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**STATEMENT BY MR. SURYA DEVA
VICE-CHAIR OF THE WORKING GROUP ON THE ISSUE OF
HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND
OTHER BUSINESS ENTERPRISES**

4th Session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

Geneva

17 October 2018

Mr Chair, Excellences, distinguished delegates, ladies and gentlemen,

Let me begin by thanking the Chairperson-Rapporteur for inviting the UN Working Group on Business and Human Rights (Working Group) to participate in the fourth session of the open-ended intergovernmental working group.

As the Working Group has noted earlier, any future binding instrument should build on and complement the UN Guiding Principles on Business and Human Rights. We welcome the zero draft of the proposed legally binding international instrument as it draws on several aspects of the Guiding Principles, although there is scope for further alignment.

In these brief remarks today, I will highlight the Working Group's work relevant to Articles 10-12 of the zero draft and then offer some reflections on the current draft of these provisions.

Mr Chair,

One important contribution that the proposed legally binding instrument could make is to improve access to effective remedies for business-related human rights abuses. This could be done, for example, by requiring states to remove well-known barriers to obtaining remedies, by prescribing a range of sanctions for businesses that do not respect human rights, and by establishing a framework to facilitate mutual assistance and cooperation amongst states in transnational cases.

The Working Group in its 2017 report to the UN General Assembly outlined what an effective remedy means under the Guiding Principles (see [A/72/162](#)). This report stresses that rights holders should be central to the entire remedy process. The remedial process should be gender-sensitive and rights holders (including human rights defenders) should be able to seek remedies without any fear of victimization. Moreover, rights holders should be able to seek, obtain and enforce a "bouquet of remedies" which have preventive, redressive and deterrent elements.

Against this backdrop, let me make a few observations regarding Article 10. Article 10 of the zero draft envisages civil, criminal and administrative liabilities, but contains no details related to administrative penalties. Nor does the current draft give enough attention to preventive

remedies, which may arise due to non-compliance with mandatory human rights due diligence or otherwise.

To make sense, the obligation under Article 10(1) to impose civil, criminal or administrative sanctions on natural and legal persons under domestic law should be limited to regulatory targets within the territory or jurisdiction of the relevant States. It is also doubtful whether courts “may require, where needed, reversal of the burden of proof” under Article 10(4). Rather, legal reforms would be needed.

Article 10(8) seems to limit liability to “intentional” commission of human rights violations amounting to a criminal offence. This may be quite restrictive and not in line with existing State practice.

The liabilities currently contemplated under Article 10 are likely to involve courts or tribunals. While judicial mechanisms are at the core of ensuring access to effective remedies, the value of non-judicial state mechanisms such as national human rights institutions (NHRIs) should not be overlooked. The proposed instrument should, therefore, include a role for NHRIs in facilitating access to remedies.

Let me now touch upon Articles 11 and 12 concerning mutual legal assistance and international cooperation. Mutual legal assistance among states is critical to provide access to effective remedy, especially in transnational cases. A June 2017 report of the Working Group found that “despite numerous allegations implicating business in classic human rights violations and international crimes, investigations and prosecutions against companies are almost non-existent” (see [A/HRC/35/33](#)). The report, therefore, makes a series of recommendations on how to improve the effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights.

The value-added of the proposed binding instrument could be to galvanize States to take collective actions in cases in which a State would require assistance and cooperation of other States in conducting investigations, collecting evidence, initiating prosecutions, and enforcing judicial orders. The text of Article 11 should be based on existing frameworks and good practices that have proved to be workable. For example, if multiple courts having jurisdiction

over certain business-related human rights abuses give conflicting judgments, it is unclear how Article 11(9) would deal with recognition and enforcement of such judgments.

Article 12 contemplates partnership not only among States but also between States and civil society to raise awareness, build capacity, share good practices, and conduct research to promote business respect for human rights. We would suggest that NHRIs should also be part of such collaborative partnerships. To appreciate better the concerns of diverse rights holders, it would also be critical to engage civil society actors who work specifically on the rights of women, children, indigenous peoples, migrant workers, and persons with disabilities.

In closing, let me add that the proposed legally binding instrument should also draw on the guidance provided by the Accountability and Remedy Project of the Office of the United Nations High Commissioner for Human Rights (see [A/HRC/32/19](#)) as well as on the recommendations made by the European Union Agency for Fundamental Rights.

Thank you very much Mr Chair. The Working Group looks forward to engaging constructively in discussions about the content of the proposed binding instrument during this session and in future.