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## Human Rights Council

### Fortieth session

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Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Addendum to the report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights**

### **Note by the Secretariat**

#### *Summary*

The present addendum contains a compilation of oral statements delivered by States during the 4th session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights<sup>1</sup>. It has been prepared in accordance with paragraph 91 (b) of A/HRC/40/48. Only oral statements received by the Secretariat are part of this compilation. Statements received in English, French and Spanish have been reproduced in their original language. Statements received in Arabic, Chinese and Russian have been transcribed into English based on the English simultaneous interpretation during the session.

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<sup>1</sup> These statements have also been posted online at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>.

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## I. General statements

### A. States

#### 1. Algeria

Monsieur le Président,

Ma délégation se joint à la déclaration prononcée par le Togo au nom du Groupe africain. Ma délégation tient à vous féliciter, Monsieur le Président-rapporteur pour votre élection à la présidence de ce Groupe et vous assure de tout son soutien. L'Algérie reste attachée aux dispositions de la Résolution 26/9 du Conseil, et se félicite dans ce cadre de l'élaboration et de la présentation du projet zéro de traité sur les sociétés transnationales et autres entreprises et les droits de l'homme, qui sera discuté à l'occasion de cette session du Groupe de Travail.

L'Algérie considère que les activités des entreprises transnationales requièrent davantage d'encadrement juridique et institutionnel au niveau international afin de s'assurer qu'elles soient en conformité avec les normes universelles des droits de l'homme. Les activités de ces entreprises affectent de plusieurs façons la vie des personnes et des communautés. Aussi, est-il indispensable, d'accorder des voies de recours adéquates aux victimes et assurer que les entreprises transnationales soient soumises à l'obligation de reddition de compte en cas de violations des droits de l'homme, quel que soit l'endroit où elles réalisent leurs activités.

L'Algérie soutient l'idée que les entreprises transnationales pourraient participer d'une manière plus constructive aux efforts de développement des sociétés, en adoptant des approches responsables qui tiennent en considération les aspects économiques mais également éthiques, sociaux et environnementaux. Ceci, en collaboration avec les États et les autres parties prenantes. L'Algérie, estime que l'élaboration d'un instrument international juridiquement contraignant encadrant les activités des entreprises transnationales aura un effet important sur la promotion d'un équilibre entre la liberté d'entreprendre et les obligations qui incombent aux États, à commencer par le respect, de la protection et de la promotion des droits de l'homme, en particulier les droits économiques, sociaux et culturels.

Je vous remercie

#### 2. Argentina

Señor Presidente-Relator:

La Argentina desea felicitarlo por su elección y augurarle éxito al frente de esta sesión. Hemos leído con detenimiento el proyecto de instrumento remitido el pasado mes de julio, de lo que resultan los siguientes comentarios generales:

Tras una atenta lectura del proyecto, vale señalar que se estima conveniente avanzar en el tema en base al trabajo ya realizado. En ese sentido, cabe tener presente que se han aprobado múltiples resoluciones, entre las que se destaca la adopción de los "Principios Rectores sobre las Empresas y Derechos Humanos: puesta en práctica del marco de las Naciones Unidas para 'Proteger, Respetar y Remediar'". Al respecto, conviene tomar en consideración la complementariedad de ambas iniciativas, para favorecer la coherencia y evitar superposiciones.

También es menester tener en cuentas las "Lineas Directrices de la Organización para la Cooperación y el Desarrollo Económicos (OCDE) para Empresas Multinacionales", que establecen los principios y buenas prácticas empresariales que comparten los gobiernos adherentes y proporcionan puntos de referencias para las empresas en temas como: derechos humanos, publicación de informaciones (transparencia), empleo y relaciones laborales, medio ambiente, soborno, intereses de los consumidores, ciencia y tecnología, competencia y fiscalidad.

Estos principios buscan generar una conducta empresarial responsable compatible con las disposiciones legales aplicables. En tal sentido, se hace notar que en el proyecto de instrumento no se mencionan tales lineamientos.

Por otra parte, advertimos que la introducción de concepto de responsabilidad de las personas jurídicas, disponiendo que los Estados lo incorporen en sus ordenamientos jurídicos internos, podría traer aparejados problemas significativos ya que la personalidad internacional de las personas jurídicas en el derecho internacional no constituye un concepto libre de controversias, desde que el mismo se reconoce sólo en forma restrictiva y limitada.

En este sentido, el proyecto introduciría un nuevo concepto de responsabilidad de las personas jurídicas vinculada a violaciones a los DDHH, que además incluiría a las personas físicas.

En lo que hace a la responsabilidad penal, el proyecto establece la obligación de los Estados de incorporar o implementar normativa sobre jurisdicción universal, concepto que, cabe señalar, no es reconocido ni aplicado universalmente por la territorialidad que caracteriza al derecho penal.

Se propone que el proyecto tenga, per se, una jerarquía superior al resto de la normativa en la materia, constituyéndose en una referencia con respecto a la cual los Estados deberían ajustar la negociación e interpretación de sus futuros acuerdos de comercio e inversión, incluso con terceros Estados. De este modo, los Estados verían restringidas sus decisiones de política comercial, debiendo someterlas al test de compatibilidad con las disposiciones de este proyecto.

Por otra parte, desde un punto de vista de consistencia material y jurídica, puede mencionarse lo siguiente:

Con respecto a la definición de víctimas cabe resaltar que hay una falta de precisión en su formulación que dificulta conocer los límites necesarios para el ámbito de aplicación personal del proyecto. Se incluye a la familia inmediata o dependientes de la víctima directa y personas que han sufrido daño interviniendo para asistir a las víctimas o para prevenir la victimización. En otros términos, bajo dicha definición podría considerarse víctimas un conjunto indefinido de personas, abriendo la posibilidad de expandir de forma tal la legitimación activa para incoar acciones que conlleve el riesgo de desvirtuar los objetivos del sistema.

Con respecto a la prohibición de las cláusulas de prescripción para incoar acciones en el caso de violación de los derechos humanos que constituyan crímenes a la luz del derecho internacional, cabe señalar que la imprescriptibilidad puede variar dependiendo de lo que los ordenamientos jurídicos de cada Estado establezcan, pudiendo no ser un concepto uniforme en todos los países.

En conclusión, nos parece que toda iniciativa tendiente a fortalecer los derechos humanos es positiva. No obstante, atento a todo lo dicho resulta evidente que debe procederse con cautela, ya que aún queda por realizar mucho trabajo para poder avanzar en un acuerdo de naturaleza vinculante. Si bien la Argentina reconoce los esfuerzos que se están realizando para elaborar un tratado internacional vinculante conforme la resolución 26/9 del Consejo de Derechos Humanos, en propuestas de este tipo se torna imperativo extremar la prudencia en el análisis para sopesar el impacto que tendrían no sólo en el ámbito del derecho internacional de los derechos humanos, sino también en el desarrollo del comercio internacional.

### **3. Azerbaijan**

Thank you Mr. Chairman,

We wish to join other delegations in congratulating you on your election and wish you success in your future endeavor.

Furthermore, we wish to thank you and the delegation of Ecuador for preparing and submitting the zero draft of the legally binding instrument in due time and for the substantial informal negotiations undertaken with the aim to prepare this draft.

We have carefully studied the zero draft of the legally binding instrument and we look forward to further engage constructively in substantial negotiations this week with you and all interested Parties with the view of improving and strengthening the draft legal document.

We believe that the respect for sovereignty and territorial integrity of Member States is the key precondition for any further fruitful engagement, and business is no exception. With this approach we can obtain global peace and achieve sustainable development.

TNCs and OBEs are emerging global players and they too shall respect norms and principles of international law, including international humanitarian law.

We are deeply alarmed with the cases of corporate human rights abuses, especially when such cases are taking place during conflict and post conflict situations, as well as in times of natural and manmade disasters, terror acts and other times of human sufferings, when already miserable situation of victims may be often intentionally misused by TNCs and OBEs to generate revenue. Such cases shall be eliminated and further prevented.

We may not be able to eliminate all corporate human right abuses with the elaboration of the legally binding document, although this is our ultimate goal, however we will give victims the instrument to seek justice and effective remedy.

Mr. Chairman,

We reiterate our support to the process of elaborating international legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises and remain committed to the process in line with the mandate of Resolution 26/9.

Thank you, Mr. Chairman.

#### 4. **Bolivia**

Jallalla Sr. Presidente,

En primer lugar, deseamos felicitar a S.E. Embajador Gallegos por su nombramiento como Presidente Relator, estamos seguros que bajo su liderazgo el grupo de trabajo continuará avanzando en sus labores.

El Estado Plurinacional de Bolivia apoya el mandato del Grupo de Trabajo para elaborar un instrumento jurídicamente vinculante sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos. Esta es una tarea de gran importancia a fin de cerrar el vacío legal que existe en el derecho internacional para la protección de los derechos humanos en casos en los cuales los perpetradores evaden la legislación nacional utilizando sus estructuras transnacionales. En ese sentido saludamos la celebración de esta 4ta sesión.

Bolivia es un país que acoge inversiones internacionales, las cuales consideramos de gran importancia para promover los objetivos de desarrollo de nuestro país. Al mismo tiempo, las empresas que operan en nuestro territorio deben respetar la normativa nacional incluyendo la normativa sobre derechos humanos. Vemos en ese sentido que no existe contradicción en la promoción de las inversiones y la promoción de reglas claras para el respeto de los derechos humanos, por el contrario, el instrumento vinculante con obligaciones claras para todas las partes podría contribuir a generar mayor predictibilidad legal a nivel internacional, la cual tendría impactos positivos en la proyección de las inversiones.

Agradecemos a la Presidencia por haber circulado el primer borrador del instrumento vinculante con la anticipación debida, y destacamos la apertura e inclusividad de las consultas que se han venido realizando en esta materia. Vemos que en el borrador de instrumento se han tomado en cuenta diferentes posiciones preliminares de conformidad con las discusiones de las pasadas sesiones, proporcionando así una buena base sobre la cual podemos avanzar en la elaboración de este instrumento vinculante. Al mismo tiempo, consideramos que el

instrumento necesita incluir un mayor énfasis a las responsabilidades que tienen las empresas transnacionales de respetar los derechos humanos, así como las obligaciones de los Estados de origen de estas empresas de cooperar en la prevención y reparación de los daños ocasionados por las mismas en sus operaciones transnacionales.

Señor Presidente,

Nuestro país participará de manera constructiva durante las discusiones esta semana, y alentamos a todos los países a poder proporcionar sus experiencias y propuestas para enriquecer el documento. Muchas gracias.

## 5. Brazil

Mr. President,

I take this opportunity to congratulate Ambassador Luis Gallegos for his election as the chair of the Open Ended Working Group on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

I would like to thank Ecuador for presenting the zero draft of the binding instrument on business and human rights.

As Brazil has highlighted on previous occasions, we reiterate our view that limiting the scope of the instrument to transnational activities of companies may create protection gaps and render implementation ineffective. In line with the Guiding Principles on Business and Human Rights (UNGPs), an internationally binding instrument should apply to all business enterprises, regardless of size, sector, location, ownership and structure.

Brazil believes that the UNGPs should be the basis for the future binding instrument. We should build on the existing guidelines to elaborate the normative framework for business enterprises, in all their activities. In this regard, we believe that the proposed definition of "transnational activities" gives rise to the perception that certain categories of companies are not obliged to follow human rights standards and that states need not regulate them.

We are pleased to note that the draft text addresses the crucial area of prevention, in order to avoid human rights violations and abuses from occurring in the first place. In this sense, Brazil shares the view that states hold the primary responsibility under international law for the promotion and protection of human rights. We also believe that it is incumbent upon governments to exercise due diligence to prevent violations and abuses and ensure accountability for the actions of business enterprises that take place within its territory or jurisdiction.

As the draft currently stands, however, it is not clear to us how due diligence measures can be undertaken on the "transnational activities" of business enterprises, since these business operations by definition normally take place in other jurisdictions. The text appears, also, to be silent on the question of due diligence on local business activities of transnational enterprises, which may also have a bearing on human rights. Likewise, Brazil considers that the definition of the appropriate jurisdiction, the applicable law and the consistency of international obligations are central to the operationalization of the proposed agreement. We understand that the "international activities" undertaken by business enterprises poses challenges for state authorities in the enforcement of human rights standards, which merits special consideration. As contained in the draft, the proposed disciplines raise risks of unwarranted litigation, forum shopping and legal uncertainty which may hamper business activities, without necessarily protecting the human rights of affected individuals.

Given the complexity of the issues raised in the draft binding instrument and the potential impact on foreign activities of business enterprises, Brazil believes that we must proceed with caution in our deliberations, building consensus and bridging gaps to reach a common understanding.

In this regard, we welcome the initiative taken by Ecuador to publish the proposed work program for the current OEIWG meeting, together with draft program for the next session.

Brazil is convinced that the current session can contribute to improve our understanding of the draft and promote convergence between negotiating parties. There is a long road ahead. We are ready to engage constructively with member states and civil society on this important matter.

I thank you.

## 6. Chile

Señor Presidente-Relator,

En primer lugar me permito destacar la adhesión de Chile a los comentarios realizados por Perú en nombre del grupo de países anteriormente señalado en su intervención. Quiero también reiterar nuestras felicitaciones por su elección en este cargo y nos cabe la certeza que continuará con todos sus esfuerzos, avanzando en construir un acuerdo que sea el resultado de la riqueza de opiniones que existen sobre esta materia.

Para Chile el tema de las empresas y derechos humanos es un aspecto fundamental en la construcción de nuestra sociedad. Entendemos que debemos avanzar hacia el desarrollo, favoreciendo el emprendimiento y entregando todas las condiciones para que la economía crezca. Pero este objetivo debe estar entrelazado con una visión integral y sustentable del desarrollo, en el cual el respeto y promoción de los derechos humanos son principios primordiales dentro de la visión de país que tenemos.

Es por ello que reconocemos como punto central para avanzar en este camino el cumplimiento de los Principios Rectores de Naciones Unidas sobre Derechos Humanos y Empresas. En efecto, los principios rectores son la piedra fundacional y aceptada por todos en esta materia y bajo estos preceptos, Chile ha elaborado el primer Plan de Acción Nacional de Derechos Humanos y Empresas, cuyo proceso tomó más de dos años y en el cual participaron tanto agentes públicos como las empresas y la sociedad civil. El Plan se encuentra actualmente en ejecución y tiene por finalidad generar mecanismos para evitar posibles impactos negativos en los derechos humanos que fueran generados por las empresas en conformidad con los Principios Rectores de Naciones Unidas

Como se podrá apreciar, Chile es un país comprometido con avanzar en crear condiciones para cumplir los principios rectores y en ese contexto, valoramos el esfuerzo de llevar adelante este proceso de negociación, que busca dotar de un marco normativo internacional que fortalezca la agenda de derechos humanos y empresas. Valoramos también el que el texto centre sus esfuerzos en la prevención y reparación de impactos, aspectos centrales de los Principios Rectores.

Por tratarse de un instrumento de derechos humanos, consideramos que los alcances del mismo deben estar dados por los potenciales impactos a estos derechos, no por el tipo de empresas que los cometan, como bien lo señalan los Principios Rectores. Por esta razón, somos de la opinión, tal como lo hemos manifestado en ocasiones anteriores, que el texto debería ser amplio en su capacidad y velar por el acceso a remedio de las víctimas a las violaciones en sus derechos humanos por parte de cualquier entidad empresarial no sólo abarcando a las empresas denominadas transnacionales, puesto que entendemos que finalmente es responsabilidad del Estado velar por el cumplimiento de las normas por parte de las empresas.

Por último, queremos reiterar nuestra convicción respecto a que este proceso de negociación no obsta en ninguna forma las obligaciones de los Estados en materia de derechos humanos y empresas, como hemos señalado anteriormente consideramos que ambos procesos son complementarios y relevantes. Por esta razón esperamos que todos continuemos avanzando en la implementación nacional del marco derechos humanos y empresas a través de Planes Nacionales u otras acciones que permitan progresar en la tarea de proteger, respetar y garantizar derechos de las personas frente a actividades de terceros, incluyendo empresas.

Señor Presidente-Relator,

Esperamos contribuir en las discusiones que se inician con una actitud constructiva y buscando equilibrios que permitan a todos sentirse representados con la dinámica de negociaciones. Creemos que este proceso debe ser gradual, sistemático e ir avanzado de forma progresiva, consiguiendo que los distintos puntos a tratarse vayan madurando, a lo largo de esta y las próximas sesiones que se convoquen de este Grupo de Trabajo, de esta forma podremos contar con un instrumento que pueda aplicarse de forma eficaz. Quisiéramos también dejar constancia que nos reservamos la atribución de manifestar nuevos comentarios, sobre los temas que se tratarán en la agenda durante esta semana y en las nuevas sesiones que se convoquen del Grupo.

No nos cabe duda que hay un consenso general sobre la importancia de esta temática, y en ese contexto, confiamos en su experiencia y capacidad que ha demostrado para liderar esta sesión y de esta forma dar un paso más hacia el objetivo común que es lograr un instrumento que sea representativo de las diferentes visiones y que sume la mayor cantidad de voluntades posibles.

Muchas gracias

## 7. China

Mr. Chairperson,

The Chinese delegation thanks the current and previous chairpersons of the Working Group and the Government of Equator and its permanent mission for the huge amount of efforts and contribution they have made to promote deliberations within the Working Group. The current session of the WG will focus on discussing the zero draft, the Chinese delegation wishes to make the following preliminary general observations in this regard.

I. Human rights and development should be promoted. Human Rights Council resolution 26/9 mandated this Working Group to regulate the activities of TNCs from the perspective of international human rights law. The same resolution also acknowledges that “TNCs have the capacity to foster economic well-being, development, technological improvement and wealth”. The UN 2030 Agenda for sustainable development also recognizes businesses as a driver for development. As pointed out in the outcome document, i.e. resolution A/RES/60/1, of the 2005 World Summit, development and human rights are both among pillars of the United Nations system which are “interlinked and mutually reinforcing”. We are of the view that the proposed legal instrument give equal treatment to the considerations from perspectives of both human rights and development and the pursuit to strengthen the human rights protection and remedy mechanism shall not affect the positive roles businesses could play in promoting development among all countries.

II. Legality should serve as a guiding principle. As introduced by the Chairperson, the current zero draft is victims-oriented and aims to establishing a legal mechanism to provide effective remedy to victims of alleged human rights abuses by TNCs. Meanwhile, under the general principle of law, such an accountability mechanism should be guided by the principle of legality to ensure, inter alia, clarity, certainty and predictability of relevant rules and to embody justice. It includes the need to define the scope of relevant obligations and legal liabilities in accordance with universally accepted international treaties and customary international laws and in conformity with the principle of reasonableness and proportionality. This will also be conducive to the goal of promoting human rights and development at the same time mentioned in the first point above.

III. Maximum consensus should be sought. The process of consultation over the previous three years or more has been conducted in a transparent and inclusive manner. In addition to member states, many other stakeholders, including civil society representatives, have provided valuable and professional opinions and recommendations which we warmly welcome and to which we attach great importance. Meanwhile, the resolution 26/9 has clearly defined the ‘inter-governmental’ nature of this Working Group, hence consensus by all States holds key to securing universal acceptance for the future legal instrument and its genuine effectiveness. We note with appreciation the huge amount of work that chairpersons, current and previous, have put into seeking consensus among member states. We encourage the chairperson to continue this endeavour. We also encourage countries to take a cooperative and constructive approach to the quest for consensus. The Chinese delegation is ready to work with other parties in our joint effort for the success of the Working Group.

Thank you, Mr. Chairperson.

## 8. Colombia

Señor Presidente,

Esta Cuarta Sesión del grupo de trabajo intergubernamental tiene como propósito iniciar la negociación del proyecto titulado “Instrumento jurídicamente vinculante para regular, en el marco del derecho internacional de los derechos humanos, las actividades de las empresas



transnacionales y otras empresas”. Y como toda negociación de un “borrador cero” deberá recoger las diversas visiones que sobre el tema han expresado los Estados a lo largo de las anteriores Sesiones.

Colombia ha sostenido que el éxito de los Principios Rectores sobre las Empresas y Derechos Humanos de Naciones Unidas es su voluntariedad, y que cada Estado debe desarrollarlos teniendo en cuenta sus necesidades y su contexto.

El proceso de desarrollo e implementación de los Principios Rectores en Colombia ha sido fructífero. Es de destacar la importancia de los Planes Nacionales de Acción sobre Derecho Humanos y Empresas, herramientas fundamentales para este propósito. Con respeto alentamos a otros Estados a desarrollar sus Planes Nacionales, lo que constituye un paso fundamental para seguir avanzando hacia proyectos comunes.

Somos conscientes de que el borrador del instrumento vinculante persigue un fin positivo y plantea el interés de proteger los derechos humanos en el marco de las actividades de las empresas transnacionales y otras empresas. Al enfatizar en mecanismos de remediación y reparación, es oportuno considerar la incorporación de elementos que permitan visibilizar de manera equilibrada los tres pilares en materia de empresas y derechos humanos, a saber “proteger, respetar y remediar”.

Por otra parte, la mayoría de las disposiciones normativas del borrador del Tratado trasladan la responsabilidad a los Estados por violaciones cometidas por las empresas. Por ello, será necesario surtir discusiones orientadas a precisar aspectos como la responsabilidad extraterritorial de los Estados (jurisdicción extraterritorial), la complementariedad y la cooperación jurisdiccional, que ofrezcan claridad frente a posibles conflictos de jurisdicción.

Este proceso de negociación que hoy inicia es un primer paso para la construcción colectiva de un instrumento que sea viable, aplicable y sostenible en el largo plazo.

Muchas gracias.

## 9. Costa Rica

Muchas gracias señor Presidente,

Costa Rica le felicita por su elección y le augura éxitos en sus trabajos. Nos complace saber que su amplia experiencia estará acompañándonos en este proceso. Le agradecemos por la circulación del primer borrador Instrumento internacional legalmente vinculante sobre corporaciones transnacionales, otras empresas y su relación con los Derechos Humanos.

Mi país seguirá con interés las deliberaciones del Grupo de trabajo abierto, para lo cual ha llevado adelante una serie de consultas inter-institucionales e intersectoriales, con miras a analizar el contenido propuesto en el borrador del Tratado.

Costa Rica es un país comprometido con la permanente actualización del derecho internacional de los derechos humanos, ya sea para resolver rezagos históricos o para mejorar las capacidades de implementar en la práctica las normas vigentes. En el campo que nos ocupa, reconocemos que en la realidad de la economía globalizada, la integración vertical de las industrias y las complejas cadenas globales de valor, efectivamente nos pone ante un escenario que debemos abordar con visión y convicción de proteger los derechos humanos de las personas. Mi país cuenta con un sólido y robusto marco de tutela de los derechos humanos, incluidos los derechos laborales desde hace setenta y cinco (75) y comprendemos la necesidad de seguir fortaleciendo el mismo acorde con las demandas de la nueva dinámica global y modelos de desarrollo.

Costa Rica se abstuvo en el momento de la adopción de la resolución veintiséis raya nueve (26/9)<sup>2</sup> y manifiesta respetuosamente que hoy en día mantenemos algunas preocupaciones sobre el texto propuesto.

<sup>2</sup> Julio 2014.

Destacamos los acuerdos ya logrados por la comunidad internacional en reconocimiento de las responsabilidades que corresponden a los Estados y a las empresas. Por esta razón, en la tarea que nos ocupa, debemos preguntarnos de qué manera este instrumento se relaciona con toda la gobernanza existente en materia de derechos humanos, derechos laborales, comercio, y otro tipo de plataformas que la OIT denomina la “gobernanza pública y privada”, cuando se refiere al tema del trabajo decente en las cadenas globales de valor. Manifiesta la OIT que dada la variedad y cantidad de iniciativas, tipos, normas, etc, existentes, el espacio regulatorio está tornándose confuso, dificultando la coherencia y coordinación entre sí, lo cual afecta la capacidad de los gobiernos de implementar todos los compromisos. Por ello debemos avanzar en estas discusiones con una reflexión clara sobre la complementariedad de este instrumento con el resto de la gobernanza, incluyendo por supuesto los Principios Rectores aprobados por unanimidad por este Consejo, la maquinaria de la OIT y el sistema de Tratados de Derechos Humanos de las Naciones Unidas.

En segundo lugar, conocemos que uno de los principales desafíos para el respeto de los derechos humanos es la capacidad de los Estados nacionales para garantizar la observancia de las normas de derechos humanos de distinta índole. Y si consideramos que las cadenas globales hoy día desarrollan a través de la relación entre empresas transnacionales y empresas locales contratadas por las primeras, limitar el ámbito de este instrumento solo a las actividades de tipo transnacional abre una asimetría y un abismo de protección para las personas que no están afectadas por actividades de tipo transnacional.

Por último, la complejidad del desafío que tenemos delante de nosotros nos lleva a plantearnos si este instrumento busca resolver comprensivamente todos los desafíos que se encuentran a todo lo largo de las cadenas de valor o si buscará enfocarse en llenar un vacío legal o procedimental, de cooperación intergubernamental para solventar problemas que pueden derivar de las complejas estructuras legales de las cadenas globales, en relación con los derechos humanos y que trascienden las fronteras del Estado nacional.

Hemos introducido algunas temáticas que han resultado de nuestras consultas, pero mi delegación se referirá en detalle a algunos artículos del borrador cero, conforme avancemos en el programa de trabajo esta semana. Algunas de nuestras preocupaciones versan sobre el ámbito de aplicación del instrumento; la relación de las corporaciones transnacionales vis à vis las empresas nacionales en el marco normativo propuesto; la clarificación de algunos términos jurídicos y procesos que aún aparecen indefinidos. En este sentido, Costa Rica manifiesta su deseo de continuar la promoción de la inversión extranjera en suelo costarricense, siempre en un marco de fiel apego a la ya existente normativa institucional y de derechos humanos y a la consolidada tradición de Estado de derecho en mi país.

Muchas gracias.

## **10. Cuba**

Señor Presidente:

Cuba da la bienvenida a esta nueva sesión del Grupo de Trabajo intergubernamental sobre Derechos Humanos y empresas transnacionales, y le agradecemos al Presidente por la preparación y circulación en tiempo de los documentos que guiarán nuestros trabajos durante esta semana.

Cuba reitera su apoyo a las labores del grupo, y en particular al inicio de la negociación de un documento vinculante sobre el tema.

Resulta necesario adoptar medidas a escala internacional, y crear mecanismos efectivos que garanticen que aquellas empresas que sean responsables de haber cometido violaciones de los derechos humanos y delitos internacionales, sean investigadas y enjuiciadas por los daños contra las personas, el medio ambiente, e incluso los recursos de los países.

Son muchos los ejemplos, en múltiples países y regiones, que reflejan la problemática actual que constituye el accionar de las empresas transnacionales y las diversas violaciones de derechos humanos que quedan impunes, en buena medida por carecer de un marco legal internacional al respecto.

Las deliberaciones de este Grupo intergubernamental serán decisivas para coordinar y fortalecer los esfuerzos nacionales y para constituir un marco legal internacional que permita unificar los mecanismos de protección a las víctimas ante las transnacionales, luchar contra la impunidad y asegurar su reparación efectiva.

Somos conscientes del gran reto que tenemos por delante, será un largo camino, en el que se requerirá la voluntad y la participación constructiva de todos los estados y de la sociedad civil para lograr avanzar.

Muchas gracias

## 11. Ecuador

Señor Presidente,

A nombre de la Delegación del Ecuador le transmito mi felicitación por su designación como presidente-relator de este grupo de trabajo y mi deseo por el éxito en sus funciones.

Agradecemos la presentación realizada por la Presidencia del Borrador cero sobre el Instrumento jurídicamente vinculante para regular en el marco del derecho internacional de los derechos humanos, las actividades de las empresas transnacionales y otras empresas. Creemos que este documento constituye un punto de partida para las negociaciones y que ha recogido las inquietudes y preocupaciones de los Estados, agencias internacionales, organizaciones de la sociedad civil, representantes de la academia, trabajadores y representantes del sector empresarial.

La creación de este grupo de trabajo dio respuesta a un clamor de la sociedad civil y de las víctimas de las violaciones a los derechos humanos por parte de las empresas, que han buscado por más de cuatro décadas llenar un vacío en la normativa internacional de los derechos humanos. Adicionalmente, la propuesta busca que se equilibre en alguna medida la protección legal con la que cuenta el sector corporativo a través de convenios de inversión o de comercio, frente a las pocas obligaciones que tienen, entre las cuales se ha soslayado tradicionalmente el cumplimiento de los derechos humanos.

Estamos convencidos de que la elaboración de un instrumento internacional vinculante que aborde la temática de los derechos humanos y las empresas no afectará de ninguna manera las inversiones especialmente en países en desarrollo. Lo que busca esta iniciativa es que dichas inversiones se efectúen en igualdad de condiciones para el sector corporativo, bajo la observancia a los derechos humanos y evitando que, como sucede en la actualidad, algunas empresas se beneficien económicamente de una competencia desleal, reflejada en la contratación de niños, el trabajo en condiciones de esclavitud, la explotación irreflexiva de recursos naturales, el acaparamiento de fuentes de agua, la destrucción del ambiente, el desalojo de pueblos y comunidades autóctonos, entre otras acciones recurrentes.

También queremos resaltar que el tema de la creación de un instrumento vinculante ha venido ganando adeptos y apoyos a nivel internacional, lo que se ha reflejado en la amplia presencia de representantes de Estados en las sesiones del grupo de trabajo, y los múltiples debates y discusiones que se han dado tanto en el ámbito académico, como en los espacios gubernamentales.

Mi delegación desea expresar su agradecimiento al Parlamento Europeo por la Resolución de 4 de octubre de 2018, mediante la cual señala su apoyo al proceso de elaboración de un instrumento vinculante, así como al trabajo efectuado hasta ahora por la presidencia ecuatoriana. Este texto rescata todas las normas internacionales y comunitarias vigentes en la Unión Europea que tienen como fin proteger los derechos humanos de abusos corporativos y que bien pueden servir como una de las fuentes para el instrumento que estamos elaborando.

Sobre la propuesta del Presidente, contenida en el Borrador cero, deseamos realizar las siguientes puntualizaciones de carácter general:

Primero.- debe tomarse en consideración que uno de los pilares fundamentales del borrador de texto jurídicamente vinculante es su enfoque centrado en garantizar remedio y acceso a la justicia para las víctimas de las violaciones. Esta Delegación considera que ésta es una propuesta razonable, útil y coherente. Sin embargo, la misma podría reforzarse en algunos temas.

Segundo.- en cuanto al relacionamiento entre los Principios Rectores de Naciones Unidas en materia de transnacionales y derechos humanos con el propio instrumento, como ya lo puso de manifiesto Kate Gilmore, y como ha venido sosteniendo el Ecuador, ambos procesos son complementarios, y no excluyentes y se refuerzan mutuamente.

En el caso del Borrador cero se nota en varios párrafos que los Principios Rectores se tomaron como base para elaborar el mismo.

Tercero.- consideramos que el texto debe armonizarse, unificando conceptos y precisando el lenguaje.

Cuarto.- el Ecuador elogia la previsión de la creación de un Comité para recibir quejas individuales en materia de derechos humanos y actuaciones de empresas.

Quinto.- la propuesta de borrador cero se concentra en la situación de las víctimas, la responsabilidad de las empresas, la prevención, el control y la reparación a los daños causados y sus efectos, tomando en cuenta toda la cadena de valor, suministro y producción en la actividad empresarial.

Tal planteamiento institucional permitirá mantener coherencia con las técnicas de seguimiento y monitoreo fundamentalmente centradas en efectuar exámenes país a partir de la posibilidad de recibir comunicaciones de las personas que se sientan afectadas, de manera individual o colectiva, de forma similar a todos los otros órganos de tratados.

Finalmente, deseamos poner de manifiesto la apertura del Ecuador para continuar colaborando con el Grupo de Trabajo y con el Presidente en tan delicadas funciones.

Asimismo, invitamos a los Estados y otros actores que se encuentran en esta sesión a que de manera constructiva participemos en el debate.

Muchas gracias Señor Presidente.

## 12. Egypt

Thank you Chair,

Egypt aligns itself with the statement delivered by Togo on behalf of the African Group.

My delegation wishes at the outset to congratulate you on your election as the Chairperson-Rapporteur of the working group, We are confident that under your able leadership and guidance, the working group will pursue its work with a view to successfully implement its mandate.

Egypt reiterates its full support to the mandate of the open ended intergovernmental working group on transnational corporation and other business enterprises with respect to human rights as stipulated clearly in Human Rights Council Resolution 26/9, aiming at redressing a legal gap in the international legal order, thus strengthening the universality, interdependency and indivisibility of human rights for all without discrimination on any ground ensuring that no one is left behind. We firmly believe that the mandate of the IGWG will end by the completion of the elaboration of the legally binding instrument.

Mr. Chair,

While recognizing the economic benefits of the transnational corporation and other business enterprises and their role supporting socio economic development efforts in solidarity with the host country, and while stressing that the primary responsibility for the promotion and the protection of human rights and fundamental freedoms lies with the state, we believe that the creation of an international legally binding instrument is of paramount importance, and that should be done in complementarity with other efforts exerted in other frameworks including the UN guiding principles for business and human rights.

Against this background, Egypt would like to commend the work done by the chairmanship during the last period and welcome the preparation of the Draft legally binding instrument and its draft Protocol, my delegation will be interacting positively expressing our comments and remarks on the two documents, in a constructive manner with view to strengthening their content and finalizing them as soon as possible allowing the victims of corporate human

rights abuses to legally defend their rights and ensuring promoting and protecting human rights for all.

As general remarks on the draft text, we underline the importance of reaching an overall balanced text that takes into consideration the importance of encouraging foreign direct investments and protecting the rights of the investors in accordance with national laws and international agreements on one hand, as well as respecting human rights obligations by those investors on the other hand, with view to the important role of TNCs and OBEs in realizing socio economic development. In the same vein, a reference shall be made in the text to the sovereign right of the state to regulate and organize the investment activities on its territory with view to implementing its national development plans. In addition, a differentiation shall be made throughout the text between the obligations of the host country and the home country of the TNCs and OBEs, for example the home country shall provide the necessary guidance to the TNCs to ensure the respect of human rights. Throughout the discussions held in the previous sessions of the IGWG, participants emphasized the need to hold the violators of human rights in the context of activities of the TNCs and OBEs accountable and that shall be the purpose and the object of the legally binding instrument.

I thank you Chair

### 13. France

La France appuie l'intervention de l'Union européenne.

La France est très préoccupée des violations des droits de l'Homme qui peuvent résulter de l'activité directe ou indirecte de certaines entreprises, particulièrement dans les domaines de l'extraction, mais aussi dans l'industrie et les services, à tous les niveaux de la chaîne d'approvisionnement. La France estime que l'action internationale dans ce domaine est un impératif pour permettre aux victimes un recours effectif.

L'Union européenne dispose en matière de respect des droits de l'Homme en entreprise d'un dispositif aux standards parmi les plus élevés qui doit être pris pour modèle.

S'agissant de la judiciarisation des délits ou crimes commis par les entreprises contre les droits de l'Homme, il est souhaitable de circonscrire le champ de la matière pénale à ce qui apparaît comme réaliste à l'échelle mondiale en s'inspirant des accords internationaux déjà existants de coopération judiciaire (conventions de la Haye de 1965, 1970, 1980). La France invite tous les Etats à les ratifier.

Au niveau national, la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre promulguée le 27 mars 2017 a complété le dispositif normatif applicable en France en matière de responsabilité sociétale des entreprises. Cette loi, adoptée à l'initiative de M. le député Dominique Potier, a permis d'étendre la responsabilité juridique des multinationales aux violations des droits de l'homme sur toute la sphère d'influence, et notamment sur les chaînes de sous-traitance des multinationales, que ce soit sur le territoire national ou non. Dès cette année, les entreprises concernées ont élaboré et publié leurs plans de prévention, dont elles devront rendre compte chaque année.

La France est aussi très engagée dans la mise en œuvre des principes directeurs de l'OCDE à l'intention des entreprises multinationales afin qu'elles adoptent un comportement responsable et éthique. Les activités du point de contact national français, dont la structure tripartite associe des représentants des syndicats, des entreprises et du gouvernement, sont à cet égard considérées comme exemplaires.

La version du projet de traité diffusée en juillet par la présidence équatorienne inclut des considérations plus réalistes et pragmatiques que les éléments diffusés antérieurement. La France souhaite que les règles de fonctionnement du groupe de travail soient inclusives, coopératives, et respectent les règles de procédure établies pour les comités de l'Assemblée générale des Nations Unies.

Le groupe tiendra cette semaine des discussions sur le champ d'application et les définitions posés dans le projet de traité : la France tient à rappeler que la prise en compte de l'ensemble des entreprises et non seulement des entreprises multinationales, apparaît à nos yeux comme

une condition nécessaire à l'universalité et à l'efficacité de l'action internationale en ce domaine.

