



Third session of the Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights

Subject 2: Scope of application

Thank you Mr Chairperson-Rapporteur,

The “elements” paper for this third session of the IGWG proposes that the scope of a future legally binding instrument should cover all human rights violations or abuses resulting from the activities of Transnational Corporations (TNCs) and Other Business Entities (OBEs) that have a transnational character regardless of the mode of creation. However, closer inspection of the “elements” – in particular Point 2 on the “Scope of Application” - makes it clear that the scope remains primarily on TNCs and potentially issues outside of human rights.

The attempt of the “elements” paper to focus on the “*activities of TNCs and OBEs that have a transnational character*” suggests trying to avoid the challenge of establishing a definition in international law of “TNC” and “OBE”. This raises the following questions, which the “elements” paper does not answer:

- What do “the activities of TNCs and OBEs that have a transnational character” mean in legal and practical terms?
- Furthermore, what would be the scope of the term “transnational character”? How would such a proposal consider the activities of TNCs and OBEs in countries that are part of intergovernmental bodies, such as regional organisations?

In 2014, Professor Ruggie warned against establishing a Treaty that focuses exclusively on TNCs. He explained that TNC are “a bundle of contracts” and transnational and national firms are so intermingled that “drawing legal boundaries around a TNC can be exceedingly difficult, let alone imposing liability only on the foreign entity in any but the most obvious situations.”

Focusing largely on TNCs would exclude most companies from the Treaty’s ambit, as well as the majority of the world’s workforce. This would jeopardize our common interest to protect the human rights of all people. It would also be extremely difficult, if not impossible, to monitor the vast array of activities that have a “transnational character” and reasonably determine liability for a harm that involves a cross-border transaction.

We’d also like to address the suggestion that companies - which we interpret to mean parent companies - directly or indirectly control “their branches, subsidiaries, affiliates, or other entities.” This does not reflect reality and it goes against the consensus and principled pragmatism of the UNGPs.

Finally, we have previously said that there should be a clear focus on human rights. Therefore, we would like to ask what is meant in the section on “Protected Rights” by “intergovernmental instruments related, inter alia, to labour rights, environment, corruption”? Why and how would a possible instrument address issues other than internationally-recognised human rights, such as those related to labour, the environment and corruption?

Thank you very much.