



Scope of the Proposed International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights

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Introduction

The elaboration of an 'International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights' (hereinafter 'the Instrument'), as mandated by the Human Rights Council at its 26th Ordinary Session (June 26, 2014),¹ requires definitions about a multiplicity of issues. Many choices need to be made among possible policy options and properly reflected in treaty language.

This paper² addresses one of such issues: the subjective scope of the Instrument, that is, whose conduct will be subject to the disciplines eventually incorporated therein.

Interpreting the mandate

Resolution A/HRC/26/9 adopted 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' (para. 1). While the Resolution does not define what is meant by 'transnational corporations', in a footnote it indicates that

"Other business enterprises" denotes 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.³

The expression 'business enterprises' appears in previous resolutions by the Human Rights Council and other instruments. Notably, the "Guiding Principles on Business and Human Rights, Implementing the United Nations 'Protect, Respect and Remedy' Framework" (UNGPs)⁴ and the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights"⁵ (hereinafter 'the Norms') have adopted this terminology. The Norms, moreover, utilizes the same wording ('transnational corporations and other business enterprises') incorporated into said Resolution.

The wording of the Resolution's footnote seems to suggest that the intended scope of the Instrument is narrower than that of the UNGPs, since the Resolution specifically alludes to the 'transnational character' of the enterprises'

operations. The Resolution's mandate rather seems to align itself with the scope of the Norms. In accordance with the Norms,

The phrase 'other business enterprise' includes 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. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4 (para. 21).

'Business enterprises' may be deemed to comprise any private actor involved in commercial activities,⁶ including manufacturing, distribution, storage and transportation. Resolution A/HRC/26/9 clarifies, however, that the intended scope of the Instrument is not to cover *all* business enterprises but only a particular category thereof: those 'that have a transnational character in their operational activities'. The key element in this concept is the geographical reach of the enterprises' *activities*, irrespective of whether the ownership or control of the enterprise is concentrated in one or more countries.

An enterprise owned or controlled by stakeholders residing in a 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. To the extent that the primary objective of the Instrument would be, as discussed below, to avoid the use of corporate and contractual structures to escape responsibility in case of human rights' violations, these concepts may be understood as encompassing any situation of foreign ownership or control of a business enterprise. The concept of 'operational activities' would seem to indicate, however, that the ownership of an undertaking would not be the sole determining factor for inclusion under the proposed Instrument. The conduct by domestically owned companies that, for instance, act as sub-contractors or licensees of a transnational corporation

would also be covered.⁷

A broad scope: all business enterprises?

It has been argued that the scope of the Instrument should be broadly defined so as to encompass any business enterprise,⁸ whether it is a small or large entity, with national or transnational activities, foreign or locally, state or privately, owned. For instance, one statement submitted to the first session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (hereinafter 'the Working Group') argued that

Business enterprises that do not have any or any significant transnational operations no doubt are capable of and in many instances have been responsible for human rights abuses no less serious in scale or severity than those of transnational businesses. The people whose human rights are abused directly or indirectly by businesses are unlikely to distinguish whether the business enterprise that causes them harm has transnational ownership or operations; nor are affected people likely to excuse abuses they suffer from a "local" business simply because the entity lacks a transnational element. From the point of view of those whose human rights are affected by business activities, the key consideration is not the formal character of the business entity, but instead the their practical access to effective remedy and reparation for the harm they have suffered.

If a treaty is going to take the views and needs of those adversely affected by business activity as a central concern, it must address all business enterprises that can potentially carry out abuses and not only on those with transnational links.⁹

It is indisputable that human rights violations may be committed by enterprises whose operations are merely domestic. The principle that *all* business enterprises are bound to respect all human rights has been universally accepted; it is one of the pillars of the UNGPs and has been reaffirmed in several Resolutions of the Human Rights Council. However, a key question in drafting the Instrument is whether such a broad coverage would be within the mandate given by Resolution A/HRC/26/9 and whether that would be the right approach in order to develop and adopt, in a reasonable time, an instrument that effectively addresses the concerns raised by the proponents of the Instrument.