Comme nos partenaires européens, nous attachons une grande importance aux principes directeurs des Nations unies en matière d'entreprises et de droits de l'Homme, et à leur appropriation par l'ensemble des acteurs.

Nous estimons qu'il est également crucial que l'ensemble des parties prenantes de la société civile et du secteur privé contribue au travail de cette session. C'est une condition essentielle pour mobiliser l'expertise et permettre une appropriation de nos travaux par l'ensemble des acteurs concernés.

La France rappelle qu'elle souhaite œuvrer à une réponse internationale cohérente et concertée aux violations constatées.

Je vous remercie.

#### 14. **India**

Thank You Mr. Chair,

1. At the outset, India would like to thank the Deputy High Commissioner for Human Rights for her opening remarks. We also congratulate you for your election as the Chairperson-Rapporteur to steer the proceedings of this session. India has always appreciated your efforts to push forward this process following HRC Resolution 26/9. The welcome remarks by the keynote speaker were also pertinent and comprehensive.

Mr. Chair,

2. India places on record its appreciation for the efforts put in by the Permanent Mission of Ecuador to the United Nations and other International Organizations in Geneva and the Secretariat for the timely transmission of the zero draft of the proposed Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights. This has enabled us to hold intensive internal consultations in our capital on the subject and we will share our interventions on every article as and when they come up for discussion. We also have a delegation from our Ministry of Corporate Affairs to take part in the discussions.

Mr. Chair,

3. Reaffirming the global commitment to sustainable development, the Hon. Prime Minister of India at the United Nations Sustainable Development Summit in 2015 had stated that "Nations have a national responsibility for sustainable development". The 2030 Agenda for Sustainable Development as adopted by the United Nations General Assembly (UNGA) also recognises the business sector as a key partner for the United Nations and governments to achieve the sustainable development goals. Considering the global expansion of businesses, the international community has increasingly felt the need to recognise the corporate responsibility of businesses to respect human rights.

4. Business enterprises play a key role and impact the lives of people with their activities. In the international forums, deliberations have been now going on for almost five decades on the subject of regulation of the activities of transnational corporations so as to ensure corporate social responsibility and respect for human rights. A significant achievement on this subject was the adoption of the United Nations Guiding Principles on Business and Human Rights by the United Nations Human Rights Council in 2011.

Mr. Chair,

5. On the domestic front, India has made several positive strides in recognising responsibility of businesses towards the society at large. The recent reforms in corporate law culminating in the enactment of the Companies Act, 2013 have witnessed that the Indian legal framework has moved towards a stakeholder model of governance from a shareholder model of governance. India is the only country that recognises in its corporate law, the duty of businesses to contribute to social development. This has been complemented by voluntary measures such as the National Voluntary Guidelines on Social, Environmental and Economic

Responsibilities of Businesses, 2011 that take into account the UNGP framework. These National Voluntary Guidelines are being further updated.

Mr. Chair,

6. The process of the HRC Resolution 26/9 of 2014 has mandated this Open-ended Intergovernmental Working Group (OEIGWG) with an important responsibility to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. Unlike the UNGPs which adopt a soft law approach on the subject, a legally binding instrument will have a binding effect and complement the goal of the UNGPs.

7. This working group is now into its fourth session and has made considerable progress since its first session. The fact that we have a zero draft in front of us to start our discussions and negotiations signals the seriousness this working group has been devoting to its mandate.

Mr. Chair,

8. India has always supported the process initiated by HRC Resolution 26/9. The objective is to have a legal instrument which is based on a fine balance with the socio-economic developmental concerns of developing countries and LDCs on one hand while also making transnational corporations more responsible in the protection of human rights. An international instrument needs to be flexible and balanced so as to have widest possible acceptance that will ensure its effectiveness.

Mr. Chair,

9. Our delegation has studied the zero draft in detail and is of the opinion that we need thorough and detailed deliberations on various elements of the draft to fine tune it and make it more balanced and workable. Clarity is required on a number of elements in the draft text, including on scope, jurisdiction, rights of victims amongst others.

Mr. Chair,

10. India understands that the discussions and negotiations on this subject will be a long drawn process and is committed to engage in a constructive manner in the discussions over this week.

Thank You.

## 15. Indonesia

Mr. Chairperson,

First of all, my delegation wishes to congratulate you for being elected as the Chairperson for the fourth Session of the Open-Ended Working Group. We trust your very able and strong stewardship in guiding the deliberation of the Working Group.

We thank the Permanent Mission of Ecuador for preparing a zero draft of the Legally Binding Instrument and its Optional Protocol. We also appreciate the core group for inviting very knowledgeable keynote speakers and experts during the discussion to provide views and inputs to our work of drafting a legally binding instrument. The participation of relevant stakeholders, including states, experts, business sector and civil society in this process is important in ensuring inclusivity of the process.

Mr. Chairperson,

While supporting the process of the drafting of a legally binding instrument, Indonesia needs to strike a balance between different priorities including development strategy, investment, human rights, environment, and poverty eradications.

Indonesia is a country that hosts many Transnational Corporations, including in the extractive sectors. Therefore, we need to ensure that the activities of their business should promote and protect human rights of our community and that they provide remedy for victims if violations occur. However, at the same time, we must make sure that the improvements made through a legally binding instrument should also contribute positively to our development priorities.

In the case of Indonesia, more than 57 million people or 99% of our business sectors are dealing with SMEs and state-owned enterprises, in which many of them have transnational characters as part of supply chains. These SOEs and SMEs are regulated by national laws. In this regard, negotiation on a legally binding instrument should also consider specific characteristics of many developing countries with similar condition like Indonesia.

The Government of Indonesia now is undertaking a careful approach and in-depth observations and engaging relevant stakeholders inclusively in the deliberation of the zero draft at the national level.

Mr. Chairperson,

We also would like to reaffirm our position that this process stems from resolution 26/9 and therefore wish to underline that the legally binding instrument should focus on Transnational Corporations, which take place or involve actions in two or more national jurisdiction. It should not apply to local businesses registered in terms of relevant domestic law.

Finally, rest assured that our delegation will participate and contribute constructive to this Session of Working Group and will provide inputs in the discussion of the articles of the zero draft.

I thank you.

## 16. Iraq<sup>3</sup>

Thank you Mr Chair.

I would like to congratulate you on the assumption of the presidency of the Working Group.

In the context of today's discussions, I would like to make the following comments.

We believe it is important to have a clear text that makes it easy for victims to achieve justice, and that on an equal footing with TNCs. Access to justice is a matter that is usually very difficult for victims, since they are usually of vulnerable groups, and do not have the necessary legal knowledge to access justice.

As for prescription, we believe that it is important to distinguish between crimes and simple administrative misdemeanours and grave crimes, thus prescription should be according to the crime and according to the national legislation.

We wonder, is it possible to consider a possibility for a state to determine that there is a crime perpetuated in another state in the context of cooperation in the field of human rights? And do you believe it is possible for another state to present a case on behalf of a victim and to prosecute in the name of the victim? Or is it only the victim that can do so? In this context, when I ask myself this question, I qualify such violations as either simple or grave, and this should be an element to determine prescription. Simple crimes should be lodged, or the case should be lodged, by the victim, and there could be a term of prescription. As for grave crimes, they could lodged as cases by other parties within a very clear framework and this could be used by some countries to interfere in other states.

I thank you.

## 17. Mexico

En su calidad de Coordinador del Grupo regional de America Latina y el Caribe de derechos humanos, México tiene el honor de presentar formalmente la nominacion de su excelencia el Embajador Luis Gallegos Chiriboga, Representante Permanente de Ecuador ante la Organizacion de las Naciones Unidas para ejercer la función de Presidente Relator de la cuarta sesion del Grupo de trabajo intergubernamental de composición abierta a cargo de la elaboración de un instrumento jurídicamente vinculante sobre empresas trasnacionales y

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<sup>3</sup> Note from the Secretariat: while this statement was intended for the general discussion session, it was delivered on Tuesday afternoon.



otras empresas de negocios con respecto a los derechos humanos, en el marco del mandato de la resolución 26/9 del Consejo de Derechos Humanos.

Expresamos el deseo del Grupo regional de América Latina y el Caribe de que la nominación del Embajador Gallegos goce del apoyo de todos los Estados miembros de Naciones Unidas. Deseamos el mayor de los éxitos al Embajador Gallegos en el ejercicio de sus funciones como Presidente Relator de este Grupo de Trabajo Intergubernamental, y en la continuación del proceso de elaboración del instrumento jurídicamente vinculante, el cual es de gran importancia para la región de América Latina y el Caribe.

Gracias Sr. Presidente-Relator.

México lo felicita por su nombramiento y le desea éxito en el desempeño de sus funciones. Tenemos confianza que bajo su liderazgo se podrán integrar las diversas opiniones y preocupaciones que expresen los Estados y los actores no estatales. Agradecemos la presentación del primer borrador del proyecto de tratado y los esfuerzos de la Presidencia para consolidar este documento.

En primer lugar quisiera reiterar el compromiso de México con los foros multilaterales como medio de diálogo para avanzar las discusiones en materia de derechos humanos y de fortalecer los estándares internacionales. Creemos que el diálogo constructivo es la base de toda negociación exitosa y desde esta perspectiva participaremos de manera sustantiva en esta negociación. Confiamos en que nuestras observaciones, al igual que las de todos los Estados y actores relevantes, serán consideradas oportunamente por la Presidencia de modo que se vean reflejadas en las conclusiones y documentos finales de la sesión.

Estamos conscientes que el objetivo de este Grupo de Trabajo es negociar un instrumento jurídicamente vinculante, que las discusiones sobre su conveniencia o no, ya han sido debatidas en el Consejo de Derechos Humanos, y que la resolución que crea el Grupo de Trabajo se refiere a un instrumento vinculante, dejando de lado otras opciones.

No obstante, consideramos pertinente subrayar los riesgos que conlleva la negociación de un instrumento vinculante sin contar con el apoyo de todos los Estados o al menos de una muy amplia mayoría.

El desarrollo de un instrumento jurídicamente vinculante es resultado de negociaciones que requieren de la construcción previa de un amplio consenso en su objetivo general, de lo contrario, la experiencia ha mostrado que un tratado negociado y adoptado con apoyo parcial no sólo no consigue su efecto, sino que muchas veces ni siquiera alcanza el número necesario de ratificaciones para su entrada en vigor. Existen decenas de tratados que por falta de consenso en su creación no han entrado en vigor, o que están muy lejos de la universalidad, y cuyas temáticas han sido dejadas de lado en las discusiones al considerarse procesos concluidos en el ámbito de Naciones Unidas.

Por otro lado, hay ejemplos que muestran que la discusión incluyente en Naciones Unidas de documentos normativos sin carácter vinculante puede impulsar esfuerzos nacionales e internacionales para enfrentar los retos de la comunidad internacional. Esto ha ocurrido en las últimas décadas con la Declaración y Plan de Acción de Durban, y su impacto en el combate al racismo y la discriminación racial, con la Agenda 2030, y recientemente con la negociación del Pacto Mundial de Migración, documentos que a pesar de no ser vinculantes pueden tener un impacto profundamente transformador.

Sr. Presidente,

Durante la negociación de este instrumento, México hará los mejores esfuerzos para contribuir a la implementación del mandato dado a este Grupo de Trabajo, poniendo especial énfasis en las víctimas. Es necesario que todos los participantes, bajo el liderazgo del Presidente Relator, contribuyamos a acercar posiciones que permitan construir consensos en torno a esta iniciativa. El diálogo abierto, transparente, respetuoso y constructivo con todas las partes es indispensable en este proceso. Durante las consultas informales que se han realizado a lo largo del último año, México ha expresado que sería deseable que el Consejo de Derechos Humanos se pronunciara, a través de una resolución, sobre la manera en que este Grupo de Trabajo debe continuar avanzando en la implementación de su mandato. Esta

cuestión nos sigue pareciendo relevante, en particular en vista de la ausencia de algunos Estados.

Señor Presidente-Relator, antes de concluir quisiera ahora compartir dos observaciones generales de México al proyecto de instrumento vinculante, que desarrollaremos con más detalle en el transcurso de la sesión.

1. La primera se refiere a la idea de que las violaciones de derechos humanos pueden ser cometidas por particulares, lo cual es una premisa que nos parece problemática.

Bajo el derecho internacional de los derechos humanos la definición de una violación exige un elemento de participación estatal, por acción u omisión, que permita que cierta conducta sea atribuible a un Estado. En este sentido, el proyecto propone cambiar de paradigma y reconocer que las violaciones a derechos humanos se cometen también por actores no estatales. En opinión de México, la vulneración o afectación de derechos humanos derivada de la actividad empresarial transnacional constituye un abuso, no una violación, y debería reflejarse de esta manera en el documento.

2. En segundo lugar, respecto al ámbito de aplicación, México estima que el proyecto no debe estar limitado a actividades empresariales transnacionales y debe referirse a todas las actividades empresariales.

Hay empresas cuyo carácter transnacional es ambiguo o difícil de comprobar y sin embargo son causantes de graves abusos en materia de derechos humanos. Por tal motivo preferimos la ampliación del ámbito de aplicación a todas las actividades empresariales, sin distinción de su carácter nacional o transnacional.

Para finalizar Sr. Presidente, quisiera expresar que profundizaremos en los detalles de estos temas y haremos propuestas concretas en algunos párrafos conforme avance la lectura del proyecto.

## **18. Mozambique**

Thank you, Mr. Chair – rapporteur, for giving us the floor!

At the outset, we wish to congratulate you, Mr. Chair – rapporteur upon your election to steer the proceedings of the 4th session of the Working Group.

We align ourselves to the statement delivered by the African Group.

We welcome the draft zero of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, on which our delegation has been all along advocating for, in light of Council Resolution 26/9.

We note, with appreciation, that the draft before us has sought to encapsulate, to the extent possible, the bulk of the outcomes of various consultations the Chair – rapporteur undertook, in an open, comprehensive, transparent and inclusive manner, involving states and other stakeholders. We highly commend the Chair – rapporteur for such remarkable work.

Meanwhile, we are of the view that article 3, on the scope, instead of making reference to all international human rights, it should be more specific on the pressing rights the draft instrument seeks to cover and protect.

As for article 4, on definitions, it should be more exhaustive so as to contemplate other relevant concepts, in the context of the present draft instrument.

We also think that the Draft should expressly make reference to the United Nations Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council resolution 17/4, in 2011, and refereed to since the inception of IGWG. Even though termed soft law, the Guiding Principles proved to be relevant in dealing with some of the issues the draft, with its binding nature, seeks do address in detail to the benefit of the potential victims.

In fact, the draft at hand should also seek to build up on those principles, where possible and relevant. The Guiding Principles represent the first substantive attempt of the UN in addressing the concerns of the victims. We should point out, that we have noticed these Principles figure in the list of documents consulted during the preparation of the draft.

**19. New Zealand**

Mr Chair,

Like others, including the EU, New Zealand has a range of procedural concerns about this open-ended intergovernmental working group, including the lack of a renewed resolution after resolution 26/9 which was adopted in 2014. It was not a straightforward matter to decide to participate today. We are not in a position to participate beyond the opening session.

Nevertheless, since views expressed by States at the time of treaty negotiation and elaboration are highly relevant for customary international law, we considered it appropriate to attend and register some key concerns.

We wish to make it clear that our silence should not be interpreted as tacit agreement to any of the provisions of the draft treaty. In effect we wish to reserve our position on the entire draft text.

We are not yet convinced of the need for a treaty, but if one were to be elaborated it must include all businesses. Why does the treaty only apply to ‘for profit’ business activities of a transnational character? The potential exclusion of activities of State Owned Enterprises is a significant flaw in the draft text. Even if we accepted the need for a legally binding instrument, it should be to all business enterprises regardless of size and whether operating for profit or otherwise.

The material scope of the draft treaty is unclear. The text says “This Convention shall cover all international human rights and those rights recognized under domestic law” Does this cover all of the major human rights treaties + ILO Conventions, and customary international human rights law?

We also have concerns that Article 9 may go too far in creating a duty to prevent rather than the usual due diligence standard of ‘seeking to prevent’, and wonder how broadly the threshold of ‘sufficiently close relationship’ between a business enterprise and the entity in the supply chain (Article 10(6)(b)) might be defined?

This concludes the New Zealand participation in the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. We request that our reservations and this statement be included in the record of the session.

Thank you Mr Chair.

**20. Peru**

Señor Presidente-Relator:

Mi delegación lo felicita por su elección y le extiende nuestros mejores votos para el exitoso desarrollo de esta importante sesión que debe estar guiada por el diálogo y el espíritu constructivo entre todos los actores que participamos. Estamos seguros que sabrá escuchar y conciliar el conjunto de comentarios de todas las delegaciones y encontrar la forma de integrarlos, en un ejercicio progresivo en el que se vaya decantando un texto que goce del consenso final de los participantes.

El Perú reitera, en primer lugar, su adhesión a los Principios Rectores de las Naciones Unidas sobre Empresas y Derechos Humanos, los que permiten orientar las acciones del Estado y de las organizaciones empresariales para proteger, respetar y reparar cualquier vulneración de los derechos fundamentales de aquellas personas que se encuentran bajo su jurisdicción ocurrida en el marco de una actividad empresarial.

Es por ello que estamos convencidos que los Principios Rectores deben ser la referencia primaria para este proceso.

Mi delegación agradece la circulación de un proyecto de tratado propuesto por usted, señor Presidente-Relator. Debido a su complejidad, máxime al encontrarse por ahora en su versión en inglés, mis autoridades no han podido concluir aún con el examen detenido que el referido documento requiere, no obstante lo cual mi delegación desea en esta oportunidad adelantar algunos comentarios preliminares:

La particularidad del fenómeno que nos convoca exige una muy detenida y cuidadosa consideración de las diferentes aristas de temas tan complejos como la jurisdicción, la ley aplicable y la responsabilidad legal. En estos temas, y en complemento a las consultas efectuadas, mi delegación considera que sería oportuno e ilustrativo contar con una opinión de la Comisión Internacional de Derecho Internacional de las Naciones Unidas.

Respecto al alcance del proyecto de tratado, unimos nuestras voces a las otras delegaciones que vienen solicitando que sean todas las empresas, tanto transnacionales como domésticas. Las víctimas son las mismas y no deben ser objeto de discriminación por si sus derechos y libertades fundamentales han sido vulnerados por una empresa transnacional o una doméstica.

En ese sentido, señor Presidente-Relator, es preciso encontrar un procedimiento o modalidad que permita superar las limitaciones que impone la nota al pie de la resolución 26 /9, e incorporar a las empresas domésticas en los alcances del tratado, bien a través del proceso negociador o, en última instancia y de ser necesario, a través de una nueva resolución del Consejo de Derechos Humanos que así lo disponga.

Señor Presidente-Relator:

El Perú coincide con la centralidad del principio de la responsabilidad primordial del Estado de proteger contra violaciones o abusos de derechos humanos a toda persona en su jurisdicción y reitera su compromiso con el cumplimiento de esta obligación, para lo que brinda un marco normativo en el que las empresas pueden desarrollar sus actividades sin afectar los derechos fundamentales y, al mismo tiempo, garantiza mecanismos que permiten denunciar, investigar y sancionar cualquier acto contrario a estas disposiciones.

Muchas gracias,

## **21. Philippines**

Thank you, Mister Chair-Rapporteur. The Philippine delegation congratulates you on your election as Chair-Rapporteur and we look to your leadership as we navigate this process, which has entered a critical stage.

We thank the delegation of Ecuador for conducting extensive informal consultations following the 3rd Session and for preparing the zero draft of a legally binding instrument (LBI) as well as the zero draft of optional protocol.

Having voted in support of resolution A/HRC/26/9, the Philippines fully supports the continuation of this working process. We believe that it has made substantive progress to flesh out elements of a legally-binding instrument, as mandated by the resolution.

The Philippines views that the legally binding instrument must reaffirm the UN "Protect Respect and Remedy" framework for business and human rights. We are implementing domestic measures to implement the UN Guiding Principles, including with consultations, now ongoing, on a draft National Action Plan on Business and Human Rights.

We take great interest in the WG and supports its ambition on elaborating a new treaty that will establish the primacy of the rights of victims over corporate interests when violations occur in the context of transnational business activities. The access to justice of millions of individuals and communities all over the world hangs upon such an instrument.

The Philippines government has been conducting multi-stakeholder consultations involving public agencies, non-governmental agencies and civil society to craft a comprehensive national position on this issue.

We have made a preliminary consideration of the draft elements, and would like to thresh out some issues going forward. These include implications on Philippine domestic laws and our existing investment and mutual legal assistance agreements.

We believe that the treaty should not impose undue burden on micro small and medium enterprises in developing and least developed economies and the bureaucracies of developing and least developed states. We are also studying how the instrument relates to other human rights treaties and relevant international law.

As we strongly reinforce broad consultations on this matter on the domestic level, we recognize the need for our discussions in the WG to be thorough, balanced and inclusive. Mr. Chair, we find assurance that you intend to lead this session in such manner. We are discussing a subject that is highly-complex as it is far-ranging in its scope and implications. Therefore, my delegation considers it is important for the WG to carefully consider all views on both substance and process, as we define the next steps forward.

We would also like to acknowledge the strong role that civil society organizations and experts have played in our work, which affirms the significance that the public and communities in many parts of the world attach to this process.

Thank you, Mister Chair-Rapporteur

## 22. Russian Federation

Thank you, Chairman. Congratulations on your election. We look forward to a constructive discussion under your leadership.

We hereby note the broad scale nature of the draft convention prepared by Ecuador. It is a comprehensive document, each element of which requires thorough consideration, not just in its own right, but also in conjunction with other thematic blocks, as well as with other existing international legal documents.

The Russian Federation is ready for this kind of discussion, although we continue to be unconvinced about the timeliness of the drafting of this kind of legally binding document. On that understanding, in this statement, and on a very preliminary basis, we highlight some general approaches that will be basing our work on when discussing specific provisions of the draft.

First of all, one thing that very much stands out is the excessively broad scope of the document; this applies both to the sphere of application of a potential convention, which is to apply to, or to be extended to, any activity of a transnational nature, even if it simply touches upon a foreign jurisdiction; secondly, the very general nature of the rights that the convention is meant to protect also stands out. Article 3 of the draft, as one example, does not just include all internationally recognised rights, but also rights provided for in a national legislation, the scope and substance of which, as we know, varies from one legal system to another. And this seemingly unrestricted scope of the convention could pose major problems when it comes to its actual application and implementation, in particular with regard to defining specific state obligations in that context.

Many provisions of the draft repeat or replicate already existing and broadly recognised international human rights – a stark example of this is article 8, which to great extent duplicates already existing state obligations. In our opinion, such repetition should be avoided. As the Russian delegation noted in the last session of the working group last year, what is very problematic is including in the document, as one of the chief elements, the general principle of criminal liability of legal entities. That concept is not applied in the Russian law, as well as in the legislation of many other states. Overall, it seems that the chief focus in the draft should be on establishing standards for protecting human rights in the sphere at hand, and not to detail definitions of mechanisms with the help of which states are meant to guarantee those standards. The main thing should be for the standards to be met.

Article 10 of the draft establishes the principle of universal jurisdiction with regard to violations of human rights that constitute crimes. This far-reaching provision requires in-depth discussion, particularly in light of the aforementioned excessively broad scope of the text.

We look forward to a comprehensive discussion on the institutional provisions, since the new mechanisms provided for in the document in many ways duplicate the functions of existing international organisations and bodies, including the Human Rights Council itself.

Finally, what is also very contradictory is the inclusion in the draft of what seems to be a priority of one branch of international law over another, particularly when it comes to the future trade and investment agreements. That issue was raised last year also. Article 13 of the draft offers a good opportunity to consider this question not only from a theoretical but also

from a practical viewpoint. Chairman, these are our general comments on the draft. I assure you and colleagues in the working group that the Russian Federation is very willing to discuss this and other matters.

At the same time, in view of the aforementioned position of the Russian delegation that developing such a convention is still premature at this point, our comments on the draft are of a purely preliminary nature and should not be prejudicial to our position on the document in principle.

Thank you.

### **23. South Africa**

South Africa aligns itself with the statement delivered by Togo on behalf of the Africa Group.

At the onset, I would like to congratulate you Ambassador Luis Gallegos on your election as Chairperson of the Working Group. We thank the Deputy High Commissioner and Mr Potier for their commitment to this subject. Indeed as Mr Potier notes there is a large number of civil society, trade unions and business present here today to give their full weight behind our work.

The Working Group Session meets this week following important global developments in support of the treaty process. Most recently, and in the in the framework of the proposed legally binding instrument, my country hosted a consultative Conference as well as a visit to a community affected by a Transnational Corporation in the mining sector to hear the voices of our citizens on this subject. The collective voice is a resounding yes.

At the regional level, the African Union is involved with regional approaches and African solutions to address corporate criminality, which together with addressing illicit financial outflows is a pressing issue confronting the continent in the context of the Agenda 2063.

The resolution recently adopted by the European Parliament is to be commended and joins a growing number of actors who are actively supporting a legally binding instrument. The Committee on Economic, Social and Cultural Rights, which recently concluded its session, robustly engaged this issue and made pertinent recommendations in the area of accountability and access to remedies for victims of violations of economic, social and cultural rights in transnational cases.

South Africa remains committed to the letter and spirit of Resolution 26/9 and thanks the Chair for presenting the draft legally binding instrument on TNCs and Other Business Enterprises to be negotiated this week. The critical component of the mandate of Resolution 26/9 is to effectively close the current gaps and the void in International Human Rights and Humanitarian Law relating to unregulated operational activities of TNCs and OBEs which, by design, are transnational in their character. Its key objective is to provide, as a law of last resort, effective legal remedies to the victims of grave violations of human rights and fundamental freedoms committed by these entities.

Chairperson,

Children with serious skin diseases, and newborns with respiratory impairments caused by the discharge of waste in their villages must stir our conscience to act collectively to conclude the treaty with a sense of urgency. As pointed out by the Deputy High Commissioner what is at hand is the perverse impact of the relatively powerful over the relatively weak. Surely we should demand that the guilty parties be punished, that reparations be awarded to those innocent victims, and that these violations be brought to an end.

Victims of transnational corporate abuses and violations face specific obstacles in accessing effective remedies. There is thus no reason why the general rules of international law should not apply to all actors – States as well as TNCs and Other Business Enterprises alike. International law imposes certain duties on international cooperation. This is a fundamental issue to be addressed by the envisaged treaty which will ensure access to remedy. Addressing jurisdiction issues; the challenges of transnational litigation; and mutual legal assistance are all important areas that this process must be seized with. Furthermore, the absence of regulatory and enforcement frameworks in certain countries cannot be viewed as a deterrent to enforcing the provisions of the treaty and holding TNCs accountable.

Chairperson,

The treaty process can no longer be viewed as “anti-business”. Currently, the world is faced with numerous challenges of poverty, unemployment, food insecurity and climate change. In this regard mobilizing investment and ensuring that it contributes to sustainable development is a priority for all countries. Globally, a new generation of investment policies is emerging, pursuing a development policy agenda with the aim of balancing the rights and obligations of States and investors. If human rights standards for TNCs and Other Business Enterprises become widely accepted, these entities will enjoy greater certainty, predictability and consistency with regards to their operations and profit making.

Thus a global standard will ensure that their responsibilities are clear and unambiguous and a level playing field is established.

Chairperson,

There have been various attempts to regulate the sphere of business and human rights. These have however, been in the form of non-binding soft laws which do not provide a legal framework that is enforceable and uniform; nor do they provide legal certainty and redress to victims. In our view, this shortcoming can only be addressed through legally binding instrument applicable to all which will reinforce non-binding frameworks.

Chairperson,

Many TNCs and Other Business Enterprises have claimed to be conducting themselves responsibly and within the prescribed domestic legislation when doing business in foreign jurisdictions. These entities should therefore not be opposing this treaty, but embracing it since it will be confirming what they have already been enforcing in their day to day operations.

In conclusion Mr Chairman, my delegation looks forward to engaging constructively on the draft text, with a view to strengthening the instrument to the benefit of the victims. This includes ensuring that direct obligations are placed on TNCs and OBEs to ensure they are held directly held accountable for violations of human rights in the same way that British Petroleum was held accountable and paid large remedies in the Deep Water Horizon violations.

#### **24. Switzerland**

Monsieur le Président,

La Suisse a pris connaissance du projet de traité juridiquement contraignant sur les sociétés transnationales et autres entreprises et les droits de l’homme présenté au mois de juillet.

La Suisse reste sceptique et ne participe pas à la négociation de ce traité international. Néanmoins, la Suisse note que le projet contient quelques améliorations par rapport aux éléments discutés lors de la troisième session.

Le projet de traité réaffirme en particulier que l’obligation primaire de protéger les droits de l’homme revient aux Etats. L’ambiguïté contenue dans les éléments présentés l’an dernier concernant les rôles respectifs des Etats et des entreprises serait donc levée.

D’autres aspects restent toutefois problématiques, comme par exemple l’omission des entreprises à caractère national dans le champ d’application du projet de traité. Même si l’on se réfère aux activités à caractère ‘transnational’, qui pourraient de facto aussi concerner des entreprises nationales, il serait souhaitable de mieux définir le champ d’application du projet de traité. En effet, les incidences négatives domestiques de la part d’entreprises à caractère national, y compris celles appartenant ou contrôlées par des Etats, sont hors portée du projet de traité.

Par ailleurs, la définition même d’activités à caractère transnational’ est très peu claire et pratiquement impossible à opérationnaliser, comme l’a indiqué le Professeur John Ruggie dans son analyse du ‘zero draft’.

Comme évoqué lors des précédentes sessions du groupe de travail, la Suisse concentre ses efforts sur la mise en œuvre de son Plan d’action national pour la mise en œuvre de Principes

directeurs de l'ONU et des Principes Directeurs de l'OCDE pour les entreprises multinationales et les instruments de l'OCDE relatifs à la diligence raisonnable. Ainsi elle mène le dialogue avec les entreprises sises dans notre pays et opérant dans des contextes à risque en matière de droits de l'homme. La Suisse considère que le projet de traité doit tenir compte du cadre de référence des Principes directeurs de l'ONU et de ces instruments.

La Suisse souhaite rappeler que les Principes directeurs des Nations Unies ont été adoptés à l'unanimité par le Conseil des droits de l'homme en 2011. Ceux-ci décrivent les responsabilités et les prérogatives respectives des États et des entreprises dans la prévention et l'atténuation des risques en matière de droits de l'homme et sont devenus depuis la référence commune de toutes les parties prenantes.

L'adoption, par les Etats, de mesures législatives peut faire partie des mesures préconisées dans le cadre du fameux 'smart mix' des Principes directeurs. Nous craignons toutefois que le processus en cours dans cette enceinte, avec les questions juridiques d'ordre fondamental qu'il soulève et les risques de polarisation qu'il comporte, ne freine les efforts de mise en œuvre des Principes directeurs.

La recherche d'un consensus sur un traité contraignant risque de compromettre la mise en œuvre des Principes directeurs de l'ONU, dans la mesure où cela pourrait freiner les actions immédiates des Etats, tant dans le champ législatif que dans le champ non-législatif. Comme l'a recommandé le récent rapport du *Groupe de travail sur la question des droits de l'homme et des sociétés transnationales et autres entreprises*, il est plus que jamais nécessaire de remédier aux lacunes en renforçant l'application des instruments de diligence raisonnable existants en matière de droits de l'homme et de renforcer les mécanismes d'accès aux voies de recours.

Monsieur le Président,

Si mon pays ne participe pas à ce stade à la négociation d'un éventuel futur traité et concentre ses efforts dans la mise en œuvre des Principes directeurs, la délégation suisse se réserve la possibilité d'intervenir au cours des débats de cette semaine afin de poser des questions et clarifier les éléments qui pourraient ne pas être cohérents avec ceux-ci.

En conclusion, nous attendons aussi des Etats engagés dans la négociation du traité, la réaffirmation des engagements dans la mise en œuvre des Principes directeurs.

Je vous remercie.

## **25. Togo (au nom du Groupe africain)**

J'ai l'honneur de prononcer cette déclaration au nom du Groupe africain.

Le Groupe africain souhaite tout d'abord féliciter l'Ambassadeur Luis Gallegos pour sa réélection à la présidence de ce Groupe de Travail et l'assure de tout son soutien.

Nous restons attachés à l'esprit de la résolution 26/9 du Conseil des droits de l'homme et appuyons pleinement le mandat du Groupe de Travail sur les sociétés transnationales et autres entreprises et les droits de l'homme visant à combler les lacunes et les déséquilibres de l'ordre juridique international concernant, notamment, les victimes de violations des droits de l'homme commises par ces entités sous leurs diverses activités.

A cet égard, nous remercions le Président-Rapporteur pour l'élaboration et la présentation du projet de traité sur la question, qui fera l'objet des travaux de la présente session du Groupe de Travail.

Monsieur le Président-Rapporteur,

Comme cela a été abondamment documenté, nombre de sociétés transnationales utilisent les disparités juridiques et politiques entre les États pour accroître leurs profits au détriment de l'environnement, du bien-être et des droits de population entière à travers le monde. .

Aussi, pour le Groupe africain, il s'agit, à travers l'adoption d'un instrument international juridiquement contraignant de restreindre cette possibilité qu'ont les sociétés transnationales d'échapper aux régulations élaborées sur le plan national pour concilier les objectifs



économiques, sociaux et écologiques, par l'adoption d'un instrument international juridiquement contraignant.

Alors qu'il est du devoir et de la responsabilité première des États de protéger les droits humains et de s'assurer que les entreprises ne les violent pas, nous estimons qu'il est également de la responsabilité des sociétés transnationales et autres entreprises commerciales de respecter les droits de l'homme et la dignité humaine et de contribuer positivement à la réalisation du droit au développement.

Monsieur le Président,

Les motifs plaidant en faveur d'une réglementation internationale encadrant les activités des entreprises transnationales, par rapport à la nécessité pour elles de respecter les droits de l'homme ne manquent pas. Le déversement illicite de produits et déchets toxiques dans les pays en développement n'est qu'un exemple flagrant de violations continues dont se rendent coupables certaines entreprises transnationales. S'agissant particulièrement de cet exemple de violation des droits de l'homme, le Rapporteur spécial des Nations Unies sur les droits de l'homme et les substances et déchets dangereux, qui a publié des rapports choquants sur cette question, a averti que l'exposition généralisée des enfants aux substances toxiques et à la pollution avait déclenché une 'pandémie silencieuse' de maladies et d'invalidités infantiles.

Les sociétés transnationales et autres entreprises, les entreprises militaires et de sécurité privées et les industries extractives sont les principaux moteurs de la mondialisation et détiennent une part léonine de toute la richesse mondiale ; elles ne peuvent, à ce titre, opérer sans un encadrement juridique international. Nous estimons donc que, dans un cadre international, réglementer leurs activités et offrir des voies de recours efficaces aux victimes de violations des droits de l'homme commises par ces entreprises devrait être considéré comme une obligation morale.

Cet encadrement permettrait d'assurer une réparation rapide, effective et adéquate au profit des personnes et des communautés touchées négativement par les activités de ces entreprises. L'établissement de normes claires pour ces entités assurera la sécurité juridique des personnes et des groupes concernés par leurs activités, de même ces normes garantiront des conditions de concurrence équitables. Cette prévisibilité est la base du développement durable et du bien-être humain.

Monsieur le Président,

Pour le Groupe africain, les travaux entrepris ici constituent une initiative complémentaire à celles que nous menons dans le cadre de la responsabilité des entreprises militaires et de sécurité privées ; les incidences sur les droits de l'homme de la gestion et de l'élimination écologiquement rationnelles des substances et des déchets dangereux ; ainsi que des incidences des flux de fonds d'origine illicite et du non-rapatriement des fonds d'origine illicite dans les pays d'origine sur la jouissance des droits de l'homme.

Nous restons déterminés à participer de manière constructive à l'ouverture de négociations sur le fond du projet d'un instrument juridiquement contraignant ayant pour objectif principal de réglementer de manière uniforme les activités opérationnelles des sociétés transnationales et autres entreprises.

Je vous remercie.

## 26. Uruguay

Muchas gracias señor Presidente,

Uruguay lo felicita por su elección, descontando que realizará una excelente conducción de las negociaciones en esta 4ta sesión.

Mi delegación participa de esta 4ª Sesión del Grupo de Trabajo intergubernamental con un espíritu constructivo, con el ánimo de que este ejercicio permita que sigamos avanzando en la promoción y protección de los derechos humanos de todas las personas.

En efecto, Uruguay mantiene una posición de principios de condena a todo tipo de violación a los derechos humanos, reconociendo la importancia del derecho de las víctimas a acceder

a remedios y medidas de reparación efectivas. Es por esa razón que hemos acompañado estas discusiones en el marco del Grupo de Trabajo, cuyo mandato compartimos.

Al mismo tiempo, estimamos que las negociaciones sobre un instrumento vinculante que aborda un tema de tanta importancia y reconocida sensibilidad, deben materializarse en un proceso de diálogo evolutivo, inclusivo y transparente, dotado de suficiente tiempo, legitimidad y representatividad que permita escuchar las voces de todos los actores interesados, sean estos gubernamentales o no gubernamentales, incluyendo a las propias empresas transnacionales.

