

Compilation of statements delivered by States during the State-led negotiations of the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

Note by the Secretariat

Summary

The present document contains a compilation of statements made by States during the State-led negotiations of the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.¹ It has been prepared in accordance with paragraph 31 (b) (ii) of A/HRC/55/59. Statements have been reproduced in the original language of submission and are included only if they were shared with the Secretariat in written form.

¹ These statements have also been posted online at <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session9/oral-statements>.

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A. States and Observer States

Preamble

1. Russia

Dear Sir or Madam, here is the written clarification of the position of Russia on certain PP of the Preamble.

1. The Russian Federation opposes formulations whose content is ambiguous. For example, there is ambiguity in determining the range of sources, taking into account which it is planned to implement certain provisions of the document – "relevant international standards" (for example, paragraph 15 of the preamble), "internationally recognized human rights" (for example, paragraphs 10, 12 of the preamble).

2. We consider it necessary to bring to uniformity the wording revealing those persons who, within the meaning of the draft, belong to those categories of the population, the regulation of interaction with which, due to their vulnerability, is particularly emphasized in a particular norm of the document.

The updated draft convention contains, for example, the following formulations: "women and girls, children, indigenous peoples, persons with disabilities, people of African descent, older persons, migrants and refugees, and other persons in vulnerable situation" (paragraph 14 of the preamble), "specific groups of people" (paragraph 4.2 "g" of article 4), "those who may be at heightened risks of vulnerability or marginalization" (paragraph 6.4 "c" of article 6), "women and groups in vulnerable or marginalized situations face in accessing such mechanisms and remedies" (paragraph 7.1 of article 7), "women, children, persons with disabilities, Indigenous peoples, migrants, refugees, internally displaced persons, and other vulnerable or marginalized persons or groups" (paragraph 15.7 of article 15) and "women, children, persons with disabilities, indigenous people, people of African descent, older persons, migrants, refugees and internal displaced persons" (paragraph 16.4 of article 16).

3. Paragraph 15. We are against the use of categories such as "gender and age responsive", "gender-responsive".

2. Colombia

a. PP3 Apoyamos , como ya lo habíamos expresado ayer en nuestra intervención inicial sobre el preámbulo la adición sugerida ya remitida a la secretaria y sugerida igualmente por por Bolivia en el PP 3 sobre la Declaración de Derechos Campesinos:

(PP3) Recalling also the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, and all other

internationally agreed human rights Declarations, as well as the 2030 Agenda for Sustainable Development.

En este mismo sentido, apoyamos la adición de “peasants and other people working in rural areas” en el (PP14) sugerido por Bolivia, México, Cuba y Ecuador.

(PP4) Reaffirming the fundamental human rights and the dignity and worth of the human person, in the equal rights of all persons men and women and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law, as set out in the Charter of the United Nations; (Mexico, Cuba, Argentina, USA, Chile, Uruguay, Panama, Brazil, Bolivia, Ecuador).

b. Apoyamos la adición de México, Chile y Panamá y Cuba en el (PP6) sobre la inclusión del derecho internacional humanitario:

c. (PP6) Reaffirming the right of every person to be equal before the law, to equal protection of the law, and to have effective and equal access to justice and remedy in case of violations of international human rights law and international humanitarian law; (Mexico, Chile, Panama)

d. Apoyamos la adición sugerida por Cuba, Egipto y Bolivia en el (PP7) que busca eliminar la expresión “business enterprises” y agregar “transnational corporations” de manera que se respete el mandato de la Resolución 26/9. Se sugiere que el reemplazo de estos términos se haga a lo largo de toda la resolución:

e. (PP7) Stressing that the primary obligation to respect, protect, fulfill and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuses by third parties, including transnational corporations and other business enterprises, and to ensure respect for and implementation of international human rights law, and to respect and ensure respect for international humanitarian law in all circumstances; (Honduras, Cuba)

(Suggests similar change for PPs 11 and 12: Honduras)

(PP 7 bis) Emphasizing that the obligation of States to protect, respect, and fulfill human rights and fundamental freedoms in the context of all business activities including those of transnational character also extends to legal instruments and policies of trade, finance, taxation, development, and other agreements of this nature; (Honduras)

f. Manifiestar desacuerdo con el cambio en el (PP8) propuesto por Reino Unido que busca reemplazar la mención a la carta de Naciones Unidas por los Guiding Principles on Business and Human Rights. Esto, por cuando se considera que los Principios Rectores son la expresión de marcos voluntarios, mientras que en este proceso de negociación se busca avanzar hacia un instrumento jurídicamente vinculante que supere los vacíos dejados por los Guiding Principles y que, en Estados como el colombiano, han mostrado NO tener ninguna efectividad para enfrentar las violaciones de derechos humanos derivadas de actividades de empresas transnacionales. (PP8) Recalling the United Nations Charter Articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of,

human rights and fundamental freedoms for all without distinction of any kind: apoyamos el texto original.

