Comments on Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights

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First, I submit the following three points for general consideration of the OEIGWG established by HRC res AVHRC/RES/26/9.

1) I would like to request the chairmanship of the OEIGWG to hold informal consultation with states and other stakeholders including transnational corporations in East Asia well before a draft document is presented to the 4th OEIGWG session in autumn 2018. In January and February 2018, I had some informal meetings with Japanese business organizations including Keidanren (Japan Federation of Economic Organizations) and found that they were not informed nor consulted about the recent discussion underway at the OEIGWG. Access to information and right to expression must be ensured for all relevant stakeholders. As indicates a total of GDP of China, South Korea and Japan which exceeds EU and is almost equivalent to US, the voice of the East Asia should be

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1 Taking this opportunity, I would like to thank Prof. John Gerald Ruggie for his precise and thought-provoking comments on my early draft
proportionally reflected in the deliberations on the drafting process.

2) I propose the OEIGW to consider drafting optional protocol(s) focusing on specific issue(s) in addition to or instead of comprehensive international human rights treaty on business and human rights. As Prof. John Gerald Ruggie suggested², we must be very precise and specific about the issues which we are tackling with in drafting a legally binding instrument. There are two issues singled out at my consultation with Keidanren, human rights violations outside of global supply-chains such as mere purchasing goods and services by transnational corporations from unrelated local suppliers and rights of migrant workers, particularly unskilled labor. The former is not considered as a part of transnational "activities" in general and may not be covered under the prospective new treaty although huge imbalance of power between local suppliers and transnational purchasers becomes quite often a hotbed of human rights harm. The latter is an issue of technical trainees from developing countries to developed ones which is quite complex in nature and needs social and financial measures in addition to international legal

provisions. Optional protocols focusing on these issues may be more practical and create a more viable social and political dynamics

3) I propose the OEIGW to consider recent technological breakthrough for developing effective monitoring and assessing mechanism on transnational business activities as a part of non-judicial mechanism within the treaty. Since a few years ago, technological innovation began transforming the entire social/economic/political system and human mindset. Particularly, blockchain, distributed ledger technology, is now changing the entire transaction system and data base. I point out among other things, applicability of blockchain technology into Regulation Technology (RegTech) for monitoring, assessing, verifying and recording transnational business activities in terms of human rights.

Facing exponentially increasing trade and financial rules and regulations and social pressure, many corporates are seriously looking for more effective and automated system in monitoring and assessing compliance with such rules and regulations.

Given the feature of blockchain technology which enables preserving recorded data without risk of retroactive alteration while keeping the verified data open to the public including potential ESG sensitive investors, properly developed blockchain-based database will benefit corporates by reducing cost of transactions and dispute settlements.

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3 Environment, Society and Governance
drastically and make it easier for the affected people to access to necessary information and practical remedies.

In my brief conversation with the director of IBM Research – Tokyo, we confirmed that blockchain technology has huge potentiality for RegTech in this regard. It is commonly acknowledged that the modern supply chain is extremely complex and long, but not reliable. IBM reported that organizations which have mastered visibility within their organizations can’t see around the corners, particularly when goods are in transit⁴. It seems to me unrealistic to assume that human rights harm/violation in the ground could be prevented if TNCs decide to undertake their burden to respect human rights in their activities. We need more for ensuring fundamental human rights for all.

Basically, if every data on transactions of corporates is recorded on block-chain-based database which could not be altered retroactively and maintained publicly without any central control authority, the people whose human rights are harmed or violated could identify which organization is primarily responsible and make complaint electronically through smartphone. This electronic submission makes possible to make complaints for those who have no other alternatives for submission.

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Admissibility of complaint to be submitted by millions of the affected people could be sorted out automatically by Artificial Intelligence (AI) at the initial stage in interaction with aggrieved person/organization(s). This process might be designed as smart contract.

At the second stage, the burden of proof or work of proof should be carried out by the accused corporate, meaning that the accused corporate must take responsibility to refute the complaint and the complaints which are not refuted should be considered as final and is uploaded as a part of block-chained database and will be open to the public.

In my thought although premature, this blockchain-based database about activities by TNCs and OBEs cover both positive and negative activities with respect to human rights and the data on positive activities which invite no complaint may be used for potential investors to determine ESG based investment whereas the negative assessment could be used for the affected people to make complaint for seeking mitigation measures and in the more serious cases for judicial proceedings, which gives incentives to corporates to follow rules and regulations more proactively.

In short, this blockchain-based system encourages corporates to take human rights due diligence voluntarily while ensuring the affected people the right to remedy.

The new international treaty in the 21st century needs new instrument of enforcement and potentiality of RegTech should be addressed and examined sooner than later in this
regard.

Now I submit my specific comments in order.

1. General Framework

1.1 Preamble

I propose the following sentence as the first para in preamble as we need well-balanced synergy between the legal instrument and much broader social and political mechanisms without which legally binding force does not function as originally expected.

Reaffirming of and building upon the UN Guiding Principles on Business and Human Rights as the commonly agreed-upon foundation,

I also propose the following sentence in preamble.

Ensuring maximum synergy with the work at the Working Group on the issue of human rights and transnational corporations and other business enterprises established by the Human Rights Council in 2011 (resolution 17/4),

1.2 Principles

As for the primacy of human rights obligation, I would suggest the following interpretation of “a primary consideration,” defined by the Committee on the Rights of the Child(CRC).
CRC defines “a primary consideration” as a larger weight must be attached to what serves the child best interest while admitting potential conflicts between the best interest of child and rights of other persons and needs of compromise. In my account, primacy of human rights should be considered as a larger weight rather than supreme power over any other considerations and should be so articulated in the provision.

9. Mechanisms for promotion, implementation and monitoring

b) International level

b-2) Non-judicial mechanisms

As Prof. Ruggie explained, given the number of TNCs and OBEs, it seems to be unrealistic for a Geneva-based committee consisting of 18 experts to assess, investigate and monitor whole the activities of TNCs and OBEs. As explained in detail in my third general point, we need to create more holistic and reliable database which ensures accountability, transparency, participation and cooperation as Prf. Baskut Tuncak emphasized.

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5 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3. para. 1), CRC/C/GC/14, May/29/2013.
