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**Speaking notes for the session tackling scope and definitions**

**Open-ended intergovernmental working group for the elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to human rights, Resolution A/HRC/26/9**

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- The South Centre is an inter-governmental organization of 54 developing countries. My intervention is part of the reflections by the South Centre’s secretariat on the zero draft of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to human, and does not necessarily reflect the views of members of the South Centre.
- My intervention concerns Article 3.1 on ‘scope’ together with Article 4.2 on ‘definitions’, which read as follows:
  - o Article 3.1: This Convention shall apply to human rights violations in the context of any business activities of a transnational character.
  - o Article 4.2: “Business activities of a transnational character” shall mean any for-profit economic activity, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means, that take place or involve actions, persons or impact in two or more national jurisdictions.
- My general reflections engage particularly the suggestion that the approach proposed under the zero draft would exclude domestic enterprises from coverage under the legally binding instrument.
- The approach proposed under the zero draft does not differentiate entities based on the mere fact of whether they are domestic or not.
- Taking this approach in conjunction with the assertion in the Preamble, which incorporate the Guiding Principles language that all business enterprises shall...respect human rights”, affirms that the proposed Instrument recognizes that it is indeed irrelevant whether an act of violation was committed by a national or transnational entity, and that all enterprises are susceptible of committing human rights violations.
- Yet, this approach shifts our attention from the legal nature of the entity and its nationality to the nature of its business conduct. So all entities are expected to be covered as long as their for-profit activities demonstrate one of three links expressed in Article 4.2, which are whether the activity took place or involves “actions, persons or impact in two or more national jurisdictions”.

- So actions or omissions by businesses acting only within national jurisdiction/ domestically will not be omitted. For example, an enterprise acting in one jurisdiction at a scale that leads to transboundary impact will be covered. Similarly, a domestic company with no international subsidiaries but which operates with a sufficiently large scale to require sourcing intermediate material from another country or hiring from another jurisdiction would be covered under the treaty.
- In effect, this approach would cover all domestic or national enterprises of significant size allowing them to potentially affect human rights.
- This approach means that the Instrument will eventually cover all kinds of business entities involved in human rights violations, whether they are parent companies, branches, subsidiaries, affiliates, contractors, or business partners, as long as their conduct takes place or involves actions, persons, or impact in two or more national jurisdictions, which would thus require mechanisms of international cooperation to be utilized to achieve effective redress and remedy.
- It is worth noting that the zero draft does not include specific reference to TNCs or other kinds of business enterprises, besides the reference made in the title. It indeed focuses on “any business activity of transnational character”. Avoiding the use of terminology linked to specific legal form of the business entity would potentially be helpful in avoiding the effects of maneuvering such legal forms through restructuring the business entity.
- Other areas of the text include clear indications that no business enterprise is excluded due to the mere fact of operating within domestic jurisdiction only. One example is under Article 9 dealing with prevention and due diligence, where States are provided the possibility to “elect to exempt certain small and medium-sized undertakings from the purview of selected obligations under [the article on prevention] ...”. This indicates that generally small and medium-sized enterprises are intended to be covered under the scope of this provision and the treaty, and are not excluded by virtue of the fact that they are domestic enterprises. If small and medium domestic enterprises are already excluded from the scope of the text by virtue of the approach adopted under scope and definitions, then such a provision would not be needed from the start.
- So the zero draft seems to seek asserting the general principle that all business enterprises shall respect human rights, which basically makes the Guiding Principles’ language an integral part of a binding treaty, thus taking them a step forward. While doing that, the zero draft keeps the focus on the specific concerns emerging from transnational business conduct which requires international cooperation or will otherwise not be effectively addressed.
- This approach seems legitimate given the reality of economic and business practices in the world today and seems well suited for a multilateral Instrument that will primarily serve as a preventive and remedial instrument focusing on victims’ access to remedy and justice. Indeed, as articulated by the Chair and multiple participants in this discussion, this would be an Instrument primarily concerned with enforcement of rights in particular situations where there are jurisdictional obstacles to hold business enterprises liable for their misconducts.

- It is worth recalling that the Accountability and Remedy Project of OHCHR recognizes the particular challenges posed by ‘cross-border’ cases<sup>1</sup>, and defines those cases as ones “where the relevant facts have taken place in, the relevant actors are located in or the evidence needed to prove a case is located in more than one State”.

- Negotiating parties seeking further clarity and certainty in the negotiation outcome could seek clarifying language or footnotes, such as assertions that domestic laws to be developed in implementation of this Treaty would be done in a manner that does not discriminate among domestic entities or between domestic and foreign entities, although this should already be guaranteed as a result of obligations that States have, either deriving from constitutional law, or stemming from the principle of non-discrimination under international law.

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<sup>1</sup> Report of the United Nations High Commissioner for Human Rights, *Improving accountability and access to remedy for victims of business-related human rights abuse*, UN Doc. A/HRC/32/19 (2016), at para.24.