g. Apoyar la adición sugerida por Honduras al (PP10) en el sentido de agregar “labour rights, health and safety standards, the environment, and fundamental freedoms in accordance with relevant international standards and agreements” como cuestiones que las empresas deben respetar.

h. (PP10) Acknowledging that all business enterprises have the potential to foster sustainable development through an increased productivity, inclusive economic growth and job creation that promote and respect internationally recognized human rights and fundamental freedoms; (Panama, Mexico, Argentina, Chile, Uruguay)

i. Apoyar la adición de un (PP11 bis) hecha por Brasil y Honduras:

(PP 11 bis) que dice: To affirm the importance of the pro persona principle and the principle of the primacy of the most favourable norm to the human person in the interpretation of any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation, and security agreements; (Brazil, Honduras).

j. Apoyamos las propuestas de Cuba, Egipto y Bolivia en el (PP12) en el sentido de reemplazar la palabra responsabilidad por obligaciones. Se sugiere este reemplazo en todo el texto. Este punto es central para un instrumento jurídicamente vinculante que sea efectivo desde el punto de vista del derecho internacional de los derechos humanos, bajo el que es indispensable que las empresas transnacionales tengan obligaciones.

- De acuerdo con la Comisión Interamericana de Derechos Humanos (sistema regional que tiene importantes pronunciamientos respecto de este tema), hay principios generales del derecho y fuentes del derecho internacional que pueden fundamentar la existencia de “obligaciones que vinculen a las empresas y otros actores económicos respecto de la vigencia de los derechos humanos”. Es decir, hay varios fundamentos en los que se puede soportar la imposición de obligaciones directas a las empresas.
- Un ejemplo de lo anterior es el artículo 30 de la Declaración Universal de los Derechos Humanos, el cual sitúa que “nada en dicha Declaración puede interpretarse en el sentido de que confiera derecho alguno al Estado, a un grupo o a una persona, para emprender y desarrollar actividades o realizar actos tendientes a la supresión de cualquiera de los derechos y libertades allí proclamados. Así, desde el instrumento fundante del derecho internacional de los derechos humanos puede verse la intención global de que ni los Estados ni los privados (personas o grupos de personas) pueden actuar en detrimento de los derechos. Se trata de un instrumento que sugiere que la imposición de obligaciones a terceros es una posibilidad.
- Existen ejemplos concretos de instrumentos internacionales que ya han impuesto obligaciones a actores diferentes a los Estados, tal como también lo recuerda la Comisión Interamericana de Derechos

Humanos. Uno de ellos es la Convención sobre los Derechos de las Personas con Discapacidad, el cual permite que organizaciones internacionales firmen y se adhieran al tratado. Un segundo ejemplo se encuentra en la Opinión Consultiva 18/03 de la Corte Interamericana de Derechos Humanos, la cual reconoció la existencia expresa de obligaciones de terceros frente a los derechos laborales de trabajadoras y trabajadores migrantes indocumentados. Un tercer ejemplo, aunque más indirecto, estaría en los informes de la Relatoría Especial de Naciones Unidas sobre la tortura y otros tratos crueles, inhumanos o degradantes, la cual ha resaltado que, para que la tortura sea erradicada, es indispensable prever medidas de protección frente a actores no estatales, es decir, obligaciones.

k. Por lo anterior, también se apoya el (PP18bis propuesto por Camerún) que dice: (PP 18 bis) Recalling that transnational corporations and other business enterprises of transnational character have obligations derived from international human rights law and that these obligations are different, exist independently and in addition of the legal framework in force in the host and home States. (Cameroon)

l. Apoyamos las propuestas de Brasil, Honduras y Cuba en el (PP12) que retoman tres conceptos centrales para el instrumento jurídicamente vinculante: “transnational corporations”, “obligation” y “violations”.

m. Apoyamos la adición de Brasil en el (PP 13) que agrega las palabras “violación” y “empresas transnacionales”.

