**First session of the Open – Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights**

**Concept note proposed under the responsibility of the designated Chair, Amb. María Fernanda Espinosa, Permanent Representative of Ecuador to the United Nations in Geneva**

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**background**

1. The open-ended intergovernmental working group (OEIWG) on transnational corporations (TNCs) and other business enterprises with respect to human rights was established through resolution A/HRC/RES/26/9 (resolution 26/9), adopted by the Human Rights Council on June 26th, 2014. The OEIWG is mandated to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (para. 1 of resolution 26/9). The resolution provides that “the first two sessions of the open-ended inter-governmental working group shall be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument” (para. 2 of resolution 26/9). The resolution also recommends that “the first meeting of the open-ended intergovernmental working group serve to collect inputs, including written inputs, from States and relevant stakeholders on possible principles, scope and elements of such an international legally binding instrument” (para. 5 of resolution 26/9). It should be noted that pursuant to paragraph 3 of the resolution, the deliberations of the first two sessions should be such as would allow the Chairperson-Rapporteur of the open-ended intergovernmental working group to “prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group on the subject, taking into consideration the discussions held at its first two sessions” - therefore, it is expected to have focused and constructive deliberations.
2. Resolution 26/9 stresses that the obligation and primary responsibility to promote and protect human rights and fundamental freedoms lies with the State, and that States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations. While the obligation of States to regulate business activities within their territorial jurisdiction is clear, on the other hand States’ obligations regarding corporate conduct acting abroad remain unclear.
3. Member States’ discussions during the process of preparation of the resolution underlined that there are gaps in the international legal framework related to the duty to protect human rights in respect of business activities, and that related instruments are concentrated in soft law. Resolution 26/9 recognizes the importance of the issue of business and human rights, especially given the increasing role that TNCs and businesses play in various economic sectors. In the case of human rights abuses caused by TNCs, the third pillar under the UN Guiding Principles on Business and Human Rights, which addresses access to effective remedy, acknowledges the limitations of national measures and the need for greater clarity in regard to access to effective remedies.
4. Furthermore, the international legal system reflects an asymmetry between rights and obligations of TNCs. While TNCs are granted rights through hard law instruments, such as bilateral investment treaties and investment rules in free trade agreements, and have access to a system of investor-state dispute settlement, there are no hard law instruments that address the obligations of corporations to respect human rights.
5. The role of TNCs has exponentially expanded over the last few decades. Value chains (i.e. intra-firm or inter-firm, regional or global, and commonly referred to as “global value chains, or GVCs) are shaped by TNCs that account for around 80 per cent of global trade[[1]](#footnote-2). It is clear that the role of corporations has evolved in a way that transcends national laws. Yet, TNCs still lack international legal responsibility commensurate with their role and influence in international and domestic affairs. While it is important to strengthen national legal frameworks and mechanisms for access to remedy in cases of human rights violations, there is an increasing need for international cooperation between states to ensure that victims of corporate human rights abuse have access to remedy.
6. Additionally, studies show that companies’ incentives are not negatively impacted by the regulatory aspects of the context in which they operate. Issues of primary concern to investors include the size and growth potential of markets, infrastructure development, and availability of resources (natural resources and abundant labor). For example, a study by the International Monetary Fund entitled “Determinants of Foreign Direct Investment: A Sectoral and Institutonal approach” (2010) showed that institutional development and regulatory procedures do not have significant influence on the total FDI flows and inflows[[2]](#footnote-3). Moreover, a World Bank study notes that “both a review of the empirical literature and analysis using new data sources suggest that business opportunities—as represented by, for example, the size and growth potential of markets—are by far the most powerful determinants of FDI”[[3]](#footnote-4).
7. The more than forty years of history of addressing issues of business and human rights under the auspices of the United Nations, dates back to the nineteen-seventies, and includes experiences like the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", which provide important precedents and lessons learned in this area. At the same time, significant steps have been achieved, including the adoption of the UN Guiding Principles (UNGPs) on business and human rights. Some Member States converge over the importance of continuing efforts towards implementing the UNGPs and developing national action plans based on them.
8. The discussions under the mandate established by the resolution could draw on existing progress in the field as well as innovating in certain areas. Close coordination with other organizations and United Nations agencies addressing certain issues, as well as coordination with civil society organizations is extremely important.

**objective for the first SESSION OF THE oeiwg**

1. The main objective of the session of the OEIWG will be to comply with the mandate contained in resolution 26/9. The actions to be taken in this regard include, among others, to confirm the chair of the intergovernmental working group; to receive inputs from States and relevant stakeholders on possible principles, scope and elements of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, and to discuss issues relating to the content (including possible principles and elements), , nature and form of such an instrument, as provided for in paragraphs 2 and 5 of resolution 26/9.