These concerns relate to situations where transnational corporations and other entities with transnational activities are capable of evading their human rights' responsibilities on jurisdictional grounds. There is a growing number of cases in which complaints relating to human rights violations by transnational corporations have been brought to courts in the corporations' home State or other States different from the State where the harm was caused. Pursuing such cases in a foreign jurisdiction requires complainants to overcome a number of obstacles, such as finding legal representation, bearing the fees of

legal experts and attorneys, and securing access to information held by the defendant. But even if these obstacles are overcome, the legal actions may be dismissed by the courts without considering their merits, on jurisdictional reasons only, such as in the case of the action brought before the Quebec Court for acts of Omai Gold Mines Limited, a Canadian subsidiary operating in Guyana, and the case brought before US courts against Union Carbide Corporation following the Bhopal gas leak disaster.¹⁰

As noted by the UNGPs,

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.¹¹

The UNGPs also notes that some States have adopted several measures with extraterritorial implications to address human rights abuses, such as

requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement.¹²

These measures, however, are insufficient and do not provide a generally applicable and robust framework to give redress to the victims of human right violations in a foreign jurisdiction. There are no international binding rules allowing for the determination of liability of parent and controlling companies under the jurisdiction of states other than those of the affected communities. This is the fundamental gap that the Instrument is intended to address, as reiterated by many delegations and non-governmental organizations (NGOs) at the first meeting of the Working Group.¹³ This objective is complementary but different from one aiming at reinforcing compliance with human rights' States obligations in respect of all business enterprises, including domestic undertakings.

Extending the scope of the Instrument to all business enterprises would not only be beyond the mandate given by Resolution A/HRC/26/9 but would mean to open a long negotiating process with uncertain outcomes. If the objective of the Instrument is to address the referred to gap in the international legal system, negotiations must focus in finding viable solutions. The argument that a new

international treaty should be applicable to a myriad of small and large domestic businesses may become, in addition to the determination of the covered human rights, one of the 'playthings for some states, and reasons for others to ignore the process' identified by John Ruggie.¹⁴ In fact, aiming at such a broad scope for the Instrument may derail the negotiating process and frustrate its basic purpose. If accepted, there would be no mechanism of monitoring and dispute resolution capable of dealing with a myriad of possible cases of human rights' violations.

As noted, this does not mean to deny that any business enterprise should be subject to human rights' obligations. The conduct of domestic businesses is regulated by national laws and enforcement mechanisms; unlike TNCs, they cannot wind down their economic activity in one country or invoke separate legal personalities to avoid their responsibility in case of human rights violations. There is certainly a need to ensure that the national legal regimes allow for an effective redress in cases where violations by domestic businesses occur, for instance by implementing the UNGPs. But actions taken to this end should not interfere with the elaboration of a new international treaty needed to hold TNCs accountable for their acts.

It may be argued that focusing on TNCs and business enterprises engaged in transnational activities would mean to discriminate among businesses, since all of them should be subject to the same treatment. However, the elaboration of a focused Instrument would not discriminate against a category of businesses but, on the contrary, put all companies, whether domestic or not, on the same footing. The fact is that, unlike domestic companies, TNCs and other businesses may avoid, because of complex corporate and contractual structures and the international dimension of their operations, their responsibilities for human rights' violations. The proposed Instrument, hence, if adopted, would rather ensure equality of treatment.

Defining TNCs

A delicate issue is whether the elaboration of the proposed Instrument would require the definition of the concept of 'transnational corporations'. An attempt of introducing a definition of this type was made during the failed negotiations of the UN Code of Conduct on Transnational Corporations. The draft Code (1983) defined "transnational corporations" as

an enterprise, whether of public, private or mixed ownership, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them [may be able to] exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the

others (para. 1(a)).¹⁵

Other instruments relating to TNCs have explicitly opted not to define this concept. Thus, the *OECD Guidelines for Multinational Enterprises* state that

A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities) (para. 4)¹⁶

Similarly, the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, indicate that

To serve its purpose this Declaration does not require a precise legal definition of multinational enterprises; this paragraph is designed to facilitate the understanding of the Declaration and not to provide such a definition. Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based. The degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields of activity and having regard to the great diversity in the form of ownership, in the size, in the nature and location of the operations of the enterprises concerned... Unless otherwise specified, the term "multinational enterprise" is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration (para. 6).¹⁷

The *United Nations Set of Principles and Rules on Competition* (1980) (hereinafter 'the Set') implicitly refers to TNCs as part of the definition of 'enterprises':

"Enterprises" means firms, partnerships, corporations, companies,... and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them (para. B.3).¹⁸

The Set also prescribes that the "principles and rules for enterprises, including transnational corporations" apply to all transactions in goods and services (para.B.5).