n. (PP14 bis) Recognizing the case of business activities and business relationships in conflict-affected areas and heightened risks of abuses, such as gender-based and sexual violence, the use of child soldiers and the worst forms of child labour; (United Kingdom, Panama)

(PP14 ter) Emphasizing the need for States and business enterprises to also integrate a disability inclusion perspective in their actions, in line with the Convention on the Rights of Persons with Disabilities, and ILO Conventions on Vocational Rehabilitation and Employment (Disabled Persons) and Discrimination (Employment and Occupation) which guarantees the right to mainstream vocational training, employment, and social protection; (United Kingdom, Panama)

3. Egypt

(PP11) Emphasizing that transnational corporations and other business enterprises of transnational character regardless of their size, sector, location, operational context, ownership and structure have the obligation to respect all human rights including by preventing and avoiding human rights violations abuses that are committed all along its global production chain, directly and indirectly linked to their operations, products or services by their business relationships play a crucial role in the social and economic development as well as the implementation of the Agenda 2030 for Sustainable Development; (Cameroon, South Africa, Ghana)

(PP12) Egypt do not agree on the UK proposal as we do not support limiting the LBI by the provisions of UNGP which should be a starting point for our

work. We see that there are no rational in duplicating the UNGP specially that it is no longer sufficient to rely on voluntary, soft law instruments that are not enforceable.

(PP13) Emphasizing that civil society actors, including human rights defenders individuals, groups and organs of society to promote and protect universally-recognized human rights and fundamental freedoms, have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and in seeking effective remedy for business-related human rights abuses, and that States have the obligation to take all appropriate measures to ensure an enabling and safe environment for the exercise of such role;

In (PP14) we support Chinese suggestions:

Recognizing the distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, indigenous peoples, peasants and other people working in rural areas, local communities, persons with disabilities, people of African descent, older persons, migrants and refugees, and other persons in vulnerable or marginalized situation, and emphasizing that the interest of different rights holders shall be fully respected in pursuing remedies for violations of their rights, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders and the structural obstacles for obtaining remedies for these persons; (China)

(PP15) we do not support the paragraph as written, our suggestion:

Emphasizing the need for States and business enterprises to integrate a gender perspective in all their measures, in line with the Convention on the Elimination of All Forms of Discrimination against Women, the Beijing Declaration and Platform for Action, the ILO Convention 190 concerning the elimination of violence and harassment in the world of work, the Gender Guidance for the Guiding Principles on Business and Human Rights, and other relevant international standards; (Egypt Gender guidance is not a negotiated text).

4. Mexico

The States Parties to this (Legally Binding Instrument),

(PP1) *Reaffirming* all the principles and purposes set out in the Charter of the United Nations;

(PP1 BIS) NEW: Reaffirming the principles of sovereign equality, territorial integrity and the duty not to intervene in matters within the domestic jurisdiction of any State, as stipulated in resolution 2625 approving the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

(PP2) *Recalling* the nine core international human rights treaties adopted by the United Nations, and the **eleven** fundamental conventions adopted by the International Labour Organization, as well as other relevant international

human rights treaties and conventions adopted by the United Nations and by the International Labour Organization;

(PP3) *Recalling also* the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and all other internationally agreed human rights Declarations, as well as the 2030 Agenda for Sustainable Development;

(PP4) *Reaffirming* the fundamental human rights and the dignity and worth of the human person, the equal rights of all persons and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law, as set out in the Charter of the United Nations;

(PP5) *Reaffirming* that all human rights are universal, indivisible, interdependent, interrelated, and inalienable, and should be applied in a non-discriminatory way;

(PP6) *Reaffirming* the right of every person to be equal before the law, to equal protection of the law, and to have effective **and equal** access to justice and remedy in case of violations of international human rights law **or international humanitarian law**;

(PP7) *Stressing* that the primary obligation to respect, protect, fulfill and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuses by third parties, including business enterprises, **within their territory, jurisdiction, or otherwise under their control**, and ensure respect for and implementation of international human rights law, and to respect and ensure respect for international humanitarian law in all circumstances;

(PP8) *Recalling* the United Nations Charter Articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of any kind:

(PP9) *Recognizing* that, in all actions concerning children, including in the context of business activities, the best interests of the child shall be a primary consideration, and shall be respected in pursuing remedies for violations of the rights of the child;

(PP10) *Acknowledging* that all business enterprises have the potential to foster sustainable development through an increased productivity, inclusive economic growth and job creation that promote and respect internationally recognized human rights and fundamental freedoms;