**THE PROGRAMME OF WORK**

1. In order to guide the debates during the first session of the OEIWG, a programme of work (PoW) was proposed to Member States almost three weeks in advance of the beginning of the session. The PoW has been enriched by the comments and suggestions provided by some interested Parties, whose concerns were addressed to the extent that they were neither conflicting nor contradictory to the mandate contained in resolution 26/9.
2. The proposed PoW has been divided into five items to be discussed during nine public meetings and one private meeting, all of them to be held during the period from Monday 6th till Friday 10th July 2015, from 10h00 to 13h00, and from 15h00 to 18h00.
3. The plenary discussions on the substantive issues are planned to take place under item 4 of the Provisional agenda, and in order to trigger the debate, seven panels have been proposed, where experts coming from different backgrounds, professional experiences and geographic regions, have been invited. The selection of experts took into account recommendations provided by States and relevant stakeholders.
4. As for the specific topics to be discussed, the intention of the PoW is to present indicative headings for the debates, neither prejudging positions, nor assuming consensus on any issue, as it is clear that the views and opinions are diverse and sometimes contradictory or controversial, as it has been expressed by many stakeholders during the preparatory stages.
5. The first substantive discussion will be on the **Principles for an International Legally Binding Instrument on Transnational Corporations (TNCs) and other Business Enterprises with respect to human rights**. Participants may be interested in sharing their views on how to address the key principles that will guide the elaboration of the legally binding instrument.
6. The second topic refers to the scope of the Instrument: **TNCs and other Business Enterprises: concepts and legal nature in International Law**. Among the issues that have drawn attention from different actors before the first session of the OEIWG is the footnote of resolution 26/9, which provides an interpretation on how to understand the expression “other business enterprises”. This issue has already triggered a lively debate. Some States and other stakeholders have requested a broad interpretation of the footnote, not limited only to businesses with a transnational character, but applied to all business enterprises. In order to address this concern, and without prejudging any position or opinion, it is important to underline that the footnote is part of resolution 26/9, which was adopted by the Human Rights Council following a multilateral negotiation and respecting the rules and procedures of the Council. Taking this into account, States and relevant stakeholders are invited to engage in a substantive and constructive discussion in order to address this concern. Therefore Member States and other stakeholders are invited to provide their views and positions on this matter during the first session of the OEIWG.
7. The third topic, referring to the coverage of human rights under the Instrument, has also generated interest. Some views refer to the need to ensure a wide and broad coverage of all human rights, while other voices have mentioned that only gross human rights violations should be addressed. Participants will be invited to share their views on this issue.
8. The fourth discussion will be on the **Obligations of States to guarantee the Respect of Human Rights by TNCs and other business enterprises, including extraterritorial obligations**. The issue of extraterritoriality of State's obligations is an important topic for consideration, since in the production chain, there may be many jurisdictions involved. While recognizing the complexity of this topic, a fulsome discussion is expected.
9. **Enhancing the responsibility of TNCs and other business enterprises to respect human rights, including prevention, mitigation and remediation**, will be the fifth issue to discuss. As the preparatory debates have showed, it is foreseeable that participants may use this opportunity to share opinions on the legal nature of TNCs, and their rights and responsibilities. There is indeed an unfinished debate about obligations to be imposed directly upon TNCs and other business enterprises.
10. The sixth topic refers to the **Legal liability of TNCs and other business enterprises: What are the standards for corporate legal liability and for which conduct?** This issue is closely related to the previous issue concerning the legal nature of TNCs.
11. The last issue addressed by the proposed Programme of Work is the need to build **National and international mechanisms for access to remedy, including international judicial cooperation, with respect to Human Rights violations by TNCs and other business enterprises** **- The OHCHR accountability and remedy project**. Under this Programme item, participants may engage in a discussion on the best way to address remedy, assessing the existing instruments, identifying potential gaps, and providing other alternatives.

**Participation**

1. Information on the session may be found at the link [http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx](http://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx) States and relevant stakeholders are invited to participate in a constructive way in this process, and to contribute to the debate by sharing their opinions, views, perspectives and expectations in the most democratic, transparent and inclusive manner, with the assurances of an objective and impartial chairmanship committed to respecting the rules and procedures of the Council.
1. Source: UNCTAD WIR 2013, http://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=113. [↑](#footnote-ref-2)
2. James P. Walsh and Jiangyan Yu (2010), “Determinants of Foreign Direct Investment: A sectoral and Institutional approach”, IMF Working Paper, available at: http://core.ac.uk/download/pdf/6671904.pdf. The paper explicitly states, “None of the developmental or institutional variables appear to have any influence either on total FDI flows or inflows into the primary sector”. The situation does not change much when assessing the inflow of FDI into the secondary sector. As a matter of fact, although labor market flexibility and financial depth seem to be partially significant, other variables related to regulation do not have any sort of influence. See also: Paulo Elicha Tembe & Kangning Xu (2012) « Attracting Foreign Direct Investment in Developing Countries: Determinants and Policies-A Comparative Study between Mozambique and China”. See also: U.S. Agency for International Development (2005) Foreign Direct Investment: Putting It to Work in Developing Countries. Washington, DC: USAID. [↑](#footnote-ref-3)
3. Kusi Hornberger, Joseph Battat, and Peter Kusek (2011) “Attracting FDI; How Much Does Investment Climate Matter?”, published as World Bank Group- View Point: Public Policy for the Private Sector, available at: [http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/327-Attracting-FDI.pdf](http://siteresources.worldbank.org/financialsector/resources/327-attracting-fdi.pdf). [↑](#footnote-ref-4)