Agreeing on a definition of 'transnational corporations' in the process of elaboration of the Instrument may prove to be a long and frustrating task. As suggested by the referred to instruments, there is no need, in fact, to provide for such a definition. It would be sufficient to arrive at a common understanding about the operational use of the concept by clarifying the conditions under which a corporation could be identified as 'transnational'. A definition might not only be difficult to agree upon; it may also be too rigid to cover all possible situations and the changing dynamics of transnational businesses. For instance, the concept of 'global value chains' (GVCs), although developed by some academics in the 1990s, has only recently gained a prominent place at the negotiating tables of the main international economic fora.¹⁹ The expansion of GVCs may currently explain a significant part of transnational activities.²⁰

There are many examples of binding instruments that do *not* contain a definition of the basic concept on which such instruments are built on. For instance, the WTO General Agreement on Trade in Services defines when international trade in services takes place, but not the term 'services'. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires the protection of 'inventions' but does not define this term either. Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States provides that 'the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment' (para. 1). In the absence of a definition, the concept has been developed through the jurisprudence relating to bilateral investment treaties (BITs).²¹

If a definition is not contained in the proposed Instrument, alternative models may be followed. Under a *delegation* model, domestic law may play a controlling role; the international treaty could only contain a referral that makes its content variable depending on the determinations made under domestic law. Under a *reliance* model, the international treaty could delegate the characterisation of a TNC to domestic law, but retain a controlling role for its final characterisation as an enterprise whose conduct is subject to the treaty rules. Another option would be to limit the domestic law to a supplementary role, by addressing matters not covered by the international treaty.²² Adopting any of these models would avoid the possibly frustrating exercise of attempting to define the concept of TNCs in the Instrument itself.

Complex structures

A well-known feature of TNCs is the complex structures that they create in order to engage in business globally. This allows them to benefit from various legal frameworks, including the treatment of a subsidiary under national law as a 'domestic enterprise' and the possibility of relying on different BITs to enforce their 'investors rights'. For instance, Philip Morris initiated an investment case in relation to the use of tobacco brands against Uruguay through Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A.

(Uruguay)²³ relying on a BIT between Switzerland and Uruguay; the company sued Australia on similar grounds through Philip Morris Asia Limited²⁴ relying on a BIT between Hong Kong and Australia.

TNCs' complex structures are a key element in legal maneuvering to avoid responsibility for the operations of formally independent companies, such as subsidiaries or sub-contractors. Many national laws provide examples of provisions in corporate law, tax law, investment law and intellectual property law aiming at regulating the activities of companies belonging to the same economic unit, or controlled by a dominant company. For example, the US Code of Federal Regulations 17 CFR 230.405 provides that

An affiliate is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

The term control ...means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

In the area of intellectual property, Decision 486 of the Andean Community defines when persons are 'economically associated' as a situation where 'one can directly or indirectly exercise a decisive influence on the other concerning the working of the patent, or where a third party can exercise such an influence on both' (article 54).

Under the proposed Instrument judicial authorities should have the authority to apply doctrines permitting them to determine the real links between formally separate entities, such as through 'piercing the corporate veil' or the doctrine of 'single economic unit'. Such authorities should also be able to apply a presumption that a parent company exercises a decisive influence over the policy and activities of its affiliates or subsidiaries.²⁵ The Instrument should also rule out the application of the doctrine of *forum non conveniens*, often invoked in common law countries to decline jurisdiction.

Conclusions

In order to determine the scope of the proposed Instrument, the central issue to be addressed is what its primary objective will be. If the aim is to resolve the issues raised by the international operations of TNCs (and other businesses) and their ability to commit violations in some countries where no redress can be effectively obtained, the negotiations should focus on filling the current gaps in international law. The footnote in Resolution A/HRC/RES/26/9 manifests this intention. The proposed binding instrument should provide a mechanism to avoid the use of complex corporate or contractual structures to escape the responsibility for human rights' violations. This would not mean to deny that all businesses must comply with human rights obligations, but to admit that covering all such businesses would be a conceptually

different objective with very different practical implications.