(PP11) *Emphasizing* that business enterprises play a crucial role in the social and economic development as well as the implementation of the 2030 Agenda for Sustainable Development;

(PP12) *Underlining* that business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the responsibility to respect internationally recognized human rights, including by avoiding causing or contributing to human rights abuses through their own activities and addressing such abuses when they occur, as well as by preventing human

rights abuses or mitigating human rights risks linked to their operations, products or services by their business relationships;

(PP13) *Emphasizing* that civil society actors, including human rights defenders, have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and in seeking effective remedy for business-related human rights abuses, and that States have the obligation to take all appropriate measures to ensure an enabling and safe environment for the exercise of such role;

(PP14) *Recognizing* the distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, Indigenous Peoples, persons with disabilities, people of African descent, older persons, migrants and refugees, and other persons in vulnerable situation, as well as the need for a human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders and the structural obstacles for obtaining remedies for these persons;

(PP15) *Emphasizing* the need for States and business enterprises to adopt measures that are inclusive and gender responsive perspective in all their measures, in line with the Convention on the Elimination of All Forms of Discrimination against Women, the Beijing Declaration and Platform for Action, the ILO Convention 190 concerning the elimination of violence and harassment in the world of work, the Gender Guidance for the Guiding Principles on Business and Human Rights, and other relevant international standards;

(PP16) *Taking into account* the work undertaken by the United Nations Commission on Human Rights and the Human Rights Council on the question of the responsibilities of transnational corporations and other business enterprises with respect to human rights, in particular Resolution 26/9;

(PP17) Recognizing the contribution and complementary role that the United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework have played in that regard and to advancing respect for human rights in the business activities;

(PP18) Noting the ILO Declaration on Fundamental Principles and Rights at Work and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy;

(PP19) Desiring to clarify and facilitate effective implementation of the obligations of States regarding business-related human rights abuses and the responsibilities of business enterprises in that regard;

4. United Kingdom

PP2: Recalling international human rights treaties adopted by the United Nations, and the fundamental conventions adopted by the International Labour Organization, as well as other relevant international human rights treaties and conventions adopted by the United Nations **and labour standards adopted** by the International Labour Organization;

PP4: Reaffirming the fundamental human rights and the dignity and worth of the human person, in the equal rights of men and women and the need to promote social progress and better standards **of living in accordance with the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Charter of the Charter of the United Nations;**

PP8: Recalling the United Nations **Guiding Principles on Business and Human Rights** including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of any kind:

PP10: Acknowledging that all business enterprises have the potential to foster sustainable development through an increased productivity, inclusive economic growth, **livelihood opportunities** and job creation that promote and respect internationally recognized human rights and fundamental freedoms **while reducing vulnerability to exploitation.**

PP11: Emphasizing that business enterprises play a crucial role in the social and economic development as well as the implementation of the Agenda 2030 for Sustainable Development, **recognising the benefits of inclusive trade and investment for reducing vulnerability to exploitation while expecting businesses to respect human rights throughout their operations.**

PP12: Underlining that business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the responsibility to respect internationally recognized human rights, **as set out in the UN Guiding Principles on Business and Human Rights**, including by avoiding causing or contributing to human rights abuses through their own activities and addressing such abuses when they occur, as well as by preventing human rights abuses or mitigating human rights risks linked to their operations, products or services by their business relationships;

PP13: Emphasizing that civil society actors, including human rights defenders, have an important and legitimate role in promoting respect **for** human rights by business enterprises, and in preventing, **and** mitigating adverse human rights impacts of business enterprises and seeking effective remedy for **those whose human rights are affected by business enterprises**

PP14: Recognizing the distinctive and disproportionate **human rights** impact **caused by business** on women and girls, children, indigenous peoples, persons with disabilities, people of African descent, older persons, migrants and refugees, and other persons in vulnerable situation, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders and the structural obstacles for obtaining remedies for these persons;

(NEW) PP14 bis: Recognizing the case of business activities and business relationships in conflict-affected areas and heightened risks of abuses, such as gender-based and sexual violence, the use of child soldiers and the worst forms of child labour

(NEW) PP14 ter: Emphasising the need for States and business enterprises to also integrate a disability inclusion perspective in their actions, in line with Convention on the Rights of Persons with Disabilities, and ILO Conventions on Vocational Rehabilitation and Employment (Disabled Persons) and Discrimination (Employment and Occupation) which guarantees the right to mainstream vocational training, employment and social protection