Entendemos que solamente a través de un proceso de negociación de estas características será posible alcanzar un texto cuyos compromisos sean aceptables para una amplia mayoría de Estados de modo de garantizar su posterior ratificación universal.

Por último, deseamos reconocer una vez más los esfuerzos realizados para lograr la complementariedad de este proceso con los Principios Rectores de Empresas y Derechos Humanos, estimando fundamental que continúe el diálogo en aras de dotar de la mayor coherencia y eficiencia al accionar del sistema multilateral en la materia.

## **27. Venezuela**

Gracias, Presidente.

Venezuela le felicita por su reelección y reitera su apoyo a las labores de este importante Grupo de Trabajo.

Mi país decididamente respaldó la Resolución 26/9 del Consejo de Derechos Humanos, impulsada por las distinguidas Delegaciones de Ecuador y Sudáfrica, que dio inicio a las labores de esta necesaria iniciativa. La

discusión que hoy nos reúne nos permite avanzar en la construcción de la cooperación económica y social de las naciones.

Hemos sostenido en diversas instancias nuestro firme convencimiento de la necesidad de establecer mecanismos y normas internacionales jurídicamente vinculantes materia de empresas transnacionales y derechos humanos.

Esta importante labor no implica duplicidad con ningún otro mecanismo del Consejo, ni que la elaboración de un instrumento internacional jurídicamente vinculante se oponga a los Principios Rectores desarrollados en la materia.

Por el contrario, este instrumento sería de gran beneficio tanto para las víctimas como para las propias empresas transnacionales que atienden sus compromisos y obligaciones en derechos humanos, frente a aquellas que no los cumplen y que actúan con total impunidad, ante la falta de recursos efectivos en favor de las víctimas.

Señor Presidente,

Debemos avanzar en la efectiva prevención y reparación de las violaciones de derechos humanos vinculadas a las actividades de las empresas transnacionales y otras empresas, en su responsabilidad de rendir cuentas por las violaciones cometidas.

Venezuela participará constructivamente en esta cuarta sesión del Grupo de Trabajo y alienta a todos Estados y demás interesados a entablar un diálogo franco, fructífero y constructivo en sus debates.

Muchas gracias.

## **28. Joint statement: Brazil, Chile, Mexico and Peru**

Señor Presidente-Relator:

Tengo el honor de dirigirme a usted en nombre del Brasil, Chile, México y mi propio país, el Perú.

Nuestros países lo felicitan por su elección y le desean el mayor éxito en la conducción de esta sesión. Confiamos en que la llevará a cabo con transparencia, idoneidad e imparcialidad

y que sabrá recoger, procesar y conciliar adecuadamente las diversas opiniones que sean formuladas durante este proceso intergubernamental.

Asimismo, valoramos el esfuerzo que viene realizando el Ecuador desde el año 2014, cuando el Consejo de Derechos Humanos adoptó la resolución 26/9.

Nuestros países reconocen la importancia del tema que nos convoca, ya que conocemos de primera mano las violaciones y abusos a los derechos humanos que pueden cometerse en el contexto de la actividad empresarial. Somos también conscientes de la complejidad del mismo, por lo que manifestamos nuestra intención de participar constructivamente en este proceso de largo aliento.

Es por ello que reafirmamos nuestra adhesión a los Principios Rectores de las Naciones Unidas sobre Empresas y Derechos Humanos, los que permiten orientar las acciones del Estado y de las organizaciones empresariales para proteger, respetar y reparar cualquier vulneración de los derechos fundamentales de los ciudadanos ocurrida en el marco de una actividad empresarial.

Nuestros países coinciden con la centralidad del principio de la responsabilidad primordial del Estado de proteger contra violaciones o abusos de derechos humanos a toda persona en su jurisdicción y reiteran que somos los Estados los sujetos de obligaciones de derecho internacional.

Señor Presidente-Relator:

Nuestros países agradecen su diligencia al haber circulado la versión en inglés de un proyecto de tratado el pasado julio, y se permiten señalar la conveniencia de que las versiones en todos los idiomas oficiales de las Naciones

Unidas estén prontamente disponibles para que los países que no tenemos el inglés como lengua materna podamos comprender en toda su extensión las provisiones contenidas en ese documento.

Sobre el alcance del proyecto de tratado, consideramos que debe ser aplicable a todas las empresas, tanto las transnacionales como las domésticas. Las víctimas deben tener la misma oportunidad de acceso a la justicia, tanto si se trata de víctimas de actividades de empresas transnacionales como de empresas domésticas. El principio de no discriminación, fundamental en el derecho internacional de los derechos humanos, debe prevalecer. Solo así se hará justicia a las víctimas.

Por otro lado, planteamos de manera general la preocupación que tenemos por la jurisdicción que tendría el futuro instrumento. La atención debe ser puesta en este punto en lograr el equilibrio entre la vocación de dotar a las víctimas de herramientas para la defensa de sus derechos y las capacidades de los Estados para atenderlas, en apego al derecho internacional.

Por estas razones consideramos muy relevante tener los Principios Rectores de Naciones Unidas sobre Empresas y Derechos Humanos como referencia para la negociación, documento que constituye el principal acervo jurídico en la materia.

Finalmente, y conscientes de la conveniencia de afirmar el carácter inclusivo del proceso que garantice la pluralidad de visiones y opiniones, nos permitimos solicitar nos pueda ilustrar sobre la participación y aportes recibidos de los diversos actores consultados y las principales fuentes en las que se basan las provisiones del borrador de tratado.

Muchas gracias,

## **B. Regional organization**

### **1. European Union**

Mr. Chairperson-Rapporteur,

The European Union would like to thank the speakers in the opening statements. We express our appreciation to the Secretariat for its work in preparation of this fourth session.

Civil society organisations and human rights defenders worldwide are mobilized to remind the international community that more remains to be done to prevent abuses in connection with activities by enterprises, and to enable access of victims to remedy when abuses occur. We agree that more needs to be done to prevent, investigate, punish and redress adverse human rights effects of business activities. As we stated during the 3rd session of this Intergovernmental Working Group, testimonies given by victims remind us that current discussions should not serve as an excuse to avoid providing remedy for victims waiting for justice now

We also increasingly see that companies recognize the merit of taking tangible steps to ensure respect for human rights throughout their operations and to seek to prevent adverse human rights impacts directly linked to their operations, products or services. Promising initiatives are also underway in the areas of trade, investment and finance.

Mr. Chairperson-Rapporteur,

The international community needs to respond in an appropriate and effective manner. We underline the word "effective" as we believe in effective multilateralism. Therefore, four years after Human Rights Council resolution 26/9 was adopted, we would have liked that the two main sponsors take genuine steps to address the concerns expressed by us and others with a view to overcoming divisions. Unfortunately, most proposals made by us or others to find ways to build consensus have not been taken into account – including the proposals to revert to the Human Rights Council to adopt a new resolution, which could have reaffirmed the mandate for the elaboration of a legally binding instrument, while allowing rethinking the best way forward on process.

We also regret that our proposals for the Program of Work of this session have not been taken on board, as they are substantive proposals. Most States and stakeholders worldwide have concerns with the footnote of resolution 26/9 restricting the scope to transnational corporations. We regret that a footnote allowing the discussions to cover all companies, and agreed by all for the second session, was not accommodated. This is not a procedural matter, but a real substantive issue. In today's globalized world, there are complex business networks and many different modes of operation between transnational corporations and a vast number of other enterprises operating at the domestic level. Covering all companies is important to ensure non-discrimination and a level playing field. Of course we could apply possible criteria of size and other characteristics, as per principle 14 of the UN Guiding Principles, and also enshrined in EU legislation. Civil society organizations and human rights defenders have documented countless cases of business-related abuses at the domestic level: is the restriction of resolution 26/9 a message that victims of such abuses would not benefit from the provisions of a new legally binding instrument?

We likewise regret that the proposal to invite Prof. Ruggie, former UN Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises and architect of the UN Guiding Principles on Business and Human Rights (UNGPs), to deliver a keynote address at the opening of this session was not accommodated – it would have been possible to accommodate a second keynote for the opening. Again, this is not a procedural matter, but a real substantive issue. An address by Prof. Ruggie would have helped us all to recall and reaffirm the global consensus around the UNGPs and their implementation, and how to build on them as a foundation for further international legal developments in Business and Human Rights. In this regard, we draw attention to the Open Letter published by Prof. John Ruggie on 9 October 2018 providing useful guidance for deliberations in this room and beyond [‘Guiding Principles’ for the Business & Human Rights Treaty Negotiations: An Open Letter to the Intergovernmental Working Group]. Is there any reason for the "draft legally binding instrument" not to refer to the UN Guiding Principles?

Despite these and other concerns, we have refrained from challenging the election of the Chair-Rapporteur or the adoption of the Program of Work as this could have potentially delayed the start of this session. We have instead come once again to convey our expectations for a transparent and inclusive process. Any Intergovernmental Working Group is expected to be chaired in line with principles set out in the UNGA Rules of Procedures and Annex I - including "impartiality", "respect for the rights both of minorities as well as majorities".

Mr. Chairperson-Rapporteur,

We would like now to make further remarks on substance. Much has been done within the EU and beyond to implement the UN Guiding Principles on Business and Human Rights, the existing authoritative framework. The UN Guiding Principles have been and remain the starting point and compass for EU engagement in the field of Business and Human Rights and unfolding their full potential through worldwide implementation remains our priority.

Within the EU we have developed a smart mix of voluntary and binding regulatory measures, at European and national level. We have developed legislation both at EU and Member States level and do not shy away from binding norms when they are needed. To mention but a few that are widely recognized at the global level, and can be potentially replicated elsewhere: the EU regulation on conflict minerals ((EU) 2017/821); the EU Non-financial reporting directive (2014/95/EU); and public procurement rules. The EU also has legislation on victims' rights granting victims access to justice. The Brussels I Regulation ((EC) No 44/2001, recast) for example enables to take European domiciled companies to European courts for damages caused and/or arising outside the Union. The Rome II Regulation establishes the applicable law for tort cases, including torts relating to human rights infringements. We can also draw on the provisions of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime. In the area of international judicial cooperation, the EU is actively participating in the work in the framework of the Hague Conference on Private International Law.

We are intensively working both internally and with partners from across regions to implement the UNGPs with a wide range of policies, project and tools. Already 15 EU Member States have adopted a National Action Plan. We are determined to work swiftly with partners across regions for the adoption and implementation of more National Action Plans. One such illustration is the ambitious project developed by the EU under the EU Partnership Instrument on Responsible Business Conduct in Latin America and Caribbean which will inter alia allow working with the governments of Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Panama and Peru in the establishment and/or implementation of National Action Plans. Likewise, EU Member States have been engaging with partner countries in different world regions to jointly implement measures which aim at aligning policy frameworks with the UNGPs and building relevant capacities in the social, judicial and business sectors to better realise human rights due diligence and access to remedy in very concrete forms. The recently adopted OECD Due Diligence Guidance for Responsible Business Conduct will provide support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises to avoid and address adverse impacts related to workers, human rights, the environment, bribery, consumers and corporate governance that may be associated with their operations, supply that may be associated with their operations, supply chains and other business relationships.

Mr. Chairperson-Rapporteur,

The EU also welcomes the progress made at the UN level thanks to the leadership in the UN Human Rights Council of the core group on Business and Human Rights (Argentina, Ghana, Norway, Russian Federation). We would like to particularly highlight the various work streams of the UN Working Group on Business and Human Rights<sup>4</sup>, and the fast approaching annual Forum on 26-28 November. We thank the High Commissioner and the Office of the High Commissioner for Human Rights for the continued leadership on the Accountability and Remedy Project with findings and concrete recommendations allowing for tangible progress in the implementation of third pillar of the UN Guiding Principles on access to remedy. It is important that all these work streams at the UN level can bear fruit and that their substantive existing and future results be fully mirrored and valued also in the discussions in this session or in other formats.

<sup>4</sup> Link to the latest contribution by the European Union, dated 20 June 2018: Consultations by the UN Working Group on Business and Human Rights on “Corporate human rights due diligence – identifying and leveraging emerging practice”  
<https://www.ohchr.org/Documents/Issues/Business/WGSubmissions/2018/EU.pdf>

We are also pleased to see progress in other initiatives such as the first Ministerial of the Alliance for Torture-Free Trade and the Political Declaration issued on 24 September 2018 in New York which, inter alia, requested the UN Secretary-General to *"establish a group of governmental experts to examine the feasibility, scope and draft parameters for a range of options including a legally binding instrument to establish common international standards for the import, export and transfer of goods used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment."*

As discussion on possible further legal developments is planned this week, we would like to reiterate that these exchanges do not take place in a legal vacuum. The UN Guiding Principles recall a set of existing obligations. It is enough to quote the first UN Guiding Principle: *"States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication"*. Full implementation of the existing human rights obligations by States to protect against abuses within their own territory and their own jurisdiction would respond to the numerous cases referenced in the context we currently discuss.

We also need to address a series of legitimate questions about implementation of current or indeed any future obligation. How can victims expect to have access to justice and to remedy in cases of abuses related to business activities in a State where the legislation fails to comply with existing international human rights law? In a State where the judiciary system is not independent? In a State where corruption impacts negatively on the fulfilment of all human rights? If a new legal instrument was to be created why would victims believe that those States currently failing to protect human rights would implement new obligations?

Mr. Chairperson-Rapporteur,

We believe the added value of any possible legally binding instrument should be to enhance the protection of and respect for human rights as well as to ensure a level playing field for companies globally. Therefore, it is essential for any proposal to reach sufficient traction amongst UN member states. We are aware that a number States are not in the room, and that many more are not ready to engage in negotiations in the current format. It is also important to ensure policy coherence and avoid any duplication of efforts. We have been reflecting internally about which type or format of a legally binding instrument would stand the best chance of achieving this level playing field.

On the basis of these various considerations from the EU's perspective, we are not yet at a stage where a formal negotiating mandate could be sought to engage in this format of discussions. The EU therefore reserves its position on the draft legally binding instrument presented in this session and requests that this reservation be recorded in the report of this session. We look forward to listening to the positions expressed by all and expect that the report of the session will reflect accurately and nominally all views and positions.

In closing, the EU is committed to building on our solid set of legislation and policies and to working globally with all States and stakeholders to make genuine progress on the Business and Human Rights agenda. We are committed to continuing to engage at the UN level or in other formats to consider the best way to ensure that any further legal development addresses the real needs to prevent abuses and ensure access of victims to remedy when abuses occur. We are committed to a meaningful and tangible progress on Business and Human Rights as this agenda is connected to wider issues, linking the promotion and protection of human rights to other global issues: trade, investment, environment, social and labour protection, tax evasion, corruption, and the list is long. In short, collectively, we need to harness globalization.

I thank you Mr. Chairperson-Rapporteur.

## C. Observer States

### 1. Holy See

Mr. Chair,

At the outset, the Delegation of the Holy See would like to congratulate you on your appointment as Chair of this Intergovernmental Working group in such a significant moment, as we begin our discussion on the zero draft of the text.

Over the last years, we have witnessed a growing interest of States and civil society for shaping an international legally binding instrument, which would be able to address the existing gaps in the global legal framework. As recalled by Pope Francis: “The twenty-first century, while maintaining systems of governance inherited from the past, is witnessing a weakening of the power of nation states, chiefly because the economic and financial sector, being transnational, tend to prevail over the political”.

The starting point for any discussion surrounding a treaty in this area must be the concern for the protection of fundamental human rights, which “derive from the inherent dignity of the human person”. A binding instrument would raise moral standards, change the way international corporations understand their role and activity and help clarify the extraterritorial obligations of States regarding the acts of their companies in other countries. In this regard, it has been proposed that the synergy between public and private sector corporations could constitute another emerging form of economic enterprise that cares for the common good without surrendering profit.

The Delegation of the Holy See is aware that the challenges of business and human rights demand a negotiation with a constructive and positive approach. Our ultimate goal is the achievement of a balanced and effective instrument, which could represent an effective tool for all the parties involved.

The focus on the rights of local communities and individuals might be reinforced with clear references to the internationally agreed language of human rights and its primacy over trade and investment policies. Such a provision could represent an instrument for framing a more stable legal environment. Thus, it could address not only the relationship between human rights and trade and investment agreements, but even represent a criterion for an assessment of its impact on human rights. For this reason, the mention of the environmental element in articles 4.1 and 8.1 is essential. Trade agreements usually contain general exception clauses which allow deviations from the obligations of the agreement, particularly if a State party pursues other legitimate public policy objectives and the respective measure is not more trade-restrictive than necessary.

Mr. Chair,

In the progression of our negotiations, we should never lose sight of the fact that “business is a vocation, and a noble vocation, provided that those engaged in it see themselves challenged by a greater meaning in life” . The international business community can count on many men and women of great personal honesty and integrity, whose work is inspired and guided by high ideals of fairness, generosity and concern for the authentic development of the human family. Economy and finance are dimensions of human activity and can be occasions of encounter, of dialogue, of cooperation, of recognized rights and of dignity affirmed in work.

Our efforts during this week of negotiation should be oriented in elaborating an instrument that could represent a useful tool. In order for this to happen, however, it is necessary to place the human person, with his or her dignity, at the center of our work and to establish the legal liability for the conduct of business enterprises that result in human rights abuses at home or abroad. Such responsibility should, as appropriate, be criminal, civil or administrative.

Thank you, Mr. Chair.

## **2. Palestine**

Thank you Chair,

At the outset we would like to congratulate you Ambassador on your election as chairperson-rapporteur of the working group. And we commend the efforts in drafting and presenting this important draft Treaty.

We understand that an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights would contribute to redressing gaps and imbalances in the international legal order that undermine human rights, and could address the lack of remedy procedures for affected communities of corporate human right abuses. The Zero Draft Treaty attempts to maintain a complementary approach with the UNGPs – a necessary requirement for the continuation of a unified universal approach in countering corporate abuses.

The release of the draft Treaty marks a significant milestone for the evolving global business and human rights framework, aiming to ensure corporate accountability and reduce the culture of impunity, during both peace time and situations of conflict. The Zero Draft Treaty and its current provisions do indeed provide a necessary development and a potential alternative avenue for individuals, communities and peoples affected by corporate abuses, especially in conflict-affected areas.

We reiterate our full support to the mandate of the intergovernmental working group and reassure our commitment to the process of elaborating a legally binding instrument in line with resolution 26/9. We look forward to the discussions of the first reading of the draft text with the view of maintaining and strengthening it. We call on all states to constructively engage and we welcome the participation and inputs from civil society organizations.

I thank you.

## **II. Articles 2 and 8**

### **A. States**

#### **1. Azerbaijan**

Thank you Mr. Chairman,

The following comments and proposals are made in addition and complementing our statement made yesterday. We believe that article 2 shall make a stronger reference to the obligations of TNCs under international law, as well as to differentiate between the definition of the host state and the owner state in order to avoid any further confusion and misinterpretation of the terms.

We therefore, request your assistance and expertise on how to further improve the language in this article.

We look forward to your assistance on this matter and we are willing to look into the possible examples of the existing international experience, if any, and how such experience can be applied to the draft legally binding document.

Thank you Mr. Chairman.

#### **2. Bolivia**

Jallalla Sr. Presidente,

Agradecemos a los expertos por sus valiosas contribuciones.

Con relación al propósito, sugerimos puedan añadirse los principios de universalidad, indivisibilidad e interdependencia.

El artículo 8 contiene importantes elementos relativos a los derechos de las víctimas necesarios para poder disfrutar plenamente su derecho a la justicia, y reparación. De manera



preliminar encontramos que los derechos y garantías que se incluyen en este artículo han sido incorporados en la legislación nacional de mi país, incluyendo en nuestra Constitución Política del Estado. Estos incluyen, por ejemplo, el derecho a la indemnización, reparación y resarcimiento de daños y perjuicios en forma oportuna, incluyendo en casos de daños ambientales, y el derecho a la información.

Destacamos también que este artículo considera el derecho de las víctimas de manera individual o como grupo. En esta línea sugerimos pueda incluirse también la referencia a comunidades y pueblos como detentores de derechos humanos los cuales también pueden ser afectados en su conjunto.

Con relación a las obligaciones contenidas en el artículo, estas deberían hacer referencia también a los Estados de origen donde las transnacionales tienen su sede principal.

Igualmente, nos parece importante la propuesta de establecer un fondo internacional para las víctimas. Consideramos que este merecería un artículo separado en el cual se pueda especificar algunos aspectos generales de su funcionamiento y financiamiento. Al respecto, consideramos que el fondo debería ser cubierto con financiamiento de los países desarrollados, y que la creación de este fondo constituye también una oportunidad para que las Empresas transnacionales comprometidas con los derechos humanos puedan contribuir en su financiamiento. Destacamos que serán los Estados parte que deberán regular el funcionamiento de este fondo, y consideramos que el mismo podría también asistir en el fortalecimiento de capacidades para los países en desarrollo que así lo requieran.

Gracias

### 3. Brazil

#### a. Article 2. Statement of purpose (...)

a. To strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities [~~DELETE: of transnational character~~];

b. To ensure an effective access to justice and remedy to ALLEGED victims of human rights violations AND ABUSES in the context of business activities [~~DELETE: of transnational character~~], and to prevent the occurrence of such violations AND ABUSES; (...)

#### b. Article 8. Rights of ALLEGED Victims

1. ALLEGED Victims shall have the right to fair, effective and prompt access to justice and remedies in accordance with international law. Such remedies shall include, but shall not be limited to: (...)

2. State Parties shall guarantee the right of ALLEGED victims, individually or as a group, to present claims to their Courts, and shall provide their domestic judicial and other competent authorities with the necessary jurisdiction in accordance with this Convention, AS APPLICABLE, in order to allow for ALLEGED victim's access to adequate, timely and effective remedies.

3. States Parties shall investigate all human rights violations AND ABUSES effectively, promptly, thoroughly and impartially and, where appropriate, take action against those natural or legal persons allegedly responsible, in accordance with domestic and international law.

4. ALLEGED Victims shall be guaranteed appropriate access to information relevant to the pursuit of remedies. State parties shall ensure that their domestic laws and Courts do not unduly limit such right, and facilitate access to information through international cooperation, as set out in this Convention, and in line with confidentiality rules under domestic law.

5.(...)

a. MAKING AVAILABLE INFORMATION TO [~~DELETE: Informing~~] ALLEGED victims of their procedural rights and the scope, timing and progress of their claims in an opportune and adequate manner; b. Guaranteeing the rights of ALLEGED victims to be heard in all

stages of proceedings without prejudice to the accused and consistent with the relevant domestic law; c. Avoiding unnecessary formalities, costs or delay for bringing a claim and during the disposition of cases and the execution of orders or decrees granting awards to ALLEGED victims;

d. Providing assistance with all procedural requirements for the presentation of a claim and the start and continuation of proceedings in the courts of that State Party. The State Party concerned shall determine the need for legal assistance, in ~~[DELETE: full]~~ consultation with the ALLEGED victims, taking into consideration the economic resources available to the ALLEGED victim, the complexity and length of the issues involved proceedings. In no case shall ALLEGED victims WHO CANNOT AFFORD be required to reimburse any legal expenses of the other party to the claim.6.Inability to cover administrative and other costs shall not be a barrier to commencing proceedings in accordance with this Convention. States shall assist ALLEGED victims in overcoming such barriers, including through waiving costs where needed WHENEVER POSSIBLE. States shall not require victims to provide a warranty as a condition for commencing proceedings.~~[DELETE: 7. States Parties shall establish an International Fund for Victims covered under this Convention, to provide legal and financial aid to ALLEGED victims. This Fund shall be established at most after (X) years of the entry into force of this Convention. The Conference of Parties shall define and establish the relevant provisions for the functioning of the Fund]~~

(...)

9. ALLEGED Victims shall have access to appropriate diplomatic and consular means, as needed, to ensure that they can exercise their right to access justice and remedies, including, but not limited to, access to information required to bring a claim, legal aid and information on the location and competence of the courts and the way in which proceedings are commenced or defended before those courts.

10. ALLEGED Victims shall be treated with humanity and respect for their dignity and human rights, and their safety, physical and psychological well-being and privacy shall be ensured.

11.States shall protect ALLEGED victims, their representatives, families and witnesses from any unlawful interference with their privacy and from intimidation, and retaliation, before, during and after any proceedings have been instituted.(...)

13. ALLEGED Victims shall have the right to benefit from special consideration and care to avoid re-victimization in the course of proceedings for access to justice and remedies.

Gracias

#### 4. China

Thank you Mr. Chairman.

I would like to thank you for chairing our meeting. Regrettably, due to time concerns, as you mentioned, our delegation actually cannot make all the comments that we would like to make. On the legal instrument, we need to make detailed deliberations but due to time concerns, we are in your hands. But we very much hope that the problem will be solved, and we will not be facing such problem again.

I would like now to make comments on art 8.

First of all, as a general position, and in our view, the purpose of article 8 is to ensure the right to remedy for victims of human rights abuse, and these are actually general obligations already undertaken by states under the current applicable international human rights treaties and customary international law. Therefore, the focus and purpose of article 8 is not to add new obligations to states, but rather to reiterate current obligations in the context of activities of TNCs. We would like to thank you, Mr Chairman, for having confirmed this while introducing the draft yesterday. At the same time, many states, when giving rights to victims, take into account the principle of equality, and this principle should not give rise to differences based on status of the victims or cause of action, so we would like to concur with other delegations so that this article 8 should not become an article of privilege. Taking into account that specific provisions in article 8 are already contained in international law or in

other treaties, we may simplify article 8. If we seek to list all the provisions, then we need to review and analyse them in connection with applicable international law, and then this approach would require rather complex and lengthy negotiations. On para 1 of art 8, para 1(a) takes from the 2005 declaration and another declaration from 1985, while para (b) mentions environmental remedies. Since our working group is on the field of human rights, and not the environmental field, and mindful that the relevant concepts in 1 (a) are already general concepts that may include the concept in 1(b) in environment, since in the 2005 declaration it is already mentioned that restitution should include the environmental field, we think that maybe 1(b) is not necessary. Para 2 mentions jurisdiction of states parties, and this should be based on the consensus to be reached on article 5, rather than creating new jurisdiction. As to extraterritorial jurisdiction, extreme caution should be exercised, because we need to respect countries' territorial sovereignty, just as mentioned by other delegations.

I think our time is up. I will leave it there for the time being. I will provide written statement to the secretariat to provide our comments on other little paragraphs. Thank you.

## 5. Chile

Señor Presidente-Relator,

Muchas gracias por la introducción sobre los temas y los alcances señalados, los cuales nos permiten contar con mayores elementos para los respectivos análisis de los artículos propuestos. En primer lugar, en relación al artículo 2 del instrumento, quisiera reiterar lo expuesto durante los comentarios generales, respecto a que creemos importante hacer una mención a los principios rectores de Naciones Unidas sobre la materia, y tras mencionarlos, como parte del acervo y del lenguaje acordado por todos, se podría proceder a especificar el acceso a mecanismos de remedio a las víctimas de violaciones a los derechos humanos por parte de las empresas.

En efecto, relacionado a lo anterior, es que reiteramos nuestro interés en que en el instrumento se incluyan no sólo a las actividades empresariales de carácter transnacional. En nuestra opinión, se debe abarcar a todas las empresas, independiente su procedencia. Es una obligación de los Estados velar por que las empresas no violen los derechos humanos, independiente si son transnacionales o no. Por ello, no podemos dejar pasar la oportunidad de establecer una obligación expresa a todas las empresas dentro de este instrumento.

Delimitar el accionar de este instrumento sólo a las empresas transnacionales, resulta reducir la aplicabilidad del instrumento y nosotros somos de la idea de fomentar una amplitud en el debate para considerar que sean todas las empresas las que estén cubiertas por este instrumento, siendo la obligación del Estado el hacer cumplir lo convenido. Estimamos también no hacer una interpretación amplia sobre el término de aplicación del instrumento a todas las empresas y restringirlo al término transnacional, crearía una serie de dificultades respecto a la definición de la calidad transnacional de las empresas y a su interpretación por las partes.

Esperamos poder entregar mayores comentarios sobre esta materia una vez se discuta el artículo 3, relacionado al alcance del instrumento.

Muchas gracias,

## 6. Ecuador

### a. *Artículo 2: propósito*

Señor Presidente,

El Ecuador, tal como se mencionó en los comentarios generales, ha sostenido desde un inicio que el propósito del instrumento vinculante es la protección de los derechos humanos frente a violaciones en el contexto de actividades empresariales.

Sobre el tipo de empresas que deben ser abarcadas por el instrumento vinculante, el Ecuador reconoce que este tema aún genera preocupación en varios actores. No obstante, el Ecuador considera que el un enfoque en el tipo de actividad y no en el tipo de empresa es más adecuado y permite una solución viable.

Sin perjuicio de lo dicho, vale recordar que instrumentos anteriores como la declaración de la OIT sobre las empresas multinacionales de 1977 o las líneas directrices de la OCDE para empresas multinacionales, revisión 2011, resuelven lo señalado al manifestar que su objetivo “no es introducir diferencias de tratamiento entre las empresas transnacionales y empresas nacionales” y que por el contrario tales directrices “reflejan prácticas recomendables para todas ellas. En consecuencia, se espera de las empresas transnacionales y las nacionales que tengan la misma conducta en todos los casos en que sean aplicables las directrices a unas y a otras”.

Instamos por lo dicho que en este aspecto se busquen opciones que permitan el consenso.

Muchas gracias Señor Presidente.

*b. Artículo 8: Derecho de las víctimas*

Señor Presidente,

De forma general este artículo, que es uno de los más importantes del Convenio, debe incorporar un enfoque de género que contemple la formulación de políticas públicas de prevención y reparación para las mujeres, cuyos derechos han sido violados en el contexto de actividades empresariales.

Las violaciones a los derechos humanos por parte de las empresas generan impactos diferentes para mujeres y hombres, resultado de sus diferentes roles en la sociedad y la discriminación social, histórica, económica y cultural que aún enfrentan las mujeres. Las actividades relacionadas con la industria extractiva generan desplazamientos forzados que en particular afectan a las mujeres, colocándolas en mayor riesgo de sufrir violencia sexual y de género, explotación laboral y pérdida de oportunidades.

De igual forma, las mujeres trabajadoras siguen recibiendo salarios más bajos por parte de las empresas y sus oportunidades se ven reducidas debido a la discriminación que sufren en razón de sus derechos sexuales y reproductivos.

Las mujeres a menudo son excluidas de las consultas sobre disposición de tierras y son relegadas de los procesos de reparación y compensación.

Por ello, se debería incluir una mención a las mujeres en el artículo 8, numeral 1, párrafo cuarto sobre “Derechos de las víctimas”:

“Los Estados Parte garantizarán el derecho a las víctimas de manera individual o como grupo, a presentar reclamaciones ante sus tribunales, y conferirán a sus órganos judiciales y a las demás autoridades competentes la jurisdicción necesaria con arreglo a la presente Convención para que las víctimas, en especial las mujeres, dispongan de un acceso a recursos adecuados, oportunos y efectivos”.

Por otra parte, se debe revisar el numeral 7 de dicho artículo, que habla sobre la creación de un “Fondo Internacional para las víctimas”, mediante la contribución de los Estados, pero no se especifica que institución o de qué forma se administrará el mismo, tampoco se hace referencia a los parámetros de selección del o los beneficiarios.

Cuestiones que deben aclararse toda vez que son contribuciones realizadas por los Estados.

Muchas gracias Señor Presidente.

**7. Egypt**

Thank you Chair,

We thank the panelists for the useful presentations, and would like also to share with you the following remarks on articles 2 and 8 of the draft legally binding instrument with view to strengthen its content:

1- In article 2, we agree with the purposes elaborated in para a and para b, however we believe that para c is not clear, and more of general nature that goes beyond the purpose and the object of the legally binding instrument. Thus we propose to modify its language to link it with the activities of the TNC and OBEs and not to fulfill its obligations under international human rights law in general.

2- The International human rights law ensures the promotion and the protection of all human rights without discrimination, including all human rights for victims thus we believe that this should be reflected in the legally binding instrument without giving primacy to group of rights. In addition a reference shall be made in sub para 12 of art 8 to “obligations under international human rights law”.

3- My delegation believe that a separate article shall be devoted for the establishment of the international fund for victims, as the establishment of this fund will be one of the major deliverables of the legally binding instrument and shall be further elaborated in a separate article.

Thank you chair.

## 8. India

Thank You Mr. Chair,

First of all, India would like to thank you for introducing the two articles of the text namely Article 2 and Article 8 under discussion. We also thank the experts for their valuable comments.

As regards Article 2, we would like to reserve our comments on this article until we have discussions on Article 4 on ‘Definitions’ as we need more clarity on the phrase “business activities of a transnational character” used in this article. Besides, India believes that this instrument should not cover national enterprises as we already have domestic laws in place for their regulation.

On Article 8, we believe the text needs considerable revision as there are number of elements which need more clarity and balance. This article needs to be flexible so as to avoid any conflict between a state’s domestic laws and its international obligations. The list of remedies should be an exhaustive list and we should not leave the options open-ended. We have encountered words like ‘satisfaction’ in the text. Now ‘satisfaction’ in the legal sense is difficult to define and has a relative connotation. What we should try to do is to make this article more flexible. It can list out the minimum standards while leaving it the states to work out the model of implementation as per their domestic legal framework.

Thank You

## 9. Indonesia

Mr. Chairperson,

At the outset, my delegation would like to express its appreciation again to the Chair for preparing a zero draft of a legally binding instrument on TNCs and Other Business Enterprises with Respect to Business and Human Rights much in advance allowing us to consult with relevant authorities in capital.

With regard to Article 2, Indonesia views that since the title, the focus and the subject of the treaty refers to the Transnational Corporations and Other Business and Enterprises, the terms used in article 2 and the rest of the draft treaty should be Transnational Corporations and Other Business Enterprises, instead of business activities of transnational character. Therefore, there should be a clear definition on Transnational Corporations and Other Business Enterprises, provided in the Section II, article 4 on definitions of the draft Treaty.

With regard to Article 2 point 1.c the purpose to advance international cooperation with a view towards fulfilling State’s obligations under international human rights laws is too broad. In this regard, we wish to add in the context of activities of Transnational Corporations and other Business Enterprises who have transnational character.

Mr. Chairperson,

On Article 8, we need clarification from the Chair on the scope of all human rights violations. We view that the term ‘all human rights violations’ is very broad and there for need to be elaborated. In our law for example, we divide human rights violation and serious human rights violations. We view that both victims of human rights violations and serious human

rights violations have the rights to remedy and access to justice, but we take more serious and urgent steps towards serious human rights violations.

I thank you.

## 10. Mexico

Quisiera referirme al artículo 2 relativo al propósito del instrumento. En este primer borrador, el objeto y fin del tratado es obligar a los Estados a fortalecer el respeto, la promoción, protección y pleno cumplimiento de los derechos humanos sólo en el contexto de actividades empresariales de carácter transnacional. Consideramos que el estándar de protección al que aspira este instrumento debe hacerse extensivo a todas las empresas bajo la jurisdicción del Estado, sin distinción, incluyendo a empresas privadas y públicas, independientemente del carácter transnacional o nacional de sus actividades.

Como expresamos en nuestros comentarios generales, consideramos que el término “violación” sólo debe emplearse cuando se trata de acciones u omisiones de los Estados y, es conveniente emplear el término “abusos” o “impactos adversos” respecto de las afectaciones a los derechos humanos causadas por las actividades de las empresas.

Respecto al Artículo 8, relativo a los derechos de las víctimas, sugerimos utilizar lenguaje procesal jurídicamente más preciso, sustituyendo el término “víctima” por “presunta víctima”, “demandante” o “promovente”. También nos parece pertinente incluir referencias a la perspectiva de género en lo relativo al acceso a la justicia, remedios y asistencia judicial.

Por otro lado, el inciso 5, subpárrafo d) prevé que no se requerirá a las víctimas en ningún caso el reembolso de costas judiciales. Sobre este tema quisiéramos preguntar si los panelistas consideran que el pago de costas puede ser una herramienta útil para evitar demandas superfluas, y por lo tanto debería mantenerse.

Sr. Presidente-Relator, quisiéramos expresar reservas sobre el inciso 7 que prevé la creación de un fondo internacional para víctimas. Esto podría tener como consecuencia que los Estados asuman una responsabilidad subsidiaria por los daños causados por las empresas, y podría duplicar esfuerzos o medidas nacionales, de países, como el caso de México, que ya tienen un fondo nacional de víctimas de conformidad con su legislación nacional y han destinado recursos presupuestarios para ello. En nuestro caso, la Ley General de Víctimas prevé un fondo de este tipo. Por lo tanto, no consideramos que sea conveniente la inclusión del fondo internacional de víctimas en el proyecto de instrumento jurídicamente vinculante.

