n 391) para. 96; UNHRC (n 392) para. 128.
[454] UNHRC (n 391) para. 53; UNHRC (n 392) para. 34.
[455] UNHRC (n 391) para. 85.
[456] Business and Industry Advisory Committee to the OECD (BIAC), ICC, IOE and the World Business Council for Sustainable Development (WBCSD), 'UN Treaty Process on Business and Human Rights: Initial Observations by the International Business Community on a Way Forward' (29 June 2015) < http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/IOE_contribution.pdf> accessed 25 July 2017; BIAC, ICC, IOE and WBCSD, 'UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: Further considerations by the international business community on a way forward (First Submission)' <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/IOE_ICC_BIAC_WBCSD_FirstSubmission.docx> accessed 25 July 2017; BIAC, ICC, IOE and WBCSD, 'UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: Further considerations by the international business community on a way forward (Second Submission)' <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/IOE_ICC_BIAC_WBCSD_SecondSubmission.docx> accessed 25 July 2017.

organisations 'which collectively represent[ed] millions of companies around the world', emphasised the effectiveness of the *UNGP* and the importance to implement it, while explicitly stating that the proposed treaty should build on the *UNGP* and 'avoid imposing direct obligations on corporations'.[457] They further stressed that the treaty 'should not create new legal liabilities for companies […] along the global supply chain'.[458] With regard to the issue of access to remedy, they underlined that the focus should be on 'improving national judicial systems in host countries' and not on 'expanding the availability of extraterritorial jurisdiction and building new international legal structures'.[459] It was also stressed that the treaty should apply to all companies, not only to TNCs.[460] In their subsequent submissions, they basically repeated the above arguments,[461] yet further elaborated their position on the allocation of the responsibility between companies and States, that the responsibility of corporations should be limited to 'respect'.[462]

Among others, the IOE was notably committed to engaging with the work of the IGWG.[463] They opted to involve themselves in the process because they were afraid that the IGWG would quickly be able to agree on a text unfavourable to business. Being involved in the process and expressing their interests was seen as more productive than simply boycotting the process entirely.[464] Accordingly, the IOE actively participated

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[457] BIAC, ICC, IOE and WBCSD, 'UN Treaty Process on Business and Human Rights: Initial Observations by the International Business Community on a Way Forward' (n 456) 1, 3.
[458] ibid 3.
[459] ibid.
[460] ibid 2.
[461] ibid.
[462] BIAC, ICC, IOE and WBCSD, 'UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: Further considerations by the international business community on a way forward (Second Submission)' (n 456) 1.
[463] OHCHR, 'First session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (n 444); OHCHR, Second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (n 444); UN 'Digital Recording 1st session' (UN Digital Recording Portal, 6 to 10 July 2015)；UN 'Digital Recording 2nd session' (UN Digital Recording Portal, 24 to 28 October 2016).
[464] IOE, 'Draft Strategy on IOE Engagement in the "Ecuador Resolution" Intergovernmental Working Group on Business and Human Rights' (5 November 2014) <http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2014-11-05__Draft_IOE_Strategy_Engagement_with_Ecuador_Initiative_IWG__Final_.pdf > accessed 14 July 2017.

both of the first two sessions of the IGWG, making both oral and written statements.[465] Their aim was to achieve 'a declaration-type of treaty' and to make it applicable not only to TNCs but also to all businesses, whereas their 'red lines' were: a) direct imposition of legally binding human rights obligations onto companies; b) measures to enhance access to remedy through extraterritorial jurisdiction and / or establishment of an international tribunal; and c) extending the scope of the responsibility of business beyond what was indicated under the *UNGP*.[466]

From the second session, the ICC also joined the IGWG and made several oral statements, restating their position expressed in the joint statements.[467]

3.2.1.4 Others

Besides those stakeholders reviewed above, intergovernmental organisations, such as the Council of Europe, the OECD and the South Centre attended at least one of the two sessions. UN related organisations,[468] National Human Rights Institutions[469] and International Committee of the Red Cross also participated.[470]

3.2.1.5 Summary of Attendance and General Attitude

Through the first two sessions, it was observed that about 20 developing countries showed explicit support for the initiative. Civil society also expressed their strong support for a treaty that could better regulate the activities of TNCs and that could hold TNCs accountable for their human rights violations. In contrast, developed countries and the business sector continued to favour the *UNGP* over the proposed treaty. They

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[465] OHCHR, 'First session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (n 444); OHCHR, Second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (n 444); UN, 'Digital Recording 1st session' (UN Digital Recording Portal, 6 to 10 July 2015)；UN, 'Digital Recording 2nd session' (UN Digital Recording Portal, 24 to 28 October 2016).

[466] IOE (n 464).

[467] OHCHR, 'Second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (n 444); UN 'Digital Recording 2nd session' (UN Digital Recording Portal, 24 to 28 October 2016).

[468] Including the UN Entity for Gender Equality and the Empowerment of Women, the UN Children's Fund, the UNCTAD and UN Environment.

[469] Such as the National Human Rights Council of Morocco, the Danish Institute for Human Rights and the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

[470] UNHRC (n 391) para. 9, Annex II; UNHRC (n 392) Annex I.

repeatedly appealed that the current initiative should not undermine the implementation of the *UNGP*. The business sector even made it clear that they were against the direct imposition of legal obligations onto corporations as well as any measures that would enhance access to judicial redress for victims of corporate human rights abuse other than domestic courts of host countries.

Admittedly, the number of States that explicitly support the initiative is still limited. However, considering the fact that the draft text is not yet tabled and about the half of the States that participated in at least one of the two sessions have not yet clearly expressed their positions, it is too early to ascertain whether or not the initiative will receive enough support from States.

Furthermore, although the division between those who support and those who oppose the initiative seems to be quite severe, a deeper analysis on contentious issues is needed to determine areas of possible compromises.

3.2.2 Discussions over Key Issues

This subsection reviews the discussion over key issues of the proposed instrument to have an overview of its possible scope and contents of it. At the same time, it examines the effectiveness of concrete proposals put forward during the discussions and the possibilities for stakeholders to come to agreement.

3.2.2.1 Relationship with the *UNGP*

As briefly mentioned above, it was observed that stakeholders that were sceptical about the proposed binding treaty repeatedly stressed the importance of the *UNGP*. Their main arguments were as follows: a) the work of the IGWG should not undermine the implementation of the *UNGP*;[471] b) the proposed treaty should be built upon the *UNGP*;[472] and c) in order to bridge the accountability gap, what is necessary is not

[471] See, for instance, ICC, 'Panel V, Subtheme 2' (Oral Statement at the 2nd session of the IGWG, Geneva, 27 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelVSubtheme2/InternationalChamberCommerce.doc> accessed 14 July 2017; Switzerland (n 434).

[472] See, for instance, ICC (n 471); EU, 'EU intervention for Day 4 under Panel V Subtheme 2' (Oral Statement at the 2nd session of the IGWG, Geneva, 27 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelVSubtheme2/E

establishing a new treaty, but implementing the *UNGP* and / or improve State-based regulatory / judicial mechanisms.[473]

Undermine the implementation of the *UNGP*?

Concerning the first point that the work of the IGWG should not undermine the implementation of the *UNGP*, the supporters of the initiative seemed to share a similar position with the opponents. Actually, States that explicitly supported the initiative also acknowledged the importance of the *UNGP*[474] and stressed that the initiative did not contradict the *UNGP*,[475] but was complementary to it.[476] In fact, when the EU proposed to amend the Program of Work during the first session in order to add a panel with regard to the implementation of the *UNGP*,[477] no States objected. With regard to a related concern expressed by the opponents that the initiative would draw limited resources and attention away from the implementation of the *UNGP*,[478] Bernaz and Pietripaoli point out that it is possible for governments to implement the *UNGP* at national level, while joining the treaty process at the IGWG.[479] In fact, Colombia and Indonesia, States that explicitly supported the initiative, are among the rare 16 States

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uropeanUnion.docx> accessed 24 July 2017.

[473] See, for example, EU (n 395); IOE, 'Panel VI' (Oral Statement at the 2nd session of the IGWG, Geneva, 28 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelVI/International_Organization_of_Employers.doc> accessed 24 July 2017; IOE, 'Draft Intervention IGWG - General opening remarks' <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/InternationalOrganizationEmployers.doc> accessed 24 July 2017.

[474] See, for instance, South Africa, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 6 July 2015 at 11:41); Egypt, (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 6 July 2015 at 11:54); Pakistan, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 6 July 2015 at 17:38); Peru, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:39); and Colombia, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:59).

[475] See, for instance, Venezuela, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 7 July 2015 at 10:40).

[476] See, for instance, Indonesia, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:34); and El Salvador, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 13:13).

[477] UNHCR (n 18) para. 13; UN 'Digital Recording 1st session' (UN Digital Recording Portal, 7 July 2016).

[478] Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva (n 356).

[479] Bernaz and Pietropaoli (n 372) 16.

that already published their own National Action Plans (NAPs) to implement the *UNGP*.[480] Furthermore, Bernaz and Pietripaoli indicate that both States and corporations continued to implement the *UNGP* even after the adoption of the Resolution 26/9.[481] Bloomer also observed that 'the treaty vote had acted as a political spur to the [*UNGP*] rather than creating a 'legal chill''.[482] Taylor, who had initially shared the above concern also later acknowledged that '[f]ar from being a diversion, the call for a treaty has been a catalyst'.[483]

Although South Africa was criticised by local NGOs for prioritizing the treaty process over the implementation of the *UNGP*,[484] in view of the above, generally speaking, the author agrees with Bernaz and Pietripaoli, that such a belief that the initiative would impede the implementation of the *UNGP* is not well founded.[485]

Building the treaty 'upon the *UNGP*'

As for the second argument that the proposed treaty should be built upon the *UNGP*, it was also observed that supporters share the same point of view with the opponents to a certain extent. Some, including Ecuador, actually expressed their intention to build the proposed treaty upon the *UNGP* by making it legally binding, in addition to other efforts to produce a robust instrument.[486] Furthermore, while the IOE stated that the

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[480] Business & Human Rights Resource Centre, 'National Action Plans' <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> accessed 24 July 2017.