PP16: Taking into account the work undertaken by the United Nations on the UNGPs and the work of the UN Global Compact

Article 1

1. Colombia

Article 1 is central to the treaty because, by establishing the fundamental definitions of the legally binding instrument, it is the provision that will guide its framework for interpretation and application. We believe that the definitions adopted in the instrument should adhere to the language of international human rights law, based on which the following suggestions are made:

Comments on 1.1.:

The following addition or replacement (in bold) is suggested to make it clear that victims can be both individuals who are rights-holders and people who, as part of a social group, are collective rights-holders, as is the case with ethnic communities, peasant communities, and any other group or community that can collectively suffer a rights violation, such as, for example, a labor union.

“Victim” shall mean any person or group of persons who suffered a human rights violation abuse in the context of transnational business activities, irrespective of the nationality or domicile of the victim. The term “victim” may also include the immediate family members or dependents of the direct victim. A person or group of persons shall be considered a victim regardless of whether the perpetrator of the human rights violation abuse is identified, apprehended, prosecuted, or convicted.

Comments on 1.2 y 1.3 due to their connectivity:

The following suggestion is made to clarify that victims can be both individuals who are rights-holders and individuals who, as part of a social group, are collective rights-holders, as is the case with ethnic communities, peasant communities, and any other group or community that can collectively suffer a rights violation, such as, for example, a labor union.

It is suggested to completely eliminate section 1.2, which was a new addition in the "updated draft" (a new concept) and is related to the definition in 1.3 that addresses the concept of "human rights abuse".

The interpretation of the new definition of "adverse human rights impact" is that it refers to the harm suffered by the individual whose rights have been violated. In other words, this concept would reflect the position of victims and affected communities as passive or receiving agents, while the term in 1.3 refers to the entity committing the violation (the active agent).

From the perspective of international human rights law, it is appropriate to speak of "violations" of human rights rather than "abuses" when there is a breach of any internationally recognized rights. This is important to avoid confusion between "human rights violations" attributed to states and "abuses" attributed to transnational corporations. For those who suffer harm as a result of the violation of their rights, we cannot establish this hierarchy. We must name both things equally, regardless of the actor committing them.

The Inter-American Commission on Human Rights also supports this view by recognizing that the foundation of rights is the protection of the principle of human dignity, which is based on the respect and value that must be given to the human being by virtue of their human condition. This was acknowledged in a 2019 report on Human Rights and Corporations: "The IACHR recognizes human dignity as the foundation of internationally recognized human rights. This dignity is unconditional, and therefore, its protection and respect cannot depend on extrinsic factors, including the identity of the perpetrator."

Based on the above, if the concept of "violation of rights" is recognized in the legally binding instrument (section 1.3), the concept of "adverse human rights impact" should be eliminated, as when it comes to the effects of a violation of human rights, we can only refer to it as a "violation" and not as "adverse impacts."

Therefore, specifically, it is suggested to eliminate section 1.2, "Adverse human rights impact," and replace the word "abuse" with "violation" in section 1.3.

Comment on 1.4 :

In order to comply with the mandate of Resolution 26/9, it is proposed to revisit a proposal previously put forward by Cameroon in earlier drafts, so that the article reads as follows:

“Business activities” means any economic or other activity, including but not limited to the manufacturing, production, transportation, distribution, commercialization, marketing and retailing of goods and services, undertaken by transnational corporations and other business enterprises of transnational character (natural or legal person), which can be private, public or mix, including financial institutions and investment funds or joint ventures. This includes activities undertaken by electronic means.

In order to comply with the mandate of Resolution 26/9, it is proposed to revisit a proposal previously put forward by Cameroon in earlier drafts, so that the article reads as follows:

Comment on 1.8 :

The proposed definition of due diligence on human rights in the "updated draft" is considered inadequate for two reasons:

(i) Firstly, this is a new definition in the "updated draft," which reflects the centrality that this document is giving to the concept of due diligence throughout the text. While due diligence on human rights is an important measure, it is emphasized that it is not the only preventive measure that the legally binding instrument should encompass. Prevention measures should also not be the exclusive focus of the instrument, as they must be

complemented with the development of other obligations related to the respect of human rights, which should be connected to access to justice and reparations measures. In summary, it is considered inappropriate to include this term as part of the definitions, and instead, it is proposed to develop due diligence further in the text, along with other obligations that need to be elaborated upon and which will be referred to later in other sections of the document.