Finalmente, consideramos que los incisos finales del artículo, del número 9 al 13, duplican innecesariamente normas de derecho internacional recogidas en otros instrumentos vigentes. Por lo tanto, sin demeritar su valor e importancia, consideramos que podrían ser suprimidos.

## 11. Namibia

Thank you Mr. Chair,

On Article 2: It is our position that States already have a duty to regulate the operations of national businesses and that the focus of this treaty is on the ETO's of businesses, thus relate to TNC's primarily and involving both host and home States. Therefore, the focus should be on the responsibilities of TNC's. However, in the interest of consensus, it might be wise to consider for the treaty to throughout refer to all types of business entities.

We concur with Ms. Molly Scott Cato that it is time to come up with a legal framework to govern the global responsibility and not retreat to nationalism. Decisions taken in one State has the potential of having an impact beyond its borders, which impact might be on the enjoyment of the human rights in another country. We are jointly shaping the political landscape within which international human rights law has to be enforced.

Article 8: Namibia welcomes the establishment of a fund for victims. Such a fund can be instrumental in facilitating access to justice for victims and can also serve to provide funding when witness protection is needed. Other instruments in ICL (UNTOC) make provision for similar funds, which has proven to be very effective.

There might be some repetition in Article 8 and some uncertainty regarding the wording of Article 8 (12), but this is the purpose of the exercise...to polish the draft. We will make proposals to the drafters in this regard.

I thank you.

## 12. Peru

Sobre el artículo 2

Reiteramos nuestro comentario sobre el alcance que debe tener el proyecto de tratado, no restringido únicamente a las actividades empresariales de carácter transnacional, sino que debe dirigirse a todas las actividades empresariales.

Por otro lado, consideramos que la formulación del párrafo 1.b es ambiguo y, como es propio de los instrumentos jurídicos, debe hacer una tipificación de las de violaciones de derechos humanos que cubre el proyecto de tratado.

Sobre el artículo 8,

Consideramos que la formulación de este artículo requiere igualmente de precisión y debe ser ajustada. El primer párrafo no especifica el detentor de obligaciones que debe hacer valer los derechos referidos. Por otro lado, debería definirse, porque no lo están en el derecho internacional, los términos de remediación ambiental y restauración ecológica.

Los siguientes párrafos asignan una serie de responsabilidades a los Estados en tanto son los detentores de obligaciones en el derecho internacional. Sin embargo, es preocupante que puedan resultar de una carga excesiva, especialmente para los países en desarrollo.

El párrafo 8 debe alinearse con los procesos existentes para el reconocimiento de sentencias extranjeras.

El párrafo 9 debe ajustarse a los casos reconocidos en los que se otorga la protección diplomática y consular.

Muchas gracias,

## 13. Russian Federation

Mr Chairperson, thank you.

First of all, we would like to note that article 8, like a number of other provisions of the draft convention, in its essence creates a special privileged mechanism of protection of human rights in the context of activities of TNCs and other companies. In our opinion, such an approach runs counter to the basic principles and the concept itself of human rights, and undermines the integrity of the administration of justice system and discriminates among victims of violations of human rights on the basis of the criterion of the subject of that violation.

What happens is that if my rights have been violated by a TNC – the state would be obliged to provide me with a privileged special regime of protection, as compared with the situation where my rights have been violated by the state itself. As is well known, in many international fora, states are struggling against attempts to fragment the system of human rights protection; they are trying to strengthen the integrity of that system and this includes through adopting appropriate decisions and resolutions, and avoiding an unjustified singling out of any privileged group or category of rights. Article 8 of the draft convention in its actual terms is diametrically opposing this goal – we cannot agree with this approach.

As for the specific rights enshrined here, many of them are already recognised in international law, and states already have obligations to ensure their compliance regardless of whether TNCs are involved in the process of the violations or not. The rights to access to justice and fair administration of justice have long been enshrined in international law through the choice of appropriate material and procedural guarantees, and these include the right to fair, effective and swift access to justice as established in the Universal Declaration of Human Rights of 1949, the International Covenant on Civil and Political Rights of 1966, the European Convention on Human Rights, etc. In international law, such key requirements have already

been enshrined, as competence of courts, their independence and impartiality, the establishment of courts on the basis of the law, equality before the law for all, etc. The provision of support to citizens in protecting their rights and legitimate interests on the part of diplomatic and consular establishments has been provided for in the appropriate Vienna Conventions of 1961 and 1963. Under the ILO, a wide range of conventions have been adopted on specific rights which more often are violated in the context of activities of companies. The rights set out in paragraphs 11 and 12 are already well-known and recognised. Given these conditions, a detailed explanation in article 8 of already existing rights and procedural guarantees is superfluous.

Rather, we would like to comment now on some specific provisions.

Subparagraph (b) of paragraph (1) of article 8 mentions measures aimed at re-establishing the so-called environmental rights, which as is well-known are not defined in any universally recognised definition. In these conditions, this norm may be non-viable. In practice, such questions are usually resolved by using extra-judicial mechanisms of compensation of actual damage.

Paragraph 2 of article 8 provides for the possibility of victims to bring collective actions. This category of suits is not provided for in the Russian law and its direct enshrinement in the convention would be a problem for us.

Paragraph 3 of article 8 goes beyond the framework of the subject matter of the convention and it is too general in nature. Its content is not related to violations in the context of the activities of TNCs and other enterprises.

Subparagraph (d) of paragraph 5 of article 8 is particularly controversial. According to this, victims of violations of human rights in any case are freed from the obligation to reimburse legal costs borne by the other side. In legal practice, we have seen cases of attempts to unfairly make defendants civilly or criminally responsible, the so-called torts of malicious prosecution. This is considered to be an abuse of the law and administration of justice. We are talking about cases that are based on unjustifiable arguments, in reality they are not related to defending rights that have been violated but they are aimed at getting economic advantages, and undermine the reputation of the defendant. However, from the latest proposals in 8(5)(d) we see that the plaintiff, even if he pursues illegal goals, must be exonerated from paying legal costs. This is not a justifiable approach.

The question of the establishment of an international fund, as provided for in article 8, in our opinion should be discussed in connection with article 14 on institutional arrangements. Just preliminarily, we can say that a decision as to the advisability of enshrining this type of obligation is only possible if we understand the practical and financial consequences thereof. Today these consequences are not clear. Perhaps the authors of the draft or the panellists already have some vision of the financial modalities for establishing such a structure and the sources of its funding? We would also like to find out the time-span we are talking about here.

Another important issue, Mr. Chairperson, we have not had a chance to speak after the completion of the round of general statements; however, already at this stage, many delegations have repeatedly raised the issue of the mandate of our group, and the need to renew the appropriate resolution of the HRC. Can we really continue productive work on the text if we simply pretend that this problem does not exist? We would like to hear your vision of the way we can resolve this issue. We will not rule out the idea that we would need further discussion specifically on this point.

Thank you very much.

#### **14. South Africa**

Chairperson,

1. The key objective of Resolution 26/9 of 27 June 2014 is to provide, as a law of last resort, effective legal remedies to the victims of the grave violations of human rights and fundamental freedoms committed by Transnational Corporations (TNCs) and Other Business



Enterprises (OBEs) under International Human Rights Law and International Humanitarian Law.

2. Underpinning the Guiding Principles on Business and Human Rights for the purposes of deterring and preventing abuses and providing remedies with legal certainty is important.

3. Currently these entities, whose operational activities have a transnational character, do not have any universal regulatory framework guiding their operations in the global economic system. The notion of Corporate Social Responsibility (CSR) which is a voluntary Code of Conduct still currently used by the Corporate Sector has no force of law and cannot be used in litigations, by competent courts for legal remedies in the cases of grave and serious violations of human rights committed by these entities. This is why during the struggle against apartheid, South Africa wanted sanctions definitively as opposed to voluntarism of corporate social responsibility which is reliant on the goodwill of business.

4. No business enterprises may violate human rights. At the same time upholding Resolution 26/9 should focus specifically on the transnational corporations. When you generalize the needs of the most vulnerable victims, you are sure to lose the essence of what is needed. This is not the intention of this process. This is why

Professor John Ruggie was called the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises in the first place.

5. They key objectives and purpose of the treaty is therefore:

(a) the provision of effective legal remedies to the victims of the grave and serious violations of human rights and fundamental freedoms by TNCs and Other Business Enterprises;

(b) To complement and reinforce weak/absent national legislation with the view to mitigating the overwhelming corporate power and to create a uniform and level playing field;

(c) To bring about universal human rights norms and standards in the operations and activities of the TNCs and Other Business Enterprises across the globe;

(d) To clarify and contextualise the notion of Extra-territorial jurisdiction and the concomitant legal obligations;

(e) To create enforcement mechanisms at the national and international level. A Treaty Monitoring Body with full mandate to issue urgent communications and undertake investigative enquiries into territories where consistent patterns of violations are reported is just one mechanism. The Chair and panellists should please elaborate on how a prosecutorial mechanism at the international level to adjudicate on allegations of grave and serious violations could be included in the treaty.

#### Article 8

1. The “rights of victims and rights-holders” is the key objective and rationale for the draft treaty’s existence and should be strengthened. A definition of a “victim and the rights-holders” for the purposes of the draft Treaty should be considered.

2. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 is of paramount importance and should be drawn from.

3. The first point of departure is the recognition of the plight of victims, including their immediate family or dependents as bearers of human rights who individually or collectively suffered harm through violations of human rights committed by TNCs and Other Business Enterprises. Paragraph 1 should therefore emphasize this point and recognize that they are central to the draft treaty.

4. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws provide that a victim who has suffered violence or trauma

should benefit from special consideration. Administrative procedures to ensure justice and reparation are needed. Article 8.10 should be frontloaded.

5. What then should follow is the operational aspects, including the right to remedy for victims of human rights abuses and violations committed by TNCs and Other Business Enterprise. This includes the victim's right to:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms

6. We agree with panellists on the inclusion of "precautionary measures" to stop immediately the harm or to prevent the harm until the case is decided.

7. An International Fund focused on legal assistance for Victims is important. The fund is to facilitate access to justice which is the key objective of the treaty. The Chair and panellists are requested to share their views on the modalities of a fund, including the direct contribution of TNCs and Other Business Enterprises to the Fund and where it could be located.

8. Finally, the draft treaty must recognize that TNCs and Other Business Enterprises must contribute to the requisite means of implementation for the realization of all human rights; for the eradication of poverty; and that they must adopt sustainable and ethical business practices.

## 15. Switzerland

Merci Monsieur le Président.

Au sujet de l'article 8, paragraphe 1, lettre. b du projet de traité, la Suisse souhaite faire le commentaire suivant :

La disposition va au-delà des Principes directeurs de l'ONU de notre point de vue. En effet, cette disposition établit des droits en lien avec l'environnement. Par conséquent, cette disposition dépasse également le cadre de la Convention tel que défini à l'article 3.

La Suisse souhaiterait connaître les bases ayant servi à la formulation de la disposition en question.

Merci Monsieur le Président.

## 16. Venezuela

Gracias Sr. Presidente.

A lo largo de las sesiones de este Grupo de Trabajo, hemos sostenido que es compromiso de los Estados la responsabilidad de promover y proteger los derechos humanos y las libertades fundamentales contra las violaciones de los derechos humanos, incluidas las cometidas por las empresas y corporaciones transnacionales, de conformidad con lo dispuesto en la Resolución 26/9 del Consejo de Derechos Humanos.

Para avanzar en la protección de los Derechos Humanos, frente a las empresas transnacionales, es necesario contar con un artículo en los términos en los que está redactado el artículo 2 del proyecto, donde quedan plasmado el propósito del futuro instrumento internacional jurídicamente vinculante.

Sr. Presidente

El fortalecimiento del respeto, de la promoción, protección y cumplimiento de los derechos humanos en el contexto de las violaciones de derechos humanos por parte de empresas transnacionales, es lo que nos ha impulsado durante estos cuatro años del Grupo de trabajo.

La víctima como el centro de acción y de protección de los derechos humanos para el acceso a la justicia y la justa reparación de las violaciones de derechos humanos cometidas por las empresas transnacionales, es el principal objetivo, sin dejar de lado la necesidad lograr la prevención de dichas violaciones.

El papel de las empresas transnacionales dentro del sistema capitalista depredador, ha dejado numerosas víctimas a lo largo de la historia reciente de la humanidad.

Creemos en la necesidad de avanzar en la cooperación entre los Estados, para garantizar la realización de todos los derechos humanos, incluido el Derechos al Desarrollo. Es necesario avanzar para la construcción de un mundo donde reine la impunidad de las empresas transnacionales.

En lo referido al Artículo 8, sobre los derechos de las víctimas y en particular sobre su numeral 7, que refiere al un Fondo internacional para las víctimas, pedimos que se aclare las implicaciones financieras para los Estados, toda que los Estados debemos prever adquisición de compromisos financieros de conformidad con el marco legal interno.

En relación al numeral 8, del mismo artículo, que se refiera a los mecanismos eficaces para la protección de sentencias nacionales como extranjeras, conforme a la convención, su derecho interno y sus obligaciones jurídicas internacionales. Venezuela contempla la figura del exequatur, siempre y cuando no sean sentencias de carácter penal, las cuales dependerán de instituciones jurídicas distintas.

### III. Articles 6, 7 and 13

#### A. States

##### 1. Argentina

###### a. *Artículo 6: Prescripción*

En el artículo 6 se prohíben las cláusulas de prescripción para incoar acciones en el caso de violación de los derechos humanos que constituyan crímenes a la luz del derecho internacional. En ese sentido, hay que tener en cuenta que la imprescriptibilidad puede variar dependiendo de lo que los ordenamientos jurídicos de cada Estado establezcan, pudiendo no ser un concepto uniforme en todos los países. Asimismo, en dicho artículo se establece que la prescripción para entablar acciones en el caso de reclamos civiles y otros procedimientos no debería ser restrictiva, permitiendo un adecuado período de tiempo para la investigación. En este caso no podrían descartarse planteos que controviertan lo dispuesto en los ordenamientos domésticos.

###### b. *Artículo 13: Conformidad con el derecho internacional*

Se propone que el proyecto tenga, per se, una jerarquía superior al resto de la normativa en la materia, constituyéndose en una referencia con respecto a la cual los Estados deberían ajustar la negociación e interpretación de sus futuros acuerdos de comercio e inversión, incluso con terceros Estados (artículo 13.6 y 13.7). Cabe señalar que los Estados verían restringidas sus decisiones de política comercial, debiendo someterlas al test de compatibilidad con las disposiciones de este proyecto.

##### 2. Brazil

###### a. *Article 6. Statute of limitations*

[DELETE 1. Statutes of limitations shall not apply to violations of international human rights law which constitute crimes under international law. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive and shall allow an adequate period of time for the investigation and prosecution of the violation, particularly in cases where the violations occurred abroad.]

###### b. *Article 7. Applicable law*

1. [DELETE: Subject to the following paragraph] ALL matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the

Convention shall be governed by the law of that court, including any rules of such law relating to conflict of laws.

[DELETE: 2. At the request of victims, all matters of substance regarding human rights law relevant to claims before the competent court may be governed by the law of another Party where the involved person with business activities of a transnational character is domiciled. The competent court may request for mutual legal assistance as referred to under Article 11 of this Convention.](...)

c. *Article 13. Consistency with International Law (...)*

6. States Parties agree that any future trade and investment agreements they negotiate, whether amongst themselves or with third parties, [DELETE: shall not contain any provisions that conflict with the implementation of this Convention and] shall ensure upholding human rights in the context of business activities by parties benefiting from such agreements.(...)

### 3. Chile

Señor Presidente-Relator,

En primer lugar queremos agradecer la introducción de sobre los artículos del borrador del instrumento que serán discutidos hoy. En opinión de Chile, son temas de alta sensibilidad al tratar sobre aspectos jurídicos, por lo cual se requiere lograr una redacción equilibrada y que confiera obligaciones claras, sobre la base del derecho internacional y que logre generar una convergencia entre las diferencias partes involucradas en la negociación.

Respecto del artículo 6 que trata de la Prescripción, estimamos no conveniente aludir a la imprescriptibilidad de los crímenes de derecho internacional, dado que la imprescriptibilidad de los crímenes de más grave trascendencia para la comunidad internacional (genocidio, crímenes de lesa humanidad y crímenes de guerra) ya constituyen una norma consuetudinaria vinculante para los Estados. Pero no existe consenso sobre este punto en cuanto a otros ilícitos internacionales.

En este contexto, si esta norma se mantiene de la forma redactada en el borrador del instrumento, existe una alta posibilidad de que los tipos penales cubiertos por la disposición sean materia controversia entre los Estados, quitando impulso al enfoque primordial del instrumento.

Adicionalmente, creemos que el texto contiene una serie de adjetivos que requieren explicase el por qué de su inclusión o considerar su eliminación del texto. Me refiero a términos que aparecen en este artículo como “excesivamente restrictivas”, “plazo adecuado” y “particularmente en casos ocurridos en el exterior”.

Sobre el artículo 7, derecho aplicable. Estimamos que se requieren mayores precisiones sobre la redacción del artículo, dado que versa sobre aspectos de sustancia y procedimiento, y en nuestra opinión, está escrito de forma abierta, lo que podría originar posibles divergencias de interpretación y posteriores controversias entre las partes.

Consideramos que debe darse un debate sobre la pertinencia de incluir el parágrafo 2, en el cual se considera la inclusión en el texto que, a petición de las víctimas, las reclamaciones formuladas ante un tribunal competente se podrá regir por la legislación de la Parte donde esté domiciliada la persona implicada en las actividades empresariales de carácter transnacional. Más allá de posibles mecanismos de cooperación y de asistencia que puedan existir, resultará un procedimiento complejo y el cual podría prestarse a una serie abusos de interpretación.

En efecto, una de las interpretaciones que se pueden obtener de este parágrafo es que las reclamaciones por violaciones de derechos humanos pueden ser conocidas por los tribunales de un país distinto al de comisión los hechos, y que ellos podrían llegar a aplicar su propio derecho nacional sustantivo para evaluar la conducta de la empresa, si sus disposiciones internas relativas al conflicto de leyes lo llegaran a permitir. Ello también implicaría, indirectamente, una evaluación de la conducta del Estado donde ocurrieron los hechos.

En relación al artículo 13, Consistencia con el Derecho Internacional Entendemos que este artículo debería referirse sólo a lo dispuesto en el Art. 31.3.c. de la Convención de Viena sobre Derecho de los Tratados.

#### 4. China

I would like to thank you for the presentation of the article and I would also like to express my thanks to the four experts.

As for these three articles, these are very important legal issues, and we will participate constructively in the discussion of these articles.

On article 6, as we see it, while we fully understand the goal of this article, there are some problems. First, regarding crimes under international law, that is not clear – it is not clearly defined by the universally accepted international law instruments. As regards to interpretation and applicability, this could lead to a lack of uniformity or uncertainty. Regarding the treaty of 1968, this provides for the non-applicability of the statute of limitations in the case of war crimes or crimes against humanity, and in that treaty there are two categories of crimes, and this is signed by 55 member states. We also look at the non-applicability of statute of limitations under international law: if we include this kind of statute of limitation, would that not be an obstacle to countries for participating under the instrument – it is worth pausing and think about this.

On article 7, in the second paragraph, it states “At the request of victims, countries where the court is situated can choose which law applies”, and the Russian delegate also referred to this issue, regarding the violation of rights in the case of criminal cases and the choice of the kind of law – this enters into the domain of mandatory norms, that doesn’t change the claim of the victim. This kind of application of law should not change according to the request of the victim.

Under article 13, we appreciate that in the first and final paragraphs we confirm the principle of sovereignty of states. We understand that this instrument should function within the framework of general international law, and as a general rule, this instrument should not be superior to other international instruments, nor should it hamper any other rules of international law. On paragraph 6 and 7, here it looks at the relationship of the instrument with any trade or investment agreements. We think that the principle of equality should be respected when it comes to human rights and development, it should not undermine the integrity of any future trade and investment agreement. We also consider that the representative of the WHO has already provided a clear explanation on this, this explanation is critical and it requires considerate thought.

Thank you very much, Chairman.

#### 5. Egypt

Thank you Chair,

Egypt would like to reiterate its support to the draft legally binding instrument which we consider as an effective tool to defend victims of human rights violations and abuses of TNCs and OBEs,

In that spirit, my delegation would like also to share with you the following remarks on articles 6,7,13 in a constructive manner with view to strengthening its content:

1- As for the statute of limitation in article 6, my delegation believes that it should be linked to the time of the knowledge of the occurrence of the violation in the framework of the implementation of the legally binding instrument, as long as it is related to the activities of the TNCs and the OBEs. In addition, the host country in following up the implementation of the legally binding instrument shall be aware of the occurrence of such violations. Article 6.1 needs to be re-drafted in synchronization with article 8.3, which requires all State Parties to investigate all human rights violations and take actions against allegedly responsible person.

2- Sub paras 6 and 7 from article 13 deals with a vital issue which is the relation between the legally binding instrument and the future trade and investment agreements, both articles

need elaboration and to be drafted in a way that takes into consideration various interests and concerns, taking into consideration going efforts to revise trade and investment agreements by many countries including my country Egypt.

Thank you Chair.

## **6. India**

Thank You Mr. Chair,

At the outset, India would like to thank you for introducing Articles 6, 7 and 13 of the text. We also thank the experts for their insightful comments.

On Article 6, there is a reference to the phrase ‘crimes under international law’. It is pertinent that the instrument should define what constitutes a crime under international law in the domain of business and human rights.

On Article 7, we believe there is a need for more clarity, particularly with respect to point 2 of the article. The terms ‘involved persons’ needs to be well defined to avoid any ambiguity. Providing a ‘choice of law’ option needs adequate safeguards to disallow forum shopping. The instrument should provide guidance in relation to establishing a genuine relation between the violation and the chosen law.

On Article 13, we once again believe that this article requires significant revision. Clarity is required on the term ‘rights and obligations’, as whose rights and obligations are being referred to in point 3 of the article. It may be noted this article has the potential to conflict with the trade and investment obligations of states as it is infeasible to re-negotiate existing bilateral investment agreements. Once again, we believe the text should bring in balance rather than conflict with the domestic laws.

Thank You

## **7. Mexico**

Gracias, señor Presidente Relator. Agradecemos a los panelistas por sus intervenciones.

Quisiera referirme al artículo 6. La mención de la imprescriptibilidad de crímenes internacionales se encuentra recogida en el Estatuto de la Corte Penal Internacional, por lo que estimamos que su inclusión en este proyecto es innecesaria.

Por otra parte, en cuanto hace a los plazos de prescripción de las infracciones y afectaciones a derechos humanos que no constituyan crímenes internacionales, consideramos que la redacción del borrador cero otorga relativa seguridad jurídica toda vez que expresiones como “no deberían ser excesivamente restrictivas” y “un plazo adecuado” son imprecisas, quedan sujetas a la interpretación de cada Estado y, en el mediano plazo, darán origen a controversias entre las partes contratantes respecto a su interpretación. En este sentido, estimamos pertinente sustituir la expresión “excesivamente restrictivas” por “innecesariamente restrictivas”.

En cuanto al artículo 7, relativo al derecho aplicable, México expresa preocupaciones sobre los siguientes elementos:

El párrafo segundo de este artículo permite que las víctimas invoquen como legislación aplicable al fondo del asunto aquella del Estado Parte de la nacionalidad de la empresa involucrada. Esta redacción podría generar reservas y objeciones en razón de su regulación nacional sobre ejercicio de jurisdicción y derecho aplicable, así como por la existencia de restricciones de orden público u otra naturaleza que impidan la aplicación de un derecho extranjero.

En este sentido, estimamos pertinente que el proyecto incorpore lenguaje que permita que las Partes contratantes se obliguen recíprocamente a modificar su legislación para admitir acciones promovidas por nacionales de otro Estado contratante, en aquellos casos en que, bajo los criterios definidos por las leyes nacionales para el ejercicio de la jurisdicción, o debido a diversos puntos de contacto transnacionales, más de un Estado pueda ejercer o reconocer dicha jurisdicción.

Respecto al artículo 13 relativo a la Conformidad con el derecho internacional, destacamos las siguientes cuestiones sobre las que México tiene reservas.

En derecho internacional, no hay jerarquías entre normas, a excepción de las normas *ius cogens*, las cuales no admiten derogación alguna. Consideramos que no puede suponerse que haya una prevalencia de este instrumento sobre otros o sobre normas de derecho internacional consuetudinario, salvo en aquellos casos en que los criterios de ley especial o ley posterior así lo permitan.

Debido a lo anterior, en el inciso 7 del artículo 13 estimamos necesaria la eliminación de la última parte del párrafo, la cual señala que las obligaciones de la presente Convención se deben respetar “independientemente de otras normas contradictorias de resolución de conflictos derivadas del derecho internacional consuetudinario o de acuerdos de comercio e inversión existentes”. Nos parece particularmente problemática la inclusión de la referencia al derecho internacional consuetudinario, debido a que una obligación convencional derivada de un tratado bilateral o multilateral, no tiene el efecto por sí sola de derogar una norma de costumbre internacional general. La inclusión de esta previsión en el tratado podría tener el efecto de violar una norma vigente de costumbre internacional.

Esta delegación quisiera también formular una pregunta a las y los panelistas y al Presidente-Relator sobre la relación entre tratados de inversión o comercio y tratados de derechos humanos: ¿sería preferible enfatizar que la obligación de respeto de los derechos humanos existe aún durante la negociación y conclusión de tratados comerciales o de inversión, como una manera de evitar conflictos normativos entre los distintos tipos de tratados?

## 8. Namibia

### a. *Article 6: Statute of limitations:*

States have the duty to ensure that victims have access to justice and to remedies and to participate in the process, which will ensure an appropriate remedy is availed to them, therefore this article is very crucial.

In Namibia we have a statute of limitation, which prescribes time limits for civil action, in which category most of the cases would fall and some criminal cases and we will have to consult in great detail on the way forward. However, one thing we are clear on is that victims should be granted a fair and reasonable opportunity to bring a matter before a court that has jurisdiction for adjudication. The way for an indigent victim to the doors of the courts is never an easy one and can take many years because of obvious reasons.

We should not lose sight of the fact that piercing of the corporate veil and other mechanisms used to establish culpability are often time consuming and complicated procedures. Provision should be made for prescription to be interrupted and/or being extended in cases based on violation of human rights by TNC's especially because of the complexities of their transnational character. We should be weary of making a fallacy of the remedies to be offered in terms of this treaty as the focus is on these remedies.

### b. *Article 7*

The purpose of MLA is to provide States the opportunity and ability to solve many complex legal issues even where a conflict of laws exists. Thus, it can be employed also with regards to this treaty.

### c. *Article 13: Consistency with International Law*

Various existing international instruments, as referred to by the Chair, have already paved the way for us in this regard and we should follow suit on those instruments. For States such as Namibia, which follows a monist system on incorporation of international law, it means that we have to pay extra attention to the provisions of an international instrument before we become a State party thereto. We welcome the way in which Article 13 is crafted, although it can be streamlined to draw a clearer connection with Trade and Investment Treaties with the aim to highlight the primacy of human rights obligations, as indicated by some of the

panellists. Sovereignty is a principle, which cannot be compromised, but which should also not be used a veil to refuse cooperation.

I thank you.

## 9. Peru

Adelantamos algunos comentarios preliminares sobre estos artículos, los que coinciden en gran parte con lo expresado previamente por las delegaciones del Brasil, Chile y México.

Sobre el artículo 6

Deseamos agregar que la redacción actual del artículo resulta en una muy difícil aplicación pues no establece prácticamente ninguna limitación a los casos en los que se puede acudir a la justicia.

Sobre el artículo 7

De la misma manera, la redacción de este artículo es general y otorga posibilidades casi ilimitadas respecto a la ley aplicable. De cierta forma, recuerda a la cláusula de la nación más favorecida, la que proviene de otras esferas del derecho internacional y que, además, ha dejado de ser utilizada. En ese sentido, hacemos eco de los comentarios realizados por la Federación de Rusia.

Finalmente, consideramos que este artículo sobre el derecho aplicable, debe ser enviado para comentarios a la Comisión de Derecho Internacional.

Sobre el artículo 13

Este artículo debe ser cuidadosamente revisado, de modo que se guarde el equilibrio que existe entre las obligaciones que tenemos los Estados en cuestión de comercio e inversiones y de los derechos humanos.

Reiteramos el comentario formulado por México y otros países, sobre que, en el derecho internacional, no hay jerarquías entre normas, a excepción de las normas *ius cogens*, las cuales no admiten derogación alguna

## 10. Russian Federation

Thank you, Mr. Chairperson.

First of all, we would like to repeat that our comments on the draft convention are without prejudice to the general position of Russia that it is premature to develop such a document.

Article 6 of the draft provides for no statute of limitations to be applied to violations of international human rights law, which are crimes under international law. This norm is so general that it does not enable a determination of what exact actions we are talking about. As you know, today there is no single document that contains an exhaustive list of international crimes. There are in this list crimes against peace, war crimes, and crimes against humanity. The convention of 1948 also included genocide as an international crime. If we look at only these universally recognised international crimes, then in the absolute majority of countries people that commit those are definitely not subject to a statute of limitations. Many states also participate in the convention on the non-application of statute of limitations to war crimes and crimes against humanity of 1968.

However, in the doctrine, there is also a category of crimes of an international character, or crimes of international nature. These are very serious criminal acts which affect the interests of several or all states, but they are not considered international crimes - for example, terrorism, hostage taking, money laundering, piracy, and others, and there are special conventions to combat these crimes as well. The question is whether these would be covered in article 6.

Moreover, in this important article, from a procedural point of view, there are uncertain categories mentioned for this: "unduly restricted", "adequate period". As we see it, these wordings, which are not backed up by objective criteria, should not be used.



In 7(2), it talks about the right of a victim of a violation to require that all matters of substance considered by a court are governed by the law of another party. Actually, the choice of applicable law is a category of civil legislation where the parties to a commercial deal with a foreign element can decide for it to be governed by the law of a third state. In criminal law, as far as we know, this principle is not applied. National court considers a criminal case and hands out a ruling in accordance with the legislation of its state, but, if necessary, it may take into account the law of the place where the crime was committed. Mr. President, it is difficult to imagine that, say, a judge in Ecuador could hand out a sentence on the basis of the Russian Federation's criminal code, and that's exactly what we are talking about in 7(2), inasmuch as it is not confined to civil suits. We do not understand either how this logic goes in line with the principle of equality of sides to a dispute before the law and courts.

Lastly, a couple of comments on article 13. First of all, in paragraph 1, not all principles of international law are enumerated. For example, for some reasons, there is no mention of the peaceful settlement of international disputes, or the principle of equality and self-determination of peoples. In our opinion, one either needs to list all of the principles, as they are defined in the declaration of 1970, or not single out some principles to the detriment of others.

Yesterday, many of those who spoke noted that the objective of the convention is to strengthen the extraterritorial nature of jurisdiction for violations of human rights. If that is true, then this approach does not comply with the principles of sovereign equality and non-interference. This contradiction is correctly pointed out in the compiled material on the draft convention that was disseminated by a number of organisations, including the ICC and the International Organisation of Employers.

Article 13(3) does not really fit with paragraph (7) of the same article either. In the former case, there is confirmation of states' obligations under existing international treaties, and then in paragraph 7, in contrast, it says that such trade and investment agreements could contain reference to ... (the Chair-rapporteur asked the delegation to provide comments in writing).

## 11. South Africa

### a. Article 6

1. It is imperative that the treaty not only apply to all violations of international human rights law but also to international humanitarian law which constitutes crimes under international law. There must be no hierarchy of human rights. South African courts approach a conflict over competing rights by attempting to find a balance between the various rights, instead of promoting one over the other.

2. South Africa comes from a brutal history of apartheid to which business was a central feature to the oppression of the majority of our people. In this regard, my government wishes to underline the generational impacts of the activities of Transnational Corporations where they have decimated lands and polluted water resources and thus undermining the livelihood of communities for generations. As a "victims text" therefore, it would thus be a shame to limit this instrument to atrocities which have taken place after this Treaty has come into force.

### b. Article 7

1. Providing victims with the choice of the most favourable applicable law, between that of the State where the harm occurred (home state) or where the TNC is domiciled (host state) is paramount. Additionally, there are circumstances when a victim is not able to utilize the courts of the home or the host state but are in a third state, and this needs to be taken into account.

2. Also, the applicable law should make reference to competent regional courts as an avenue of remedy.

### c. Article 13

Consistency with international law

1. While respecting the principles of sovereign equality and territorial integrity, the duty to cooperate as a fundamental tenet of international law must apply and must be incorporated in the text.

2. In Article 13, 7, clear language underpinning investment agreements which calls for equitable relations and respect for human rights should be emphasized. This article must not preclude any measure to address disadvantageous and constraining bilateral trade investments. It is important for Agenda 2030.

## **B. Observer States**

### **1. Palestine**

Thank you Chair for giving me the floor, and we thank the panellists for their inputs and comments.

We would like to share with you our view on the drafted text and in considering Article.7;

The focus on conflict-affected areas in the Treaty is an absolute necessity, considering the sharp rise in conflicts around the globe in the 21st century, particularly since 2010, affecting millions around the world.

While noting provision 6 under Article 15, we see there is an absence of reference to the applicability, where appropriate, of international treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

This would be essential addition to Article.7, particularly when we are addressing situations of conflict. In such situations, the treaty would benefit from reiterating state obligations under both international human rights law and humanitarian law to guarantee maximum protection for individuals and communities.

I thank you.

## **IV. Article 9**

### **A. States**

#### **1. Argentina**

En el artículo 9 se establece la obligación de que los Estados introduzcan en sus ordenamientos jurídicos internos la obligación - en cabeza de las empresas - de realizar amplias actividades de "debida diligencia" sobre las "entidades bajo su control directo o indirecto, o directamente ligadas a las operaciones, productos o servicios", incluyendo la obligación de contribuir financieramente en materia de prevención (art. 9.2.c). En la práctica, resulta difícil imaginar hasta dónde podrían llegar este tipo de obligaciones. Si se piensa en los contratos que frecuentemente se desarrollan en el ámbito comercial transnacional (contratos de distribución, de agencia, de suministro, licencias de uso de marca, etc), la carga administrativa y financiera que recaería sobre las empresas sería difícil de predecir, puesto que deberían realizar una debida diligencia para cada actor ligado a sus operaciones, productos o servicios. Se estima que este tipo de propuestas, más allá de su loable objetivo, debería calibrarse a la luz de la necesaria agilidad y realidad en la que se desarrolla el comercio transnacional. A mayor abundamiento recordemos que el artículo 9.2.f) obliga a las empresas a dejar constancia de dichas tareas de debida diligencia en TODAS sus relaciones contractuales, así como contratar seguros para cubrir potenciales reclamos resarcitorios (art. 9.2.h). Dicho en otros términos, este tipo de cláusulas merecerían evaluarse con mayores elementos que permitan visualizar la factibilidad material de poder llevarse a la práctica con eficiencia y efectividad, atendiendo a los objetivos del sistema.

Por otra parte, en el artículo 9.5 se establece la facultad de las Partes para otorgar excepciones para ciertas empresas pequeñas y medianas en relación a estas actividades de "debida diligencia". Es decir, la posibilidad de eximirse de cumplir con una parte del proyecto

dependerá de la voluntad y los parámetros que fije un organismo estatal, lo cual además agregaría complejidades burocráticas que frecuentemente conspiran contra el dinamismo que requiere el comercio internacional.

## 2. Chile

Señor Presidente-Relator,

Creemos que el artículo sobre Prevención debe ser puesto en relieve como la oportunidad de profundizar la complementariedad entre el instrumento y los Principios Rectores.

Como sabemos, uno de los aspectos centrales de los Principios Rectores, es que se relacionan además con la prevención de impactos, por medio del proceso de debida diligencia, cuya definición constituye lenguaje acordado y ha sido aceptada tanto por empresas como por Estados.

En ese sentido, quisiéramos ver reflejado en el instrumento una mayor interrelación con las etapas establecidas en los Principios Rectores. En nuestra opinión, el borrador divide algunas de las etapas establecidas en los Principios, crea etapas nuevas y establece la debida diligencia como un deber de resultado, no como un deber de medio. Este cambio, sin duda complejizaría en extremo la forma de monitorear o hacer cumplir la obligación.

Un punto de este artículo que debemos modificar es que no existe una definición sobre qué se entiende por una Pyme, siendo que a este tipo de empresas se le presentan una serie de obligaciones de difícil observancia, como por ejemplo: realizar informes periódicos, efectuar “*evaluaciones previas y posteriores*” (sin especificar contenido), prevenir violaciones por parte de entidades bajo su control “*indirecto*”, o celebrar “*consultas significativas*” con todos los grupos cuyos derechos se vean “*potencialmente*” afectados.

Lo anteriormente señalado impondría al Estado una obligación de exigir esos requisitos a cualquier actividad empresarial que se realice en su territorio, lo que no parece razonable dada la menor capacidad en recursos económicos y humanos de las empresas de menor tamaño. La posibilidad de exención que contempla el parágrafo 5 de este artículo no basta para contrarrestar esta preocupación, ya que se trataría de una facultad ad hoc, y que puede ser fuente de controversia entre Estados.

