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Business and the Right to Development

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Transcript of the statement by Ms. Kinda Mohamadieh,
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Thank you for the invitation to this exchange.

I have been following the observing the process of negotiating the legally binding instruments since the inception of the process. Over these ten years it is clear that a lot has changed in terms of the thinking and the practice about business and human rights, which has been evolving both at the multilateral level and also through certain practices and evolving in specific jurisdictions, but also through jurisprudence that have dealt with the liability of businesses, specifically in the context of corporate groups in relation to climate change and in the context of supply chains.

Negotiating the LBI is expected to keep up with these developments and the LBI as an instrument can indeed address a lot of the issues pertaining to business and human rights, but it cannot address all the issues that are embroiled in the challenge of aligning the private business endeavor with the public collective objectives of development and the fulfillment of human rights. In the end, in terms of thinking of the legally binding instrument, we also need to think about it as one of the multiple elements that are required in order to achieve this alignment or kind of shift in the incentive structures that would allow the alignment, or a better alignment between the business practices on one hand, and the collective public interests on the other hand.

It is a reality that there is an intrinsic tension with businesses, especially corporations, in the context of the increasingly financialized hyper globalized competitive markets that we encounter today, where it is a reality that maximization of short-term private profits remains a dominant priority despite the narratives of moving to alternative models, if we look at how big companies are governed. This is a priority, among other long list of issues of concern, but this remains a priority. It also remains a determining factor in how decisions by executives in these companies are made, particularly because of also how your enumeration of these corporate decision makers are pegged to the short-term value of the share of these companies.

In the end, what needs to change is very much linked to the role of the states utilizing the different institutions policies and legal frameworks that can shift the incentive structure. Behind all of this, the LBI is just one matter in that kind of puzzle, but the LBI I view would provide an added value that other legal instruments or legal frameworks cannot, particularly because of its value as an instrument of international cooperation, in order to address challenges emanating from the business conduct that a singular state cannot address by itself or cannot handle by itself.

In that context, building on everything we have witnessed this far in the negotiations, I will share some of my personal views on how the LBI could be of added value, this would be more general remarks and maybe later if the time allows I can share some specific views on the issue of due diligence and the issue of legal liability.

The instrument needs to be focused on finding solutions for changes that already emanate from the lived experiences pertaining to access to justice in cases of corporate misconduct. I think the negotiations of the FBI this far have to certain extent succeeded in focusing on these empirical evidences, and in order to continue that, we need to continue having this instrument being rooted in the experiences of victims and in this sense the negotiations ought to remain open to benefiting from the experiences of social movements, indigenous and civil society groups that work with victims and work on the ground on these cases.

The LBI also should balance between clarifying the human rights related principles and obligations applicable to all business, but also to be able to pay specific attention to the harm emerging in the context of transnational business activities.

This takes me back to the important value added that the that the LBI can present as an instrument of international legal cooperation to address these cases when not one singular state can address them. In order to be effective in addressing the transnational element it is not only enough to look now talking more about the technicalities to look how the scope of the instrument is defined, but it is very crucial to look very closely at how the operational parts, namely due diligence, adjudicative jurisdiction, legal liability are designed in a way that enables this instrument to be relevant to the transnational aspect of business conflict.

The transnational element is important because the transnational issue cannot be addressed except through international cooperation and cooperation between home and host state of transnational business or investors, but also because we have empirical evidence that shows that business structuring is used in many cases in order to avoid liability. Group structuring is often referred to in the literature as carefully designed group risk allocation, and it is because there is empirical evidence that this structuring is used specifically in cases where there is a high risk of litigation that a company could face as a result of the risk to human rights violations and other harm that could emerge in the context of the business model ,this requires particular attention.

The LBI is important as well for the legally binding instrument to address the challenges emanating in relation to climate change and business, and business and human rights in the context of conflict affected zones. These are not easy issues, they are definitely more complex than the general issues of business and human rights, but the LBI is being negotiated in a period when there are multiple developments in regard to these issues. For example, on climate change we have multiple recent normative developments in light of the 2021 resolutions of the General Assembly and the Human Rights Council on the right to a healthy and sustainable environment, but also in light of the work of these special opportunities on the right to healthy environment and the Special Rapporteur to climate change.

In this context, it is increasingly acknowledged that the interpretation of human rights treaties must consider an account for the climate crisis and also that human rights law plays a crucial role in clarifying and shaping these states obligations when it comes to the climate crisis. So,

in this context the legally binding instruments need to grapple with these issues and have a comprehensive approach where the environmental and climate issues are addressed across the totality of the legally binding instrument and not in the selective way, but also addressed in a comprehensive and not fragmented way.

We have seen recently that in certain recent emerging practices, climate change has been taken independently of the environmental human rights due diligence for example for businesses. This is a fragmented approach that is intention with what the authoritative voices on climate change and human rights. Specifically, the right to a healthy environment has been calling for a more integrated manner of addressing climate change as part and parcel of the environmental issues that are of concern to the right to a healthy environment.

In this context as well, and I will second what the ambassador has noted by highlighting the importance of addressing states obligations to ensure effective remedy, not only for the rights of those affected today, but also the rights of those that will be affected in the future. In this context, when we are dealing with the climate issue, this aspect of the rights of the future generations becomes more of a key concern.

I will stop here and maybe engage more later in the discussion, thank you.