

**Open consultations on the implementation of HRC Resolution 26/9
Elaboration of an international legally binding instrument
on TNCs, OBEs and human rights**

Guiding questions for thematic discussions

Scope:

The objective of specifying the scope of an international instrument is for the contracting States to identify the subjects to whom the treaty provisions will apply to, and the extent to which its provisions grants effective protection of the rights recognised in it. The discussions under the OEIGWG so far have tackled two main issues pertaining to scope: (1) which business entities will be subject to the coverage of the Instrument (subjective scope), and; (2) which human rights will be covered by the Instrument (objective scope).

Since then, there have been different approaches, ideas and proposals related to both the objective and the subjective scope of the future instrument. With regard to the subjective scope, one of the main differences lies between those who prefer a broad scope that encompasses all business enterprises, while other views defend a scope focused only on TNCs and OBEs with transnational operations. In that regard, one of the approaches that has received more support, is the proposal of a scope focusing on the transnational character of the activity or conduct of the business enterprise, regardless of its mode of creation, control, ownership, size or structure. Other aspects of the discussions in this regard, include the need and feasibility of a definition of TNCs and OBEs, taking into account the example of several related international instruments and processes.

With regard to the objective scope, some of the views and proposals prefer a broad scope that covers all human rights reflected in all human rights treaties and other intergovernmental related instruments, while other prefer to limit such coverage to human rights recognized by States under the treaties they have signed on, and under international customary law.

In this regard, taking into account that reaching a common understanding on the possible landing zone between the different views on the scope of the future legally binding instrument will help define the approach to other elements under the Instrument, the following guiding questions are put forward to facilitate the thematic discussion within the second open informal consultation:

- a. Does your delegation consider that the approach focused on the conduct of the business enterprise rather than on the nature of the enterprise would be useful to determine the scope of coverage of the Instrument? and what instruments could be used as examples in this regard? (i.e. the Convention against corruption, the Convention against transnational crime, inter alia).
- b. Does your delegation suggest another effective alternative for approaching the definition of the subjective scope of the Instrument?
- c. Does your delegation consider that the Instrument would require a definition pertaining to the business entities to be covered by the Instrument?

Jurisdiction:

Clarifying jurisdiction is a cornerstone of a legally binding Instrument in order to guarantee the ability of victims to choose the forum where they seek to bring a case in response to violations committed by business enterprises. In order to attain access to remedy and justice, it is crucial to tackle barriers that victims face in accessing courts in jurisdictions linked to the transnational practice of business enterprises.

In this regard, several comments and proposals have been made to address those barriers and accountability gaps, and to clarify when courts could consider claims for abuses occurring abroad, including through clear references to basis for jurisdiction such as a reasonable link between the State and the conduct concerned, as well as a possible definition of what is understood as “under its jurisdiction”. Other views refer to the issue of enforcement of judgements, the possible use of prescriptive jurisdiction principles, as well as to the strong link between the provisions of jurisdiction and those of international cooperation.

Therefore, taking into account the importance of having a better understanding of the possible landing zone between the different views on the issue of jurisdiction of the future legally binding instrument, the following guiding questions are put forward to facilitate the thematic discussion within the second open informal consultation:

- a. Has your delegation considered circumstances in which courts could hear claims arising from conduct undertaken outside your territory? Which are the applicable principles of jurisdiction in such cases?
- b. Is your country party to any treaty or convention which clarifies jurisdiction of courts in cross-border or transnational cases? How has it been implemented?
- c. Does your delegation agree to an approach that would link jurisdiction over cases arising from transnational business conduct to place of incorporation/ domicile, place of headquarters, and place of substantial business interest of the business enterprise involved?