Según la redacción del artículo, parecería tratarse de una facultad discrecional ejercida caso a caso (por oposición a un criterio generalizado de exención basado en el tamaño de la empresa), que no exime al Estado de su obligación de prevenir violaciones a los derechos humanos, las que, si llegaran a concretarse, igualmente podrían dar lugar a su responsabilidad internacional. Sin embargo, más importante aún es la circunstancia de que tampoco hay criterios uniformes para determinar la procedencia de la exención, por lo que una empresa podría obtenerla en uno de los Estados en que ejerce sus actividades o en que ellas tienen impactos, pero no en otros países. De tal modo, estos últimos podrían cuestionar la licitud de la exención obtenida en el primero, y alegar su responsabilidad internacional por incumplimiento de la Convención.

Por ello, volvemos a reiterar que nuestra posición en que este instrumento sea aplicable para todas las empresas y contenga obligaciones más genéricas y factibles de cumplimiento en toda actividad empresarial, atendiendo especialmente a sus capacidades.

En efecto, parecería que este texto establecer mayores compromisos directos a las empresas que incluso a los Estados, llegando a requerir que de los ítemes (a) hasta el (e) estén en todos los contratos de las empresas. De lo anterior, surge la pregunta sobre cómo los Estados implementan estas obligaciones. Por ello, me permito expresar que la posición de Chile en relación a la naturaleza de los instrumentos internacionales de derechos humanos, es

que la actividad empresarial no es sujeto de derechos ni de obligaciones, estas reposan sobre el Estado y los derechos sobre las personas.

## 3. Costa Rica

Muchas gracias Señor Presidente,

Mi delegación tiene muchas consultas sobre el aporte relacionado con la prevención. ¿El fin de este Artículo es darle fuerza jurídica a los principios rectores 17 a 20? Si es así, ¿cómo se logra garantizar una capacidad uniforme de hacer cumplir esas obligaciones en todo el mundo? Partimos del supuesto de que, si todos los países tuviéramos la misma base legal de reconocimiento de los principales instrumentos internacionales de derechos humanos y, todos los estados tuvieran las mismas capacidades de hacer cumplir la ley en sus territorios, incluyendo la prosecución de responsabilidades, cuando se producen violaciones a estos derechos, posiblemente no estaríamos realizando este ejercicio.

A mi país le preocupa que las capacidades nacionales para hacer cumplir la ley son sumamente dispares en sede administrativa, desde la normativa jurídica y en el sistema de administración de justicia.

El principal trabajo de prevención debe partir del conocimiento de esas capacidades nacionales pues el inciso 3 del Art. 9 establece la obligación del estado parte de tener procedimientos efectivos nacionales con el fin de asegurar la aplicación de las obligaciones de este artículo. Según se desprende del texto del tratado, ello implicaría crear una institucionalidad ad hoc para este cometido al regular las operaciones de las transnacionales. Costa Rica tiene una tradición pionera en resguardo de los derechos de los trabajadores. No obstante, hace dos años el país adoptó una reforma procesal laboral que trabaja desde la prevención, fortaleciendo las capacidades administrativas de inspección laboral con el fin de cubrir de mejor manera el universo del mercado laboral. Asimismo, la asistencia a “víctimas” incluso gratuita costeadada por el Estado y la garantía de un proceso que asegure la justicia pronta y cumplida, reduciendo los tiempos de juicio de años a meses. Esta normativa aplica a todas las empresas tanto nacionales como transnacionales. Ninguna empresa puede operar en nuestro país sin respetar la normativa legal y el Estado hoy día tiene más y mejor capacidad para detectar el incumplimiento.

Entonces, con base en nuestra experiencia, la primera consulta es cuál es la obligación jurídica

que se establece acá y a quién. ¿Cómo el Estado puede garantizar jurídicamente la debida diligencia de parte de las empresas, en adhesión a su ya existente obligación de hacer cumplir la ley? ¿Se propone entonces el establecimiento de una estructura adicional en el estado para velar ex ante por el seguimiento de la debida diligencia de parte de las empresas con respecto a sus obligaciones de respetar los derechos humanos -que están a su vez consagrados en la legislación nacional?

Muchas gracias.

#### **4. Ecuador**

Señor Presidente,

El artículo 9 es esencial puesto que la prevención es un factor fundamental para evitar que las empresas realicen actividades que violen los derechos humanos; sin embargo, no está claro cómo se aplica el principio de la debida diligencia. El artículo se remite a citarlo en general, pero no clarifica el contexto. En Derecho Internacional Público se debe especificar qué es el objeto y cuándo es aplicable el principio de la debida diligencia.

Asimismo, en el literal c) no está claro a qué se refiere con la prevención y la relación del pago de contribuciones financieras.

Igualmente, en el literal g) se habla de varios grupos con alto riesgo de violaciones de los derechos humanos, pero la lista no es exhaustiva ya que faltan por ejemplo adultos mayores, personas GLBTI. Para evitar la exclusión de grupos vulnerables es recomendable que el texto se refiera en general a grupos en situación de vulnerabilidad.

Muchas gracias Señor Presidente.

#### **5. Egypt**

Thank you Chair,

My delegation would like to share with you the following remarks on article 9 dealing with the prevention of the violations:

1- In sub para 1 the term “control” needs more elaboration to be able to define the level of control of the state party and consequently the obligation on that state.

2-Raising awareness of the human rights obligations is one of the effective tool of prevention, and we propose to reflect this in article 9.

Thank you Chair.

## 6. France

Merci M. le Président – Rapporteur

Conformément à la position européenne, et en raison des compétences de l’UE sur plusieurs aspects du projet de traité, la France réserve sa position sur la V0 telle qu’elle a été diffusée.

Je prends la parole ici à titre national pour faire état de notre législation, et des leçons que nous avons pu tirer de l’élaboration de cette loi et des débats qui l’ont accompagnée. Je tiens à insister sur le fait que cette loi nationale est restreinte aux prérogatives de l’Etat français indépendamment de tout cadre international. Je souhaite en particulier souligner l’importance des actions de prévention et la portée efficace que l’on peut leur donner.

La France a en effet adopté en mars 2017 une loi sur le devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre qui porte entièrement sur la prévention, mais en considérant celle-ci dans toutes ses dimensions, afin de permettre une ampleur et une efficacité maximale. Je rappelle que cette loi s’applique à toute entreprise de plus de 5000 employés, filiales comprises, en France ou de plus de 10 000 employés à l’échelle mondiale au niveau du groupe en France et l’étranger. Ces seuils ont été fixés dans le cadre de la loi actuelle pour cibler en premier lieu les entreprises les plus organisées et qui ont le plus grand pouvoir de marché.

La loi sur le devoir de vigilance crée l’obligation pour les entreprises donneuses d’ordre d’élaborer, rendre public et mettre en œuvre de façon effective un plan de vigilance.

Ce plan, qui est sous la responsabilité légale de la société mère établie en France, ne concerne pas seulement ses propres activités mais également celles de ses filiales, sous-traitants et fournisseurs qui peuvent être établis en dehors du territoire national.

Il doit comporter les mesures de vigilance raisonnable permettant de repérer les risques et prévenir les atteintes graves aux droits de l’Homme, à la santé et à la sécurité des personnes, ainsi qu’à l’environnement.

Le plan de prévention comprendra notamment des mesures telles que la cartographie des risques, leur hiérarchisation et l’évaluation régulière de la situation des filiales, des sous-traitants et des fournisseurs. Des actions adaptées d’atténuation des risques et de prévention des atteintes graves doivent figurer dans ce plan, ainsi qu’un mécanisme d’alerte et de recueil des signalements. Enfin, la loi demande aux entreprises un dispositif de suivi des mesures mises en place.

L’avancée majeure de la loi adoptée consiste à engager la responsabilité uniquement civile de l’entreprise en cas de manquement constaté dans ce plan de prévention ou dans sa mise en œuvre. L’introduction d’un volet pénal aurait des conséquences très complexes en matière d’établissement des faits et de coopération judiciaire internationale. Dans ce cadre de droit civil, le juge français pourrait condamner l’entreprise si la prévention s’est révélée défectueuse, et ceci quel que soit le territoire où le manquement a été constaté.

La France invite les États et le groupe de travail à prendre en considération ce type de mécanisme et les cas auxquels il s’applique afin de répondre de manière pragmatique et efficace aux défis constatés dans le domaine des entreprises et des droits de l’Homme. La France estime que la prévention doit être au cœur du dispositif à la définition duquel œuvre le groupe de travail. Elle est la première garantie du respect des droits de l’Homme en entreprise. C’est une raison pour laquelle le champ couvert par l’accord en discussion ne peut pas se limiter aux entreprises transnationales.

Je vous remercie.

## 7. India

Thank You Mr. Chair,

1. India while affirming its commitment to the intent of this article seeks to prevent human rights violation by business activities of a transnational character and wishes to observe that Article 9 is the core of this LBI and our approach is for businesses to come up with self-regulating procedures. In India, as regulators of business, we have sought to change the philosophy of business to make it for people and planet and not just for profit. The Companies Act, 2013, under Section 166, casts fiduciary duties on the director which make him responsible to not only the Company, its members and shareholders, but also to its employees, community, and for protection of the environment. Further, section 135 of the Act requires that companies which meet a certain threshold of net worth, turnover and net profit are required to spend 2% of their average of net profit before tax of three preceding financial years towards socially responsible activities.

2. My delegation is of the view that while the draft LBI urges businesses to take measures to prevent human rights violations, certain improvements are desirable.

3. The duty to prevent human rights violations as elucidated in article 9.2.c is an onerous one and the threshold must be reduced to 'seeking to prevent' human rights violations which is a reduced standard. Further, 'seeking to prevent' human rights violations should be treated as a mitigating factor while affixing liability under Article 10.

4. Further, article 9.4 also needs to be re-drafted to make 'due-diligence' understood as a 'standard of conduct' and not as a 'standard of result'.

5. India appreciates the exemption clause provided in article 9.5 for protection of certain small and medium enterprises from additional undue administrative burdens. However the carve out is only for select obligations under Article 9. Considering the importance of SMEs in the economy, more flexibility in exemptions may be provided to SMEs.

Thank You.

## 8. Mexico

Gracias señor Presidente Relator. El borrador del instrumento prevé la obligación a cargo de los Estados para que adopten en sus legislaciones un marco preventivo adecuado aplicable a todas las actividades empresariales de carácter transnacional, con el fin de que se respeten las obligaciones de debida diligencia, considerando los posibles impactos o consecuencias negativas sobre los derechos humanos.

Estimamos que este artículo es de gran relevancia, ya que en muchas legislaciones nacionales no existen normas que exijan a las empresas, indistintamente del carácter transnacional o nacional de sus actividades, a cumplir obligaciones de debida diligencia.

Notamos también que no hay uniformidad en las leyes nacionales que regulan las materias energética, ambiental, minera, entre otras, respecto de las obligaciones de las empresas para implementar medidas de debida diligencia y prevención de afectaciones a derechos humanos, ni de realizar diagnósticos de impactos adversos sobre derechos humanos. Las más avanzadas son probablemente las legislaciones en materia energética, seguidas por la materia ambiental, que incorporan respectivamente los derechos a la consulta previa, libre e informada, y la obligación de las empresas a evaluar el impacto ambiental y social de actividades, proyectos y desarrollos.

Consideramos que la implementación de esta obligación requerirá establecer plazos para la adecuación de los ordenamientos jurídicos nacionales, ya que implicará un profundo proceso de armonización legislativa interna. Será necesario implementar leyes secundarias o regulaciones para definir procesos a seguir, a fin de dar cumplimiento a las obligaciones derivadas de dicho artículo.

Quisiéramos proponer un ajuste al inciso 1 del artículo 9, para que el impacto adverso resultante de actividades empresariales de carácter transnacional no se limite únicamente a

aquellas consecuencias directas, sino también indirectas y previsibles. Sugerimos que la última parte de este párrafo se refleje de la siguiente manera. Leo el texto en inglés: "...taking into consideration the potential impact on human rights resulting from or associated with the size, nature, context of and risk associated with of the business activities."

De esta manera, el estándar aplicable para la determinación del cumplimiento de las obligaciones de debida diligencia de las empresas, contemplará también vulneraciones indirectas que pudo prever o debió prever la empresa.

Por otra parte, nos parece positivo que el inciso 2.g del artículo 9, reconozca el derecho a la consulta y participación a favor de grupos que no necesariamente gozan de este derecho, y por ello puede, al igual que el Convenio 169 de la Organización Internacional del Trabajo, tener el efecto catalizador de reconocer el derecho a la consulta y participación de grupos como las mujeres, los niños, niñas y adolescentes, personas con discapacidad, migrantes, refugiados y desplazados. Consideramos que deben incluirse a las personas mayores y cualquier otro grupo en situación de vulnerabilidad a efecto de ser considerados en las consultas a que se refiere el inciso (2.g) de este artículo. Valdría la pena considerar, incluso, si sería deseable que haya una disposición general sobre la obligación de realizar una consulta previa, libre e informada, cuando de las evaluaciones de impacto se desprenda que pudiera existir un impacto negativo en los derechos humanos, sin limitarlo a grupos en situación de vulnerabilidad.

Sr. Presidente-Relator, tenemos ciertas reservas respecto al inciso 5 del artículo 9, ya que tiene un alto grado de discrecionalidad e inseguridad jurídica, dejando al arbitrio de los Estados la exención de ciertas pequeñas y medianas empresas de las obligaciones de debida diligencia, con ánimo de protegerlas de cargas administrativas excesivas. Consideramos que la facultad potestativa de los Estados parte a eximir de las obligaciones de debida diligencia a pequeñas y medianas empresas resultaría en un régimen débil de protección. Por ejemplo, en zonas fronterizas la vecindad y proximidad de dos Estados puede implicar que las pequeñas y medianas empresas tengan efectos transnacionales, los cuales podrían ser también adversos para los derechos humanos.

Finalmente, Sr. Presidente, reiteramos nuestra preferencia de usar el término "abusos" o "impactos adversos" respecto de las afectaciones a los derechos humanos causadas por las actividades transnacionales de las empresas, y no el término "violación", el cual consideramos que solo debe emplearse en relación con los Estados.

## 9. Namibia

Mr Chair,

Article 9: Prevention:

We thank the panellists for their insights. Article 9 is perhaps the most important article in the treaty as prevention is an indispensable pillar upon which protection, promotion and fulfilment of human rights is built.

For effective prevention to take place, there has to be an effective early warning mechanism in place to detect and address the risks involved. This can be done through human rights due diligence. We agree that this should be done throughout the supply chain and at all stages. Too many violations of human rights occur undetected because of the many links in the supply chain that are not monitored. A façade of due diligence should be exposed in time in order to avoid continuation thereof.

We propose Article 9 to refer to the term "human rights due diligence", as indicated by one of the panellists, as this will capture the essence of the prevention sought through the treaty. We further propose that the listing in Article 9 (g) be carefully considered in order to be all-inclusive as the list currently poses a risk of exclusion of groups with a heightened risk of violation, especially farmers and/or farmworkers. We also propose this sub-article to include awareness raising as a specific element of the consultations alluded to.

Whilst SME's should not be encumbered with unnecessary due diligence administrative burdens, they should not be excluded from the primary obligations to prevent abuses from occurring.

Mr Chair,

Despite the fact that businesses do not operate in a vacuum of legal responsibilities, the realities on the ground, based on evidence of abuses and impunity, remains a stark reminder of the gaps in the international legal framework regarding the ETO's of TNC's. Therefore, we maintain that this treaty is necessary and the work of this WG remains critically relevant.

I thank you.

#### **10. Russian Federation**

Thank you, Chairperson. And we thank all the panellists for their evaluation of the draft that has been submitted for review.

Mr Chairperson, in our understanding, states that enter into obligations under the convention must have the possibility of deciding for themselves on the forms and mechanisms that would be used nationally for ensuring that these obligations are lived up to, and for preventing violations of them by corporations and individuals. In this way, these states can take into account the particular characteristics of its legal system and financial and administrative possibilities, as well as regional circumstances and legal traditions in the appropriate way. What is most important is that we have a universal standard that is ensured.

In this connection, we do not see in principle the need for including such elaborate provisions on preventive measures in the convention.

If I comment on the existing text, we have serious issues with 9(2)(f). It provides for including human rights segments in all contractual obligations of transnational nature. This paragraph, in the view of our delegation, does not take into account the type of contents that we see in commercial contracts, including mechanisms for dispute settlement under those contracts. The inclusion of human rights segments in the subject matter of such contracts would mean that the courts dealing with civil cases and commercial arbitration that are most frequently used for settlement of commercial disputes would have to be competent to consider also human rights violations. Thus, they would have to consider categories of cases that are totally different from what they usually deal with in commercial disputes. This is clearly not the tasks of specialists in civil and international private law.

These considerations, moreover, are fully applicable to article 13(6). Here, we see the same problem. The inclusion of human rights segments into investment and trade agreements would mean the need for a radical reform of the international system for investment and trade dispute settlement. Moreover, it is not clear what "all contractual relations" means in the text. Suppose a contract does affect human rights at all, for example, if it works in the digital sphere or is of short-term nature. Then the inclusion of human rights obligations into it would become a pure formality. Such approach would hardly be the correct one.

Mr. Chairperson, we get a general impression that this and many other provisions of the draft convention, although clearly based on good intentions and in-depth theoretical knowledge of human rights, nonetheless they are somewhat divorced from reality and the actual context in which these obligations are to be carried out. What could effectively work in the form of recommendatory guiding principles, as we see it, are not always viable when they are transformed into obligations. In this connection, we would prefer not to include in the convention any provisions on preventive measures. As we see it, it would be more correct to formulate them in the form of commentaries or recommendations on implementing the obligations contained in the text, using as an example the practice of UNCITRAL, which, moreover, would make it possible to correct and adjust such provisions in the course of building up the practice of implementing the convention.

Thank you.

#### **11. South Africa**

1. In adherence to the letter and spirit of this text which has been coined as a "victims text" or rather the rights-holders' text, the subject of Prevention is an integral part of this Treaty as it highlights the importance of ensuring that human rights violations do not take place from the very commencement of business activities.



2. In our view, when we speak of the operationalisation of “prevention” and “preventive remedies” in the mandate of the HRC as well as contained in core international human rights instruments, we are speaking directly to the treaty.

3. Notwithstanding the need for effective remedies, most TNCs & OBEs will continue with violations on the premise that they will pay remedies and settle out of court. A Prevention Mechanism is imperative and must be strong enough to protect peoples and communities and ensure that lives are not lost in the first place.

4. The call for the text to make specific reference to the plight of women and children and the promotion and protection of their human rights is well supported.

5. It is important that this Article further refer to the following:

a) The Article must be guided by the “duty of care” which creates the legal obligation for transnational corporations and other business enterprises to adhere to a standard of reasonable care while performing any acts that could foreseeably harm others, My delegation is in agreement with the concept of human rights due diligence as suggested by the panelist and for this, setting out a standard which is universal and uniform in its application so that all TNCs will be assessed by the same benchmark is important;

Article 9.1 should refer to the consideration of human rights impacts as well as environmental impacts and these assessments must be conducted independently and transparently at cost to the company involved,

b) The reporting referred to in Article 9.2d should not be limited to nonfinancial matters but should be inclusive of financial and non-financial matters. It must be understood that the two components are mutually reinforcing therefore must be interrogated together,

c) The cardinal principle of Free Prior and Informed Consent (FPIC) must be explicitly mentioned and should guide the consultations as addressed in Article 9.2g. Further to this, we cannot ignore the fact that sometimes Transnational Corporations (TNCs) and Other Business Enterprises (OBEs) have increased or changed their business plan after consent has been given by communities. In this case, the notion of “continuous consent” should be added to ensure that communities have the right to suspend or stop developments that were not previously agreed upon.

d) Article 9.5. It is very important that TNCs and OBEs understand that Prevention Mechanisms should be an integral part of the business model as opposed to being viewed as “additional administrative burden”. Furthermore, in understanding that TNCs and OBEs work through subsidiaries, agencies, representatives and so forth which may be small or medium sized, all of these entities should be held accountable for human rights violations.

e) In addition to the above, the text should reflect clear obligations to halt production as well as mitigating strategies. These would be important components in order to stop violations.

f) Lastly, Chair, my delegation believes that this Article should make provisions for Prevention Mechanisms in conflict situations and situations of occupation where people are more vulnerable to human rights violations by TNCs and OBEs in particular women and children.

## 12. Switzerland

Merci Monsieur le Président.

La Suisse souhaiterait faire deux commentaires au sujet de l’art. 9 du projet de traité par rapport à sa cohérence avec les Principes directeurs des Nations Unies

-Notre première remarque concerne le concept et la terminologie. Le projet de traité reprend le concept de la diligence raisonnable en matière de droits de l’homme, tel qu’il est décrit dans les Principes directeurs des Nations Unies. Le concept et la terminologie utilisés ne sont toutefois pas alignés sur les Principes directeurs ainsi que sur les directives de l’OCDE comme le Guide OCDE sur le devoir de diligence pour une conduite responsable des entreprises qui a été publiée récemment en Mai 2018.

-Notre deuxième remarque concerne les formes de participation: le projet de traité reconnaît en principe dans les articles 9 et 10 que des sociétés peuvent être impliquées dans des atteintes aux droits de l'homme sous différentes formes. Cependant, les catégories utilisées dans le projet de traité ne correspondent pas à la différenciation découlant des Principes directeurs de l'ONU, c'est-à-dire les notions de contribution directe, indirecte et implication des entreprises dans des abus des droits de l'homme.

Merci Monsieur le Président.

## **B. Observer States**

### **1. Palestine**

Thank you Chair for giving me the floor, and we thank the panelists for their interventions.

In regards to the draft text, in its current format, the Treaty focuses on various important issues, including corporate human rights due diligence, but it does not shed light on the importance of requiring strict due diligence by both the state and corporate actors in situations of conflict.

Unfortunately, "special attention" under article 15 remains insufficient to address the increasing role of corporations in the commission of and involvement in grave breaches of international law, as well as their significant role in protracting and sustaining conflicts, particularly those relevant to the arms industry and natural resources.

In this regard, we see that adding a provision under article 9 on prevention requiring enhanced due diligence specific to conflict-affected areas to avoid adverse human rights impacts by corporate activities and/or their relationships, is rather essential.

As well as, where a situation is clearly in violation of international law in a conflict-affected area, the treaty must require States to create regulations to ensure that companies refrain from activities that contribute to such violations and / or terminate existing business activity.

I thank you.

## **V. Articles 10, 11 and 12**

### **A. States**

#### **1. Argentina**

Artículo 10: Responsabilidad jurídica

En este artículo se introduce el concepto de responsabilidad de las personas jurídicas, obligando a los Estados a incorporarlo en sus ordenamientos jurídicos. En este sentido, la personalidad internacional de las personas jurídicas en el derecho internacional no constituye un concepto libre de controversias, reconociéndose en forma restrictiva y limitada. En el caso de la Argentina, por ejemplo, en lo que respecta a la responsabilidad penal de las personas jurídicas, la ley 27.401 la acota a un reducido número de tipos penales, principalmente vinculados al soborno transnacional. En ese sentido, el proyecto introduciría un nuevo concepto de responsabilidad de las personas jurídicas vinculada a violaciones a los derechos humanos, que además incluiría a las personas físicas (artículos 4.2 y 10.1). En lo que hace a la responsabilidad penal, el proyecto establece la obligación de los Estados para incorporar o implementar normativa sobre jurisdicción universal (artículo 10.11), concepto que, cabe señalar, no es reconocido ni aplicado universalmente por la territorialidad que caracteriza al derecho penal.

#### **2. Azerbaijan**

Thank you Mr. Chairman,

Our remarks are made in the spirit of cooperation and with the view of improving and strengthening the draft legally binding document.

We share the concern of many other delegations regarding the definition and scope of the term “universal jurisdiction”. This is term is new and we wish to look closely into it together with you.

In line with our statements made last year, as well as this week we would like to draw your attention to the fact that sometimes violations of human rights by TNCs are taking place in times of conflict and in post-conflict situations. It is often that those violations are taking place on the territories of one state that are occupied by another state and in this case we would like to ask you to help us understand which state in this case shall bear the responsibility for such violations and the courts of which state will be in the position to study the case of violation.

In this regard we also see the need to work on the definition of the term “business activities of transnational character” with the view to also cover such activities taking place during conflicts and in post-conflict situations, as well as on the occupied territories.

Thank you Mr. Chairman.

### 3. Brazil

#### a. Article 10. Legal Liability

1.State Parties shall ensure through their domestic law that natural and legal persons may be held ~~[DELETE: criminally, civil or administratively]~~ liable for violations of human rights undertaken in the context of business activities ~~[DELETE: of transnational character]~~. (...)

3.Where a person with business activities ~~[DELETE: of a transnational character]~~ is found liable for reparation to a victim, such party shall provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.(...)

#### Civil Liability

5.State Parties shall provide for a comprehensive regime of civil liability for violations AND ABUSES of human rights undertaken in the context of business activities and for fair, adequate and prompt compensation.

6.All persons with business activities ~~[DELETE: of a transnational character]~~ shall be liable for harm caused by violations AND ABUSES of human rights arising in the context of their business activities, including throughout their operations: (...) c.to the extent risk have been foreseen or should have been foreseen of human rights violations AND ABUSES within its chain of economic activity.(...)

#### Criminal liability

8.State Parties shall provide measures under domestic law to establish criminal liability for all persons with business activities ~~[DELETE: of a transnational character]~~ that intentionally, whether directly or through intermediaries, commit human rights violations AND ABUSES that amount to a criminal offence, including crimes recognized under international law, international human rights instruments, or domestic legislation. Such criminal liability for human rights violations AND ABUSES that amount to a criminal offence, shall apply to principals, accomplices and accessories, as may be defined by domestic law.

~~[DELETE 9.Criminal liability of legal persons shall be without prejudice to the criminal liability of the natural persons who have committed the offences.](...)~~

~~[DELETE: 11.Where applicable under international law, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to crimes.]~~

~~[DELETE: 12.In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions or other administrative sanctions, for acts covered under the previous two paragraphs.]~~

b. *Article 11. Mutual Legal Assistance(...)*

6.States Parties shall carry out their obligations under the previous [REPLACE Article" by "PARAGRAPH"] in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in a way not contrary to domestic law.(...)

8.State Parties shall provide judicial assistance and other forms of cooperation in the pursuit of access to remedy for victims of human rights violations AND ABUSES covered under this Convention.(...)

c. *Article 12. International Cooperation(...)*

c. Facilitating cooperation in research and studies on the best practices and experiences for preventing violations AND ABUSES of human rights in the context of business activities [DELETE: of transnational character].

**4. Chile**

Señor Presidente-Relator,

Quisiera agradecer su introducción y también a los panelistas por sus comentarios sobre estos artículos.

Creemos que hay una serie de materias que deben ser objeto de mayor precisión respecto a los artículos tratados dado que entendemos que no han cristalizado. Por ejemplo el artículo 10 sobre responsabilidad y su párrafo 11 sobre la Jurisdicción Internacional, es objeto de amplia discusión en la Sexta Comisión de Naciones Unidas.

Por todas estas razones, expresamos nuestra reserva sobre estas materias.

Muchas gracias.

**5. China**

Thank you, Mr. Chairman.

Thank you for the presentation of these articles.

We would like to thank the four experts for their presentations, which are very good reference.

Concerning arts. 10, 11, and 12, there are a lot of legal issues which require very detailed discussions. Because of time constraints, we would like to just present some general views, but this will not prevent us to present our specific conditions later on.

Concerning art. 10, legal liability is a basic concept of the country's legal framework. It reflects the respect for the domestic laws. We think that this can be a basis for our discussion. But I would like to add that how to decide upon the legal liability, this depends on the specific provisions, including article 9 and arts. 3 and 4. Concerning art 10, our concern is that in paragraph 11, it is mentioned universal jurisdiction. Indeed, this concept has been used very often but when we talk about universal jurisdiction, every person has very different understandings. To discuss this concept, we will require a very long time, and because of time constraints, I would like to mention just one point, which is very clear to all the legal experts of all countries. From 2009 until now, the 6<sup>th</sup> Committee of the GA, which is the very good UN platform which reflects the official oppositions of the countries, and there the scope and application of universal jurisdiction is discussed without specific and substantive progress because the countries have differences on the two basic elements, which are the scope of crimes and application conditions. This shows that, from the point of view of positive international law, universal jurisdiction is not commonly recognized and it is not a jurisdiction rule. What is more dangerous is that, because there is no common definition, in practice this concept has often been abused in the courts of the developed countries, they launch frivolous litigation and prosecution against developing countries officials. The assembly of the EU has expressed repeatedly the serious concerns about it. Just because of this, the EU launched the consultation process at the 6<sup>th</sup> Committee of the GA concerning this concept. We support this concern. In this discussion of our draft, we understand that the

other countries have different positions on this issue but even the 6<sup>th</sup> Committee, this authoritative platform, cannot solve this problem. How can we solve it in our Working Group? Besides, through the universal jurisdiction concept, it is not directly related to the concept of legal liability in art 11. Therefore we believe that in this draft, to use a vague and easily abused concept will not be necessary, nor it will be appropriate, this will not be favorable for consensus, so it should be eliminated. If the other delegations want to discuss more broadly bases of jurisdiction, we can discuss it when we discuss art. 5, taking into consideration a broader international law to avoid using the vague concept of universal jurisdiction. This would lead to differences and controversies.

Concerning art. 11, legal assistance, we would like to present briefly our position. We noted that this article is based on the international treaties, and the general national practices, but there is a problem. The legal assistance in the criminal cases, especially when it concerns the mandatory measures when the request is made, this is made on the condition of dual criminality, that means, the act should constitute crimes in the requested country and the requesting country. So we suggest we should add this language.

The specific view will be presented later. Thank you.

## 6. Costa Rica

Muchas gracias Señor Presidente,

Mi delegación tiene consultas sobre el aporte relacionado bajo el acápite 11: asistencia judicial recíproca.

El derecho a la justicia pronta y cumplida y a la compensación es un principio básico de la doctrina de los derechos humanos. La garantía de ese derecho es fundamental en situaciones que requieren la búsqueda de recursos en tribunales extranjeros y el mantenimiento de los casos durante años. El desafío que representa para los tribunales nacionales el juzgar de acuerdo con principios jurídicos y jurisdicción extranjera, las diferencias en las resoluciones entre un país y otro, la dificultad para recabar prueba y testigos en el extranjero y la incertidumbre legal para las empresas y para las víctimas. En este sentido, Costa Rica consulta respetuosamente ¿qué instancias técnicas se prevén en el presente Instrumento para abordar este desafío?, es un delicado ámbito que necesita especial atención.

Me permito compartir que en el caso costarricense las instancias administrativas encargadas de tutelar y fiscalizar los derechos humanos en el caso del derecho laboral, no tienen la facultad legal de compartir datos de un proceso de investigación, ya que éstos son confidenciales y sólo conocidos por las partes. En el caso de Costa Rica, el intercambio de información está regido por el principio de legalidad contenido en la Constitución Política y la Ley General de la Administración Pública.

En lo que respecta al artículo 12, sobre Cooperación Internacional, Costa Rica reconoce la importancia de promover e irradiar la institucionalidad de los derechos humanos a nivel nacional e internacional y la cooperación juega un rol capital. En este sentido, mi país considera importante inspirarse de los Principios Rectores para promover esquemas efectivos de cooperación internacional y compartir las mejores prácticas sobre el tema que nos ocupa.

Señor Presidente, sin olvidar el interés para mi país de hacer todos los esfuerzos posibles en materia de prevención, las iniciativas de fomento de la capacidad y sensibilización llevadas a cabo a través nuestras instituciones, pueden desempeñar un papel decisivo para ayudar a todos los Estados a cumplir su deber de protección, en particular facilitando el intercambio de información sobre los retos enfrentados, las mejores prácticas, y promoviendo así enfoques más coherentes.

Costa Rica está de acuerdo con que la acción colectiva a través de instituciones multilaterales puede ayudar a los Estados a nivelar la situación con respecto a la observancia de los derechos humanos por parte de las empresas en los diferentes Estados y eso debe lograrse elevando el nivel de los Estados más rezagados.

Mi Delegación considera que un reto muy importante es trabajar en un esquema cooperativo donde precisamente no está incluida la empresa transnacional, la cual es de la atención del convenio.

Muchas gracias.

**7. Ecuador**

**ARTÍCULO 10: RESPONSABILIDAD LEGAL**

Señor Presidente,

El numeral 2 del artículo 10 es ambiguo ya que indica que la responsabilidad civil no está supeditada a la responsabilidad penal. Para que exista responsabilidad civil se debe haber previamente establecido una responsabilidad penal de acuerdo al derecho interno. La redacción puede ser incompatible con varios sistemas jurídicos nacionales.

Muchas gracias Señor Presidente.

**8. Egypt**

Thank you, Mr. President.

In the framework of the positive and constructive dialogue, and in order to enrich our conversation, we would like to provide the following remarks on the articles under consideration. As regards article 10, on legal liability, we reaffirm that is important not to have any conflicts between the domestic laws and the provisions of the international law. While we believe that this article is pivotal in the zero draft, we still believe that it still needs more clear drafting in order to be effective and implemented in the future. For example, it is widely recognized, in a number of domestic laws, that the burden of proof is the responsibility of the litigant. Therefore, the current drafting of 10(4) is in conflict with these laws. 10(11) requires states to include provisions on universal jurisdiction in its domestic laws. This might require a change of domestic laws while there is a controversy on applying or implementing this concept on a universal level.

The same applies to article 11 that has to do with mutual legal assistance. 11(12) might be in conflict with domestic laws on the privacy of bank accounts.

Article 12 is one of the most important elements of the zero draft. We would therefore suggest that it would be strengthened by including a reference to the cross-border corporations and other enterprises, so that when awareness programs would be provided for those enterprises, in line with the human rights principles, and in line with international law obligations, [...] by the parent country and the host country, in order to guarantee that these obligations are met.

Thank you, Mr. Chair.

**9. India**

Thank You Mr. Chair,

1. India thanks you for introducing articles 10, 11 and 12 of the draft text. We also thank the experts for their valuable comments.

2. We believe Article 10 cannot be insulated or be in conflict with corporate law but, in fact be harmonious with the corporate structure and the corporate legal architecture.

3. As regards Article 11, we understand that a number of provisions in this article have been drawn from the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption.

Mr. Chair,

4. We believe both Articles 10 and 11 need more clarity as certain elements have the potential to infringe upon the sovereignty of states. We believe terms like 'universal jurisdiction' need more clarity. We are also of the view that additional grounds for refusal of legal assistance which are already provided in the United Nations Conventions against Corruption and Transnational Organized Crimes should also be part of this article as they factor in the sovereign rights of states.

Thank You

## 10. Iraq

Thank you Mr Chair. I would also thank your Excellency on this initiative and thank all honoured participants.

Allow me at the outset to say that I have a legal experience and my legal experience was inspired by my long experience as a lawyer for 17 years, and then as a legal advisor in the cabinet and deputy minister of justice in Iraq, and a member of the legal committee of the Iraqi parliament.

I would like to give the following remarks, we have a number of remarks as regards article 10. On the civil liability in 10(5), we believe that we need to come up with a provision that obligates both governments and companies to abide by its provisions as long as these governments have become parties of such instrument; they also have to domesticate their legislation with the provision of the law. Article 10 in its prelude imposes administrative and civil obligations both on legal and non-legal entities, while at the end of this provision it negates such responsibility for natural persons. This is a contradiction, given the fact that legal persons can only behave according to the natural will of the natural persons, therefore any criminal penalty on the person that represents the natural person is an obligation, and this is in order not to let the natural person to evade the punishment. All of this is assumed to go in contradiction with article 9 on criminal responsibility, we have to specify criminal liability on equal footing for natural and legal persons alike. We can safely say that the criminal sanctions on legal person like liquidation or fines, in addition to other civil financial sanctions, as well as other administrative sanctions on legal persons can be defined, and can be made in order to define the responsibility of natural persons as regards human rights violations.

Lastly, I believe that the provisions need to be revised and need to be more strictly legal.

Thank you Mr. President.

## 11. Mexico

Gracias, señor Presidente. Agradecemos a los panelistas por sus interesantes intervenciones y comentarios. Quisiera compartir algunos comentarios, preocupaciones y propuestas sobre el artículo 10, relativo a la seguridad jurídica.

En el ámbito del Derecho Privado no es uniforme la práctica de los Estados para atribuir distintos tipos de responsabilidad a las personas morales o los criterios para determinar y cuantificar el daño ni el alcance y modalidad de la reparación. En este sentido, México estima pertinente que el instrumento señale que las diferentes clases de responsabilidad resultantes de afectaciones a derechos humanos derivadas de la actividad transnacional de las empresas se regulen de acuerdo al derecho interno de los Estados Parte, notablemente en materia de responsabilidad penal de las personas morales.