(ii) Secondly, because the proposed definition reflects the weaker view of due diligence, as it does not make reference to the value chain, which is central to any obligation for the prevention of human rights violations when we are referring to transnational corporations. Furthermore, the definition uses the concept of "adverse impacts on human rights," which has already raised our concerns. Additionally, the definition does not specify that this is an obligation imposed on the regulated companies but seems to leave it to their discretion.

It is emphasized that, despite the importance of due diligence on human rights, it is certainly an insufficient measure for states to have the tools to protect and guarantee human rights. Moreover, in contexts of armed conflict such as those experienced by Colombia, where human rights violations are committed by economic actors and are documented by national judicial authorities, due diligence becomes ineffective because we need to develop other obligations for situations where, unfortunately, preventive measures are no longer relevant, as human rights violations have already occurred without judicial response. Therefore, we suggest removing this concept from the definition and addressing it appropriately in the prevention obligations.

Comment on 1.9 :

The "updated draft" adds definition 1.9 for "Relevant State agencies," which, upon analyzing the entire text, replaces the term "courts and non-judicial mechanisms." It is considered inappropriate to use the concept of "relevant state agencies" for three reasons:

(i) In the case of human rights violations, states have an obligation to provide victims with judicial remedies. Therefore, it should explicitly mention "courts" along with "other non-judicial mechanisms." The use of "relevant state agencies" can create confusion in this regard, as it puts judicial responses and non-judicial responses on the same level, both of which could fall under this concept. Although important and complementary, non-judicial measures cannot replace the role of judges and courts. For these reasons, it is suggested to eliminate section 1.9.

2. Mexico

1.1. "Victim" shall mean any person or group of persons who suffered a human rights abuse in the context of business activities, irrespective of the nationality or domicile of the victim. The term "victim" may also include the immediate family members or dependents of the direct victim, **and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.** A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted.

~~1.2. “Adverse human rights impact” shall mean a harm which corresponds to a reduction in or removal of a person’s ability to enjoy an internationally recognized human right.—~~

~~1.3. “Human rights abuse” shall mean any acts or omissions that take place in connection with business activities and results in an adverse human rights impact~~ **shall mean any direct or indirect harm suffered in the context of a business enterprise’s activities or relationships, through acts or omissions, against any person or group of persons, that impedes the full enjoyment of internationally and nationally recognized human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment.**

1.4. “Business activities” means any economic or other activity, including but not limited to the **extraction**, manufacturing, production, transportation, distribution, commercialization, marketing and retailing of goods and services, undertaken by a natural or legal person, including Stateowned enterprises, financial institutions and investment funds, transnational corporations, other business enterprises, joint ventures, and any other business relationship undertaken by a natural or legal person. This includes activities undertaken by electronic means.

1.5. “Business activities of a transnational character” means any business activity described in Article 1.4. above, when:

- (a) It is undertaken in more than one jurisdiction or State; or
- (b) It is undertaken in one State but a significant part of its preparation, planning, direction, control, design, processing, manufacturing, storage or distribution, takes place through any business relationship in another State or jurisdiction; or
- (c) It is undertaken in one State but has significant effect in another State or jurisdiction.

1.6. “Business relationship” refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship, including throughout their value chains, as provided under the domestic law of the State, including activities undertaken by electronic means.

1.7. “Regional integration organization” shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this (Legally Binding Instrument). Such organizations shall declare, in their instruments of formal confirmation or accession, their level of competence in respect of matters governed by this (Legally Binding Instrument), and they shall subsequently inform the depositary of any substantial modification to such competence. References to “States Parties” in the present (Legally Binding Instrument) shall apply to such organizations within the limits of their competence.

~~1.8. “Human rights due diligence” shall mean the processes by which business enterprises identify, prevent, mitigate and account for how they~~

~~address their adverse human rights impacts. While these processes will vary in complexity with the size of a business enterprise, the risk of severe adverse human rights impacts, and the nature and context of the operations of that business enterprise, these processes will in every case comprise the following elements:—~~

- ~~(a) identifying and assessing any adverse human rights impacts with which the business enterprise may be involved through its own activities or as a result of its business relationships;—~~
- ~~(b) taking appropriate measures to prevent and mitigate such adverse human rights impacts;—~~
- ~~(c) monitoring the effectiveness of its measures to address such adverse human rights impacts; and—~~
- ~~(d) communicating how the relevant business enterprise addresses such adverse human rights impacts regularly and in an accessible manner to stakeholders, particularly to affected and potentially affected persons.—~~

1.9. **“Remedy” shall mean the right of a victim to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning human rights abuses and reparation mechanisms.** An “effective remedy” involves reparations that are adequate, effective, and prompt; are gender-, disability- and age- responsive; and may draw from a range of forms of reparation such as restitution, compensation, rehabilitation, satisfaction (such as cessation of abuse, apologies, and sanctions), as well as and guarantees of non-repetition.