[481] Bernaz and Pietropaoli (n 372) 13, 16.

[482] Phil Bloomer, 'Unity in Diversity: the advocates for the Guiding Principles and binding treaty can be complementary' (Business & Human Rights Resource Centre) <https://business-humanrights.org/en/unity-in-diversity-the-advocates-for-the-guiding-principles-and-binding-treaty-can-be-complementary> accessed 27 July 2017.

[483] Mark Taylor, 'The Movement and the IGWiG' (Institute for Human Rights and Business, 3 July 2015) < https://www.ihrb.org/other/governments-role/the-movement-and-the-igwig> accessed 27 July 2017.

[484] Centre for Human Rights, University of Pretoria and International Corporate Accountability Roundtable, 'So. Africa: NGOs publish "shadow" natl. baseline assessment on govt.'s implementation of business & human rights frameworks' (Business and Human Rights Resource Centre, 4 April 2016) < https://business-humanrights.org/en/so-africa-ngos-publish-shadow-natl-baseline-assessment-on-govts-implementation-of-business-human-rights-frameworks> accessed 1 August 2018.

[485] Bernaz and Pietropaoli (n 372) 16.

[486] See, for instance, Ecuador, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 6 July 2015 at 17:42); Colombia, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:59); and Social Service Agency of the Protestant Church in Germany(Brot für die Welt), International family of Catholic social

treaty should acknowledge the importance of the first and second pillar of the *UNGP*, namely States' obligation to protect and corporate responsibility to respect,[487] some States that were in favour of the treaty also proposed to reaffirm the obligations of States[488] and to elaborate on the responsibility of corporations based on the *UNGP* in the proposed treaty.[489]

In fact, what the business sector proposed was to oblige States to develop and carry out NAPs and to establish a monitoring mechanism to ensure the implementation of the *UNGP* and NAPs by State parties.[490] Considering the statements made by supporters, there should be ample possibility that they would include this proposal of the business sector into the draft text. Even South Africa, which expressed scepticism about the obligation to develop NAPs based on the *UNGP*,[491] stated that the proposed legally binding instrument could 'feed into NAPs' by providing uniforms standards for their development. This would improve the NAPs, which in their current state were lacking and unable to adequately provide regulation.[492]

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justice organisations(CIDSE), Friends of the Earth Europe(FoEE), International Baby-Food Action Network(IBFAN) and Centre for Research on Multinational Corporations(SOMO), 'Open-ended Inter-Governmental Working Group on transnational corporations and other business enterprises with respect to human rights: Oral Statement' (Oral Statement at the 2nd session of the IGWG, Geneva, 27 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelVSubtheme2/CIDSE_BftW_FoEE_IBFAN_SOMO_Enforcement.docx> accessed 1 August 2017.

[487] IOE, 'Panel VI' (n 473).

[488] See, for instance, Cuba, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 8 July 2015 at 11:27); and Bolivia, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 8 July 2015 at 11:36).

[489] South Africa, 'Statement delivered by South Africa' (Oral Statement at the 1st session of the IGWG, Geneva, 8 July 2015) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel6/States/South_Africa.pdf> accessed 24 July 2017.

[490] BIAC, ICC, IOE and WBCSD 'UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: Further considerations by the international business community on a way forward (First Submission)' (n 456).

[491] The representative of South Africa made a Statement during the second session of the IGWG that South Africa did not consider the UNGP as codified international human rights law, and thus it was contradictory that member States were expected to develop NAPs. See, South Africa, 'Statement delivered by South Africa: Panel V Strengthening Cooperation with Regard to Prevention, Remedy and Accountability and Access to Justice at the National and International Levels' (Oral Statement at the 2nd session of the IGWG, Geneva, 27 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelV/SouthAfrica.docx> accessed 1 August 2017.

[492] South Africa, ' Opening Statement Delivered by South Africa' (Oral Statement at the 1st session of the IGWG, Geneva, 6 July 2015)

However, the extent that they considered building the initiative 'upon the *UNGP*' seemed to differ between proponents and opponents. For instance, to the business sector, this meant that the treaty should 'fully respect'[493] the *UNGP* to the extent such as: the treaty should be based on *UNGP*s' three-pillar architecture[494] that 'properly differentiat[es] between the role of the State and that of companies'[495] and thereby limiting the responsibility of corporations to 'respect'. The treaty should address all companies including domestic enterprises instead of limiting its scope to TNCs;[496] the treaty should not include any direct obligation to be imposed on corporations; and a TNC would not be required to provide remediation for human rights violations committed by a direct business partner of the TNC as the commentary of the *UNGP* suggests.[497] As will be elaborated upon later, supporters of the initiative did not share such views and demanded the proposed treaty to do more than 'just teething' the States obligation of the *UNGP*.

What is needed: Implementing the *UNGP* or a binding treaty?

In respect of the third point, that what is needed is not to develop a new instrument but to implement the *UNGP* and / or to improve national regulatory / judicial mechanisms, the division between supporters and opponents seems stark, as it touches upon the necessity of creating a new treaty.

In the eyes of the opponents, as the EU articulated, '[corporate] human rights abuses [did] not result from a lack of international rules and obligations but rather stem[med]

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/SOUTHAFRICAS_Opening_StatementbyAmbMinty_Panel1.pdf> accessed 1 August 2017; FIAN International, Franciscans International, CCFD-Terre Solidaire and Society for International Development, 'Oral Statement' (Oral Statement at the 2nd session of the IGWG, Geneva, 27 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelVSubtheme2/FIAN_FI_CCFD_PICI_SID_PanelV.pdf> accessed 2 August 2017.

[493] BIAC, ICC, IOE and WBCSD, 'UN Treaty Process on Business and Human Rights: Initial Observations by the International Business Community on a Way Forward' (n 456).

[494] ICC (n 471).

[495] BIAC, ICC, IOE and WBCSD, 'UN Treaty Process on Business and Human Rights: Initial Observations by the International Business Community on a Way Forward' (n 456).

[496] ibid.

[497] BIAC, ICC, IOE and WBCSD, 'UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: Further considerations by the international business community on a way forward (Second Submission)' (n 456).

from a failure in implementing the existing ones'.[498] The IOE also stated that '[t]he legal challenge [was] not that there [was] a governance gap at international level, but that many countries lack[ed] the capacity to effectively implement and enforce their laws'.[499] Based on such views, they stressed that what was important was to improve the compliance of the host States with their existing human rights obligations to protect, and therefore it was important to implement the *UNGP*.[500]

In contrast, for the proponents, the *UNGP* was limited in its capacity to properly address the issue of business and human rights, especially in relation to TNCs. While they acknowledged that the *UNGP* was useful to improve national laws and thereby adequately regulate domestic corporations,[501] they underlined that TNCs could evade national regulations on jurisdictional ground.[502] In addition, the negative impact of the ISDS mechanisms onto national regulatory / judicial system was also discussed.[503]

In sum, the opponents of the proposed treaty argue that governments should be able to regulate and hold TNCs accountable, if they adequately implement the *UNGP* and strengthen their national rule of law, whereas supporters argue that implementing the *UNGP* is not enough to regulate TNCs and therefore a binding instrument is needed. In the eyes of the author, the arguments of proponents seem more valid, for three reasons:

First, even if host countries strengthen their national rule of law by properly implementing the *UNGP*, they may still face difficulties in holding TNCs accountable, in case those TNCs close their operations in the territories of those States and move

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[498] EU (n 395) 2.
[499] IOE, 'Draft Intervention from the floor on Panel I' (Oral Statement at the 2nd session of the IGWG, Geneva, 24 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/Panel1/InternationalOrganizationEmployers_Panel1.doc> accessed 1 August 2017.
[500] ibid; EU (n 395).
[501] Pakistan, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 7 July 2015 at 12:27).
[502] Bolivia (n 417); South Africa 'Statement delivered by South Africa: Panel IV Open debate on different approaches and criteria for the future definition of the scope of the international legally binding instrument' (Oral Statement at the 2nd session of the IGWG, Geneva, 27 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIV/SouthAfrica.docx> accessed 1 August 2017.
[503] Alfred de Zayas, 'Corporate social responsibility' (Presentation at the 2nd session of the IGWG, Geneva, 27 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIV/AlfredDeZayas.docx> accessed 1 August 2017.

their assets to somewhere else; and / or if the host governments are sued by TNCs for trying to hold them accountable domestically, just like what has happened to Ecuador in Chevron / Texaco case.[504]

Second, as Ruggie pointed out, it is difficult to justify the arguments of opponents to insist that the protection of rights of individuals should be carried out by the domestic systems of host governments, while they are still pursuing the set up of international arbitrations for the protection of the rights of investors. As Ruggie rightly articulated, 'if national law and domestic courts sufficed, then why do TNCs not rely on them to resolve investment disputes with [S]tates? '.[505]

Third, even if home States implement the *UNGP*, its potential effects could be limited, because: 1) the *UNGP* did not clarify States' extraterritorial obligations to protect;[506] and 2) there is no uniform standard for the development of NAPs.[507] Indeed, as the EU stated, if States adequately implemented the *UNGP* at national level and established necessary domestic regulations, the *UNGP* could be 'binding' under their jurisdiction.[508] Thus it could have immediate effect in States that have strong governance system that could compete with the power of TNCs, such as home States. However, since the *UNGP* took an ambiguous position on States' extraterritorial obligation to protect, whether or not States take measures to regulate overseas activities of TNCs and / or provide access to justice in their own courts for abuses committed abroad remains a matter of States' individual discretion. Furthermore, as States voluntarily develop their NAPs in the absence of any uniform standards, it is doubtful if their NAPs could be effective. For instance, Meeran, a panellist for the second session, pointed out that in terms of access to justice, the NAP of the United Kingdom was 'devoid of any measures', as it only dealt with non-judicial grievance mechanisms and supporting other countries, whereas the government of the United Kingdom passed legislation 'relating to costs in civil cases which positively undermines access to remedy' after the endorsement

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[504] See, Chapter 3.1.1.
[505] Ruggie (n 17) 4.
[506] UNHRC (n 14) GP 2.
[507] South Africa (n 492); FIAN International, Franciscans International, CCFD-Terre Solidaire and Society for International Development (n 492).
[508] EU (n 395).

of the *UNGP*.[509] Likewise, Taylor also indicated that States were not so keen to establish laws that impose direct liabilities onto corporations for their involvement in human rights abuses.[510]

In view of the above, the author shares the views of the proponents, that a legally binding treaty is needed, along with the *UNGP*. At the same time, the author observes that the supporters of the instrument were not against the implementation of the *UNGP*. The point they were making was that the *UNGP* was not enough to regulate TNCs and hold them accountable, even when it is implemented adequately. Therefore, in the eyes of the author, the positions of the supporters and opponents are not fundamentally polarised, even though they seem to contradict each other.

