I wish to express my continued thanks to the Madame Chair from Ecuador for the opportunity to provide my perspectives on these important issues, and to my colleagues on the panel and to all other participants for their contributions and insights.

These written comments are meant to complement and further memorialize my comments made during the July 7, 2015 meeting of the Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights (“IWG”).

The Significant Developments and Activity in the Business and Human Rights Sphere

- The United National Guiding Principles on Business and Human Rights (“UNGP”) were endorsed just four short years ago in 2011. As the United Nations (UN) Working Group on Business and Human Rights has acknowledged, “putting the basics in place within large organizations takes time.”

- Despite this reality, however, much has been done on the company level, as Mr. Thomas Mackall correctly noted and identified in his written comments to the IWG. Companies have increased their awareness of human rights issues within their operations and have engaged in substantial capacity-building both within their organizations and with key business partners and stakeholders to achieve greater alignment with UNGP due diligence and other principles.

- Beyond the company-level, there has also been significant activity in this area. The OECD Guidelines for Multinational Enterprises added an entire chapter that addresses human rights issues consistent with the UNGP.

- The UN, among other initiatives in this space, has recently undertaken an ambitious project geared to achieve greater consistency and clarity over the Third Pillar of the UNGP. This initiative, in its own terms, “aims to deliver credible, workable guidance to States to enable more consistent implementation of the Guiding Principles in the area of access to remedy.”

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1 A/HRC/29/28/Add.3.
2 http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx
Governments, for their part, have also taken strides to achieve greater consistency with the UNGP. The United Kingdom (UK) and the Netherlands, for example, have developed National Action Plans (NAPs). The UK, in addition, recently enacted the Modern Slavery Act of 2015, a law that is designed to eradicate modern slavery and human trafficking within corporate “value” or “supply chains,” as they are known.  

The United States has also undertaken steps to develop its own NAP. The United States has also, as further example, amended its Federal Acquisition Regulation (FAR) to impose wide-ranging requirements upon companies contracting to do business with the United States government to eliminate trafficking in persons within their own organizations and suppliers.

Any Treaty Must be Thoughtfully Considered in this Context

- A recent article in the Economist has detailed the growing awareness of business and human rights issues in the corporate community as well as the significant challenges. Among those significant challenges is developing the human rights awareness of business partners within a value or supply chain.

- There has been significant discussion at the IWG to implement a treaty to correct what was referenced as a regulatory “gap” in holding only transnational companies accountable for any type of human rights abuse.

- This discussion, however, incorrectly presumes that transnational entities have static and easily-identifiable suppliers and business partners. This discussion also presumes a modicum of control between transnational entities and suppliers within a value or supply chain that may be non-existent. As a result, the failure to even consider including purely domestic companies into a treaty removes the potential to legally incent those companies to respect human rights, thus frustrating the significant and ongoing efforts of transnational companies to more fully implement the UNGP.

- Although it has been argued that transnational entities should be the focus of any treaty because domestic companies are already covered under domestic laws, the simple reality is that transnational companies are also covered by the existing laws and regulations of every jurisdiction in which they operate.

- Furthermore, any treaty process should also focus on the state’s responsibility under Pillar One of the UNGP to protect human rights. It makes little practical sense to focus intergovernmental and other resources on developing a treaty for states that lack the infrastructure, or legal or political climate, for enforcement. The treaty process should consider shifting its focus from developing a remedial

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framework to empowering host countries to better enforce their own existing laws.

- Nevertheless, and if the treaty process retains a focus on developing a remedial framework vis-à-vis transnational companies, significant and careful study should be given to three very complex legal and political issues:
  
  o Whether there is sufficient consensus under international law to hold corporate entities legally liable for any conduct that could be construed as a human rights violation;
  
  o Whether extraterritorially extending the reach of a treaty beyond those states that have thus far participated in the treaty process furthers and respects the spirit of the UNGP without unduly interfering with traditional notions of comity, diplomacy, and sovereignty; and
  
  o Determining the appropriate legal standards by which a corporate entity’s conduct should be adjudged under any treaty framework.

- These complex and charged questions require significant study and careful consideration that cannot be adequately covered in this submission.

My continued thanks go to the Madame Chair, the IWG, and to all participants, for the opportunity to have participated in this important work.

/s/ Michael Giuseppe Congiu