~~1.10. “Relevant State agencies” means judicial bodies, competent authorities and other agencies and related services relevant to administrative supervision and enforcement of the measures referred to in this (Legally Binding Instrument) to address human rights abuse, and may include courts, law enforcement bodies, regulatory authorities, administrative supervision bodies, and other State based non judicial mechanisms.—~~

3. **Russia**

Dear Sir of Madam,

Here is written clarification of Russia’s commentaries on article 1, voiced verbally, to note in the draft where applicable.

1. In several fragments of the text, the word "victim" is supplemented with the clarification of a human rights abuse (for example, **paragraph 1.9 of article 1**, paragraph "d" of article 2, paragraph 4.1 of article 4, paragraph 13.2 "c" of article 13). We consider this addition unnecessary, because the very definition of the concept of "victim" in paragraph 1.1 of article 1 already indicates a violation of human rights.

2. In the draft, when disclosing the concept of victim (**paragraph 1.1, article 1**), the category of "domicile" continues to be used. As we noted previously, this category is more characteristic of the States of the common legal system. We propose to use the phrase "habitual residence" in relation to

the victim instead of the category "domicile", which already appears in paragraph 9.1 "d" of article 9 of the updated draft convention.

Article 2

1. Mexico

The purpose of this (Legally Binding Instrument) is:

(a) To clarify and facilitate effective implementation of the obligation of States to respect, protect, fulfill and promote human rights in the context of business activities, particularly those of transnational character;

~~(b) To clarify and facilitate effective implementation ensure respect and fulfillment of the human rights responsibilities of business enterprises;~~

~~(c) To prevent the occurrence of human rights abuses in the context of business activities by effective mechanisms for monitoring, enforceability and accountability;—~~

~~(d) To ensure access to gender-responsive, child-sensitive and victim-centred justice and effective, adequate and timely remedy for victims of human rights abuses in the context of business activities;—~~

~~(e) To facilitate and strengthen mutual legal assistance and international cooperation to prevent and mitigate human rights abuses in the context of business activities, particularly those of transnational character, and provide access to justice and effective, adequate, and timely remedy for victims.—~~

(c) To prevent human rights abuses deriving from business activities, facilitating access to remedy, and strengthening mutual legal assistance and international cooperation.

Article 3

1. Mexico

Muchas gracias, señor Presidente-Relator.

3.1. This (Legally Binding Instrument) shall apply to all business activities, including business activities of a transnational character.

México considera que la formulación actual en el cuarto borrador, que es la misma del tercer borrador revisado, es adecuada.

Quisiéramos plantear nuestro argumento utilizando un ejemplo: supongamos que una empresa constituida en un país de renta media, lleva a cabo negocios en cuarenta países del mundo. Para poder operar en cada una de esas jurisdicciones, ha debido establecer una entidad nacional conforme a las leyes de cada país, que usa su misma identidad e incluso nombre, aunque terminan siendo entidades distintas. En virtud de ello, está sujeta a distintos tipos de regulaciones, que cambian según el lugar donde opere. En su país de origen, por ejemplo, no existen normas sobre debida diligencia en derechos humanos; pero en dos de los países donde está presente, está sujeta a la implementación de procesos de debida diligencia. Ello implica la existencia de distintas reglas de operación conforme al lugar donde trabaja, y distintas formas de considerar

las cuestiones de derechos humanos. Con base en este ejemplo, nos preguntamos, ¿qué empresa no está registrada conforme a la legislación nacional de país alguno?

Esta delegación reconoce que la cuestión del alcance del instrumento ha sido, desde la primera sesión, una de las principales discusiones en el seno del Grupo de Trabajo Intergubernamental. En la resolución 26/9, se hace referencia tanto a empresas transnacionales, retomando una fórmula acuñada por la Subcomisión de derechos humanos en sus informes de los años 90 sobre el tema, e incluso antes, como a las actividades transnacionales de las empresas. Para esta delegación, como seguramente lo es para las demás delegaciones y partes interesadas presentes, es fundamental que el desarrollo de un instrumento en la materia pueda ser efectivo, y ello implica tener una definición clara en cuanto al alcance subjetivo del mismo.