A possible way forward over the 'division' with regard to the *UNGP*

As reviewed earlier, the supporters of the proposed treaty actually acknowledged the importance of the *UNGP*, and some of them already showed their commitment to implement it. Therefore, besides the extent of how strictly the treaty should be in line with the *UNGP* on concrete issues, most of the 'division' with regard to the *UNGP* could be avoided by incorporating provisions that oblige States to implement the *UNGP* and incorporate the creation of monitoring mechanisms in the proposed instrument. In this way, the discussion could be shifted from 'the implementation of the *UNGP* ***or*** the establishment of a treaty' to 'the implementation of the *UNGP* ***and*** the establishment of a treaty'. By doing so, stakeholders that oppose the proposed treaty based on their belief that the implementation of the *UNGP* should be prioritised would no longer have a basis for their opposition, assuming that they are sincere in their own arguments and not merely using the *UNGP* as an excuse for not taking stronger actions. Additionally, as analysed above, there should be ample room for supporters to accept such a proposal.

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[509] Richard Meeran, 'Panel V sub theme 2: The relation between the UN Guiding Principles and the elaboration of an internationally binding legal instruments on TNCs' (Presentation at the 2nd session of the IGWG, Geneva, 27 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelVSubtheme2/RichardMeeran.docx> accessed 1 August 2017.

[510] Mark Taylor, 'A Business and Human Rights Treaty? Why Activists Should be Worried' (Institute for Human Rights and Business, 3 July 2015) <https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-why-activists-should-be-worried/?> accessed 27 July 2017.

The issues raised by the business sector in relation to the *UNGP*, such as the scope and the nature of corporate responsibilities as well as the target of the treaty, will be reviewed later.

3.2.2.2 The question of coverage: focusing on TNCs or applicability to all corporations

One of the most contentious issues was if the proposed treaty should address only TNCs or all companies. This was actually the reason that the EU left the first session.[511]

According to Resolution 26/9, the mandate of the IGWG is 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises',[512] where as its footnote defines 'other business enterprises' as 'all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law'.[513] Thus, it is quite clear that the mandate exclude domestic companies.

The scope of the treaty's coverage drew criticism from not only States[514] and business organisations[515] that were sceptical about the initiative, but also from some civil society organisations[516] as well as academics.[517] They mainly argued that a) domestic

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[511] They proposed to amend the Program of Work to widen the scope of the subject matter, by adding 'including local business' after every 'other business enterprises' throughout the Program of Work. When the proposal was rejected by majority of participating States, the EU again proposed to add a footnote to the Program of Work stating 'this Program of Work does not limit the scope of this Intergovernmental Working Group, taking into consideration several calls for the discussion to cover TNCs as well as all other business enterprises'. The second proposal was again rejected and eventually the EU left the first session on the second day. See, EU (n 395) 6-7. Bernaz and Pietropaoli point out that although the suggestion by the EU could have been supported by NGOs, the way they rose the issue as a pre-condition to join the session was deemed problematic. Bernaz and Pietropaoli (n 372) 8.

[512] UNHRC (n 16) para. 1.

[513] ibid footnote.

[514] See, for instance, EU (n 395) 1-3; Japan (n 432).

[515] BIAC, ICC, IOE and WBCSD 'UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: Further considerations by the international business community on a way forward (First Submission)' (n 456).

[516] See, for instance, Human Rights Watch (n 373); Amnesty International (n 374); Christy Hoffman, 'REMARKS of Christy Hoffman, Deputy General Secretary of UNI Global Union to the IGWG' (Presentation at the 2nd session of the IGWG, Geneva, 24 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/Panel1/ChristyHoffman.docx> accessed 1 August 2017.

[517] See, for instance, Surya Deva, 'Defining the Scope of the Proposed Treaty on Business and Human

enterprises could also commit human rights violations[518] and b) it was not in line with the *UNGP*, which addressed 'all companies' and thus undermined a fundamental element of the *UNGP*.[519] It was also argued that it was necessary to extend the treaty's scope in order to have a 'truly victim-centric' approach, as 'victims of business-related human rights impacts do not care whether their suffering resulted from the action of a domestic company or a multinational one'.[520]

In contrast, several States that supported the proposed treaty argued that the instrument should focus on TNCs, and therefore did not have to include local companies.[521] One of the reasons was that the mandate given to the IGWG specifies that the scope of application does not include local businesses, and the IGWG had to respect this clearly stated boundary.[522] Besides this technicality, there were, too, other more substantial reasons for focusing the treaty on TNCs, namely: a) TNCs could evade their human rights responsibilities, thanks to their complex structure and cross-border operations by invoking their separate legal personality and / or transferring their assets from one State to another in order to escape national regulations;[523] b) TNCs could not be equated with local corporations, since their sizes, resources and power were significantly different;[524] c) local governments were capable of holding domestic companies accountable, as domestic companies did not have above traits of TNCs that enable them to escape from national regulations and adjudications;[525] d) the *UNGP* already acknowledged the principle that all companies should respect human rights and provide guidelines to

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Rights' (Written contribution to the 2nd session of the IGWG) 1 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/SuryaDeva.doc > accessed 1 August 2017.

[518] EU (n 395) 2-3; BIAC, ICC, IOE and WBCSD 'UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: Further considerations by the international business community on a way forward (First Submission)' (n 456); Human Rights Watch (n 376); Amnesty International (n 377).

[519] EU (n 398) 2; BIAC, ICC, IOE and WBCSD 'UN Treaty Process on Business and Human Rights: Initial Observations by the International Business Community on a Way Forward' (n 456) 2.

[520] BIAC, ICC, IOE and WBCSD 'UN Treaty Process on Business and Human Rights: Initial Observations by the International Business Community on a Way Forward' (n 456) 2.

[521] UNHRC (n 391) para 59; UN 'Digital Recording 1st session' (UN Digital Recording Portal, 6 to 10 July 2015); UN 'Digital Recording 2nd session' (UN Digital Recording Portal, 24 to 28 October 2016).

[522] UNHRC (n 391) para 14. States that expressed such views include: Pakistan, India, Cuba and Egypt. See, UN 'Digital Recording 1st session' (UN Digital Recording Portal, 6 July 2015 from 15:52 to 18:12).

[523] Bolivia (n 417); South Africa (n 502).

[524] South Africa (n 502).

[525] UNHRC (n 392) para. 33; Pakistan (n 501); Namibia, 'Oral Statement' (Oral Statement at the 2nd Session of the IGWG, UN Digital Recording portal, 24 October 2016 at 12:36).

enhance national system for the effective regulation of domestic companies;[526] and e) only TNCs enjoyed the access to investor-State dispute settlements, which local companies were not allowed to have.[527] Furthermore, some argued that targeting only TNCs would not be discriminatory, rather, it would provide an equal footing for TNCs and domestic companies, as domestic companies could not escape from national regulations for their human rights violations as TNCs could do.[528] In addition, it was argued that if the scope of the proposed instrument to included all companies, it would become very broad and might hamper the conclusion of the negotiating process within a reasonable time, as well as pose challenges to the establishment of effective monitoring and / or dispute settlement mechanisms.[529]

A possible way forward over the target of the proposed treaty

Considering the above, the author believes that there are good reasons for the proposed treaty to focus on the issues relating to TNCs. That being said, the author finds that it would be more constructive for the treaty to cover all companies, while dedicating specific provisions for TNCs. This would both enable a victim-centric approach, and minimize the possibility that the treaty becomes '[a plaything] for some States, and [a reason] for others to ignore the process',[530] such as demonstrated by the EU at the first meeting.[531] Such a hybrid approach was actually proposed by some stakeholders,[532]

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[526] Pakistan (n 501); Carlos M. Correa, 'Scope of the Proposed International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights' (South Centre Policy Brief No. 28, September 2016) <https://www.southcentre.int/policy-brief-28-september-2016/> accessed 1 August 2017 2.

[527] Anne van Schaik, ' Intervention Anne van Schaik, Friends of the Earth on session VI' (Presentation at the 2nd session of the IGWG, Geneva, 27 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIV/AnneVanSchaik.doc > accessed 1 August 2017.

[528] UNHRC (n 392) para. 101; South Africa (n 502); South Africa, 'Statement delivered by South Africa' (Oral Statement at the 2nd session of the IGWG, Geneva, 24 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/Panel1/SouthAfrica.docx> accessed 24 July 2017; Correa (n 526).

[529] Correa (n 526).3.

[530] John Ruggie, 'Get real or we'll get nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business and Human Rights Treaty' (Business & Human Rights Resource Centre) <https://business-humanrights.org/en/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty> accessed 27 July 2017.

