

**Speaking notes on ‘Scope of Application’ (24.10.2017)**

**Third session of the open-ended intergovernmental working group for the elaboration of an international legally binding instrument on TNCS and other business enterprises with respect to human rights**

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On the issues pertaining to the scope of application of a prospective legally binding Instrument, the Elements Document clearly points to the following:

- 1- **First**, the Elements Document proposes that a future Instrument would cover activities of TNCs and OBEs regardless of mode of creation, control, ownership, size or structure.
  - a. This is a clear statement that the coverage will not be limited to corporations of certain size, or certain nationality, or business entities incorporated or structured in a specific way or another;
  - b. This approach internalizes the universally accepted principle that all business enterprises are bound to respect all human rights, a principle which has also been reflected under the Guiding Principles and has been reaffirmed in several Resolutions of the Human Rights Council;
  - c. This approach also internalizes an understanding that the corporate actor is in continuous change in respect to its legal structure, contractual relations and economic operations. Moreover, all business entities, whether structured as transnational networks of companies (TNCs) or not, they are all legal creatures of domestic law and domiciled in a specific national jurisdiction.
- 2- **Second**, the Elements Document proposes that the focus be on the activity or conduct of the business entity, as the determinant factor for coverage under a prospective Instrument.
  - a. This approach seems to stem from the wording of Resolution 26/9, which focuses attention on the ‘transnational character’ of businesses, thus on the geographical reach of the conduct carried out by the business enterprise, independently of the ownership or control of the enterprise;
  - b. This approach means that the Instrument will eventually cover all kind of corporations, whether they are parent companies, branches, subsidiaries, affiliates, or business partners, as long as they engage in transnational activities. For example, an enterprise owned or controlled by stakeholders residing in one country may have operations of a ‘transnational character’ if it engages in business activities through an affiliate, subsidiary or a controlled undertaking in another country. In the same sense, the conduct by domestically owned companies that act as sub-contractors or licensees of a transnational corporation would also be covered.
  - c. This approach, focused on the nature of the activity rather than on the nature of the corporation, also seems to reflect an understanding that the prospective

Instrument is concerned primarily with the challenges arising from the ability of corporations in their transnational conduct to maneuver jurisdictional limitations in order to avoid legal liability for violations that could be committed as part of their operations.

- d. If such an approach is adopted, then there would be no need to define TNCs to make the prospective Instrument operative.
- 3- **Third**, concerning the protected rights under the Instrument, the Elements Document incorporates the notion of “all internationally recognized human rights” as protected rights. This approach reflects uncontested points raised throughout the first two working group sessions, including:
- a. the principle of universality, indivisibility and interdependence of all human rights, which would make it difficult to differentiate among different human rights and among human rights violations;
  - b. Similarly, this approach builds on the approach of the Guiding Principles, which include a clear statement and reconfirmation that businesses can violate the full range of human rights.

Overall, it can be noted that to the extent that the primary objective of the prospective Instrument would be to help avoid the use of legal and contractual structures by corporations in order to escape liability in case of human rights’ violations, and to attain remedy for victims of corporate human rights violations and abuses, the concepts and approaches proposed under the Elements Document provide a very useful basis for moving the discussion towards textual negotiations.

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