Hablar de empresas transnacionales, desde una perspectiva esencialmente jurídica, implica reconocer la existencia de entidades jurídicas constituidas conforme al derecho interno de cada país, que operan de forma coordinada a través de las fronteras, y no de una entidad jurídica única, como parece denotar el concepto de “empresa transnacional”. Es por ello que, desde la tercera sesión, esta delegación ha propuesto enfocarse específicamente en las actividades transnacionales que desarrollan las empresas, y que puedan suponer dificultades para su efectiva regulación, en atención al carácter primordialmente territorial de la jurisdicción de los Estados. No se trata de una empresa única que trabaja en distintas partes del mundo, sino de distintas entidades jurídicas que coordinadamente, desarrollan actividades empresariales de forma transnacional. Esa realidad jurídica, que aplica de igual forma en las distintas cadenas globales de valor, nos ha llevado a plantear que es sobre las actividades empresariales transnacionales a lo que este instrumento debe enfocarse, tanto para efectos de la prevención, como para efectos del acceso a la justicia y a la reparación.

Por otra parte, consideramos que el alcance y enfoque de este instrumento debe centrarse en todas las empresas y sus actividades, pues todas tienen una responsabilidad de respetar los derechos humanos y, de manera correlativa, todas las personas tienen el derecho a que sus derechos humanos sean respetados por éstas. Una víctima no es menos víctima de abusos de derechos humanos solamente porque la empresa o el actor que lo provoca opere en un ámbito transnacional o solo dentro de las fronteras de un Estado. Además, en el contexto económico actual, ¿qué empresa no obtiene insumos o brinda servicios a personas o entidades en otros Estados? No obstante, sin lugar a dudas, debemos reconocer y enfatizar la gran dimensión de los riesgos e impactos de las actividades transnacionales de las empresas y la dificultad para garantizar el acceso a la justicia a las personas afectadas. Por ello, deben diferenciarse las obligaciones que los Estados establezcan para las empresas según su tamaño y capacidad, incluyendo la implementación de procesos de debida diligencia.

En lo que concierne a la noción de “abuso de derechos humanos”, que ha dado lugar a un interesante debate en esta sala, quisiéramos poner a consideración de este Grupo de Trabajo Intergubernamental la intervención que esta delegación hizo durante el 5º período de sesiones, cuando se introdujo el concepto. Citamos: “[México] desea dejar manifiesta la inquietud sobre si el derecho internacional de los derechos humanos, a la luz de la globalización

económica, puede evolucionar para reflejar de forma más precisa la manera en que los impactos en los derechos humanos ocurren, particularmente en el contexto de actividades empresariales. En ese sentido, esta delegación considera que debe eliminarse, tanto en esta sección como en el resto del texto, la noción de “human rights violation”, y sustituirse por “human rights abuse”. Lo anterior en virtud de que el texto abordaría los impactos producidos directamente por las empresas, mismos que constituirían un abuso de derechos humanos, [como una categoría específica en el derecho internacional de los derechos humanos]; y la violación de derechos humanos, por el contrario, surgiría del incumplimiento [por el Estado Parte] de una norma de [este] instrumento jurídicamente vinculante, [o del incumplimiento o afectación de un derecho reconocido en otro tratado de derechos humanos,] en línea con el derecho internacional general... De esta manera, se haría más preciso el alcance de las obligaciones, de la potencial imputabilidad bajo el derecho interno [de la responsabilidad jurídica de las empresas por las afectaciones que causen a los derechos humanos, incluso en el marco de actividades transnacionales], y resaltar la obligación primaria del Estado de respetar, proteger y garantizar los derechos humanos en su territorio o bajo su jurisdicción.”

Con esto, cedo la palabra a mi colega, para abordar algunas precisiones textuales que quisiéramos plantear.

3.2. Notwithstanding Article 3.1. above, ~~when imposing prevention obligations on business enterprises under this (Legally Binding Instrument),~~ States Parties may establish in their law a non-discriminatory basis to differentiate how business enterprises discharge **the prevention obligations foreseen in Article 6 of this (Legally Binding Instrument)**, commensurate with their size, sector, operational context or the severity **of the adverse human rights impacts.**

3.3. This (Legally Binding Instrument) shall cover all ~~internationally recognized human rights and fundamental freedoms binding on the State Parties of this (Legally Binding Instrument)~~