[531] Indeed, the attitude of the EU on this matter was criticised by European NGOs. One panellist for the 2nd session actually stated: ' I have to say in all honesty that the European NGOs were a bit surprised by the EU position here at the UN. Here the EU is insisting heavily on the need to cover all enterprises,

including Namibia, one of the States that explicitly supported the initiative.[533] In concrete terms, Deva proposed to establish either a treaty that was applicable to TNCs, with an Optional Protocol to extend the scope of its application to all corporations; or, a treaty that was applicable to all companies with a dedicated chapter dealing with the traits specific to TNCs.[534]

3.2.2.3 The question of coverage: rights involved

Prior to the sessions of the IGWG, Ruggie suggested that a possible (and rare) candidate where a new legal instrument with regard to business and human rights could be successfully achieved would be about 'business involvement in gross human rights abuses, including those that may rise to the level of international crimes, such as genocide, extrajudicial killings, and slavery as well as forced labo[u]r'.[535] He argued that to be successful, treaties should be narrowly crafted like 'precision tools', targeting specific governance gaps in areas where 'a certain degree of consensus among [S]tates' could be expected.[536]

This proposal by Ruggie was discussed, during the sessions of the IGWG, but the majority of the participants eventually rejected it, as many believed that it was important for the proposed treaty to cover all human rights, including the right to development, as well as principles of universality, indivisibility, interdependence, equality and non-discrimination.[537] It is worth noting that the scope of the rights was one of the rare issues where 'there appeared to be a consensus' during the first and second sessions of the IGWG.[538]

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while at home, the scope used for European laws is much narrowly defined. The French duty of care for example will be, if adopted, only applicable to companies with over 5000 employees. The EU Non Financial reporting Initiative will be only applicable for companies with over 500 employees'. See, van Schaik (n 527).

[532] Deva (n 517) 1; van Schaik (n 527).

[533] Namibia, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 7 July 2015 at 12:25).

[534] Deva (n 517) 1.

[535] John Ruggie, 'A UN Business and Human Rights Treaty?' (28 January 2014) 5 <https://sites.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf> accessed 2 August 2017.

[536] Ruggie (n 17) 5.

[537] UNHRC (n 391) para 62; UNHRC (n 392) para. 102.

[538] UNGRC (n 392) para. 102.

That being said, it is not so clear what 'all human rights' entails. There were States that stated that the instrument should specifically cover the rights of vulnerable groups,[539] as it could be in particular challenging for them to access to remedy. At the same time, some States NGOs and panellists also made proposals to include rights enshrined in the nine core human rights treaties[540] as well as the Universal Declaration of Human Rights (UDHR), the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and eight fundamental ILO conventions.[541] It was also suggested that the instrument should guarantee specific rights that are often affected by business activities, such as the right to food, as well the rights to access to land, water and other resources.[542]

On the other hand, the business sector underlined that the proposed treaty 'should focus on real human rights issues' and exclude issues such as climate change and youth unemployment.[543]

To sum up, the proposed instrument seems to cover all human rights without much

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[539] Cuba, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 7 July 2015 at 16:26); South Africa, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 7 July 2015 at 16:28); Bolivia, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 7 July 2015 at 16:35); Venezuela, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 7 July 2015 at 16:36); UNHRC (n 394)

[540] Namely, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and Convention on the Rights of Persons with Disabilities (CRPD). OHCHR, 'The Core International Human Rights Instruments and their monitoring bodies' <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> accessed 3 August 2017.

[541] Deva (n 517) 3; UNHRC (n 391) para 32, 33, 65; UNHRC (n 392) para. 36, 126. Eight fundamental ILO conventions include: Freedom of Association and Protection of the Right to Organise Convention (CO87), Right to Organise and Collective Bargaining Convention (C098), Forced Labour Convention (C029), Abolition of Forced Labour Convention (C105), Equal Remuneration Convention (C100), Discrimination (Employment and Occupation) Convention (C111), Minimum Age Convention (C138), and Worst Forms of Child Labour Convention (C182). International Labour Organization, 'Conventions and Recommendations' <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed 3 August 2017.

[542] Cuba, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 7 July 2015 at 16:26); UNHRC (n 391) para 32; UNHRC (n 392) para. 126.

[543] BIAC, ICC, IOE and WBCSD, 'UN Treaty Process on Business and Human Rights: Initial Observations by the International Business Community on a Way Forward' (n 456) 4.

dispute, even though negotiations have yet to specify the exact scope of 'all human rights'. The author believes this consensus on the scope of the rights to be protected under the proposed treaty is a positive step, because it acknowledges the universality, indivisibility and interdependence of human rights, and, as the *UNGP* articulated, the business activities could affect 'virtually the entire spectrum of internationally recognized human rights'.[544]

3.2.2.4 The question of coverage: responsibility of corporations

The scope of the responsibility of TNCs could become another contentious issue if the proposed treaty articulates not only corporations' negative responsibility to 'respect', but also the positive responsibility to 'protect' and 'fulfil', especially since the business sector clearly expressed its intention that the responsibility of corporations should be limited to 'respect', as delineated in the *UNGP*.[545]

In fact, to a certain extent, the *UNGP* imposed upon corporations the responsibility to 'protect',[546] as corporations are expected to 'prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'.[547] Also, it seemed there was no stakeholder who expressed during the IGWG that the general responsibiliy to protect should be extended beyond business activities and subsequently be imposed upon corporations.[548] Thus, what could be contentious would be the issue concerning the positive responsibility of corporations to 'fulfil', since some stakeholders, including South Africa underlined that the corporate responsibility should entail positive duty to contribute towards the realisations of human rights, for instance, through providing resources.[549]

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[544] UNHRC (n 14) GP12 Commentary.
[545] ICC (n 471); BIAC, ICC, IOE and WBCSD, 'UN Treaty Process on Business and Human Rights: Initial Observations by the International Business Community on a Way Forward' (n 456).
[546] David Bilchitz, 'IGWG Oral Submission 2: The Nature of Corporate Obligations' (Presentation at the 2nd session of the IGWG, Geneva, 26 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIIISubtheme2/DavidBilchitz.docx > accessed 1 August 2017; De Schutter (n 5) 15–16.
[547] UNHRC (n 14) GP13(b).
[548] UNHRC (n 391); UNHRC (n 392).
[549] UNHRC (n 392) para. 89; South Africa, 'Statement delivered by South Africa' (Oral Statement at the 2nd session of the IGWG, Geneva, 26 October 2016)

That being said, it was observed that not very many stakeholders explicitly took the position that the treaty should articulate the positive obligation to fulfil as a part of corporate responsibility.[550] Moreover, allocating the obligation to fulfil to corporations may invite criticism that such an imposition would allow States to shirk their human rights obligations, as it was the case in the discussion over the *Norms*.[551] The author assesses the value of imposing the obligation to fulfil in terms of enhancing the victim's access to justice. The author acknowledges that the participation and contribution of companies are needed to tackle human rights challenges, especially in relation to rights to health, food, water and privacy.[552] However, on the basis of how effectively such an obligation would enhance victims' access to justice, imposing positive obligations on TNCs may not contribute enough to justify the contentious negotiations it would entail. Given the diverse and sometimes contentious array of opinions among stakeholders, it remains necessary to balance areas of conflict and consensus with a view to the necessary outcome of an effective binding instrument.

3.2.2.5 Measures to enhance the State duty to protect

During the sessions, various measures that would enhance the State duty to protect were discussed. Such measures include: a) establishing criminal, administrative and civil liabilities of corporations and / or their executives within national jurisdiction when they violate human rights of others; b) removing legal, practical and procedural barriers to enable civil suits for the human rights violations committed by TNCs; c) clarifying extraterritorial obligations; and d) enhancing international judicial cooperation and legal mutual assistance.[553]

Establishing criminal, administrative and civil liabilities

The State obligation to protect individuals against abuse by third parties imposes upon States, the general duty to adopt the necessary legal framework.[554] However, not many

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<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIIISubtheme2/SouthAfrica.docx> accessed 1 August 2017.

[550] UN 'Digital Recording 2nd session' (UN Digital Recording Portal, 26 October 2016).

[551] See, Chapter 2.2.3.

[552] Wettstein (n 264) 170–171.

[553] UNHRC (n 391); UNHRC (n 392).

[554] ICJ (n 291) 19.

States establish legal liability of corporations for their human rights abuses.[555] To address this, it was discussed during the sessions that the proposed instrument could provide international common standards for corporate liability that could be adopted at the national level,[556] similar to what Article 19 of the WHO Framework Convention on Tabacco Control (FCTC) aimed to do.[557] Among others, the possibility to set out an obligation for State parties to establish liability of parent companies for the human rights abuse committed by their subsidiaries or in their supply chain was suggested,[558] where States such as Ecuador and Bolivia expressed their support.[559]

Such proposals would strengthen the national rule of law, and were aligned with suggestions made by the business sector.[560] However, broadening the scope of parent companies' liability so extensively as to include abuses committed in their supply chains, by subsidiaries and other affiliated companies; and integrating this at the national level alarmed the business sector. They in turn responded that these liabilities included 'all activities they might otherwise undertake as they worked to mitigate rights-impactful situations.' Therefore, instead of carrying out their human rights obligations as the *UNGP* advised, 'some companies might conclude that, [depending on the theories of liability adopted,] engaging in human rights due diligence [...] is too

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[555] ibid 20.

[556] See, for instance, International Federation of Human Rights (FIDH) and ICJ, 'Joint Oral Statement by the International Federation of Human Rights (FIDH) and the International Commission of Jurists (ICJ)' (Oral Statement at the 2nd session of the IGWG, Geneva, 26 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIIISubtheme2/InternationalFederationofHumanRightsandInternationalCommissionofJurists.docx> accessed 1 August 2017; Michelle Harrison, 'Statement of Michelle Harrison, EarthRights International' (Presentation at the 2nd session of the IGWG, Geneva, 26 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIIISubtheme2/MichelleHarrison.docx> accessed 1 August 2017; FIAN International, Franciscans International, CCFD-Terre Solidaire and Society for International Development (n 492).

