

Introduction - Session on Scope of Application – 24 October 2017

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I would like to extend my gratitude to the Open-ended intergovernmental working group for the elaboration of an internationally legally binding Instrument on Transnational Corporations and other Business Enterprises with respect to human rights, and to the Permanent Mission of Ecuador for this invitation to address the questions related to the scope of application for the future treaty. I would also like to congratulate the Open-ended working group on their work so far and the significant achievement it is to have engaged in extensive dialogue with governments and a multitude of other stake holders over the past two years to prepare for the current session which represents the commencement of substantive negotiations for the treaty.

The scope of application is laid out in what I will refer to as the ‘elements document’, and covers three specific issues, namely which rights are to be protected; what acts will be covered, and by whom.

In terms of the protected rights, there is a significant strength in the elements document that it clearly states that all internationally recognized human rights should be covered in the treaty. The reason why this treaty is being proposed is the firm recognition that acts by TNCs and OBEs may negatively impact upon the human rights enjoyment of individuals world-wide. The comprehensive approach to rights reflects the indivisibility and interdependence of universal human rights, which is imperative for victims of violations. Furthermore, due to the nature of the TNC/OBE operations, many of the violations will be in the area of economic and social rights, and including the full list of rights, will ensure that

more of the current problems will be addressed. Furthermore, the listing of rights in the elements document section 2:1, is interesting and perhaps somewhat broader than what is often seen. However, the drafters should be congratulated on including a clear reference to additional labour rights, and to environment and corruption as provided in intergovernmental instruments beyond the commonly referred to international human rights treaties. This broad inclusion demonstrates that the document clearly recognise not only that the full spectrum of human rights needs to be covered, but also that the enjoyment of human rights is dependent upon an enabling environment that recognises the complexity in human rights protection. In my view, such an inclusive approach is necessary to tackle negative impacts on human rights enjoyment from a highly varied set of actors in the international community.

Regarding the Acts subject to the application, there is a clear limitation of business activities to those that have a transnational character. Of course, for individuals suffering human rights violations, there is no difference whether those responsible have acted transnationally or domestically. However, it is understandable why the transnational character has been focused on. The national obligation to protect individuals from human rights violations as a result of acts by private entities or other third parties is now well established – even if not always complied with. The proposal in section 2.2 regarding the acts covered by the scope of application provides a confirmation of the long-recognised reality that acts by transnational corporations and other business enterprises are now highly influential in individuals’ human rights enjoyment, yet far too often not addressed. I would, however, suggest that the negotiators also consider including not only acts by these actors, but also omissions - omissions that result in lack of protection against violations or abuses of human rights. Finally, I welcome the comprehensive listing of types of businesses or

corporations that may be committing these acts, and the emphasis in the document that it is the *activity* and the impact of these rather than the legal definition of an entity, which should be of importance.

Thirdly, to the actors subject to scope of application. Section 2.3 in the elements document cover

- States and organisations of regional economic integration
- TNCs and other business enterprises; and
- Natural persons

These are certainly key entities concerning the activities or omissions that may lead to violations or abuses of human rights. The close interaction between states, TNCs and OBEs; or between organisations of regional economic integration and TNCs/OBEs certainly merits their inclusion in the listing. It is, however, not clear to me why organisations of regional economic integration has been singled out, when other global organisation of financial or trade character have not been included. These latter ones have been included as obligation subjects later in the elements document, but have not been listed here as potential actors relevant for the scope of application. The designation ‘organisations of regional economic integration’ may also result in discussions as to which organisations fall within this category, and which do not. I would suggest that the reference to international or regional organisations as actors relevant for the scope of application of the future treaty, should be as inclusive as that of TNCs and OBEs: namely any international or regional organisation which – through its activities – engage with and may influence TNCs and OBEs.

I thank you for your attention