En cuanto al principio de la inversión de la carga de la prueba a favor de las víctimas, consideramos positiva la disposición contenida en el numeral 4 de este artículo. Estimamos que la redacción es consistente con principios y criterios de derecho internacional, en tanto esta se contempla, por ejemplo, con respecto al delito de tortura, particularmente cuando la persona está sujeta a un proceso penal. En este sentido, estimamos que, de la redacción de dicho precepto, no se desprende una obligación de los Estados de modificar su legislación interna para dar cumplimiento a ello, sino que es potestativo y quedará regulado por la legislación nacional la posibilidad de la inversión de la carga de la prueba.

En relación con el numeral 6 del artículo 10 estimamos pertinente incorporar una redacción de espectro amplio, similar a la sugerida para el artículo 9.1, agregando la frase “resulting from or associated with” después de “impact on human rights”, de tal suerte que el estándar de protección sea no sólo la causalidad directa, sino la previsibilidad, para el caso de relaciones causales indirectas cuando se trate de filiales, empresas controladas o cadenas de suministro.

Por otra parte, consideramos que la redacción del inciso b) del párrafo 6, que permite la posibilidad de atribuir responsabilidad en el derecho interno a una persona con actividades empresariales de carácter transnacional por los actos cometidos por una filial o entidad en su

cadena de suministro, siempre y cuando exista una conexión sólida y directa entre su conducta y el agravio, podría modificarse.

En este sentido, sugerimos los siguientes cambios a la redacción del numeral 6:

- Primer párrafo: “All [natural and legal] persons...”
- Inciso (a): “to the extent [they exercise] control...”
- Inciso (b): “to the extent it exhibits [sufficient control or influence over] its subsidiary...”
- Inciso (c): “to the extent risk [could] have been foreseen...”

En cuanto al inciso (c) del numeral 6 del artículo 10, estimamos pertinente agregar una excepción para aquellos casos en que la víctima o víctimas hayan contribuido, mediante dolo o negligencia, o den causa, a la vulneración.

Nos parece problemático que se señale que las sanciones se determinarán de acuerdo con lo establecido en el derecho interno de cada Estado Parte, lo cual generará desigualdad entre los Estados. Consecuentemente, al decidir un inversionista el destino de su inversión, podría llevarla a un Estado en el que perciba que el marco jurídico en materia de derechos humanos es menos estricto.

Por otra parte, esta delegación desea resaltar la complejidad que puede representar en la práctica demostrar la existencia del elemento subjetivo de intencionalidad, plasmado en el numeral 8 del artículo 10. Quisiéramos solicitar respecto a esta cuestión la opinión de los panelistas.

Señor Presidente, respecto al artículo 11, relativo a la asistencia judicial recíproca, nos parece en general bien formulado. Sin embargo, nos preocupa el inciso (k) del numeral 3, pues parece dejar a la discreción de los Estados la interpretación del contenido y alcances de los derechos humanos, lo cual sería contrario al derecho internacional y resultaría en la relativización de las normas de derechos humanos e inseguridad jurídica.

Al respecto, estimamos pertinente reformular el artículo 11.3.k, eliminando la referencia a la interpretación del derecho internacional de los derechos humanos, e insertando una mención al derecho doméstico. De esta manera, la redacción sería “Assistance in regard to the application of domestic law”.

Respecto al artículo 11.6, nos parece importante agregar al concepto de derecho internacional, quedando la redacción de la siguiente manera “States Parties shall afford one another assistance in a way not contrary to domestic [and international] law.”

Por último, México desea formular una pregunta al Profesor David Bilchitz respecto a su intervención. ¿Cómo estima que se haría la implementación de las obligaciones directas que propone, si no es a través de los mismos Estados? ¿No considera que es necesario reforzar la capacidad jurídica interna de regulación, y aumentar el nivel y precisión de la cooperación internacional y de la asistencia judicial recíproca?

## 12. Namibia

Mr Chair,

Just as introduction, Namibia would like to indicate that we are confident that the drafters of the text and those of us contributing thereto will as far as possible strive to keep in mind the literal rule of interpretation in the process of drafting and we still have the golden rule of interpretation as safety net for just in case we end up in absurdity. So, we acknowledge, much work still needs to go into the refining the text.

Article 10: Legal Liability:

Article 10 provides for instances where States legal systems do not permit criminal prosecutions of legal persons such as corporations. Proportionate and dissuasive non-criminal sanctions, including monetary sanctions can be considered. This is set out in instruments like the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Convention and provides for some useful flexibility.



The UNCAC for example also requires States to “establish the liability” of corporations for offenses under that Convention, whether that be criminal or, in States whose legal systems do not permit criminal prosecution of legal persons, then “effective, proportionate and dissuasive” civil or administrative sanctions. We agree with Mr. Deva that these sanctions should however be clarified.

In Namibia, like in many countries with a similar legal system, the burden of proof differs between civil and criminal cases. In civil cases, we have to prove on a balance of probabilities, which is lighter than that in criminal cases, where the burden of proof requires proof beyond any reasonable doubt. The institution of a civil claim is also not dependent upon any criminal charge and criminal and civil cases arising from the same incident often run concurrently.

Further, intention as stated in Article 10 (8) is an element of crime in many legal systems and requires that the criminal act must be on purpose. However, the foreseeability test provides for a viable alternative to this stringent requirement, which is often difficult to prove. This can indeed be helpful if incorporated as stated by Mr. Devan.

We agree with Mr. Bilchitz that a closer connection needs to be established between the decision-makers and the violations that occurs and more generally, between this draft treaty and corporate law. As indicated yesterday during the discussions under Article 6 (Statute of limitation), the process of piercing of the corporate veil is not an easy one and can be an obstacle to indigent victims, especially in developing States. Article 10(6) can be enhanced in this regard, keeping in mind the challenges with the enforcement of laws in States with weaker governance structures as the abuses taking place at the hands of TNC’s in such States are often more severe.

We prefer the flexibility of article 10(4) on the burden of proof, making the reversal subject to domestic law, because reversal of the burden can be problematic for some states.

Articles 11 & 12 are clear and is clearly based on other international instruments, which provides for MLA and International Cooperation, and which have been implemented with great successes.

I thank you.

### 13. Peru

#### a. *Artículo 10*

Mi delegación puede ofrecer solo algunos comentarios preliminares sobre este artículo, particularmente complejo y sensible para nuestro país.

En primer lugar, reiteramos nuestra opinión que el alcance debe ser a todas las empresas y no únicamente a las que tienen carácter transnacional.

Por otro lado, consideramos que la responsabilidad jurídica debe ser ejercida también en los casos de violación del derecho internacional humanitario, por lo que solicitamos que sea incluido en los diferentes párrafos en los que se menciona a los derechos humanos. Asimismo, como ha sido expresado anteriormente por otras delegaciones, somos de la opinión que debe mencionarse a las violaciones y los abusos de derechos humanos.

Como para el caso del artículo 7, proponemos que se solicite la opinión de la Comisión de Derecho Internacional.

#### b. *Artículo 11*

Comprendemos que la reparación para las víctimas de violaciones y abusos en el contexto de actividades empresariales que se realicen en más de una jurisdicción requiere un complejo andamiaje jurídico que requiere de asistencia judicial recíproca. Sin embargo, las provisiones del artículo en su redacción actual detallan una serie de responsabilidades de cooperación para los Estados que supondrían esfuerzos enormes para su aplicación. Una vez más, la carga sería excesiva para los países en desarrollo.

Muchas gracias

#### 14. Russian Federation

Thank you, Chairperson.

In my statement on Monday, as it was the case last year, I stressed that the concept of criminal liability of legal entities is not used in the Russian legal system and, if such an obligation were to be introduced here, this would be an obstacle for Russia's accession to the international treaty. We are guided by this premise when assessing article 10 which core is indeed this idea of legal entities holding criminal liability.

Art. 10 (12) does not resolve the problem either. First of all, criminal liability continues to be a key principle in art. 10. Secondly, conflicting norms are included from the very outset into paragraph 12 inasmuch as it is impossible to objectively establish what is understood by the terms "effective, proportionate and dissuasive non-criminal sanctions". Such a vague wording provides grounds for potential accusations of non-implementation of the convention.

There are other expressions in art. 10 whose meaning is also incomprehensible. For example, these are the phrases "or its equivalent" in paragraph 2, "control over the operations", "sufficiently close relation", "strong and direct connection" in paragraph 6, and also the term "crimes recognized under international law" in paragraph 8, whereas in article 6, which we discussed already, the term "crimes under international law" is used.

One of the most controversial provisions of the draft is 10(11) on the principle of universal jurisdiction. This concept has given rise to many legal questions because of possible cases of abuse of it. The universal jurisdiction is currently applied for the most serious, grave crimes under international law, such as aggression, piracy, torture and genocide. There are no grounds in current international law for expanding this list with all the violations of human rights which might exist in the criminal legislation of each specific state.

In this context, the phrase "where applicable under international law" at the end of 10(11) complicates the situation even more. If it is to mean that universal jurisdiction is to be applied only to crimes for which it is already recognized, then we don't understand why this confirmation has to be included in the present text.

Further thought needs to be given to art. 10(4) on shifting the burden of proof. There is a very well-known maxim, "actor incumbit onus probandi", "the burden of proof shall be borne by the plaintiff", that has been incorporated in the procedural legislation of most countries of the world, and it is applied in the practice of international judicial and arbitration bodies. The possibility of shifting the burden of proof for ensuring victims' procedural rights indeed does exist in the legislation of many countries, but usually it is applied in disputes with states, when the parties in the suits are clearly not equal. And in the convention we are talking about disputes between participants in legal proceedings who are formally equal.

10(3) refers to a situation where a state has paid compensation to a victim, rather than the violator. This provision requires clarification, inasmuch as, as a general rule, states do not bear responsibility for unlawful actions by private persons.

And my last point: in art. 11(2) we see an obligation of states to give legal assistance to each other, including access to information and evidence. At the same time, this obligation is not correlated with the duty to ensure the procedural rights of the persons against whom these actions have been taken. As a result, fighting for the rights of some might end up culminating in a violation of the rights of others.

Thank you very much.

#### 15. South Africa

##### a. *Article 10: Legal Liability*

While States have the primary duty to uphold human rights, the current status quo is a preference and not an obligation on TNCs and Other Business Enterprises to behave in a specified manner and be accountable for human rights abuses and violations. These entities who accumulate profits larger than the GDPs of many developing countries in which they operate in, need to assume more responsibility and be held accountable by complying with

all the internationally recognized human rights and fundamental freedoms throughout their operations.

This obligation must include their positive contribution and direct obligation to communities in which they operate in as a mandatory requirement and with requisite reporting obligations, including financial and non-financial reporting. This should be explicitly referred to in the draft treaty.

Furthermore, adherence by TNCs and Other Business Enterprises to the principle of Free Prior, Informed and Continuous Consent must come into effect. States must also ensure that citizens/communities are consulted to determine their vision for their land

As pointed out by some of the panelists, there are circumstances whereby regulatory and enforcement frameworks are absent or limited. The draft treaty would need to address these challenges.

There is a thus greater need to include specific components on co-operation between home States and host States in holding these entities accountable for human rights violations and mutual legal assistance.

Ensuring that natural and legal persons are held criminally, civil or administratively liable for human rights violations is imperative. All possible ways in which TNCs and OBE may be involved in violations must be covered. The issue of making provision for criminal liability conditional as in Article 10.8 should also be cautioned and the language revised appropriately. Violations recognized as crimes under international law and for which international law require the imposition of criminal sanctions, including investigation and prosecution, should be incorporated into national criminal law and reflected in Article 10.8.

*b. Article 11: Mutual Legal Assistance*

International judicial cooperation and mutual legal assistance is critical to effectively enforce the Treaty and to complement provisions on extraterritorial obligations.

Ensuring Mutual Legal Assistance between States will provide the necessary international legal framework for mutual cooperation between two countries, including in relation to criminal investigations.

The Article must also make provision for technical assistance including adequate training and other initiatives.

*c. Article 12: International Cooperation*

The provisions of this Article should be strengthened to also reflect obligations of TNCs and Other Business Enterprises. It is not only about international co-operation of States but also the co-operation of TNCs and Other Business Enterprises in ensuring redress for human rights violations that they have caused or contributed to as already reflected in the OECD Guidelines for Multinational Enterprises. The purpose of the treaty is to go beyond voluntarism and ensure that they are now binding.

The Article should draw from the UN Charter, whereby achieving international co-operation to solve international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all is ensured.

The Declaration on the Right to Development provides an essential guide to the manner in which States, the international community and all organs of society must act and cooperate to ensure an enabling environment for development that is sustainable, just, equitable and inclusive. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

The Article should include the general obligation of States to cooperate in respect to identification, investigation, prosecution and enforcement of judicial orders in cases of

human rights abuses committed by or with the participation of TNCs and Other business enterprises under their jurisdiction.

**16. Uruguay**

Muchas gracias señor Presidente Relator, agradecemos a los panelistas por sus interesantes intervenciones.

Uruguay desea hacer un breve comentario de carácter meramente preliminar, en el marco del proceso de análisis del proyecto de instrumento que aún se encuentra en curso a nivel nacional entre las instituciones relevantes.

En tal sentido, con relación al artículo 10 que versa sobre la responsabilidad jurídica, en forma similar a lo que fuera expresado por otras delegaciones, deseamos dejar constancia de que el mismo se encuentra siendo sometido a un pormenorizado análisis a la luz de nuestra normativa nacional, por presentar dificultades de fondo para Uruguay, dado que nuestro sistema legal en principio no prevé la responsabilidad penal de las personas jurídicas.

**17. Venezuela**

Agradecemos la presentación de los panelistas sobre este importante asunto.

En relación al artículo 10, numeral 11 relativo a la “Responsabilidad Jurídica” en el documento jurídicamente vinculante, la Delegación de Venezuela se reserva su posición sobre el concepto de la llamada “jurisdicción universal”. Todos los Estados en ejercicio de su soberanía, tienen la potestad y el derecho de ejercer o establecer la jurisdicción en los términos que estimen considerar, de acuerdo a las garantías y principios constitucionales que hayan establecido.

Consideramos entonces, que es necesario aclarar lo más suficientemente posible, el significado y alcance del mencionado “Concepto de la Jurisdicción Universal”, al que se hace referencia en el Borrador.

Muchas gracias.

**B. Observer States**

**1. Holy See**

Mr. Chair,

International law has yet to articulate the human rights obligations of corporations and to provide mechanisms for regulating corporate conduct in the field of human rights. Since the nineteenth century, international law has addressed almost exclusively the conduct of States. Traditionally, States have been viewed as the only “subjects” of international law, the only entities capable of bearing legal rights and duties.

Developing and Least Developed Countries suffer the consequences of an asymmetry in the international system, whereby the rights of business companies are backed up by hard laws and strong enforcement mechanisms, while their obligations are backed up only by soft laws, like voluntary guidelines. One of the Guiding Principles on Business and Human Rights’ most transformative contributions is the requirement that the responsibility of companies to respect human rights is not limited to their own operations, but extends to human rights impacts connected to their products and services throughout their network of suppliers and other business relationships. Through the Guiding Principles, it has been recognized that companies do not control every dimension of these relationships, so they introduce the concept of leverage. Where human rights are adversely affected by activities in a company’s value chain, the company’s responsibility is to use its leverage to try to improve those people’s situation. Where the leverage is insufficient the company is expected to try and increase it, perhaps in collaboration with other companies or different stakeholders.

During the discussions in preparation of the first draft of this legal instrument, the need to address the gaps in the global legal framework emerged. Unfortunately, the legal framework has not kept up with evolutions in the global economic and financial reality. The growing

transnational dimension of the activities of the enterprise called this Working Group to frame the civil and criminal liability through the inclusion of business operations and relationships in countries other than the countries where the business could be based. While under general international law the concept of jurisdiction serves to allocate state competences, in human rights law the term is used to define, as appropriately as possible, the pool of persons to which a state ought to secure human rights.

The protection of human rights is traditionally framed within the context of public law, including constitutional, administrative and criminal law. Legal liability for business enterprises in domestic law typically includes responsibility under criminal, civil and administrative law. In certain jurisdictions, constitutional law plays a role in the protection of rights. However, reality shows that those affected by corporate abuses, especially in certain jurisdictions, also tend to use private law, which often does not provide a solution to those challenges. Article 10 of the zero draft represents a good basis for defining the legal liability, overcoming the realm of public law, by assigning to domestic law the capacity to hold natural and legal persons “criminally, civil or administratively liable for violations of human rights in the context of business activities of transnational character”.

It emerges, therefore, that legal liability results in a combination of public and private law with substantive and procedural elements. Through the provision of Article 10.8, “Criminal liability”, the offences and their authors are defined with sufficient clarity, accentuating that criminal liability of a legal entity does not exclude the personal individual criminal responsibility of company directors or managers. Furthermore, through the inclusion of the reversal of the burden of proof there is a clear effort to balance, in the contest of huge power and resources asymmetries, the differences between corporations and affected local communities. Such a language represents a good basis for the negotiation.

In conclusion, the Delegation of the Holy See would like to recall that our efforts during this first session should be devoted “not only to create ‘ethical’ sectors or segments of the economy or the world of finance, but to ensure that the whole economy — the whole of finance — is ethical, not merely by virtue of an external label, but by its respect for requirements intrinsic to its very nature”.

Thank you, Mr. Chair.

## 2. **Palestine**

Thank you chair for giving me the floor and we thank the panellists for their important inputs.

Regarding the text under Article.10 on legal liability, the creation of a uniform international rule on the civil and criminal liability of TNCs by the draft treaty would be a positive step. To the effect, certain points need to be highlighted.

We should look for ways to create accountability for corporations that are enabling, aiding and abetting violations of international law and human rights especially in cases of occupation and conflict-affected areas. It is crucial for all those under occupation and in conflict-affected areas to ensure that this treaty does not only lay duties on states but creates an international rule that ensures criminal, civil and administrative responsibility of transnational corporations.

In addition, the absence of provisions that hold the State directly responsible for actions and omissions committed by TNCs under the State’s control, instruction or guidance or while exercising government authority delegated to them, explicitly or tacitly, need also to be highlighted.

Finally, criminal liability of the corporate actors should be universally defined within this Treaty. This should not be subject only to ‘domestic law’ and we ask for this limitation to be removed from the text, we also ask that criminal liability is not only limited to intentional cases.

I thank you.

## **VI. Articles 3 and 4**

### **A. States**

#### **1. Argentina**

Artículo 4: Definiciones

La definición de víctimas (art. 4.1) se caracteriza por una falta de precisión en su formulación que dificulta conocer los límites necesarios para el ámbito de aplicación personal del proyecto. Se incluye a la familia inmediata o dependientes de la víctima directa y personas que han sufrido daño interviniendo para asistir a las víctimas o para prevenir la victimización. En otros términos, bajo dicha definición podría considerarse víctimas un conjunto indefinido de personas, abriendo la posibilidad de expandir de forma tal la legitimación activa para incoar acciones que conlleve el riesgo de desvirtuar los objetivos del sistema.

#### **2. Azerbaijan**

Thank you Mr. Chairman,

Our remarks are made in the spirit of cooperation and with the view of improving and strengthening the draft legally binding document.

We suggest that the scope of this instrument shall cover business activities of transnational character, which shall also cover such activities taking place during conflicts and in post-conflict situations, as well as on the occupied territories.

In our view “missed opportunity” shall be covered under the listing of harms faced by victims as a result of human rights violations by TNCs in article 4.1. Sometimes victims are not participating in decision making processes requiring their involvement due to various circumstances often beyond their control and the harm that they are suffering can be a missed opportunity to benefit from the activities undertaken by TNCs on their territories.

We appreciate the fact that the article 4.2 is covering business activities undertaken by electronic means. However, considering the speed of the digital development in the contemporary world we would like to work closely with you on the phrasing with the view to cover the TNCs existing online only or mainly.

It is useful to also name most vulnerable groups of victims such as women, children, migrants, refugees, internally displaced persons and persons with disabilities in article 4.

We also suggest that the draft legally binding document provides the definition of TNCs in order to avoid further confusion and misinterpretation in the future.

We also consider it crucially important for the draft legally binding document to cover human rights violations taking place in conflict and post conflict situations.

Thank you Mr. Chairman.

#### **3. Bolivia**

Jallalla Sr. Presidente,

Valoramos las contribuciones de los expertos. Con respecto al alcance consideramos que este artículo está en línea con la resolución 26/9 en la cual el Consejo de Derechos Humanos estableció el mandato de este grupo de trabajo, precisando con claridad que el ámbito de aplicación son “las empresas cuyas actividades operacionales tienen carácter transnacional y no se aplica a las empresas locales registradas con arreglo a la legislación nacional pertinente”.

El Consejo de Derechos Humanos delimitó de esa manera el mandato, tomando en cuenta que, si bien todas las empresas, sin importar su tamaño o el alcance de sus operaciones deben respetar los derechos humanos, la brecha legal se encuentra en aquellas empresas que utilizan sus estructuras transnacionales para evadir la justicia nacional. Creemos en ese sentido que el párrafo 1 es lo suficientemente amplio como para abarcar a las actividades empresariales

de carácter transnacional a lo largo de la cadena de valor y que no excluye a ninguna empresa que tenga actividades de carácter transnacional, sin importar su tamaño.

También apoyamos que la Convención abarque todos los derechos humanos internacionales y aquellos reconocidos en el derecho interno.

Con relación a la Definición, consideramos que el término de víctima podría ampliarse a comunidades o pueblos afectados quienes también son sujetos de derecho.

Apoyamos que se incluya la referencia a los derechos ambientales, tomando en cuenta que un gran número de países y regiones hemos reconocido el derecho al medio ambiente. Por ejemplo el derecho al medio ambiente fue reconocido en el Protocolo Adicional a la Convención Americana sobre derechos humanos en materia de derechos económicos, sociales y culturales “Protocolo de San Salvador”.

Con relación a la definición de actividades empresariales de carácter transnacional quisiéramos consultar a los expertos que opciones habría para otorgar mayor especificidad para evitar diferentes interpretaciones que puedan poner trabas a las víctimas, manteniendo al mismo tiempo la amplitud necesaria que evite vías de escape para los perpetradores.

Gracias

#### 4. **Joint statement: Brazil, Chile, Honduras, Mexico, Peru**

Señor Presidente-Relator,

Es para mí un honor tomar la palabra en esta sesión en representación de Brasil, Honduras, México, Perú y Chile.

Junto con agradecer la presentación general sobre los artículos que cubren tanto el alcance como las definiciones del instrumento, quisiera partir señalando que ambos artículos forman parte integral y establecen el ámbito de competencia y los límites en los cuales se podría aplicar el instrumento. Es por eso que queremos realizar los siguientes comentarios, con el propósito de fomentar la discusión y que se recojan nuestras impresiones.

En relación al artículo 3, consideramos que la redacción del alcance del instrumento impacta su consistencia y el ámbito de efectividad en su conjunto. En ese sentido, tratándose de un instrumento de derechos humanos nos resulta razón de preocupación que su alcance sea determinado por el tipo de actividad y no por la gravedad del impacto.

Como fuera señalado, durante la anterior intervención realizada a nivel colectivo, además en las diferentes intervenciones de nuestros países en capacidad nacional, consideramos que resulta primordial ampliar el ámbito de aplicabilidad del instrumento, para dejar de ser restringido a las actividades empresariales de carácter transnacional, sino que debe extenderse su capacidad de acción para abarcar todo tipo de actividad empresarial, sea a nivel nacional como transnacional. Asimismo, creemos firmemente en que es responsabilidad del Estado el velar por el cumplimiento de las normas y las obligaciones internacionales por parte de las empresas.

Nos asiste la convicción que limitar este instrumento a un tipo exclusivo de actividad empresarial lo aleja del espíritu de los Principios Rectores de Naciones Unidas, así como deja espacio a la interpretación respecto del carácter transnacional de las actividades empresariales al no existir criterios claros, estables y uniformes para su

determinación. Para poder conferir a las víctimas de mecanismos de remedio efectivos y provistos de certidumbre jurídica, debe existir un marco normativo preciso que comprenda a todas las empresas.

#### 5. **Brazil**

##### a. *Article 3. Scope*

1. This Convention shall apply to human rights violations AND ABUSES in the context of any business activities [~~DELETE: of a transnational character~~].(...)

b. *Article 4. Definitions*

1. "Victims" shall mean persons who individually or collectively ~~[DELETED: alleged to have]~~ suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, ~~[DELETED: including environmental rights]~~, through acts or omissions in the context of business activities ~~[DELETED: of a transnational character]~~. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

2. Business activities ~~[DELETED: 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, ~~[DELETED: that take place or involve actions, persons or impact in two or more national jurisdictions]~~.

**6. Chile**

Señor Presidente-Relator,

La siguiente es la intervención a título nacional respecto a los artículos 3 y 4 del instrumento. En primer lugar quisiera agradecer sus comentarios sobre estos artículos y señalar que adherimos completamente a los preceptos señalados en la intervención leída con anterioridad como parte de un grupo de países.

Como ya fue puesto en relieve, Chile estima que el instrumento debe procurar regir las actividades de todas las empresas. No parece adecuada la redacción actual, en que se establece que la Convención se referirá a las violaciones de los derechos humanos ocurridas en el contexto de "cualquier actividad empresarial de carácter transnacional", concepto que se define en términos muy expansivos en el Art. 4, parágrafo 2. Como esta disposición no exige ni habitualidad ni periodicidad para las actividades allí establecidas, cualquier empresa que realice esporádicamente transacciones con "impactos internacionales", o que ocasionalmente involucren a personas o bienes ubicados en dos o más Estados podría quedar comprendida en el ámbito de aplicación de esta última disposición, según la interpretación que se le otorgue.

Considerando que no se prevé un órgano del tratado con competencia para determinar si una empresa está incluida dentro del ámbito de aplicación del instrumento, cada Estado parte empleará criterios diferentes para efectuar esta determinación. Por lo anterior, podría darse el caso que una misma empresa sea calificada de modo diverso en cada país, lo que generará mayor grado de inseguridad jurídica.

La ausencia de criterios claros, estables y uniformes para determinar cuáles son las empresas bajo el ámbito de aplicación de la Convención generará un importante grado de inseguridad jurídica para cada Estado que eventualmente la ratifique. Cada uno de ellos estará obligado a prevenir las potenciales violaciones que pudieran cometer sujetos difíciles de determinar, y por ello, estará obligado a supervisar que los mismos sujetos den cumplimiento a las normas previstas por el instrumento, con las consiguientes discusiones sobre la responsabilidad internacional del Estado que pudieran suscitarse.

Dicho todo esto, se hace más que adecuado que se reformule el alcance la Convención para aplicarse a todas las empresas, sin distinción ni categorías. De esta forma, junto con ampliar el ámbito de acción del instrumento, se dará debida certidumbre respecto las obligaciones y compromisos de las partes.

Muchas gracias.

**7. China**

Thank you Mr. Chairman.

We would like to thank the four panellists for their valuable presentations.

Arts. 3 and 4 serve as legal basis, defining obligations and responsibilities. They are extremely important and warrant a thorough review in line with the principle of legality.

Art. 3(2) mentions that the convention shall cover all international human rights and those rights recognised under domestic law. While we understand and support the objective of



protecting all human rights, however in a legal instrument precise definitions are needed in order to reflect such objective. Now, the wording has two problems, mentioned also by the experts and also other delegations. One is that international human rights does not have a clear definition, and such an overly generous formulation is not in line with the principle of legality. It also runs the risk of imposing international obligations to states that they did not undertake or accept in the first place. So we suggest that international human rights should be clearly defined as those emanating from treaties to which the state is a party, or customary international law accepted by the concerned state. In the 2005 Basic principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violation of International Human Rights Law and Serious Violation of International Humanitarian Law and in particular its OP1 took exactly this approach, limiting the state's obligation to those it has already undertaken or accepted.

The second problem lies with the human rights recognised under domestic law. There are commonalities but also differences in rights recognised by states. Some human rights with the same terms may have different legal meanings in different states. We understand that such wording comes also from the Basic Principles and Guidelines from 2005 and from its OP1. However, unlike that document, that document is not a legal instrument, while we are negotiating a legal instrument, and this legal instrument is not to be implemented by each state separately according to its domestic law, but rather by all countries through international cooperation. So, the current wording would cause inconsistencies in criteria for assessing whether TNCs have violated human rights, and subsequently in the criteria on how to handle their legal responsibilities. This wording lacks certainty and predictability, and the panellists also offered some opinions that are valuable, that this will not undermine the definition under domestic law, but we should not base on domestic law in order to form the definition.

Now, on art. 4 on definitions, we noted that the defining of victims also comes from the 2005 Basic Principles and Guidelines, and can form a basis for our discussion. However, since we are discussing a legal instrument, it has higher requirements in terms of clarity and accuracy in terms of definitions, compared to the Basic Principles and Guidelines. So we will, in connection with the discussion on other articles, offer comments for amendments at a later stage. As to paragraph 2, according to our mandate, the primary object of our instrument that we are negotiating are TNCs. In paragraph 2, "business activities of a transnational character" serve only as a supplement. Therefore, we suggest considering adding a definition on TNCs, because they are our primary focus and object. As for the current suggested definition on "business activities of a transnational character", it seems too broad, and the panellists offer the wording of "impact" and we think that this definition seems too broad, and warrant further re-visitation after negotiations on other substantive articles. Thank you, Mr. Chairman.

## 8. Ecuador

### ARTÍCULO 4: DEFINICIONES

Señor Presidente,

El Ecuador considera que la definición de víctima es general y ambigua, toda vez que excluye el reconocimiento de la condición de víctima por parte del Comité.

La noción de víctima en Derecho Internacional se refiere a la parte lesionada; y, de conformidad con reglas generales de la Responsabilidad Internacional de los Estados, la parte lesionada es aquella *"cuyo derecho individual ha sido denegado o dañado por el acto ilegal internacional o que ha sido de otra manera afectado por dicho acto"*.

En el área de protección internacional de derechos humanos, la parte lesionada es el individuo cuyos derechos han sido violados, y para ello debe existir un reconocimiento de la dicha condición.

En el sistema interamericano, por ejemplo, el Reglamento de la Corte Interamericana de Derechos Humanos define el término de víctima de la siguiente manera: *"la persona cuyos derechos han sido violados de acuerdo a la sentencia proferida por la Corte"* (art. 2). Es decir, la definición de víctima se refiere a la persona cuyos derechos ya han sido determinados por la Corte, habiendo establecido violaciones en su detrimento. Durante el proceso de determinación de si existió o no dicha violación, la parte que sostiene haber sido lesionada es denominada a lo largo del proceso como *"presunta víctima"* (art. 2)

En este sentido, se propone que la definición de víctima se refiera a “la persona cuyos derechos humanos han sido violados en el contexto de las actividades empresariales, de acuerdo a la determinación del Comité”: y, que el texto utilice el término “presunta víctima” para precisar aquella persona de la cual se alega han sido violados sus derechos humanos en el contexto de actividades empresariales”

Muchas gracias Señor Presidente.

## 9. India

Thank You Chair,

1. First of all, India would like to thank the panel for their useful comments.

Mr. Chair,

2. On Article 3, which concerns the scope of the instrument, India reiterates its position that this instrument should focus only on business activities of a transnational nature and not to national enterprises as we already have domestic laws to regulate them.

3. India also believes that point 2 of Article 3 should be revised so as to ensure that there is no conflict between a state’s domestic laws and its international obligations.

4. As far as Article 4 on ‘Definitions’ is concerned, the text requires to be revisited to bring in more clarity and flexibility. Phrases like ‘mental injury’ or ‘emotional suffering’ are difficult to define objectively in the legal sense. Hence it leaves room for their misuse. The reference to ‘environmental rights’ also needs to be revisited.

5. On the definition of ‘business activities of a transnational nature’, India believes that the definition requires to be fine-tuned as a number of elements in the definition raise concerns. Use of words and phrases like ‘impact’ and ‘including activities undertaken by electronic means’ have the potential to conflict with the growth of e-commerce activities. This impinges on the development of economic activities of states. Hence, further clarity is required on these points.

Thank You.

## 10. Indonesia

On Article 3 point 1, we view that the focus of the future treaty is on transnational corporations, therefore the scope of the future treaty should specifically mention and refer to the business activities of the Transnational Corporations, instead of using the terms “transnational character”.

With regard to the definitions provided in Article 4 of the zero draft treaty, we view that in line with the title of the draft legally binding instrument, the definitions provided in this article should include definition of Transnational Corporations, instead of business activities of a transnational character.

On the definition of Transnational Corporations, UNCTAD has defined Transnational corporations (TNCs) as incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. UNCTAD has also provided definition of a parent enterprise and a foreign affiliate in detail. This can be used as an option of reference.

Another reference that may also be taken into consideration is the principles of the concept of Multinational Enterprises articulated at the 2011 OECD Guidelines for Multinational Enterprises. The guidelines explain that Multinational Enterprises comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways.

The UNCTAD’s definition and the concept provided in the OECD Guidelines could be useful for deliberation on the definitions provided in Article 4, particularly with regard to Transnational Corporations.

In addition, we view that several terminologies frequently used in the draft treaty need to be defined clearly in the article 4.

I thank you.

## 11. Mexico

Gracias, señor Presidente. Respecto al artículo 3, entendemos que la limitación del ámbito personal y material de aplicación del instrumento, a empresas que realicen actividades de carácter transnacional, dejando de lado las empresas que no realizan dichas actividades, obedece a la intención de reunir el mayor consenso posible en torno al tratado. No obstante, no nos parece conveniente que se limite el ámbito de aplicación únicamente a las empresas consideradas como “transnacionales”, ya que no todas las personas naturales o jurídicas que pudieren menoscabar o afectar los derechos humanos tienen dicho carácter. Consideramos que las empresas estatales, como señaló el Prof. de Schutter, o las empresas privadas con operaciones nacionales tienen gran poder económico y representan una mayoría numérica respecto de las “transnacionales” y, consecuentemente, son causantes de mayor número de abusos en materia de derechos humanos.

De otro modo, estimamos que la aplicación del instrumento sería desigual entre los Estados cuyas legislaciones nacionales aún no se encuentran lo suficientemente robustecidas en este ámbito de regulación, y los países cuya regulación y mecanismos de prevención son lo suficientemente sólidos. Generalmente las grandes industrias de cualquier carácter que se instalan en países con legislaciones laxas o con pocos mecanismos de prevención, precisamente lo hacen con el objetivo de beneficiarse de dicha laxitud, porque esto representa un beneficio a su productividad. Esto contrasta con los regímenes regulatorios hacia el interior de sus países de origen, los cuales tienden a ser mucho más estrictos. Por ello sugerimos que se amplíe el ámbito material de aplicación a todas las actividades empresariales, sin distinción de su carácter nacional o transnacional.

Por otro lado, reiteramos que el término “violación” sólo debería emplearse en relación con los Estados y, en cambio, emplear el término “abusos” o “impactos adversos” respecto de las afectaciones a los derechos humanos causadas por las actividades transnacionales de las empresas.

Con respecto al artículo 4, en particular la definición de víctima, consideramos que pudiera ser problemática pues ésta diferiría según el derecho interno de cada Estado parte. Nos parece problemático que la calidad de víctima se adquiera por el solo hecho de reclamar dicho carácter al afirmar haber sufrido daños sin que se establezca una relación causal directa entre la actividad empresarial y la afectación. Lo anterior pudiera generar confusiones entre víctimas y peticionarios. Para ilustrar esto, quisiéramos compartir la definición de víctima que ese encuentra en el marco jurídico mexicano, en nuestra Ley General de Víctimas, la cual establece que son víctimas directas: “aquellas personas físicas que hayan sufrido algún daño o menoscabo... como consecuencia de la comisión de un delito o violaciones a sus derechos humanos reconocidos en la Constitución y en los Tratados Internacionales de los que el Estado Mexicano sea Parte.”

Siguiendo esta definición, consideramos que el estándar para que se reconozca a una persona o colectividad la calidad de víctima, debe ser el establecimiento de una relación causal directa a juicio de una autoridad judicial o administrativa competente, de acuerdo con la regulación de cada Estado. Se pudieran tomar como base los requisitos de admisibilidad que se prevén para las peticiones en los sistemas regionales de protección de derechos humanos.

## 12. Morocco

Monsieur le Président,

Ma délégation félicite l'Ambassadeur d'Equateur pour sa désignation comme Président de ce Groupe de Travail. Copie de cette déclaration a été transmise au Secrétariat du Groupe de Travail.

Le Royaume du Maroc a adhéré à la déclaration de l'organisation de Coopération et de Développement économique (OCDE) sur l'investissement international et les entreprises multinationales le 23 novembre 2009.

Un point de contact national a été mis en place en 2010 réunissant le Conseil National des Droits de l'Homme (CNDH), l'Instance Centrale de la prévention de la Corruption (ICPC), le Conseil de la concurrence ainsi que sept Départements Ministériels.