There is no need to agree on a definition of 'transnational enterprises' to develop and adopt the proposed Instrument. Alternative models may be applied, which have worked well in other areas of law, and which may allow for a swift and more effective conclusion and implementation of the new treaty. In order to be effective, judicial authorities should be given the power to apply tools that permit them to establish the responsibility of the controlling entity, regardless of formal corporate or contractual structures.

End notes:

¹ See Resolution A/HRC/26/9, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9.

² The paper is based on the presentation made by the author at the first session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (Geneva, 6 to 10 July 2015); it also incorporates reflections from the statements made and discussions held during that session.

³ The fact that this clarification is contained in a footnote does not diminish its legal weight in determining the scope of the mandate. In accordance with the international customary law principle of 'effective interpretation', the interpreter shall take into account all the provisions in a way that gives meaning to all of them, harmoniously. See, e.g., the WTO Appellate Body report in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, para. 81 (available at [http://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(Symbol=%20wt/ds98/ab/r*%20not%20rw*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICanged=true](http://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(Symbol=%20wt/ds98/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICanged=true)).

⁴ Available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁵ Approved August 13, 2003, by [U.N. Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16](#), U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003). Source: <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.

⁶ See *Oxford Dictionary*, <http://www.oxforddictionaries.com/definition/english/business>.

⁷ The Norms, for instance, provide that '[e]ach transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons who enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms' (para. 15).

⁸ See, e.g., Oral statement by Colombian Commission of Jurists about the General Principles and objectives of the future treaty on TNCs and other Business Enterprises, submitted to the first session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (6 to 10 July 2015), available at <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Statements.aspx>.

⁹ Joint Oral Statement on the Scope of the Legally Binding Instrument: TNCs and other Business Enterprises submitted to the first session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (6 to 10 July 2015), available at <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Statements.aspx>.

¹⁰ See, e.g., Amnesty International, *Injustice incorporated: Corporate abuses and the human right to remedy*, 7 March 2014, available at <https://www.amnesty.org/en/documents/POL30/001/2014/en/>, pp. 122-126.

¹¹ UNGPs, pp.3-4.

¹² UNGPs, p. 4.

¹³ See *South News* No. 93, 14 July 2015 available at <http://us5.campaign-archive2.com/?u=fa9cf38799136b5660f367ba6&id=62fa395837&e=UNIQID>.

¹⁴ 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', available at <https://business-humanrights.org/en/get-real-or-we'll-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty>.

¹⁵ Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2891>.

¹⁶ Available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

¹⁷ Available at http://www.ilo.org/empent/Publications/WCMS_094386/lang-en/index.htm.

¹⁸ Available at http://unctad.org/en/docs/tdrbpcconf10r2_en.pdf.

¹⁹ See, e.g., Demián Dalle, Verónica Fossati, Federico Lavopa, 'Industrial policy and development space: The missing piece in the GVCs debate', *CEL, Revista Argentina de Economía Internacional*, Number 2, December 2013.

²⁰ See, e.g., Deborah K. Elms and Patrick Low (editors), *Global value chains in a changing world*, Fung Global Institute, Nanyang Technological University, World Trade Organization, 2013, available at https://www.wto.org/english/res_e/booksp_e/aid4tradeglobalvalue13_e.pdf.

²¹ Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini', *Chicago Journal of International Law*, Vol. 15, No. 1, 2014, available at <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1058&context=cjil>.

²² On these different models in the framework of BITs, see, Carlos Correa and Jorge Vinuales, 'Intellectual property rights as protected investments: how open are the gates?', *Journal of International Economic Law*, forthcoming.

²³ See <http://www.italaw.com/cases/460>.

²⁴ See <http://www.italaw.com/cases/851>.

²⁵ See, e.g., Frédérique Wenner and Bertus Van Barlingen, 'European Court of Justice confirms Commission's approach on parental liability', *Competition Policy Newsletter*, No. 1, 2010.



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