[557] Leah Margulies, 'Intervention by Leah Margulies' (Presentation at the 2nd session of the IGWG, Geneva, 26 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIISubtheme2/LeahMargulies.pdf> accessed 1 August 2017; World Health Organisation Framework Convention on Tabacco Control (adopted 21 May 2003, entered into force 27 February 2005).

[558] UNHRC (n 391) para. 88.

[559] ibid para. 93; Ecuador, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 9 July 2015 at 11:15); Bolivia, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 9 July 2015 at 11:21).

[560] IOE, 'Draft Intervention IGWG - General opening remarks' (n 473) 1; ICC (n 471) 1.

risky'. [561]

De Schotter examined models to solve the legal obstacles in the way of holding parent companies accountable,[562] in relation to the separate legal personalities within a group of corporations.[563] According to his analysis, imposing direct liability onto a parent company for failure to exercise due diligence is the most advisable model, as it would hold a parent company accountable not only for its actions but also for its omissions in controlling its subsidiaries and thereby incentivise a parent company to monitor the activities of its subsidiaries. This model is also 'fully consistent with the emphasis placed by the [*UNGP*]'.[564]

Considering the above, it seems feasible for the proposed treaty to provide common standards for corporate liability, without fostering corporations' reluctance to take positive steps to prevent, mitigate or even end human rights abuses arising from their operations.

In addition, establishing individual liability of directors and managers of a corporation that committed human rights violation was also discussed during the session.[565]

Enabling civil law suits by removing barriers

Another area that was discussed to enhance the State duty to protect was to ensure victim's access to justice by removing legal, procedural and practical barriers.[566] Such barriers include: separate legal personality and limited liability as reviewed above; legal standing; filing deadlines; access to information that corporations obtain; the burden of proof; victims' access to legal representation and funding, given the lengthy and costly litigations against TNCs; inequality of arms, as TNCs would be capable to hire a number of good lawyers; and the doctrine of *forum non convenience*, when a victim

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[561] ICC (n 471) 2.
[562] He compared three models namely: piercing the corporate veil, the presumption of control in the integrated enterprise, and the direct liability of the parent corporation for failure to exercise due diligence.
[563] De Schutter (n 5) 21–31.
[564] ibid 27–29. He also provides another reason to favour this model, in relation to overcoming the *forum non convenience* doctrine.
[565] UNHRC (n 391) para. 90.
[566] UNHRC (n 391) para.100, 105; UNHRC (n 392) para. 105, 109, 115, 117.

tries to access the court of home State.[567]

Some of these barriers were identified by the *UNGP*[568] as well as by the work of the OHCHR Accountability and Remedy Project (ARP), a follow-up project of the *UNGP*,[569] where States have been encourage to 'take appropriate steps' to reduce them. The added value of the proposed treaty would be to oblige State parties to do so. In addition, there was little dispute regarding the matter during the sessions, perhaps due to the fact that it was already part of the *UNGP*.[570]

Clarifying Extraterritorial Obligations

The issue of States' Extraterritorial Obligations to protect attracted much attention during the first two sessions of the IGWG.[571] In fact, the ARP also found that one of the two key problems that hamper the capacity of domestic courts to adequately respond to the cross-border cases involving corporate human rights abuse was 'a lack of clarity at [the] international level as to the appropriate use of extraterritorial jurisdiction',[572] but this issue was far more contentious than reducing legal barriers.

Many States that supported the initiative expressed their expectation that the proposed instrument would address this issue, underlining the fact that treaty bodies already recognised such obligations.[573] NGOs and academics also stressed the importance of including this issue in the treaty, highlighting its effectiveness in enhancing victims' access to justice, especially in cases where host States were unwilling or unable to hold TNCs accountable.[574] The two dimensions of extraterritorial obligations were also

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[567] Harrison (n 556); Meeran (n 509); Claudia Müller-Hoff, 'Intervention by Claudia Müller-Hoff, European Center for Constitutional and Human Rights' (Presentation at the 2nd session of the IGWG, Geneva, 28 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelVI/ClaudiaMullerHoff.docx > accessed 1 August.

[568] UNHRC (n 14) GP26 Commentary.

[569] UNHRC (n 392) para. 105. The project received the mandate from the UNHRC based on Resolution 26/22, the other Resolution adopted a day after Resolution 26/9 that established the IGWG was adopted.

[570] UNHRC (n 391); UNHRC (n 392).

[571] ibid.

[572] OHCHR, 'Business and Human Rights:'The Accountability and Remedy Project' Background paper' 18 <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/OHCHR_ARP_Background_Paper_to_Draft_Guidance.pdf> accessed 4 August 2017.

[573] UNHRC (n 392) para. 61.

[574] See, for instance, Hoffman (n 516); Meeran (n 509); FIAN International, Franciscans International,

illustrated, namely: a) home States obligations to adequately regulate TNCs activities throughout their operations, such as imposing upon them disclosure and reporting requirements, and due diligence requirements to prevent, mitigate, and end harms; and b) home States obligations to establish extraterritorial jurisdiction for corporate human rights abuses committed outside of its territory.[575]

In contrast, the business sector stressed the consequences of extraterritorial obligations, such as: a) bringing cases to the courts of home States would cost victims time and money;[576] b) in case corporations were in complicit with States' conduct while violating human rights, the States in question would remain immune, as 'there is no general exception to the law of sovereign immunity for civil claims';[577] c) it might interfere with the sovereignty of another State;[578] d) States showed reluctance to use extraterritorial jurisdiction;[579] and e) extraterritorial jurisdiction would be available only for cases concerning TNCs, while it would not deal cases concerning domestic companies.[580] Such active intervention by the business sector clearly illustrates corporations' overall resistance of corporations towards this matter.

Indeed, the author shares advocates' view that codifying States' extraterritorial

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CCFD-Terre Solidaire and Society for International Development (n 492).

[575] See, for instance, Kinda Mohamadieh, 'Speaking notes: Kinda Mohamadieh, South Centre' (Presentation at the 2nd session of the IGWG, Geneva, 25 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIISubtheme2/SpeakingNotes_KindaMohaamdieh_Oct25.2016.pdf > accessed 1 August 2017; ICJ, 'Oral Statement by the International Commission of Jurists' (Presentation at the 2nd session of the IGWG, Geneva, 25 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIISubtheme2/International_Commission_of_Jurists.docx> accessed 1 August 2017.

[576] IOE, 'Panel VI: Lessons learned and challenges to access remedy (selected cases from different sectors and regions)' (Oral Statement at the 2nd session of the IGWG, Geneva, 28 October 2016) < http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelVI/International_Organization_of_Employers.doc> accessed 1 August 2017.

[577] ICC, 'Comments by Dr. Ariel Meyerstein, United States Council for International Business / ICC-USA on behalf of the International Chamber of Commerce' (Oral Statement at the 2nd session of the IGWG, Geneva, 25 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIISubtheme2/International_Chamber_of_Commerce.docx> accessed 1 August 2017.

[578] IOE, 'Panel 2, Subtheme 2 – Jurisprudential and practical approaches to elements of extraterritoriality and national sovereignty' (Oral Statement at the 2nd session of the IGWG, Geneva, 25 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIISubtheme2/International_Organization_of_Employers.doc> accessed 1 August 2017.

[579] ibid.

[580] ibid.

obligations would positively contribute to closing the accountability gap. However, it is possible that extraterritorial obligations would be limited in effect, particularly if home States do not ratify the proposed instrument. Considering the general tendency in the past for developed countries to often align their positions with business sectors, there is a risk that this concern would be true.

There are, however, other promising signals that suggest that developed States would adhere to their extraterritorial obligations. For instance, the Netherlands stated that they were considering the necessity of a new legislation that could hold Dutch companies accountable for human rights violations committed abroad, in their effort to implement the *UNGP*.[581]

Furthermore, the Committee on Economic, Social and Cultural Rights (CESCR) recently issued General Comment (GC) 24, concerning State Obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR)[582] in the Context of Business Activities.[583] It clearly articulates States' extraterritorial obligations to respect, protect and fulfil with regard to rights enshrined in the Covenant.[584] These extraterritorial obligations stipulate, among other things, that:

a) 'Corporations domiciled in the territory and / or jurisdiction of States Parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, *wherever they may be located*';[585]

b) 'Appropriate monitoring and accountability procedures must be put in place to ensure effective prevention and enforcement. Such procedures may include imposing a duty on companies to report on their policies and procedures to

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[581] Netherlands, 'Statement by the Netherlands' (Oral Statement at the 2nd session of the IGWG, Geneva, 25 October 2016) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIISubtheme1/Netherlands.docx> accessed 1 August 2017.

[582] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[583] Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment 24' (23 June 2017) UN Doc E/C.12/GC/24 para. 38.

[584] ibid para. 25-37.

