**United Nations Human Rights Council Working Group on TNCs and other Business Enterprises with Respect to Human Rights**

Palais des Nations, Room XX, 27 October 2016

Panel IV: "Open debate on different approaches and criteria for the future definition of the scope of the international legally binding instrument"

Remarks by Khalil Hamdani[[1]](#footnote-1)\*

The scope of this working group is transnational corporations and other business enterprises. I find it curious that there is debate on the definition of other business enterprises, and very little debate on the definition of TNCs.

There is no precise legal definition of a transnational corporation. In other disciplines as well, the changing character of the transnational corporation has made past definitions obsolete. And, I have no doubt that any current definition will be outdated in the future. For this reason, the OECD stated 40 years ago: “A precise legal definition of multinational enterprises is not required for the purpose of the Guidelines”.[[2]](#footnote-2) In that pragmatic spirit, it seems reasonable that if a definition of TNCs is not required, then a definition of other business enterprises is also not required.

Anyhow, even if the net is cast broadly, the search will soon narrow. Consider the available facts. The universe of business is upwards of 200 million registered enterprises worldwide.[[3]](#footnote-3) A very small fraction of this population has operations of a transnational character. UNCTAD was able to identify 320,000 enterprises that had at least one affiliate abroad.[[4]](#footnote-4) These TNCs have some 1.1 million affiliates. Together, they account for less than 1 percent of all registered enterprises. Now, OECD country data show that the remaining 99 percent of registered firms in all its member States are small- and medium-size enterprises.[[5]](#footnote-5) These are largely local businesses with fewer than 10 employees and as such it is very doubtful that a significant number would have transnational operations. Thus, even at this highly aggregate level, TNCs and their affiliates are a distinct grouping within the larger universe of business enterprise.

Now, the rationale for special attention to TNCs is well accepted. While the different units that make up a TNC are registered domestically in one country or another, their operations are internalized within a corporate structure that functions outside the full scrutiny, protection and regulation of individual national legal regimes. These operations are generally beneficial, but when these operations evade, contravene or run afoul of national measures or objectives, States can take unilateral or extraterritorial actions, or they can jointly agree on a code of conduct based on guiding principles and binding treaties. There is a vast canon of soft and hard law on the activities of transnational corporations. Nevertheless, there are weaknesses, evidenced by instances of transnational activities that are harmful of fundamental rights and the inability of arbitrations to assign accountability and provide remedy.

Of course, human rights are universal and applicable to all. The draft code of conduct on TNCs that was negotiated in the 1970s and 80s contained international standards for the respect for human rights and fundamental freedoms.[[6]](#footnote-6) Although the code of conduct was on TNCs, human rights were seen as unequivocal and applicable to all actors—State, non-state and individual actors. It was also recognized that there are other instruments to reach non-TNC actors. The code would not duplicate, overlap or override such other instruments; instead, the code would extend their reach to encompass transnational activities. I would hope that this working group would follow a similar approach.

I should like to make three additional comments on the approach of this working group *vis-à-vis* that of international investment agreements.

First, the focus in multilateral and bilateral agreements is on foreign direct investment, while the focus of this working group is on TNCs. These are two sides of the same coin. In both cases we are looking at the management of the transnational relationship. FDI is defined as a minimum level of equity ownership that confers control of the business operations to the foreign entity. However, FDI does not capture the full obligation of TNCs, because control can be exerted through non-equity relationships, such as licensing, franchising and subcontracting through supply chains. Also, when ownership structures are complex, tribunals look beyond equity ownership and consider other indicators of control such as involvement in substantial business activity. In all cases, control is the key, for in control lies responsibility. It is through control that a TNC or foreign investor shapes decision-making, sets policies and practice, and has ultimate responsibility to respect human rights in companywide operations. Thus, the broader approach of this working group on TNCs as actors, rather than investment as an activity, provides a more comprehensive framework for prescribing principles for transnational behavior and conduct with respect to human rights.

Second, the emphasis in multilateral and bilateral agreements is on treatment, while the emphasis of the working group is on responsibility. These are also two sides of the same coin. Rights and responsibilities are the *quid pro quo* of a social contract where one is contingent upon the other. There are 3,321 treaties that establish mandatory standards for the protection and treatment of foreign investors by host governments.[[7]](#footnote-7) An equally prescriptive and energetic effort is needed on the responsibility front. If not, there would be a pushback on the other front and commitments on protection and treatment would weaken. This would be a setback for the international investment framework. Thus, this working group has an important role to play in restoring the balance between rights and responsibilities at a high level, without lowering of standards on either side. That is surely in the interest of TNCs as well.

Third, and finally, a major challenge for world investment is to create shared value for all stakeholders.[[8]](#footnote-8) The Sustainable Development Goals will require significant investment, well beyond current levels.[[9]](#footnote-9) Investments will be needed also in social sectors and areas traditionally earmarked for the public sector and development aid. This is not simply a matter of investment promotion, but of creating new business models for responsible investment that respect human rights and advance development, in partnership with non-governmental organizations, local communities and the state. The *Guiding Principles on Business and Human Rights* is a potentially important instrument for nurturing responsible business conduct that is supportive of sustainability and inclusiveness. The treaty initiative should be a complementary instrument that commits states, TNCs and other business enterprises to put these principles into practice.

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1. \* Visiting Professor, Graduate Institute of Development Studies, Lahore School of Economics, Pakistan. [↑](#footnote-ref-1)
2. OECD, OECD Guidelines for Multinational Enterprises (1976, and 2011 update). [↑](#footnote-ref-2)
3. Orbis international corporate database, Bureau Van Dijk. See <http://www.bvdinfo.com/en-gb/our-products/company-information/international-products/orbis>. [↑](#footnote-ref-3)
4. UNCTAD, World Investment Report 2016, p. 134. [↑](#footnote-ref-4)
5. OECD, Financing SMEs and Entrepreneurs 2015: An OECD Scoreboard. [↑](#footnote-ref-5)
6. For background on the code of conduct, see Khalil Hamdani and Lorraine Ruffing, United Nations Centre on Transnational Corporations: Corporate conduct and the public interest (Routledge, 2015). [↑](#footnote-ref-6)
7. As of September 2016. See UNCTAD <http://investmentpolicyhub.unctad.org/IIA>. [↑](#footnote-ref-7)
8. See Karl P. Sauvant and Khalil Hamdani, An International Support Programme for Sustainable Investment Facilitation (Geneva: E15 Initiative of the ICSTD and World Economic Forum, 28 July 2015) available at <http://www.ictsd.org/sites/default/files/research/E15-Investment-Sauvant%20and%20Hamdani-FINAL.pdf>. [↑](#footnote-ref-8)
9. According to UNCTAD, World Investment Report 2014, developing countries face an annual investment gap of $2.5 trillion for meeting the resource demands of the SDGs. [↑](#footnote-ref-9)