Depuis Aout 2015, le CNDH assure un mandat de 3 ans pour la présidence du Groupe de travail sur la question des entreprises et des droits humains, relevant de l'Alliance mondiale des institutions nationales des droits de l'homme. Il est également membre du Groupe de travail du réseau africain constitué sur le même sujet.

S'agissant du projet de Convention examiné aujourd'hui, il est important de souligner que dans son préambule le projet retient les principes d'universalité, d'indivisibilité et d'interdépendance des droits de l'homme. Il rappelle également des références générales aux instruments juridiques internationaux en l'occurrence la charte des Nations Unies, la Déclaration Universelle des Droits de l'Homme ainsi que des Conventions essentielles de l'OIT ou la Convention relative à l'élimination de toutes les formes de discrimination raciale.

Article 3 Paragraphe 2- Sur le fond la définition du champ d'application de la Convention dans l'article 3 paragraphe 2, en terme d'agencement avec le paragraphe 1 de la disposition gagnerait en clarté s'il était combiné avec le paragraphe 1, le Maroc suggère la reformulation suivante "*la présente convention s'applique aux violations des droits de l'homme tels que reconnus internationalement dans le cadre de toute activité commerciale à caractère transnational.*"

Article 9 Paragraphe 2, Alinéa (g)- la mention de la notion de *déplacés internes* semble inappropriée. Cette notion n'a jamais été juridiquement définie dans le cadre d'une convention comme c'est le cas de la Convention sur l'Apatridie ou de celle sur les réfugiés. La seule définition qui en est donnée est celle prévue dans les principes directeurs des Nations Unies de 1998 et dont la portée juridique est purement indicative.

De plus, ma délégation est d'avis qu'une citation exhaustive des exemples peut apparaître comme réductrice puisque ne prenant pas en compte les cas non identifiés ou qui pourraient se présenter à l'avenir. Pour ces raisons ma délégation suggère de faire référence aux différentes catégories mentionnées sous l'appellation de "victimes" tel que défini dans l'article 4 du projet de Convention.

Merci Monsieur le Président,

### 13. Peru

Señor Presidente-Relator:

El artículo 3 también adolece de las mismas dificultades que el artículo 2, pues demasiado general. Como sabemos, el concepto de derechos humanos abarca una amplísima gama de derechos y consideramos que, en este tratado, deben ser definidos los derechos para los cuales se aplicaría.

Por otro lado, reiteramos el comentario sobre la necesidad que este proyecto de tratado no distinga entre los tipos de empresas, tal como lo consagra los Principios Rectores. Este comentario vale también para el artículo 4.

Como lo expresamos en nuestros comentarios generales, señor Presidente-Relator, es preciso encontrar un procedimiento o modalidad que permita superar las limitaciones que impone la nota al pie de la resolución 26 /9, e incorporar a las empresas domésticas en los alcances del tratado, bien a través del proceso negociador o, en última instancia y de ser necesario, a través de una nueva resolución del Consejo de Derechos Humanos que así lo disponga.

En cuanto al párrafo 1 del artículo 4 que hace referencia a los "derechos ambientales", debe tener también una definición ya que está reconocido en el derecho internacional.

Muchas gracias.

### 14. Russian Federation

Thank you, Chairperson.

I would also like to point to a very in-depth statements by our panellists.

First of all, we repeat that our comments are preliminary in nature, and do not undermine the overall position of the Russian delegation, that is that developing this document is premature.

Concerning the articles under consideration.

The scope of the convention, taking into account a very vague definition of the term “business activities of a transnational character” in article 4, is defined in a too general way. In essence, any activity could be covered by this treaty, provided such activity in any way affects two or more states.

In conditions of globalisation and digital economy, this approach makes it possible to apply the convention almost to any commercial transaction, including that with the use of internet. In our opinion, this does not meet the provisions of the HRC resolution of 2014. We think that this is an unjustified and broad interpretation of the mandate of the group.

The content of article 3(2) is too broad as well. The category “all international human rights” is incomprehensible. In the UN Guiding Principles and in the commentary to them, another concept is used that is “internationally recognised human rights”.

The situation becomes even more complicated with the inclusion in the scope of the Convention of “rights recognized under national law”: their extent and content varies in different legal systems. In other words, in this way the convention’s scope contains the risk of the lack of unity in terms of its application, and substantive differences could arise in terms of the obligations incumbent on states parties. Also, there could be abuses, when on the basis of the legislation of one state accusations could be put forward against another state on the basis of the convention, claiming a violation in the territory of the latter of the rights not recognised by its legislation.

The definition of the term “business activities of a transnational character” include individuals (natural persons) into the scope of this convention. We are not convinced of the correctness of this approach and the degree to which this complies with the mandate of the group. Obviously, human rights consequences of the activities of TNCs on one hand, and individuals on the other hand, are incomparable in terms of their scale. [...] Placing them on the same footing in one document would be incorrect and counterproductive, particularly since the mechanisms and possibilities for enforcement in relation to individuals and legal persons are totally different. In this connection, we believe it is necessary to delete “natural persons” from the definition I referred to.

Concerning article 4. It looks unjustifiably short for such an ambitious document, which contains a number of innovative ideas and concepts. In this context, we believe that further development and clear legal definitions require such terms used in the text, as “environmental rights”, “ecological restoration”, “crimes under international law”, “representatives of victims”, and “appropriate access to information”.

We also need to further refine the definition of victims. First of all, we are not prepared to support the inclusion in this category of persons who merely allege of having their rights violated. We believe that we need to think about a specific, narrow definition [...] aimed solely at real victims of violations, in order to avoid abuse and make a practical implementation of the treaty easier.

Here there is also mention of such categories as “environmental rights” and “substantial impairment” that have no universally recognised definition in terms of their content. In addition, we see that economic harm is included as a form of violation of human rights, without further clarification. This basically would allow a person, for instance, who has lost out in a transaction, to accuse the TNC of violating its rights.

Thank you very much.

## 15. Saudi Arabia

Thank you chair.

My government reasserts the important role of international human rights instruments. The definitions are of course very important to any legally binding instrument. The way in which they are drafted needs to be clear and concise. For example, the definitions that we see in

article 4 for victims and business activity appear somewhat vague to us and could lead to different kinds of interpretation that may jeopardize the instrument. The definition of the harm is not clear either. Because again the definition is rather vague. We have not been able to distinguish the relationship when it comes to the victims. We would have a number of comments on this draft and we will submit these in writing.

## 16. South Africa

Chairperson,

Thank you to you and the panellists.

On Article 3, my delegation wishes to reiterate that this Intergovernmental Working Group as created by Resolution 26/9 was mandated to create a legally binding instrument for Transnational Corporations and Other Business Enterprises. In this regard the scope should clearly reflect this.

As alluded to yesterday, no business enterprise may violate human rights but at the same time the focus is on TNCs and OBEs (as mentioned by some delegations). The text in the Zero Draft should therefore use the language as agreed by replacing “business activities of a transnational character” with Transnational Corporations and Other Business Enterprises to read:

This Convention shall apply to human rights violations occurring as a result of the operational activities of Transnational Corporations and Other Business Enterprises

In addition, the text should include fundamental freedoms to read:

This Convention shall cover all internationally recognised human rights and fundamental freedoms and those further recognised under domestic law.

Furthermore, international humanitarian law including situations of occupation and armed conflict must be included.

On Article 4,

The word victim should encapsulate the following:

Peoples or groups of peoples/ communities whose quality of life is affected/ has been affected by the activities of these entities resulting in HR violations.

Peoples or groups of peoples/ communities who are suffering/ formerly suffered harm at the hand of these entities as a result of the operational activities.

Furthermore, the definition must include individuals/ groups/organs of society who also suffer at the hands of TNCs and OBEs in line with the Declaration on the subject

Chairperson,

In line with Resolution 26/9, the definition under Article 4.2 must be specific and reworded to “Transnational Corporations and Other Business Enterprises”. As formulated the term “business activities of a transnational character” covers one part of the mandate.

To limit the definition of TNCs and OBEs “for profit economic activity” may give TNCs a route to escape given the fact that some of their activities may include non-profit activities. Therefore and in addition to the above, the scope should include the methods in which the entity can be involved. In this regard, the definition for a transnational corporation should include: an entity whether fully or partially state-owned or privately owned which own or controls production, distribution, services that operates across more than two jurisdictions including a partnership, association, joint venture or proprietorship.

## 17. Switzerland

Monsieur le Président,

Concernant l’article 3, la Suisse a deux demandes de clarification :

-Dans l’article 3 alinéa 2, il n’est pas clair si le champ d’application « tout le droit international des droits de l’homme » est le même que celui couvert par le Principe directeur

n° 12, c'est-à-dire les droits de l'homme figurant dans la Charte internationale des droits de l'homme et les principes concernant les droits fondamentaux énoncés dans la Déclaration relative aux principes et droits fondamentaux au travail de l'Organisation internationale du Travail, ainsi que le droit international humanitaire.

-En ce qui concerne les 'droits reconnus sous la loi domestique' ce concept est relativement nouveau et mérite d'être clarifié par rapport aux Principes directeurs, d'une part, et aux éventuelles contradictions avec les standards internationaux, d'autre part.

Je vous remercie.

## 18. Venezuela

Gracias Presidente.

El proyecto de instrumento jurídicamente vinculante delimita en su artículo 3 su ámbito de aplicación a las violaciones de derechos humanos en el contexto de cualquier actividad con carácter transnacional, permitiendo definir las situaciones en las que son aplicables las disposiciones del instrumento.

Dicho artículo es fiel reflejo del contenido de la Resolución 26/9 del Consejo de Derechos Humanos, que estableció el mando para la elaboración de un instrumento internacional jurídicamente vinculante, para regular las actividades de las empresas transnacionales y otras empresas en el ámbito del derecho internacional de los derechos humanos.

Señor Presidente,

Sobre la definición de víctima contenida en el artículo 4, numeral 1, del Proyecto de instrumento internacional, éste difiere de la establecida en nuestro ordenamiento jurídico, que dispone que toda víctima es la persona directamente ofendida por el delito. Pese a ello, consideramos que es jurídicamente válida la manera de como se ha formulado este concepto en el Proyecto del instrumento internacional jurídicamente vinculante.

En relación a la definición de "Empresas Transnacionales", creemos que debe ser establecida dentro del texto con un marco conceptual sólido, para evitar la ambigüedad interpretativa al momento de aplicar el futuro tratado.

Muchas gracias.

## VII. Article 5

### A. States

#### 1. Azerbaijan

Thank you Mr. Chairman,

Our remarks are made in the spirit of cooperation and with the view of improving and strengthening the draft legally binding document and we continue to support the process of elaborating legally binding document.

As we negotiate to create a legal tool to further protect human rights vis-à-vis powerful transnational corporations, we shall refrain from providing a tool for questioning the principle of sovereignty and territorial integrity of Member States.

We must make sure that this legally binding document will not be used to create provocations and legalize puppet regimes on the occupied territories of states.

In line with the proposals made by our delegation earlier and as suggested and supported by some experts and Member States' delegations yesterday, we suggest to make a reference to the humanitarian law in the draft legally binding document, as well as to introduce a separate article covering special cases in conflict and in post-conflict situations.

We look forward to working closely with you and other interested Parties on this subject.

Thank you Mr. Chairman.

**2. Brazil**

1. Jurisdiction, with respect to actions brought by an individual or group of individuals, independently of their nationality or place of domicile, arising from acts or omissions that result in violations AND ABUSES of human rights covered under this Convention, shall vest in the court of the State where:(...)

2. (...)

c. [DELETE: substantial business interest](...)

**3. Chile**

En primer lugar quisiera expresar mis agradecimientos tanto a usted como a los panelistas por las presentaciones respecto al artículo 5, Jurisdicción.

Estimamos que existen disposiciones relativas a este artículo que son motivo de preocupación, entre los temas que nos generan interrogantes se encuentran los asociados a las numerosas sedes existentes, la posibilidad de “forum shopping” o elección del foro más conveniente por parte de los peticionarios, las opciones para eludir las limitaciones relativas a la prescripción, los inconvenientes ocasionados por la posibilidad de procesos paralelos en distintos Estados (litispendencia), las posibilidades que se otorgan para eludir la cosa juzgada.

En ese mismo contexto, consideramos como temas que requieren redefinirse en una nueva elaboración del instrumento el posible conflicto entre legislaciones distintas aplicables a los mismos hechos, los efectos extraterritoriales expansivos de la ley nacional y la falta de excepciones adecuadas a las solicitudes de asistencia recíproca y de reconocimiento judicial de decisiones extranjeras, las que deberían considerar al menos la cosa juzgada y la compatibilidad con el orden público del Estado requerido.

Con la intención de posibilitar una mejor interpretaciones de algunas materias de derecho internacional privado contenida en este instrumento. Consideramos que sería una interesante alternativa, solicitar la asistencia técnica de la Conferencia de La Haya de Derecho Internacional Privado.

Muchas gracias.

**4. China**

Thank you, Mr. Chairman. Thank you for presenting the text.

We would like to thank the three panelists for the inspiring presentations.

Article 5 is an important article in this instrument. It suggests two categories of jurisdiction. One is the state where such acts or omissions occurred, this is territorial jurisdiction, this is in conformity with what is going on in all countries. The second one is the jurisdiction of the state of the domicile of legal persons or associations. If the domicile and the place where the acts take place are not the same. This is extraterritorial jurisdiction. Therefore, we share what was stated by some panelists, their concerns. So, we have to be careful and carefully study the domicile jurisdiction and it has to have a scope, has to have a reasonable scope. Concerning paragraph 2, how to judge the legal person’s domicile, the wording in (a) and (b) are ok in general, however in (c), some experts also mentioned their concerns, the concept is quite vague, and it should be adjusted. Para 2(d) says that a legal person is considered domiciled at the place where it has a subsidiary. This is not a general practice, and even many countries oppose it. So this paragraph should be eliminated. Concerning natural and legal persons, it mentioned the association of natural or legal persons, this concerns the attribution of allocation of legal persons, it is not clear as to its relation with 10(6), so we agree with what was stated by the relevant panelist just now, this should be carefully studied.

Concerning collective claims, we think it is not appropriate here. That means the claimant can act on behalf of the other claimants without consent. This is not in conformity with the domestic laws of countries. It does not belong to the jurisdiction article, it is a procedural article. This should be governed by the domestic laws of the countries, so paragraph 3 should be eliminated.

I would also like to add that the extraterritorial jurisdiction should be appropriately defined in a reasonable way. It should not be unlimited. On this basis, the general jurisdiction has no limit, it is a jurisdiction without limit. So we strongly oppose it. It has no international legal



basis either. We very much support Mr. Wijekoon statement concerning extraterritorial jurisdiction, that it has some legal, diplomatic and economic concern. We totally agree with him, and we should study and consider this.

Thank you, Mr. Chairman.

## 5. Ecuador

Señor Presidente,

En relación al artículo 5 sobre Jurisdicción, se torna necesario establecer reglas procesales claras, toda vez que en el texto actual, quedaría abierta la opción para que la persona elija la jurisdicción.

Por otro lado, se podría tomar en cuenta parámetros de Derecho Internacional Privado, específicamente en lo que consiste el punto de conexión - institución que expresa el vínculo entre un hecho con efectos en más de un Estado y la legislación aplicable-.

Asimismo, es importante señalar que el Derecho Internacional Privado ha desarrollado varias tesis para solventar inconvenientes con respecto al establecimiento de domicilio, lo cual podría reflejarse en el texto. Además, se debe considerar que en los ordenamientos jurídicos internos existen disposiciones que establecen reglas sobre la elección de varias jurisdicciones.

En este contexto, se registra la importancia de la pregunta que México formuló a los panelistas.

Muchas gracias Señor Presidente.

## 6. India

Thank You Chair,

At the outset, India thanks the experts for their valuable comments.

1. On Article 5 concerning the ‘Subject of Jurisdiction’, India believes that the text requires significant revision and clarification.
2. The right to bring an action under the instrument should be conferred to the victim. Permitting anyone to bring an action without the victim’s consent has the potential for abuse.
3. The article also needs to provide a mechanism to recognize the main proceeding in situations where there are multiple proceedings in place.
4. Point 2 of Article 5 should be harmonious with the domestic corporate law so as to avoid any ambiguity or misuse. Point 2(d) of the same article has enough ambiguity and leaves scope for misuse and hence should be removed.

Thank You

## 7. Iraq

Thank you, Sir.

I have a number of comments to make on article 5, namely jurisdiction.

Given that we are trying to ensure access to justice for victims who undergo harm, and given the universality of human rights, rights which must be upheld by all, in particular by states who could, in the future, accede to this convention, I believe that jurisdiction here to guarantee access for victims would depend on the court nationality and his or her domicile. There reason here is for the victim to have direct access to justice. Given that the violations could in fact lead to the victims fleeing, giving the magnitude of the harm, we could add in an exception to further provide guarantees to victims so that the victims have access to justice. Let me repeat once again the comment made yesterday as to the linguistic drafting wording. Of course, this text needs to be further revised and needs to be reshuffled in order to fill in the gaps. We would need to define the terms of article 5, such as “domicile” and the “parent company”, and I suggest the “legal centre” as well as “key administration and affiliations” and I think this should be replaced by “centre of activities of these companies”.

Thank you very much.

**8. Mexico**

Gracias, señor Presidente. La Delegación de México desea agradecer a los panelistas por sus interesantes intervenciones sobre la cuestión de la jurisdicción. Al respecto, esta delegación desea formular una pregunta a los panelistas:

Aunque no es una competencia necesariamente generalizada en los sistemas procesales civiles de los distintos países, una cantidad significativa de Estados cuenta con un foro residual o exorbitante, conocido bajo la figura del foro por necesidad, o *forum necessitatis*. Aunque el texto actual del proyecto de tratado no lo contempla, México desea solicitar la opinión de los panelistas sobre si sería conveniente y apropiado que el texto incluyera una disposición en donde, sujeto al sistema de derecho procesal civil de cada país, los Estados podrían proveer ese foro para evitar una denegación de justicia, al no haber otro foro competente o apropiado.

**9. Namibia**

Mr Chair,

Thank you Mr. Chair and thanks to the panelists for their views and opinions.

Mr. Chair,

For many States, it is problematic to take on passive jurisdiction, as it conflicts with their legal systems. Also, in many States it is a requirement that a ground for active jurisdiction exists before it is exercised. However, we have seen developments in the international law sphere, including IHRL where the concept of passive jurisdiction has developed and has been embraced by States, as indicated by Mr. De Schutter. It is known that jurisdiction is traditionally based on territorial considerations aimed at establishing the existence of some link between the preferred or chosen forum and the dispute. There should thus be a real and substantial link between the two. This link usually relate to the subject matter of the litigation or to the parties.

Other jurisdictional requirements might also be established in addition to the above and this differs according to the jurisdictions. In common law jurisdictions for example, the presence of the defendant within the forum can serve as additional basis of jurisdiction whereas in some civil law jurisdictions, it is linked to the nationality of the parties or even the existence of the defendant's property within the forum. There are thus clearly very substantial differences. Given the mixture of different legal norms within which TNCs operate, the aim of this treaty should be to provide a uniform application that will ensure access to remedies for all victims of corporate human rights abuses, especially in developing countries which lacks effective accountability mechanisms.

Despite development, as pointed out before, there are still a series of regulatory gaps, some due to the fact that corporations operate internationally, while the laws regulating them have a national character. In this context of impunity, business corporations more easily capture international as well as national institutions.

Mr. Chair,

It is a reality that the principle of "separation of corporation identity" and "from non conveniens", which, when applied together, very often serve multinational corporations well to avoid being held liable in the parent company's domicile for the damages caused in other countries, thereby enabling them to apply "double standards" in developing countries. Mr. Meeran also highlighted this in the WG session of 2017.

Mr. Chair,

Conflict of jurisdictions is a risk as the violations and abuses can occur in more than one State or territory, under the hand of one business. In that regard, we will have to consider the consequences on the ground. We also welcome the inclusion of Article 5 (3), but we are weary of a façade of consent in the absence of real consultations, especially in the case of illiterate victims and also in the case of indigenous or marginalized people.

The inadequacy of jurisdictional doctrines in light of the complexities of operations of TNCs should not shield them.

We take note of the warning sent out by Mr. Wijekoon on the consequences of withdrawal of investors as a result of possible accession to this treaty, investors we value and cannot do without, but we are also aware of the manipulating nature of these threats by investors and we remain acutely aware that in many countries, we have not seen the livelihood of the people improved as a result of investment, but to the contrary, it has deteriorated.

I thank you.

## 10. Russian Federation

Thank you, Chair-Rapporteur.

First, I would like to thank the panellists for their interesting comments on this very important article.

Russia believes that the concept in article 5, jurisdiction, is too broad. In the elements proposed under this article, the state is ascribed jurisdiction with regards to violations on a whole series of criteria, some of which we might call traditional, such as the location of incorporation of the company, or place of violation; and others, on the other hand, blur those traditional criteria, for example, extending judicial competence to states with regards to locations of subsidiaries, branches, agencies, as well as so-called instrumentality and the like, the meaning of which are not clear from the text. In international law there is no singular understanding either of the term “substantial business interest”.

In view of this, the fact that we are talking mainly about major TNCs, such a broad definition of the place of their incorporation or domicile allows effectively arbitrary and unjustified causes to bring suits through all links of the supply chain, to the detriment of the jurisdiction of possibly a single state which in fact is the competent allocation for bringing such a suit. We are not ready to agree with such an expansive approach.

A major omission in the article, we think, is the absence of a provision on how to resolve conflicts of national jurisdictions. This omission creates serious risks of extraterritorial application of legislation to the detriment of the sovereignty of other states and in violation of the principle of sovereign equality, which is effectively reaffirmed in article 13. In those conditions, we suggest a change in the thrust of article 5: rather than expanding the possibility for application of jurisdiction to a multitude of states, on the contrary we should consider clear, effective mechanisms for establishing the competent jurisdiction, the specific jurisdiction where any case or action should be heard. As practice shows in recent years, certain states have used the possibility of the extraterritorial legislation very actively for unscrupulous competition, and pressuring national businesses in developing countries with the view of promoting the interests of their own companies. So it is important for the convention, due to the fluidity of jurisdiction, provisions should not create an international legal basis for this kind of arbitrary, unscrupulous interpretations by states of their own jurisdiction, and also for promoting purely commercial interests in the pretext of fighting for human rights. Given yesterday’s discussions, we would like to reiterate that the document should not provide for the application of the concept of universal jurisdiction with regards cases of any human rights violations committed by TNCs and other businesses. Moreover, we believe it would be useful to hold a discussion with regards the idea of submission of cases by third parties without the consent of victims. That provision requires justifications and procedural explanations in the text, since its practical implementation is also fraught with potential abuse.

We are grateful for the clarifications regarding collective actions, or class actions, however, for Russia those clarifications are not entirely applicable, since in our law there is not a civil class actions are not instituted.

Finally, in line with our comments yesterday on the wisdom of excluding natural entities as potential violators of human rights, under the scope of this convention we think it is necessary to withdraw the reference to them in paragraph 1(b) and in article 5(2).

Thank you.

## 11. South Africa

Chairperson,

Thank you to the panellists for sharing their expertise in this area.

Addressing jurisdictional challenges is an important area of the treaty and need for the victims who have failed to seek redress both in the home or the host state; with their cases being litigated for decades. Transnational corporations have been able to operate outside of the jurisdictional reach of their home corporate laws and regulations, thus exploiting legislative frameworks that are vague and/or not properly regulated or enforced.

The question that we have to ask is whether this Article on jurisdiction will cover the huge remedial gap that exists. Will it ensure that a victim can be guaranteed access to justice both where the violation occurred and faced with situations whereby TNCs settle out of court as a way to circumvent being held accountable? On the other side, will it ensure that the home states litigate effectively? We know of many court cases in developed countries that were unsuccessful as the courts reasoned that the proximity between the parent companies and the human rights violations was insufficient and therefore rejected them. Chairperson, we are not entirely convinced that the provisions of this Article will adequately address these challenges as it maintains the status quo that currently exists.

This Article must make specific provision for preventing home state courts from declining jurisdiction on the basis of the *forum non conveniens* in order to ensure that the victims can access justice.

Furthermore, the draft treaty should also take into account the possibility of accessing justice in a third state where the victims may be domiciled after the violation has taken place. Regional approaches in accessing justice must also be included.

Information regarding the jurisdictional activities of the transnational corporation must also be made available to local authorities within the jurisdiction to ensure transparency and accountability. This draft Treaty must account for the complex structure of their activities.

The implementation of this Treaty cannot be limited to one State and requires the duty of international co-operation. Therefore the call for the reduction of regulatory, procedural and financial obstacles among States is supported by my delegation. It is imperative that there is cooperation of judicial systems to curb any delay for the justice of victims.

In addition, Article 5.2 should include:

Parent companies interest in the subsidiary as mentioned by Mr Meeran

The issue of subcontractors and suppliers;

Partnerships with whom they have an established commercial relationship;

The Article must further include reference to breaches of the duty of care by parent companies in ensuring that their subsidiaries do not cause harm to the communities in which they operate in.

We agree with Mr Meeran that the realities of class action lawsuit must be taken into account, including the consent aspect. In the South African constitutional jurisprudence there is a test of public interest measures when consent cannot be obtained.

Finally Chairperson, the over-reliance of existing domestic laws could create a loophole in implementation of the treaty. Each domestic system differs in the degree of stringency and enforcement. The purpose of the international treaty is to create uniform norms and standards in international law that all States must aspire to.

I thank you.

## 12. Venezuela

Agradecemos la presentación de los panelistas sobre este importante asunto.

La inclusión de elementos sobre la jurisdicción en el futuro instrumento internacional jurídicamente vinculante, está directamente relacionada con el acceso a la justicia y la

efectiva reparación a las víctimas de las violaciones de derechos humanos cometidas por empresas y corporaciones transnacionales.

Las empresas transnacionales sacan provecho de las limitaciones de algunas jurisdicciones para evadir las obligaciones y responsabilidades en materia de derechos humanos a las cuales deben estar sujetas, evitando de esta manera, que se haga justicia, sobre todo en los países en los cuales realizan sus operaciones.

Una mejor comprensión y claridad sobre la jurisdicción en un futuro instrumento internacional jurídicamente vinculante, posibilitaría a las víctimas el acceso a la justicia, y garantizaría a éstas la debida seguridad jurídica que implica poder acudir sin obstáculos a los tribunales.

Es harto conocida la gran desigualdad entre el poder económico que tienen las empresas transnacionales frente a las víctimas de sus violaciones y atrocidades.

En relación al artículo 5 del Proyecto, éste dispone los supuestos en los cuales se aplicaría las reglas de la jurisdicción, y la forma en que el tribunal del Estado de que se trate conocería de los hechos cometidos, estableciendo que la misma recaería en:

El Tribunal del Estado donde se produjeron los actos u omisiones.

El tribunal del Estado donde esté domiciliada la persona natural o jurídica o el grupo o asociación de personas que cometió la falta u omisión.

Venezuela reconoce la primacía de los tribunales nacionales al momento de conocer las causas de violaciones graves de derechos fundamentales, por lo que los tribunales internacionales solo tienen carácter complementario.

Muchas gracias.

## **VIII. Articles 1, 14 and 15**

### **A. States**

#### **1. Azerbaijan**

Thank you Mr. Chairman,

Our remarks are made in the spirit of cooperation and with the view of improving and strengthening the draft legally binding document.

In line with our previous statements we would like to make some specific suggestions on the Preamble of the draft legally binding instrument.

Insert “international humanitarian law” in paragraph three of the Preamble after “Recognizing the rules of international law”. The paragraph shall read “Recognizing the rules of international law, international humanitarian law and international human rights law with respect to the international responsibility of States;”.

The principle of sovereignty and territorial integrity is the primary principle that serves as a basis for any further engagement whether political or economic. This principle was also covered under the draft elements document that we were discussing last year. We therefore request inserting that principle in paragraph seven of the Preamble after “Upholding the principles of...”.

Paragraph eight of the Preamble shall also make reference to the international humanitarian law and shall read “Desiring to contribute to the development of international law, international humanitarian law and international human rights law in this field;”.

We welcome article 15.5 as is.

We have no specific comments on other articles under consideration for the time being and we will submit all possible further comments to you in writing.

Thank you Mr. Chairman.

**2. Brazil**

*a. Article 1. Preamble*

(...)

Upholding that every person has the right to equal and effective access to justice and remedies in case of ~~["risk or"]~~ harm decisive for the enjoyment of their HUMAN rights; ~~["Recognizing the rules of international law and international human rights law with respect to the international responsibility of States"]~~

(...)

*b. Article 14. Institutional Arrangements*

Committee

1. (...)

h. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, THROUGH THE ESTABLISHED PROCEDURES. (...)

4. (...)

~~["e. The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the present Treaty].~~

**Conference of States Parties**

(...)

**Implementation**

(...)

5. In implementing this agreement, State Parties shall address the specific impacts of business activities on while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, OLDER PERSONS, persons with disabilities, indigenous peoples, migrants, PEOPLE OF AFRICAN DESCENT, LGBTI PEOPLE, refugees and internally displaced persons.

(...)

**Depositary**

(...)

**Signature**

8. The present Convention shall be open for signature by all States ~~["and by regional integration organizations"]~~ at United Nations Headquarters in New York as of (date).

**Consent to be bound**

9. The present Convention shall be subject to ratification by signatory States ~~["and to formal confirmation by signatory regional integration organizations"].~~ It shall be open for accession by any State ~~["or regional integration organization"]~~ which has not signed the Convention. ~~["Regional integration organizations"]~~ ~~["10. "Regional integration organization" shall mean an organization constituted by sovereign States of given region, to which its member States have transferred competence in respect of matters governed by this Convention. ]~~ ~~["11. This Convention shall apply to regional integration organizations within the limits of their competence; subsequently they shall inform the depositary of any substantial modification in the extent of their competence. For the purposes of paragraph 17, and paragraphs 22 and 23 of this article, any instrument deposited by these organizations shall not be counted. Such organizations may exercise their right to vote in the Conference of States Parties with a number of votes equal to the number~~

of their member States that are Parties to this Convention. Such right to vote shall not be exercised if any of its member States exercises its right, and vice versa.]

#### **Entry into force**

(...)

#### **Reservations**

(...)

#### **Amendments**

(...)

#### **Denunciation**

(...)

### **3. China**

Thank you, Mr. Chairman.

We would like to thank the three panelists for the valuable presentations.

Concerning the preamble, we listened to the presentation by the Chairman. At the same time, we suggest that we should add that the purposes and guidelines of the instrument stated in HRC Res 26/9, in this instrument maybe we do not have to mention this resolution itself. However, the relevant purposes and guidelines of this instrument can direct our orientation. It should be confirmed. Just now, the representative for Egypt said that we should clearly respect the UN Charter principles and purposes. At the same time, we would like to add “recognizing the positive role of businesses in development”. This is also what is confirmed in HRC Res 26/9, so that the preamble would be more accurate and balanced.

Concerning article 14, the institutional arrangements, we believe that constitutional arrangements would depend on other substantive articles. Whether we should set up a committee, we think that we should take into consideration the existing processes on strengthening human rights treaty bodies. Especially we suggest that we should avoid overlapping with the functions of other human rights treaty bodies, as stated by some other delegates, because there are some other human rights bodies that are also dealing with this issue. And also we should take into consideration the financial implications.

Concerning article 15, final provisions. On implementation, on this part, as it can be separated, it should not be contained in the final provisions, but paragraph 3, in this article, we respect the views of the delegations, but we feel that this paragraph risks opposing businesses to human rights. We risk separating these two. Actually, we have a consensus, which is that development and human rights are correlated and mutually supportive. This consensus should guide our thinking when we think about the relationship between development, between business and human rights. Our instrument actually differs in nature and in content from the Framework Convention on Tobacco Control. Business is an important driving force for development. In this sense, we can promote human rights through development. Of course, in these activities, we should ensure they will respect human rights. This balanced relationship is also what is confirmed in 26/9. So we suggest that this paragraph 3 should be readjusted, it should not be put into the operative part. It should be put in the preamble, maybe we can present it in a more positive way. We can talk about the contributions of business to development, and we should emphasize that we want to ensure that the business will respect human rights in its activities, and, when violations happen, relief should be provided. In this way, it is very positive, so we can avoid putting business in opposition to human rights.

Thank you, Mr. Chairman.

### **4. Ecuador**

#### **ARTÍCULO 15: DISPOSICIONES FINALES**

Señor Presidente,

Mi Delegación considera que esta disposición es compatible con la práctica de elaboración de todos los instrumentos convencionales de Derecho internacional público.

Los tratados internacionales contienen esta serie de cláusulas en las que se mantiene la determinación de las cuestiones procedimentales y accesorias, pero importantes del tratado correspondiente.

En cuanto al número de ratificaciones para que el instrumento entre en vigencia, el Ecuador sugiere que se considere un número razonable de ratificaciones, lo que permitiría que, de forma expedita, entre en vigencia el convenio y que en consecuencia el Comité pueda establecerse.

Muchas gracias Señor Presidente.

## 5. Egypt

Thank you Chair,

We thank the panelists for their very useful presentations, and would like to share with you the following remarks with view to strengthening the text:

1. In any international convention the preamble is a stand alone part and not considered as one of its articles. Thus we agree with Mr. Smith that the preamble paragraphs need to be separated from other sections that include different articles.
2. The language in the preamble part needs modification to be in line with the internationally agreed language used in other international human rights conventions, my delegation can share with you our proposal bilaterally in this regard.
3. The purposes and the principles of the UN Charter in the preamble section shall be mentioned in the preamble, guiding the implementation of the legally binding instrument.
4. We also propose to add a reference to the important role of the TNCs and OBEs in achieving socio economic development in the preamble and to the sovereign rights of states to regulate and organize investment activities on its territories.
5. As for article 14, we have heard the intervention of Mr. Smith today as well as the intervention of the Head of Treaty body Branch in the OHCHR, Ibrahim Salama, in the first day of the session, who brought to our attention the fact the this the very first treaty to be elaborated while a review of the treaty body will take place in 2020, we encourage to take the ongoing discussions in this context into consideration while elaborating the institutional arrangements, and we reserve our right to come to you with proposals in this regard.
6. Finally Mr. Chair, article 15 is of paramount importance we believe that it is the heart of the legally binding instrument and it has to be clearly drafted to avoid double interpretation, we would like to re- emphasize on the importance of avoiding imposing new burdens on the developing states. We would also like to express our support to art.15.3, we believe that this article will ensure the primacy of human rights over business and will contribute to preventing future human rights violations.

I Thank you chair.

## 6. India

Thank You Chair,

1. India thanks the experts for their valuable comments.
2. First of all, we believe that the Preamble part of the text should be separate from the articles and not be an article in itself. This is in conformity with all international instruments.
3. We believe the reference to “all business enterprises” in para 5 of the Preamble should be revisited as we understand that this instrument should focus only on business activities of a transnational character. Para 7 of the Preamble is inconsistent with provision in Article 9.5 of the text, which gives states the provision to exercise exemptions for small and medium size undertakings. Hence it should be revised accordingly.
4. On the term ‘self-determination’, India states its reservation that the words ‘the right of self-determination’ appearing in this article should only apply to the peoples under foreign



domination and these words do not apply to sovereign independent states or a section of people or nation – which is the essence of national integrity.

5. We again reiterate the need to ensure that the text in the preamble should be revisited to ensure there is no conflict between a state's domestic laws and its international obligations. The Preamble needs to be balanced and should not bring in any ambiguity.

6. On the Articles 14 and 15, we have no comments to offer as of now. We believe that we first need to work and build consensus on the elements in the text up to Article 13 before we work out the Institutional Arrangements and the Final Provisions.

Thank You

## 7. Indonesia

Thank you Mr. Chairperson

We would like to echo other states in thanking the panelist for their very insightful of presentations.

We wish to provide a brief inputs, namely to propose a paragraph: “Reaffirming the purposes and principles of the UN Charter” at the very beginning of the Preamble Section.

## 8. Mexico

Gracias señor Presidente. La delegación de México desea compartir algunos comentarios y observaciones respecto a los artículos 1, 14 y 15 del proyecto de instrumento.

En cuanto al artículo 1º relativo al preámbulo del proyecto, coincidimos con algunas organizaciones de la sociedad civil que, en comentarios generales, señalaron que el preámbulo no debería formar parte del articulado del instrumento. Esta posición es coherente con lo dispuesto en el artículo 31 de la Convención de Viena sobre Derecho de los Tratados. Al entenderse que el preámbulo de un instrumento de esta naturaleza no forma parte del cuerpo dispositivo o normativo del tratado, y no goza de la misma fuerza obligacional, a pesar de su valor interpretativo, estimamos que el preámbulo debe quedar fuera del articulado

En cuanto a la parte sustantiva del preámbulo, estimamos positiva la redacción del párrafo 4, relativo al ámbito espacial de aplicación del instrumento, el cual comprende no sólo el territorio, sino también cualquier otro espacio sobre el cual el Estado parte ejerza su jurisdicción o control.