[585] ibid para. 33

ensure respect for human rights and *providing effective means of accountability and redress for abuses to Covenant rights* [that *occur outside their territories* due to the activities of business entities over which they can exercise control]'. [emphasis added by author][586]

Considering the fact that the CESCR was almost universally ratified,[587] the effect of this GC could be far-reaching. In addition to the issue of extraterritorial obligations, GC 24 also addresses the issue to reducing barriers for victims' access to justice.[588]

Fostering international judicial cooperation and legal mutual assistance

Another issue that was discussed during the sessions[589] and overlapped with the findings of the ARP[590] concerns international judicial cooperation and legal mutual assistance. According to the ARP, this issue is another key problem that impedes the ability of domestic judicial systems to effectively address cases of cross-border corporate human rights abuse.[591] In concrete terms, such cooperation entails: cooperation in investigation such as collecting evidence, in administrative proceedings, and in the execution of judgements.[592] Similar provisions on the State duty to cooperate are contained in treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[593] and the International Convention for the Protection of all Persons from Enforced Disappearance.[594]

Unlike the issue of extraterritorial obligations, little dispute was observed about this issue during the sessions. Indeed, as De Schotter indicates, '[a]n instrument focused on legal mutual assistance does not present the ideological dimension [... that] imposing on

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[586] ibid para. 30, 33.
[587] OHCHR, 'Ratification Status for CESCR - International Covenant on Economic, Social and Cultural Rights' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en> accessed 3 August 2017.
[588] CESCR (n 583). See, in particular, para. 42 - 45.
[589] UNHRC (n 391) para. 71, 88, 103; UNHRC (n 392) para. 110.
[590] OHCHR (572) 18.
[591] ibid.
[592] ICJ (n 291) 32; UNHRC (n 391) para. 103; De Schutter (n 5) 43.
[593] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 Article 9 (1).
[594] International Convention for the Protection of all Persons from Enforced Disappearance (adopted 23 December 2010, entered into force 23 December 2010) 2716 UNTS 3 Article 15.

corporations new, far-reaching human rights obligations' does, and it would not create a new mechanism for corporate accountability either.[595] Instead, it actually strengthens the capacity of domestic judicial systems,[596] thus making it less likely that the business sector and States that are sceptical about the initiative would object. De Schotter further argues that in this way, the proposed treaty could deal only with cases of a transnational character, in effect bypassing the contentious issue of whether the treaty applied, only to TNCs or to all companies.[597]

Furthermore, in the GC 24, the CESCR stated:

> 'Improved international cooperation should reduce the risks of positive and negative conflicts of jurisdiction, which may [otherwise] result in legal uncertainty and in forum-shopping by litigants, or in the inability for victims to obtain redress. *The Committee welcomes in this regard any efforts at the adoption of international instruments that could strengthen the duty of States to cooperate in order to improve accountability and access to remedies for victims of violations* of Covenant rights in transnational cases'. [emphasis added by author] [598]

Indeed, if States cooperate with each other to, for instance, enforce judgement, the difficulties that the victims of the Texaco / Chevron case faced in seizing the corporation's assets would be reduced. Furthermore, such a treaty could be effective in cases where home States do not ratify it, as long as a certain number of developing States ratify it, making it enforceable in States where TNCs are likely to maintain their operations. In light of this, the author finds that the element of legal mutual assistance could be a very promising stipulation in the future binding instrument.

3.2.2.6 Imposition of direct legal obligations upon corporations

During the first two sessions, the issue of imposing direct legal obligations upon corporations was also discussed.[599] In fact, States that expressed explicit support for the initiative, along with NGOs and academics stated that the proposed treaty should

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[595] De Schutter (n 5) 44.
[596] ibid.
[597] ibid.
[598] CESCR (n 583) para. 35.
[599] UNHRC (n 391) para.47, 83 ; UNHRC (n 392) para. 69, 71, 75, 79.

impose direct legal obligations upon corporations.[600] As the International Commission of Jurists (ICJ) elaborates with examples, such 'direct obligation' imposed onto corporation seems to feed into the establishment of corporate liability at the national level in practical terms.[601] Thus, it would work exactly like establishing common liability standards as reviewed above, unless the treaty established an international court / tribunal that would adjudicate cases based on the direct obligations of corporations enshrined in the emerging treaty.[602] In fact, several participants called for the establishment of such a court / tribunal.[603]

The business sector was opposed to the matter. They argued two points: a) if the instrument to establish direct obligations onto corporations and enforce it through civil litigation, it would leave States, which could also be a leading perpetrator, immune -'a rather perverse outcome';[604] and b) it would undo the expectations adopted by consensus in the *UNGP*.[605]

The author considers the added value of the direct imposition of corporate obligations to be rather limited, especially if it was not accompanied by an international enforcement mechanism such as a World Court of Human Rights. However, the burden to establish such a court could be very heavy, as strong objections by States are expected,[606] and

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[600] See, for instance, Cuba, 'Oral Statement' (Oral Statement at the 1st Session of the IGWG, UN Digital Recording portal, 9 July 2015 at 11:08); Bolivia (n 559); South Africa (n 549); Bilchitz (n 546); Surya Deva, 'Panel III.1: Examples of International Instruments Addressing Obligations and Responsibilities of Private Actors' (Presentation at the 2nd session of the IGWG, Geneva, 26 October 2016) < http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/PanelIIISubtheme1/SuryaDeva.pdf> accessed 3 August 2017.

[601] ICJ (n 291) 18.

[602] De Schutter (n 5) 33–40.

[603] UNHRC (n 391) para. 105; UNHRC (n 392) para. 34, 40, 55; de Zayas (n 503); South Africa (n 502); Brot für die Welt, CIDSE,FoEE, IBFAN and SOMO (n 486); Global Campaign to Dismantle Corporate Power and Stop Impunity, '8 PROPOSALS FOR THE NEW LEGALLY BINDING INTERNATIONAL INSTRUMENT ON TRANSNATIONAL CORPORATIONS (TNCs) AND HUMAN RIGHTS' (Written contribution to the 1st session of the IGWG) 6 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Global_Campaign_to_Dismantle_Corporate_Power_andStop_Impunity_June-2015_en.pdf> accessed 1 August 2017.

[604] ICC (n 471).

[605] BIAC, ICC, IOE and WBCSD, 'UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: Further considerations by the international business community on a way forward (Second Submission)' (n 456) 1.

[606] De Schutter (n 5) 39–40.

may ultimately take a long time to realise.[607]

3.2.2.7 Implications with regard to Trade / Invest Agreements

During the sessions, the dimension dealing with the negative implications of trade / investment agreements under the proposed treaty was also intensively discussed.[608] The proposals included: a) the treaty providing guidance when States develop trade / investment treaties, such as obliging States to carry out human rights impact assessments; to include investor obligations as well as human rights clause into agreements;[609] and b) the treaty including a clause that ensures hierarchical supremacy of international human rights norms over trade / investment agreements.[610]

In response, the business sector, argued that States actually could choose not to sign investment treaties / trade agreements.[611] They further stated that investment treaties actually protect human rights -most notably the right to property.[612]

Actually, GC 24 articulated this issue as well. It addresses States' duty not to undermine the rights of individuals and groups when concluding investment treaties and / or trade agreements. It suggests that States carry out human rights assessments upon developing such economic treaties, including examining their contribution to the realisation of the right to development. Furthermore, it advises States to include human rights provisions in such agreements, and ensure that ISDS to consider human rights implications when they interpret existing agreements.[613]

The author strongly believes that the negative human rights impacts stemming from these economic treaties need to be addressed. That being said, given the considerable number of States who ratified the ICESCR, the proposed treaty could leave out this issue from its scope to avoid yet another obstacle for the establishment of the instrument.

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[607] Brot für die Welt, CIDSE,FoEE, IBFAN and SOMO (n 486).
[608] UNHRC (n 391) para. 30, 52, 91, 97; UNHRC (n 392) para. 26, 28, 37, 52, 91, 106.
[609] UNHRC (n 391) para. 26, 106.
[610] ibid. para. 34.
[611] ibid. para. 37.
[612] ICC (n 577).
[613] CESCR (n 583) para. 13.

3.2.2.8 Enforcement options

Issues concerning the enforcement mechanisms were also discussed during the sessions. Obviously, effective ways to enforce the proposed treaty may vary depending on its exact contents. Given that the contents of the instrument have not yet been decided, this section is limited to only enlisting several of the options proposed.

The author observes that for the treaty that would encompass above ideas, enforcement needs to be done at both national and international levels:[614]

National level

At the national level, the instrument needs to be implemented through national laws and national democratic institutions. For instance, measures need to be taken: to establish corporate liability under national law; to reduce barriers for victims' access to remedy, including allowing them to file a class action and granting jurisdictions over human rights violations committed abroad by a company domiciled in one's State; and establishing a national body / giving a mandate to existing national human rights bodies to ensure policy coherence throughout the different functions and agencies of governments.[615]

There were several proposals made for enforcement mechanisms at the international level:

Treaty body

The first was to establish a treaty body that ensures effective implementation of the treaty by States parties for instance, through a State reporting procedure, country visits and receiving individual and collective complaints. Just like other treaty bodies, it would also provide commentaries.[616] Some also advocate the treaty body to monitor

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[614] Brot für die Welt, CIDSE,FoEE, IBFAN and SOMO (n 486); ICJ, 'Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises' (October 2016) 38 <https://www.icj.org/wp-content/uploads/2016/10/Universal-OEWG-session-2-ICJ-submission-Advocacy-Analysis-brief-2016-ENG.pdf > accessed 5 August 2017.

[615] ibid 39-45.

[616] ibid 45.

corporate compliance, based on direct obligations that would be imposed upon them.[617]

The World Court of Business and Human Rights

The second was to establish a Court that adjudicates cases involving corporate human rights abuse and handing down binding judgements, based on corporate obligations to be enshrined in the treaty.[618] The draft Statute of the World Court of Human Rights provides useful insight in this regard.[619] In fact, it anticipates exercising the jurisdiction of the Court over corporations, based on prior declarations of adherence from corporations.[620] However, as De Schotter points out, its effect on enhancing corporate accountability within this system would be limited, as it would depend on voluntary participation by corporation themselves. Instead, it would be more effective if the Court established its jurisdiction over corporations, based on the State's ratification of the Statute of the World Court of Human Rights, which would then have jurisdiction over those corporations. In addition, if the proposed treaty would establish a court that is not limited to adjudicating cases involving corporations, but instead also covers other entities including State parties as stipulated in the draft Statute, the concerns expressed by the business sector regarding States' complicity and the resulting need to hold States accountable would be addressed. However, the burden of setting up such a Court may become even heavier.[621]

The International Criminal Court for Business and Human rights

Finally, calls were made to expand the jurisdictional scope of the International Criminal Court to allow the prosecution of corporations that committed international crimes.[622]

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[617] Global Campaign to Dismantle Corporate Power and Stop Impunity (n 603).
[618] UNHRC (n 391) para. 105; UNHRC (n 392) para. 34, 40, 55; de Zayas (n 503); South Africa (n 502); Brot für die Welt, CIDSE,FoEE, IBFAN and SOMO (n 486); Global Campaign to Dismantle Corporate Power and Stop Impunity (n 603).
[619] Julia Kozma, Manfred Nowak and Martin Scheinin, 'A World Court of Human Rights: Consolidated Draft Statute and Commentary' <http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf> accessed 4 August 2017.
[620] ibid. Article 7(2); Manfred Nowak and Julia Kozma,'Research Project on A World Human Rights Court: A World Court of Human Rights' (June 2009) 26 <http://bim.lbg.ac.at/sites/files/bim/World%20Court%20of%20Human%20Rights_BIM_0.pdf> accessed 4 August 2017.
[621] De Schutter (n 5) 34–35.
[622] Brot für die Welt, CIDSE,FoEE, IBFAN and SOMO (n 486).

However, this requires amending the Rome Statute, which itself could be complicated given that it requires a two-thirds majority of the 124 State parties in the event that a consensus cannot be reached.[623] An alternative to this is to establish a similar Criminal Court dedicated to corporations through the proposed instrument. In this way, it would be possible to prosecute corporations for committing international crimes and / or 'serious' human rights violations without amending the Rome Statute.[624] However, if it is to include 'serious' human rights violations, the scope of this notion should be clarified. The scope of this system would not cover the entire spectrum of human rights, a limitation that could encourage States to accept this proposal.[625]

3.2.2.9 Procedure: Involvement of business sector in the discussion

Lastly, the author reviews the discussion regarding the participation of the business sector in the negotiation of the IGWG. As reviewed in Chapter two, the business sector has been actively engaged in the initiatives. Their participation was actually encouraged and welcomed as an important stakeholder whose cooperation was considered necessary for effective implementation.[626] During the sessions, this trend continued: a number of delegations stated their expectation that the initiative should involve 'all relevant stakeholders, including NGOs, trade unions and the business community'.[627]

Against this background, NGOs stated that the negotiation should be shielded from the influence of the business sector.[628] Reference was made to Article 5.3 of the FCTC, which clearly states 'Parties shall act to protect [public health] policies from the commercial and other vested interests of the tobacco industry' and thereby effectively

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[623] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 Article 121; International Criminal Court, 'The States Parties to the Rome Statute' <https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 5 August 2017.

[624] De Schutter (n 5) 35.

[625] Brot für die Welt, CIDSE,FoEE, IBFAN and SOMO (n 486).

[626] Bilchitz and Deva (n 215) 10.

[627] EU, 'European Union contribution in view of the second session of the Intergovernmental Working Group on Transnational Corporations and Other Enterprises with respect to human rights - 29 August 2016' (Oral Statement at the 2nd session of the IGWG, Geneva, 26 October 2016) para. 4 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/EuropeanUnion.docx > accessed 5 August 2017; UNHRC (n 391) para. 25-27.

[628] UNHRC (n 392) para. 21; Global Campaign to Dismantle Corporate Power and Stop Impunity (n 603) 6-7.

eliminating conflicts of interest.[629] A panellist who joined the development of the FCTC warned '[w]ithout including the obligation to prevent conflicts of interest in this process, it will be nearly impossible to create a meaningful instrument'.[630]

In light of the analysis made in Chapter two, which demonstrated how the business sector effectively exercised their power to influence the outcomes of past initiatives, the author finds such concerns valid. However, considering statements made by some States, excluding the business sector from negotiation process may seriously pose the risk that the IGWG loses potential support from some States. Therefore, the author suggests to keep the negotiations open to the business sector until positions of States on the draft to be proposed becomes clearer. At the same time, businesses should be carefully monitored to ensure that their involvement does not undermine the effectiveness of the treaty, and to shield the negotiation process from conflicts of interest if necessary. In addition, attention should be paid to the States who insist on including the business sector in the negotiations, to examine whether or not they are joining the negotiations to merely weaken the draft.[631]

4. Conclusion

Holding TNCs accountable for their human rights violations remains a challenge to the State-based framework for the protection and promotion of human rights, given TNCs' complex structure and cross-border character. Additionally, TNCs' sheer economic power creates situations where governments that host their activities are unable or unwilling to regulate them adequately. Therefore, there has been an imminent need to close these accountability gaps.

Establishing a set of binding norms that deals with the issue of TNCs at the international level has been considered as a way to address such accountability gaps. Attempts have been made as early as the 1970s, but the negotiations have been contentious and no binding international norms have yet been achieved. The most recent

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[629] WHO Framework Convention on Tabacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166 Article 5.3.
<http://www.who.int/tobacco/wntd/2012/article_5_3_fctc/en/>
[630] Margulies (n 557).
[631] Bernaz and Pietropaoli (n 372) 9.

attempt in this area is the on-going work of the IGWG, established by the UNHRC Resolution 22/9 in June 2013. The IGWG is mandated to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of [TNCs]'.

This thesis examined both past attempts and the on-going discussions at the IGWG in order to assess if the work of the IGWG could produce a legally binding instrument that is effective enough to hold TNCs accountable, and at the same time, feasible in terms of gaining support from enough States to be realised and bring actual effects on the ground.

Analysis of the past attempts led to three findings:

First, it is necessary to gain support from a certain number of States to adopt any initiative. In the past attempts, it was observed that there was a general tendency that developed countries resisted the establishment of strong regulations over TNCs. At the same time, it was also noted that States positions changed, reflecting geo-political situation of that time.

Second, the role of non-State actors in international norm settings in the domain of business and human rights has gained importance over the time. On one hand, civil society has played a significant role in setting the agenda of business and human rights and advocating for stronger regulations. On the other hand, majority of business has effectively lobbied against any binding regulations and successfully influenced the outcomes.

Third, although the State-centred framework in the domain of international human rights protection has been facing challenges in the era of globalisation, State-centred doctrine still matters to States. Establishing binding regulations over corporations may interfere with this doctrine, and thereby elicited strong resistance from States.

Such findings provide useful insights to assess the on-going discussion at the IGWG.

With regard to the first point, the initiative has so far achieved explicit support from about 20 States and the African group, out of about 90 States that participated in at least one session. Admittedly, the number of States that explicitly support the initiative is still

limited. However, considering the fact that the draft text is not yet tabled and about the half of the States that participated have not yet clearly expressed their positions, it is too early to ascertain whether or not the initiative will receive enough support from States. Furthermore, although developed countries have so far continued to maintain their reluctance to adopt binding regulations, such a trend may change to reflect the shift in international investment trends.

As for the second point, both civil society and business sector have been actively engaged in the initiative. In fact, civil society played a pivotal role for the tabling and adoption of Resolution 26/9 that established the IGWG. Given the fact that they jointly advocate in coalitions, and some of them are equipped with expertise and knowledge in the field, it is expected that they could wield significant influence. Indeed, their lobbying activities especially at the national level would be vital for the work of IGWG to gain support from their governments. With regard to the participation of the business sector, although States and intergovernmental organisations are in favour of 'consulting with relevant stakeholders', considering past experiences, the business sector should be carefully monitored to ensure that their involvement does not undermine the effectiveness of the treaty, and to shield the negotiation process from conflicts of interest if necessary.

Concerning the last point, after reviewing the possible contents discussed during the session, it can be observed that so far, there is no proposal that could pose a serious threat to the State-centred doctrine, at least, not to the extent the *Norms* did. Indeed, the IGWG is a suitable avenue to discuss this matter, as States are the ones to negotiate the text, and thereby the risk that a draft could threaten State authority is significantly lowered. Moreover, such an avenue allows States to develop innovative contents, since it is not restricted to 'restating' international law, in the way the *Norms* was developed. It was also observed that some proposals are less contested, but would have possibilities to bring about positive change on the ground in terms of holding TNCs accountable. The author will elaborate on these options in the recommendations below.

In addition, the recently issued GC24 of the CESCR may also have a positive impact on the negotiation process, as the negotiation at the IGWG can now exclude the

contentious issues that are already covered by GC24. The issues covered by GC 24 entail: States' extraterritorial obligations, including States' obligation to ensure corporations to act with due-diligence to identify, prevent and address abuses in their global supply chain, as well as by their business partners, and to providing effective means of accountability and redress for abuses that occur outside their territories; and States' obligations to safeguard human rights when concluding trade agreements and / or investment treaties.

In view of the above, although sufficient support from States has yet to be gained, there are positive indications in terms of the overall environment surrounding the IGWG. However, ultimately, the instrument's effectiveness and feasibility in ending corporate impunity would depend on the draft itself. Bearing this in mind, the author wishes to make some recommendations regarding the form and content of the draft.

Form of the treaty

Given the imminent need to bring about change for the victims on one hand, and the contentious nature of the matter on the other, the proposed instrument should be formulated in a manner that allows gradual development. In concrete terms, it could consist of two parts, namely the core treaty and its optional protocols. Such a format would help shorten the duration of the negotiation, and thereby bring about change in a shorter period of time.

Contents of the core treaty

Although the treaty should leave room for development, the core part should be effective enough to enhance corporate accountability. Simultaneously, it should consist of less contentious elements.

Considering these demands, the author recommends that the core treaty include the following elements:

First, it should include provisions to oblige State Parties to implement the measures articulated in pillar one and a part of pillar three of the *UNGP*. Special attention should be paid to, GP 26, to reduce legal, practical, procedural and other barriers that hamper victims' access to remedy. It should also require State Parties to develop NAPs. The

ARP and the Working Group on the issue of human rights and transnational corporations and other business enterprises, that succeeded the work of the SRSG, could help State Parties with this matter.

By including this element, the initiative can address the concern raised by some States and the business sector that the initiative might undermine the implementation of the *UNGP*, and thereby opposed the work of the IGWG. Furthermore, this part obviously contributes to strengthen the national rule of law and to building the capacity of State Parties to adequately regulate corporations under their jurisdiction.