Esto es armónico con criterios y principios del derecho internacional de los derechos humanos. Creemos que es importante que el instrumento obligue a los Estados a la aplicación del tratado no sólo en sus territorios sino en los espacios en que, no siendo parte de su territorio, el Estado ejerza alguna jurisdicción de acuerdo con el derecho internacional, como es el caso de aeronaves y embarcaciones, la zona contigua al mar territorial, la zona económica exclusiva, territorios controlados por el Estado bajo instituciones como el protectorado o territorios ocupados de facto.

Por otra parte, corresponde a los Estados la obligación y responsabilidad primaria de promover, respetar, proteger y garantizar los derechos humanos, lo cual es coherente también con la definición de víctima que se establece en el artículo 4, del que se interpreta que no se busca atribuir responsabilidad internacional a actores no estatales, toda vez que el lenguaje que se utiliza no se refiere a violaciones de derechos humanos, sino a menoscabos o afectaciones.

En ese sentido, y reconociendo que los Principios Rectores de Naciones Unidas sobre las empresas y los derechos humanos son el estándar internacionalmente reconocido y aceptado en la materia, respetuosamente planteamos que se sustituya, en el párrafo 6 del preámbulo, la palabra “shall” por “should”, a fin de resaltar la responsabilidad de todas las empresas de respetar todos los derechos humanos, independientemente de su tamaño, sector, contexto operativo, propiedad y estructura, a través de procesos de debida diligencia y evaluaciones de impacto en derechos humanos. Dicha responsabilidad existe independientemente de la implementación efectiva de las obligaciones del Estado, quien en todo caso, deberá tomar las medidas necesarias para garantizar la protección de los derechos humanos en su marco

jurídico interno, incluso frente a los impactos negativos que pudieran ocasionarse como resultado de la actividad empresarial.

Por otra parte, respecto al artículo 14 relativo a las disposiciones institucionales, estimamos pertinente conocer más a fondo la visión de la Presidencia sobre el Comité y su sostenibilidad, en particular en el contexto del párrafo 1 subpárrafo h, y a la luz de los retos que enfrentan los órganos de tratados de derechos humanos ya existentes en su conjunto.

Por último, respecto al artículo 15 relativo a las disposiciones finales, nos parece pertinente eliminar la referencia, en el inciso 3, a los derechos adquiridos, en inglés “vested rights”, ya que podría resultar en violación de los principios generales del derecho y de normas de derecho internacional.

Respecto a los párrafos 4, 5 y 6 consideramos que podrían ser eliminados o podrían ubicarse en el preámbulo.

Finalmente, en relación con el numeral 12, estimamos que a fin de que el proyecto cumpla su objetivo y se garantice un enfoque consensuado, sería sumamente importante fijar un número razonable de ratificaciones necesarias para su entrada en vigor, siguiendo como ejemplo otras convenciones de derechos humanos.

Muchas gracias.

## 9. Namibia

Item 4 –Articles 1 (Preamble), 14 (Institutional Arrangements) and 15 (Final Provisions)

Thank you Mr. Chair and thanks to the panelists for their views and opinions.

Mr. Chair,

We concur with those delegations who requested for the preamble to not form part of the articles, but to be free standing followed by the Statement of purpose as Article 1. This is indeed in line with the drafting style of international instruments. We will also propose language to the drafters to streamline the new Article 1.

We welcome the inclusion of “equitable geographical” representation in the Committee as set out in Article 14 (1) (b). We agree with Mr. Lopez on his point that there should be no conflict of interest of committee members. This is important for impartiality and fairness.

Article 14 (2) – We agree with Mr. Smith to increase the periodicity to 5 years, but this can depend on the complexity or simplicity of the reporting mechanism. In this regard, the challenges that States already have in complying with reporting obligations should be kept in mind.

Article 14 (5) and (6) on Conference of States Parties is not clear on the periodicity of the meetings, although (6) makes mention of a biennial meeting at the instance of the UNSG or the COSP. We propose harmonization of the two subsections. We also propose that Article 15 includes a sub article requesting States party to the treaty to declare their willingness to use this treaty as the basis for MLA and International Cooperation, thus providing, as in ICL, a common platform for such cooperation.

Since it is the duty of States to safeguard the rights of the people, States are required to ensure that its policy and legal framework reflect the diligent execution of this duty, thus Article 15 (3) is valuable in this regard although the rights of all interested parties should be considered and carefully balanced.

I thank you.

## 10. Peru

Señor Presidente-Relator:

Mi delegación desea adelantar algunos comentarios preliminares sobre los artículos 1, 14 y 15.

Sugerimos la inclusión de un párrafo sobre el compromiso de los Estados Miembros de asegurar el respeto universal y efectivo a los derechos y libertades fundamentales, tal como consta en la Declaración Universal.

Sugerimos también que se incluya al derecho internacional humanitario en el tercer párrafo.

Sobre el artículo 14, consideramos que el establecimiento de este futuro Comité, como es la práctica usual en los convenios de derechos humanos, deberá tener en cuenta el proceso de revisión de los órganos de tratado que se está llevando a cabo.

Sobre el artículo 15, párrafo 5, consideramos importante que los grupos mencionados con un riesgo mayor de violaciones y abusos de derechos humanos, puedan ser considerados en los otros artículos del proyecto de tratado.

Muchas gracias,

## 11. Russian Federation

Thank you, Chairman.

It seems that prior to discussing the idea of creating as part of the convention any kinds of organs, it is necessary first to carry out a review of existing international mechanisms which could be sufficient for discussing the issue of business and human rights. As we know, an analysis of the various aspects of the activities of TNCs, including in the human rights context, is already being addressed by many other international organisations and bodies, including for example UNCTAD. Issues of ensuring human rights, including with regard to the activities of TNCs are considered in the human rights organs, such as the CESCR, UN Human Rights Committee, CERD, CEDAW, and others. Finally, the mandate of the proposed committee will overlap with the mandate of the Human Rights Committee itself.

Before carrying out the said review, we think it would be premature to create a new body under the convention at this stage, since such a step would create the risk of duplication of functions and fragmentation of efforts of the international community in this sphere. It is also important to understand, even at this stage, the financial implications of establishing such a committee, whose activities are proposed to be funded by the UN regular budget.

The inclusion in the convention of the provision on some national mechanisms, art 15(1), we also think is redundant. Each state has a right to independently tackle, with the help of whatever national institutes it may have, to ensure the fulfilment of its own international commitments.

As to the preamble, its text requires further work in terms of consistency and of the legal logic and the accuracy of the terminology used. In particular in paragraph 8 of the preamble there is a mention of the principles of non-discrimination, participation, inclusion, and self-determination. Their substance and significance for the purposes of the convention is not clear. In our opinion it would be more logical to reconfirm in this paragraph the universally recognised principles and norms of international law.

Furthermore, it is not clear why, throughout the text of the preamble, the words “international law and international human rights law” are used, given that “international human rights law” clearly falls within the framework of the “international law”.

We also propose excluding a reference to HRC Res 26/9 We believe it is irrelevant and uncharacteristic for this kind of international treaty.

I thank you.

## 12. South Africa

Chairperson,

Preamble

This Working Group derives its mandate from Resolution 26/9 which stipulates that this Working Group will elaborate an international legally binding instrument for transnational corporations and other business enterprises. The resolution acknowledged that TNCs and

OBEs have a responsibility to respect human rights and this instrument would regulate the activities of these entities in International Human Rights Law.

My delegation is concerned that the Preamble of this draft falls short of ensuring the obligations of the TNCs. In this regard, the Preamble should include the following:

Recalling the UN Charter in its totality;

Recalling the outcomes of the all major conferences and summits in this field including the UDHR, VDPA, DDPA in relation to the cardinal principle of non-discrimination;

Strongly underlines that the phenomenon of globalisation and its negative impact on the economies of the developing countries has brought about disparities in the equitable sharing of the benefits of globalisation and emphasises the imperative need to mitigate the challenges of poverty and underdevelopment, the realisation of the unfinished Millennium Development Goals and the need to make the Right to Development and the 2030 Agenda for Sustainable Development a reality for everyone,

Underlining the void that exists in the International Human Rights Law and Humanitarian Law that leaves these entities unregulated, leading to lack of uniformity;

Underlines the need for TNCs and Other Business Enterprises to be held accountable in international human rights and humanitarian law for human rights abuses violations and the imperative need to hold these entities accountable;

Stressing that TNCs and OBEs, irrespective of their size, sector, ownership and structure, have a duty and obligation to respect all human rights and fundamental freedoms, including in situations of armed conflict and situations of occupation;

Underlining the positive contribution TNCs and OBEs should make to ensure the means of implementation for the realization of human rights and sustainable development;

We agree with many speakers that the rights of women and children be central to the treaty.

#### ON ARTICLE 14

My delegation notes the creation of the Committee. A Treaty Monitoring Body with full mandate to issue urgent communications and undertake investigative enquiries into territories where consistent patterns of violations are reported is just one mechanism. This working group should interrogate how a prosecutorial mechanism at the international level to adjudicate on allegations of grave and serious violations could be included in the treaty and how such a binding international mechanism of judicial control to end corporate impunity should be considered.

In light of this, this Article must be very clear about the following provisions in relation to the Committee:

The process of nominating members of the Committee should be specific and transparent. This will ensure that there is no conflict of interest and bias in the members selected;

The members should be given the power to hear complaints from peoples and groups of people;

Should be able to issue binding decisions;

The Committee should be able to request information from companies as well as State agencies. This could include visits to either the country or the company with the aim of investigating or gathering information beyond the regular reports provided;

The Committee should be permitted to request Transnational Corporations and Other Business Enterprises to appear before it in the event that it is implicated in human rights violations;

The Committee should be able to make a determination of the types of remedies that must be given to victims;

The general order to be taken by the Committee to review cases should be incremental: Cases should exhaust domestic courts and regional courts before reaching the international level;

Closely linked to the powers of the Committee, it is imperative that there is a fund solely dedicated to the access of justice for the victims of human rights violations by these entities, particularly from developing countries be established. This fund must be maintained by the TNCs and OBEs to whom the violations emanate from. It would be impractical for contributions of the fund to be solely the responsibility of the State.

#### ARTICLE 15

The Article must have a provision that stipulates that this Treaty will not prejudice obligations taken in other Treaties. Furthermore, nothing in the treaty shall be interpreted as impairing the inherent right of all peoples to enjoy their human rights and fundamental freedoms

### 13. Venezuela

Gracias, señor Presidente.

La sección final del Documento, es similar a la de otros instrumentos jurídicamente vinculante, en particular en sus puntos 14 y 15 referidos al sistema de reservas, imposibilitando las reservas que sean incompatibles con el objeto y propósito del Instrumento, puesto que esto desvirtuaría el compromiso del Estado con su ratificación.

Asimismo, estas disposiciones permiten que el Estado pueda retirar las reservas en cualquier momento, lo cual otorga cierto margen de flexibilidad a los Estados Parte del futuro Instrumento.

Señor Presidente,

Consideramos importante que el borrador contemple dentro de sus disposiciones una regulación que esté referida a los mecanismos de solución pacífica de controversias, para caso en que surjan desavenencias entre las Estados Parte del futuro Instrumento Jurídicamente Vinculante, bien sea por la interpretación de dicho Instrumento, o por cualquier otro motivo sobre su aplicación.

Nuestra Constitución nos intima a que los tratados internacionales en los que es parte la República cuenten con una cláusula por la cual las partes se obliguen a resolver las controversias por vías pacíficas, de conformidad con el Derecho Internacional.

Muchas gracias.

## B. Observer States

### 1. Holy See

Mr. Chair,

The Delegation of the Holy See has already expressed in the preparation of this process that the interplay of business and human rights offers a *unique* opportunity to humanize further the economy. As recognized even in the UNCTAD Nairobi Azimio, the United Nations “*recognize that economic activities should be at the service of persons. Any development and growth strategy should aim at the promotion of every human being and at the primacy of human work*”<sup>5</sup>. Economic and financial actors, both at the international and national levels, need to recognize that economic activities function not only through self-regulation of the market and much less through agreements limited to reconciling the interests of the most powerful stakeholders, but they need also to consider that they function at the service of persons who work and contribute to development. Since the transnational legally binding instrument under negotiation aims to create an international system that would be really sustainable, inclusive and equitable at all levels, we consider of utmost importance that such agreed language will be reflected in the Preamble of the *zero draft*.

Political decisions, social responsibility on the part of the business community and criteria governing investments, all of these must be guided by the pursuit of the long-term common good and concrete solidarity among generations. As recalled by Pope Francis “an

<sup>5</sup> UNCTAD XIV, *Nairobi Azimio Declaration*, TD/519/Add.1, para. 9

interdependent world is calling us to devise and implement a long-term common project that invests today in order to build for tomorrow (...). Environmental and energy problems now have a global impact and extent. Consequently, they call for global responses, to be sought with patience and dialogue and to be pursued rationally and perseveringly”<sup>6</sup>.

Mr. Chair,

Our obligations for the environment are strictly related to the need to be concerned for future generations. In shaping the Preamble, we cannot forget that we are called to a “responsible stewardship” of our common home. The Delegation of the Holy See would like to insert into the preambular language the following sentence: “stressing that the urgent challenge to protect our common home includes a concern to bring the whole human family together to seek a sustainable and integral development”.

Thank you, Mr. Chair.

## 2. Palestine

Thank you chair, and we thank the panellists for their inputs.

The focus on conflict-affected areas in the Treaty is an absolute necessity, considering the sharp rise in conflicts around the globe in the 21st century, particularly since 2010, affecting millions around the world.

While noting provision 6 under Article 15, we see there is an absence of reference to the applicability, where appropriate, of international treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

This would be essential addition to Article.7, particularly when we are addressing situations of conflict. In such situations, the treaty would benefit from reiterating state obligations under both international human rights law and humanitarian law to guarantee maximum protection for individuals and communities.

We commend the effort on adding special attention to cases of business activities in conflict-affected areas in provision 4 under Article 15. But unfortunately, we see that the language is not strong enough and needs to be strengthened.

In addition, while we agree that a focus on gender-based and sexual violence is necessary in the treaty, we see that having a separate provision on this point is more appropriate than adding it to a provision that focuses on conflict-affected areas.

On provision 15.3, we are encouraged that this provision of the Zero draft is addressing concerns regarding the imbalances that states face from corporate representatives and other vested interests, and the undue influence they exert over government policies and laws.

It is particularly concerning to see how some corporate representatives and other vested interests intervene in the foreign policy making process of some countries to encourage arms sales that perpetuate conflicts in many regions, in the interests of corporate profits.

We note the text of article 15.3 reflects the proven successful example of how to address corporate conflicts of interest contained in article 5.3 of the framework convention on tobacco control.

Since Article 15.3 holds the potential to be a powerful preventive measure to defend the public policy and law-making arena from the undue influences of corporations and vested interests, we would recommend that the text of article 15.3 be moved to the section of the instrument dealing with preventative measures.

Finally, Mr. Chairperson, we recommend removing the words ‘in accordance with national law’ from article 15.3 for fear it would weaken the efficacy of this article.

I thank you.

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<sup>6</sup> Pope Francis, Address to participants at the meeting for executives of the main companies in the oil and natural gas sector and other energy related businesses, 9 June 2018.

## **IX. Panel “Voices of Victims”**

### **A. States**

#### **1. Belgium**

Je vous remercie, Monsieur le Président.

La Belgique s’aligne sur la déclaration de l’Union européenne.

Elle réserve sa position sur le projet de traité et partage les préoccupations exprimées par l’Union européenne en début de session relatives au processus.

Monsieur le Président,

La Belgique remercie les panelistes pour leurs présentations et saluent les efforts qu’ils mènent sur le terrain pour défendre les droits des victimes des violations et abus commis dans le contexte des activités des entreprises. Il s’agit de témoignages importants qui montrent toute l’importance que les Etats et les entreprises - qu’elles soient nationales ou transnationales - doivent accorder à une meilleure application de leurs obligations de respecter et de faire respecter les droits humains dans ce cadre.

La Belgique estime que les victimes de ces abus et violations doivent rester au centre de toute initiative au niveau national et international visant à renforcer leur protection. Elle accueille dès lors positivement la tenue de ce panel.

Il est important de souligner à cet égard que nos discussions aujourd’hui s’inscrivent dans un contexte où il existe déjà dans un bon nombre de pays - compris en Belgique - un large éventail d’instruments judiciaires et non judiciaires à disposition afin que les victimes fassent valoir leurs droits. La Belgique est toutefois consciente que des obstacles variés peuvent entraver l’accès effectif à un mécanisme de réparation et qu’il convient de remédier à cette situation. Il peut s’agir aussi d’un manque de connaissance des recours existants de la part des victimes. C’est dans cet esprit que dans le cadre de l’exécution de son plan d’action national sur les droits humains et les entreprises, la Belgique a commissionné une étude complète et indépendante sur les mécanismes étatiques judiciaires et non-judiciaires donnant accès à un recours en Belgique. Cette étude est désormais publiée sous forme de brochure et vise à informer, le plus efficacement possible, sur les droits et devoirs de chacun, et les moyens de les respecter et les faire respecter. Elle permet notamment d’aider les victimes à savoir où trouver de l’aide ou une assistance juridique, qui sont les acteurs clés ayant une compétence dans ce domaine et quelle est la procédure la plus appropriée.

En outre, une analyse a été effectuée dans un rapport distinct visant à répertorier les obstacles majeurs et les éventuelles lacunes des mécanismes existants et à formuler des recommandations politiques, ce qui permettra de soutenir les autorités dans leur volonté de rendre l’accès à la réparation le plus efficace possible pour des victimes de violations et d’atteintes aux droits humains.

La Belgique se tient à disposition pour partager les résultats de ses recherches avec ses partenaires ainsi qu’à réfléchir ensemble comment améliorer encore la protection des victimes des violations et abus des droits humains.

Je vous remercie, Monsieur le Président.

#### **2. France**

Merci Monsieur le Président,

Nous vous remercions pour l’organisation de ce panel, et remercions les panélistes de leurs présentations.

La France s’associe à la déclaration de l’Union européenne.

Les violations subies par de trop nombreuses victimes de par le monde du fait des entreprises sont pour la France une préoccupation majeure. La communauté internationale doit rester

saisie du sujet. La session qui s'achève a été l'occasion d'éclairages et d'échanges intéressants.

Nous comprenons la difficulté pour les personnes affectées d'avoir accès à des procédures équitables, voire les risques qu'elles encourent pour faire valoir leurs droits devant la justice.

Au vu des discussions de la semaine, et pour assurer aux victimes une protection efficace et pragmatique, nous attirons l'attention du groupe de travail sur les principes suivants, qui mériteraient d'être davantage explorés ou éclaircis.

Il paraîtrait ainsi plus cohérent d'envisager dans un premier temps l'obligation d'inscription dans les législations nationales d'un dispositif de diligence raisonnable pesant sur les entreprises, ces entreprises engageant leur responsabilité juridique en cas de manquement à ces obligations. C'est ce qu'a fait la loi française en 2016. Ces cadres législatifs nationaux permettraient d'établir une forme de cartographie des obligations imposées et des violations sanctionnées, qui faciliterait grandement l'exercice et l'efficacité des recours dans un contexte international.

De plus, au nom du réalisme, notamment pour que les juges nationaux soient en mesure de rendre justice pour les victimes, les règles juridiques sur lesquelles ils se fondent doivent être mieux définies. Nous considérons en effet que la clarté et la prévisibilité des dispositions jouent en faveur des victimes, tant en matière de prévention que de réparation des violations.

Ces considérations, inspirées des principes directeurs des Nations unies, et qui ont également guidé l'élaboration de la loi française sur le devoir de vigilance de mars 2017, constituent à ce jour la base consensuelle la plus pragmatique et la plus susceptible d'atteindre les objectifs poursuivis en faveur des victimes.

Je vous remercie./.

### **3. Iraq**

Thank you, Chair.

I thank you for giving me the floor.

We heard about the issues at stake this morning, and I would like to thank the panellists and states for their contributions, because this shows the great responsibility we have on our shoulders when it comes to human rights and the various solutions proposed.

What we heard this morning is extremely important, and I think that we must be sure to include it in the convention. Some spoke of abuses committed by transnational corporations. Personally speaking, I should like to endorse this. In Iraq, there are large numbers of transnational businesses who have been involved in killing, shooting to kill people without a particular reason or basis. This is inexplicable. Furthermore, we must raise an extremely important issue, namely that these transnational corporations enjoy immunity, which means that they cannot be reached by the law. It seems to be impossible to amend their law in order to adapt to human activity. We, as an international community, need to tackle these unjustifiable immunities, which actually point to terrible, flagrant violations of human rights, whether that be on the part of transnational corporations or indeed some governments, who are involved in violations because of their own interests. This context becomes very blurry and poisonous when there are violations committed by governments themselves. Today, I come before you as a representative of public opinion and of the international community, and I would like to tell you that some privileges seem to be granted by a number of countries to these transnational corporations. That is what we need to tackle. Of course there are other practices undertaken by these multinationals due to the privileges they enjoy, and also by certain laws. These immunities are a danger to us all, and they are likely to destabilize the situation of human rights in our countries. Furthermore, I would also like to say that no guarantee is granted to victims. On an international or national level, victims do not have access to remedy.

I have also found no reference in all international treaties and instruments to texts providing and guaranteeing protection in this area to the victims and on this subject enumeration

Thank you very much.



#### 4. Spain

España se alinea con la intervención y con la posición presentada por la Unión Europea.

Tal y como ha puesto de relieve de manera muy clara en su intervención la Unión Europea, las organizaciones de la sociedad civil, los defensores de derechos humanos, los medios de comunicación independientes y las instituciones nacionales de derechos humanos desempeñan un papel fundamental para facilitar que las voces de las víctimas de violaciones de derechos humanos – a las que dedicamos esta sesión – puedan ser oídas. Por ello, compartimos la preocupación ya expresada sobre la falta de referencias específicas a los defensores de derechos humanos en el borrador que se nos ha presentado.

Permítanme en este contexto recordar el informe, centrado en el ámbito de las empresas, presentado por el Relator Especial sobre defensores de derechos humanos a la Tercera Comisión de la Asamblea General, en su 72º período de sesiones. Coincidimos con el análisis realizado en dicho informe en cuanto al papel esencial de los defensores en la protección de la tierra, unas condiciones de trabajo justas, la lucha contra la corrupción, el respeto a las culturas indígenas y la consecución de un desarrollo sostenible. Por eso mismo, vemos con preocupación el creciente número de ataques que sufren los defensores y que incluyen una extendida criminalización, asesinatos y amenazas.

Para España esta materia es de especial importancia, siendo la protección de los defensores de derechos humanos una prioridad de nuestra política exterior en materia de derechos humanos. Me gustaría compartir con ustedes

algunas iniciativas que hemos adoptado y que subrayan la relevancia atribuida a los defensores en cuanto a las violaciones de derechos humanos relacionadas con la actividad empresarial.

En aplicación de los compromisos asumidos en virtud de los Principios Rectores de Naciones Unidas sobre empresas y derechos humanos, España adoptó su Plan de Acción Nacional sobre empresas y derechos humanos en julio de 2018. El Plan español destaca el papel de los defensores de derechos humanos en relación con el acceso a los mecanismos de reparación y, al contrario, el serio obstáculo que para el acceso a dichos mecanismos suponen las amenazas o la represión dirigida contra ellos. El Plan reafirma igualmente el compromiso con la aplicación de la Declaración de las Naciones Unidas sobre Defensores de Derechos humanos. Otras medidas contempladas en el Plan de Acción Nacional son la colaboración con las organizaciones de la sociedad civil en la difusión de los mecanismos de reparación existentes, el desarrollo de instrumentos para que todo ciudadano pueda tener acceso a una información comprensible sobre los mecanismos de reparación de los que puede hacer uso o la recopilación de buenas prácticas sobre el establecimiento de mecanismos de reclamación gestionados por las propias empresas que respeten los criterios identificados en el Principio Rector 31.

Finalmente, quisiera insistir en la idea de que, cuando hablamos de víctimas de violaciones de derechos humanos relacionadas con la actividad empresarial, no cabe hacer diferencias entre ellas. Carece por tanto de cualquier justificación limitar el alcance de estos debates a un determinado tipo de empresas o de actividades empresariales. El principio de no discriminación, que está en la base de la teoría de los derechos humanos, exige que todas las víctimas disfruten de los mismos derechos y del mismo grado de protección.

### B. Regional organization

#### 1. European Union

Mr. Chairperson-Rapporteur,

The plight of victims is an appeal to all of us to respond in an effective manner. Those who have suffered human rights violations by States as well as those that are victims of abuses by non-state actors have a right to access justice and a right to effective remedy. More and more voices stress the need to address abuses connected to the activities of business enterprises both of domestic enterprises as well as companies headquartered abroad. Civil society organisations, human rights defenders, independent media and national human rights

institutions have an important role in enabling the voices of victims of human rights violations and abuses to be heard. It is unacceptable that any of those speaking out on behalf of the victims become subject to harassment, persecution and retaliation, and have to risk their own lives as they work for the promotion and protection of human rights. Many human rights defenders indeed face specific risks when they try to help victims of abuses connected to activities of enterprises.

States need to set up measures to support and protect human rights defenders and ensure that the legitimate and peaceful activities of human rights defenders are not obstructed. There are clear provisions in the UN Guiding Principles on Business and Human Rights, for instance in the commentary to Guiding Principle 26: States should *"ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed."*

Several interventions this week raised concerns about the lack of specific provisions on human rights defenders or the lack of a gender perspective in the "draft legally binding instrument". While the EU reserves its position on the "draft legally binding instrument" as well as the "draft optional protocol", we believe that any possible legally binding instrument should reaffirm that States have the obligation to respect, protect and fulfil the rights of all individuals, including human rights defenders in accordance with the UN Declaration on Human Rights Defenders. Any legally binding instrument should also include provisions for groups of persons often disproportionately affected by abuses related to business activities such as women, persons with disabilities, children, indigenous peoples, or ethnic or religious minorities.

The support to human rights defenders is one of the key priorities of EU human rights agenda. With the European Instrument for Democracy and Human Rights, the EU has put in place a comprehensive mechanism to support human rights defenders at risk, entitled 'Protect the Defenders'. Activities under the Mechanism include: urgent support, including physical/digital protection, legal support, medical support, trial and prison monitoring, a permanent helpline for human rights defenders (24h/7); medium-term support including monitoring of the situation of human rights defenders situation, early warning, reinforcement of capacities, trainings on risk prevention and security; and long-term support including support to national networks, advocacy and lobbying. In addition, the European Commission supports specific projects on business and human rights and can provide small grants on an ad hoc basis to human rights defenders in need of urgent support. This support has regularly been used for human rights defenders at risk because of corporate human rights abuses.

The EU also confirmed on many occasions its commitment to the UN Declaration on the Rights of Indigenous Peoples. Action should also be taken to address the killings, criminalisation, threats and violence against indigenous peoples and their leaders, against individuals as well as to human rights defenders, in the context of land and natural resources, in the protection of the environment, biodiversity and the climate.

On the rights of victims, we would like to elaborate on some of the key provisions in EU law, as they are relevant to the debates held here. The EU Charter of Fundamental Rights in its Article 47 guarantees the right to an effective remedy and fair trial and provides the possibility of legal aid to individuals who lack sufficient resources where such aid is necessary to ensure effective access to justice. In addition, it foresees that everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal as well as the possibility of being advised, defended and represented. More specifically, concerning victims' rights in the context of criminal proceedings, the Victims' Rights Directive (2012/29/EU) is the EU's major instrument providing for a set of binding rights for all victims of all crimes. When it comes to victims of business related human rights violations, the Victims' Rights Directive is applicable to situations which are qualified as crimes under national laws.

In such cases, the Directive significantly improves access of the victims to justice, including to remedies. In particular, it establishes a set of procedural rights for victims of crimes, including victims' right to be heard, right to challenge a decision not to prosecute, rights to legal aid in accordance with national law and a right to decision on compensation from the

offender in the course of criminal proceedings. In particular, the Directive provides in Article 16 the possibility of facilitating victims' civil claims in criminal procedures: according to this provision, the victims have a right to decision within a reasonable time on compensation from the offender in the course of except where national law provides for such a decision to be made in other legal proceedings. In addition, the point 2 of this provision should be also mentioned in this context as it states that Member States shall promote measures to encourage offenders to provide adequate compensation to victims.

We would also like to draw attention to the ongoing project by the European Union Agency for Fundamental Rights to look at obstacles and promising practices in relation to access to remedies for victims of business-related human rights abuses. By analysing complaints mechanisms in selected EU Member States, this research maps what hinders and what facilitates access to remedies. This is one of the concrete illustrations of progress made since the clear directions of work set out in the Foreign Affairs Conclusions of 20 June 2016 on Business and Human Rights.

Mr Chairperson-rapporteur,

We are thankful to civil society for the several events organized in parallel of this session as it is important that civil society continues documenting concrete cases and bringing testimonies to the attention of the international community. The annual Forum on Business and Human Rights continues to also be an important avenue to highlight cases, as well as positive examples where business enterprises engage with civil society organisations and human rights defenders to prevent abuses and ensure access to remedy. We look forward to the forthcoming Forum on Business and Human Rights on 26-28 November as a new opportunity to share experiences from all regions and identify concrete means for further progress. Multi-stakeholders initiatives such as the International Code of Conduct Association and the newly established Centre for Sport and Human Rights provide innovative ways to ensure access to an effective remedy.

We heard this week a reaffirmation of the global consensus on the UN Guiding Principles on Business and Human Rights as the existing authoritative framework for all States and stakeholders to make immediate and tangible progress to better prevent business-related abuses, and ensure access of victims to remedy. States must implement their existing obligations, and companies need to fulfil their responsibility to respect human rights. We also have a collective responsibility to make full use of the findings and recommendations of the OHCHR-led Accountability and Remedy Project on judicial mechanisms in cases of business-related human rights abuse and State-based non-judicial mechanisms. We are pleased with the continuation of this project with a focus on non-State-based grievance mechanisms thanks to the leadership of the core group on Business and Human Rights (Argentina, Ghana, Norway, Russian Federation) and the adoption by the Human Rights Council in July 2018 of resolution 38/13. We also need to fully use the tools developed or being developed by the UN Working Group on Business and Human Rights, including its forthcoming guidance for States and business on action to safeguard and support human rights defenders in line with the UN Guiding Principles on Business and Human Rights.

We also heard this week that the UN Guiding Principles are widely recognized as a foundation for further international legal developments in Business and Human Rights. The question remains open on how to build consensus on further international legal developments. The EU takes note that a number of States are not participating in this process, and has listened carefully to the different views expressed this week. We witness a great variety of views from States regarding the "draft legally binding instrument", and expectations to rethink the way forward on process to allow for a meaningful and inclusive discussion. We heard the views expressed by all stakeholders, including business, trade unions and civil society.

Mr. Chairperson-Rapporteur,

Discussions this week have also shown that many have come to support this process out of concern about the negative impact of globalization and of concerns that States will not live up to the ambitious objectives as set out in the 2030 Agenda for Sustainable Development. Indeed, an ambitious goal: "Transforming our world". As we stated at the opening of this session, the European Union is committed to a meaningful and tangible progress on Business

and Human Rights as this agenda is connected to wider issues, linking the promotion and protection of human rights to other global issues: trade, investment, environment, social and labour protection, tax evasion, corruption, and the list is long. In short, collectively, we need to harness globalization. The EU is committed to the promotion and the protection of human rights at home and abroad and we are committed to mainstreaming human rights into all external aspects of EU policies in order to ensure better policy coherence.

In closing, we need to respond to the legitimate expectations of victims of business related activities. This requires a collective endeavour to ensure access to justice and effective remedy; and a collective endeavour to effectively prevent further abuses connected to business-related activities. In light of these global challenges, the European Union stands ready and committed to continue working together with all States, business associations and enterprises, civil society organisations and human rights defenders.

I thank you Mr. Chairperson-Rapporteur.

## **X. Concluding remarks**

### **A. States**

#### **1. South Africa**

Chairperson,

South Africa was pleased to participate at the 4<sup>th</sup> Session of the IGWG on TNCs and Other Business Enterprises with Respect to Human Rights. We thank the Chair for the management of the process over the week and we agree that this has been a very constructive and fruitful debate during the week.

We appreciate the participation of the panellists and the robust involvement of civil society throughout the week and we hope that their voices have been echoed in our interventions. We are humbled by their participation as well as those States who are calling for greater accountability for all organs of society including TNCs and Other Business Enterprises.

We are extremely disappointed by the threats made by business and some States to proponents of the treaty process. The work of this Working Group is complementary to a number of UNHRC initiatives, including that on illicit financial flows. Studies have shown that illicit financial flows have in fact outnumbered the combined inflow of ODA and FDI in a number of developing countries.

The mandate of this Working Group is clear which is to elaborate a legally binding instrument on TNCs and Other Business Enterprises with Respect to Human Rights. The mandate will thus continue until we have completed our important work. We are hopeful that the revised legally binding instrument will take into account the resounding call for the obligations of TNCs and Other Business Enterprises and the interrogation of an effective international implementation mechanism.

This Working Group has massive potential to fill the missing link in human rights protection in the context of globalization and transnational global economic activity. We look forward to partake in the informal consultations as we work towards the 5<sup>th</sup> Session of the Working Group.

I thank you.

### **B. Regional organization**

#### **1. European Union**

Mr Chairperson Rapporteur,

We would like to thank you for the handling of this session and allowing for diverging views to be expressed. We would like to thank the Secretariat for the handling of this session and the elaboration of the draft report.

Four years have passed since the adoption of resolution 26/9 which triggered division in the Human Rights Council establishing this Intergovernmental Working Group. We would have liked to see genuine steps by the main sponsors to address the concerns expressed by us and others with a view to overcoming divisions. Otherwise, there is a risk that several States stick to their position not to participate and that others take a similar position. There is ultimately a risk that many States will not adopt the draft text if and when it is produced by this process. Equally, there is a risk of disillusionment among civil society, trade unions and even business who see the merit of further legal developments at the international level to level the playing field to better prevent abuses, and ensure access by victims to remedy when abuses occur.

We believe in effective multilateralism and we continue to expect that the flaws of this process be fixed or that a new process be initiated for progress on this important, yet complex, issue of our time. We owe it to victims and to the next generations.

The 4<sup>th</sup> session of the Intergovernmental Working Group is about to end. One year has passed since the end of the 3<sup>rd</sup> session when the Intergovernmental Working Group requested the Chairperson-Rapporteur to "undertake informal consultations with States and other relevant stakeholders on the way forward" [A/HRC/37/67], which entailed a need to find agreement on process. At the first and only consultation convened on 17 July 2018 to discuss the process, the European Union and States from different regions made concrete proposals, including to revert to the Human Rights Council, to find common ground and build a foundation for an inclusive, fruitful, substantive and constructive discussion – see Annex I for the full text of the EU intervention of 17 July 2018; Annex II contains the Joint Statement on Intergovernmental Working Groups delivered on 19 September 2018 during the 39<sup>th</sup> session of the Human Rights Council. These proposals and the proposals from others were unfortunately dismissed; instead, two days later, the Permanent Mission of Ecuador published the draft treaty and indicated it would proceed to the 4<sup>th</sup> session without a resolution. We reiterated our suggestions before the 39<sup>th</sup> session of the Human Rights Council, but to not avail.

Once it became clear that there would be no resolution before the 4<sup>th</sup> session, we conveyed the expectation that discussion on the future of the process be held before the start of the 4<sup>th</sup> session with all States and stakeholders to ensure predictability and minimize the risk of disagreement when Conclusions and recommendations are negotiated at the end of the session. There was no such space for discussion before the session, or indeed during the current session. The draft Conclusions and recommendations were made available only on the last day of this session, 19 October at around noon. Their content clearly confirmed that, in our view, there was no attempt by the Chairperson-Rapporteur to respond positively to the proposals to revert to the Human Rights Council with a view of rethinking the best way forward.

We decided therefore not to engage in the consultations on the Recommendations of the Chair-Rapporteur and Conclusions of the working group called on 19 October at a late hour in the session, and disassociate ourselves from their adoption. We therefore request that our position be accurately reflected in the report under the section "Adoption of the report": *"the European Union disassociates from the Recommendations of the Chair-Rapporteur and the Conclusions of the working group and considers that it is not bound by the directions set out"*.

We see that the draft report presented to us does not always accurately reflect all views and positions and we welcome the fact that there will be a two-week period to make comments. We also welcome that an Annex will be developed with the attributions of positions expressed throughout the session, including in the opening and closing of this session.

We do not wish to block the adoption of the report, but we rather send yet another signal that it is about time to build common ground. We are committed to continue working within the EU on options for further legal development likely to effectively allow progress in the prevention of abuses by business-related activities, and ensure access to victims to remedy when abuses occur.

We invite all to reflect on the words of former Special Representative of the Secretary General Prof. John Ruggie in his Open letter to this Intergovernmental Working Group before the start of this session: *"Success—not on paper but on the ground—demands deep*

*reflection, good will, and a constructive process that searches for consensus in the knowledge that real change requires it."*

I thank you Mr. Chairperson-Rapporteur.

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