Second, if possible, it should provide international common standards for corporate liability for human rights violations, including civil, criminal and administrative liabilities. Furthermore, it could include provisions to oblige State Parties to establish those corporate liabilities under domestic law. It could further elaborate upon the obligations for State parties to establish liability of parent companies for the human rights abuse committed by their subsidiaries or in their supply chain, for failing to act with due-diligence. It can also be considered to include establishing individual liability of directors and managers of a corporation that committed human rights violation.

Given the legal vacuum in this area in many States, this could positively contribute to preventing and addressing corporate human rights abuse at the national level. Thus, it would enhance national rule of law in the area of business and human rights, which is in line with the direction that the business sector and developed countries have promoted. That being said, given the fact the business sector has generally had a negative attitude toward this, it could be contentious. Therefore, it is important to use the 'due-diligence' model when establishing parent companies liability in relation to acts committed by their business partners, as it is in line with the *UNGP*, which the business sector supports. Furthermore, it should avoid establishing corporate liabilities for failing to meet the responsibility to fulfil, in order to avoid further contention. In case it becomes so contentious that it hinders the adoption of the instrument itself, this part can also be included as another optional protocol.

Third, it should include provisions to oblige States to cooperate with each other to effectively address cross-border cases of corporate human rights abuse. In concrete

terms, such legal mutual assistance entails: cooperation in investigation such as collecting evidence, in administrative proceedings, and in the execution of judgements.

In so doing, it enables State Parties to hold TNCs accountable and bring victims justice, especially in cases where TNCs evade their responsibilities by utilising their transnational character. For instance, it would work when TNCs evade their responsibilities by relocating their operation from one country to another. Furthermore, such provisions could have a certain effect on ground even in cases where home States do not ratify the treaty. Because TNCs are likely to maintain their operations in at least some developing countries that are likely to ratify the treaty, and thereby making it enforceable.

The ARP, another project based on the *UNGP* that focuses on access to remedy, also indicated that the lack of such legal mutual assistance was one of the key problems that hamper victims' access to effective remedy. Considering the fact that many States, including the ones who are sceptical about the treaty initiative, support the work of the ARP, a wider support from those States on this matter could be expected. Furthermore, the fact that GC 24 of the CESCR also recommended that States develop an international legal instrument on this matter would give more credibility for the inclusion of this element to the proposed treaty.

Fourth, it should establish national and international monitoring mechanisms to ensure its implementation. At the national level, a new body or existing human rights mechanism could carry out ensure policy coherence, while at the international level, a treaty body could be established to facilitate State reporting procedures, country visits and providing comments and recommendations. This work at the international level could be consolidated with the work of the Working Group on the issue of human rights and transnational corporations and other business enterprises.

Fifth, it should cover all human rights, as already agreed upon during the sessions. It is further recommended to make references to the rights of vulnerable groups, in order to enhance their access to remedy. The latter could be contentious, yet should be agreeable, insofar as they are 'real human rights issues'.

Lastly, as the first and second elements deal with national rule of law, while the third elements deal only with cases of a transnational character, perhaps consensus could be found in terms of one of the most contentious issues - the coverage of the instrument.

On one hand, the supporters who insisted that the treaty should focus on TNCs actually acknowledged the importance of adequately regulating all companies at the national level, and thus may agree to cover all companies for the first and second elements. At the same time, the third element may satisfy them as it could deal with their main concern, to establish a framework for a transnational regulation. On the other hand, advocators who demanded that the instrument cover all companies - most of them also reiterated the importance of domestic regulations - should be satisfied by the first and second elements to include all companies, while the third element does not even question the scope of coverage, as purely domestic companies may not be involved with any cross-border case.

Optional Protocols

By reviewing past attempts, it has become clear to the author that although a binding regulation has not yet been achieved, the overall attitude of every stakeholder towards the issue of business and human rights has shown positive development over the years. For instance, during the negotiation of the *Draft Code*, the issues that were dealt with under the category of 'human rights' were limited to anti-discrimination as well as equality of opportunity and treatment; and business behaviour in relation to apartheid in South Africa and its illegal occupation of Namibia. In about 40 years, it evolved to the extent that it is now widely accepted that business has to respect all human rights.

Therefore, the author holds the view that human rights instruments in the domain of business and human rights can and will continue evolving. With this optimism in mind, the author identifies the potential areas for the optional protocols of the future legally binding treaty.

A first optional protocol could be aimed at establishing an International Criminal Court for business conduct that adjudicates international crimes and serious human rights violations committed by corporations. The protocol could elaborate on the scope of

crimes and define 'serious' human rights violations while setting out procedural matters. Through a State's ratification, the Court establishes jurisdiction over corporations under the jurisdiction of that State party. Obviously, the Rome Statute could provide useful insights for the development of this protocol.

A second optional protocol concerns the establishment of the World Court of Business and Human Rights. It would impose direct human rights obligations onto business, and adjudicate alleged human rights violations based on those obligations. The Court should have jurisdiction over States as well, since States are often complicit with business in committing human rights violations. Just like the Criminal Court, the Court would establish jurisdiction over corporations with States' ratification. The draft Statute of the World Court of Human Rights, the *UNGP*, and to a certain extent, the *Norms* could provide useful insight for the establishment of the Courts and the articulation of corporate obligations.

Admittedly, although these optional protocols could have a strong effect, they are very ambitious and may take time to be realised. However, in the mean time, the core treaty could serve to enhance corporate accountability.

To conclude, the author believes that it is possible for the IGWG to produce a legally binding instrument that is effective enough to hold TNCs accountable, and, at the same time, feasible in terms of gaining support from enough States to be realised and bring actual effects on the ground.

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Abstract

Analysis on the Discussions over the Legally Binding Treaty on Business and Human Rights: The Possibility to Achieve an Effective and Feasible Instrument

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August 2017

Holding transnational corporations (TNCs) accountable for their human rights violations remains a challenge to the State-based framework for the protection and promotion of human rights. Establishing an international instrument that regulates the activities of TNCs has been considered as a way to address this issue. Attempts have been made as early as the 1970s, but the negotiations have been contentious and no binding norms have yet been achieved.

In June 2014, the United Nations Human Rights Council adopted Resolution 26/9 to establish an intergovernmental working group (IGWG), with a mandate to 'elaborate an internationally binding instrument to regulate [...] the activities of [TNCs]'.

This thesis examines the possibilities for this most recent attempt, and examines if they could produce a legally binding instrument that is effective enough to hold TNCs accountable, and at the same time, feasible in terms of gaining support from enough States to be realised and bring actual effects on the ground.

To answer this question, it reviews past attempts to establish a binding regulation alongside the discussions at the IGWG to identify challenges, opportunities and possible options.

This thesis concludes that it should be possible for States to establish an effective binding treaty, focused on legal mutual assistance and the inclusion of optional protocols that allow stronger mechanisms to be established in the future.

business and human rights, intergovernmental working group, binding treaty, UN guiding principles, corporate social responsibility, ISDS, World Court of Human Rights

Zusammenfassung

Analysis on the Discussions over the Legally Binding Treaty on Business and Human Rights: The Possibility to Achieve an Effective and Feasible Instrument

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Der staatliche Rahmen zum Schutz und zur Förderung der Menschenrechte stößt im Zeitalter der Globalisierung an seine Grenzen. Eine der Herausforderungen ist es, transnationale Konzerne für Menschenrechtsverletzungen zur Verantwortung zu ziehen, was durch deren komplexe, grenzüberschreitende Strukturen erschwert wird. Weiters erzeugen transnationale Unternehmen durch ihre enorme Wirtschaftskraft Situationen, in denen sich Regierungen, nicht mehr in der Lage sehen oder nicht bereit sind, deren Aktivitäten angemessen zu regeln. Um solche Lücken zu füllen, wurde schon seit den Siebzigerjahren versucht, internationale Regulierungen auszuarbeiten, um die Aktivitäten von transnationalen Konzernen zu regeln. Allerdings konnten für diese höchststrittigen Fragen bisher keine verbindlichen internationalen Normen erzielt werden.

Einer der neuesten Ansätze auf diesem Gebiet, ist die Arbeit der zwischenstaatlichen Arbeitsgruppe (IGWG), begründet in der Resolution 26/9 des Menschenrechtsrats der Vereinten Nationen, verabschiedet im Juni 2014. Die IGWG hat die Aufgabe „ein internationales rechtsverbindliches Instrument zur Regulierung der Tätigkeiten transnationaler Unternehmen und anderer Firmen innerhalb der internationalen Menschenrechtsnormen auszuarbeiten“.

Angesichts der Strittigkeit der Angelegenheit, untersucht diese Masterthese, ob – im Rahmen dieser Initiative – die Möglichkeit besteht, ein effektives Instrument zu schaffen, welches dazu beitragen könnte, transnationale Unternehmen zur Verantwortung zu ziehen.

Um diese Frage zu beantworten, werden frühere Bestrebungen nochmals analysiert, um Herausforderungen bei der Entwicklung von verbindlichen Regelungen zu identifizieren. Im Anschluss werden Diskussionen überprüft, die bei den ersten zwei Sitzungen des

IGWGs abgehalten wurden, um mögliche Optionen zu finden.

Schließlich wird das Ergebnis erreicht, dass es für Staaten möglich sein sollte, ein verbindliches Abkommen zu erzielen, das dazu beitragen würde, transnationale Konzerne zur Rechenschaft zu ziehen, mit einem Fokus auf gegenseitige Rechtshilfe, verbunden mit Fakultativprotokollen welche stärkere Mechanismen für die Zukunft begründen.

Wirtschaft und Menschenrechte, zwischenstaatlichen Arbeitsgruppe, verbindliches Abkommen, UN-Leitprinzipien, unternehmerische Gesellschaftsverantwortung (corporate social responsibility), Investor-Staat-Schiedsverfahren, Weltgerichtshof für Menschenrechte