

# UN Working Group on Business and Human Rights: Enhancing its independence, impartiality and legitimacy

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## The Issue in Question

The UN Working Group on Business and Human Rights (the “WG on Business and Human Rights,” the “Group,” or “WG”), established by Resolution 17/4 of the Human Rights Council, forms part of the Human Rights Council Special Procedures system. When carrying out their tasks as delineated in the resolution that created this Special Procedure, members of the Group act for the common good within an intergovernmental organization, and not for private interests of any other entity or body. **The public function of the Group requires that its members discharge their functions with absolute independence and impartiality.** The unique environment in which the WG on Business and Human Rights operates and the peculiar features of its mandate, notably its duty to adopt a multi-stakeholder approach, **require greater attention to the particular factors that may influence its ability to act independently and impartially.** The adoption of additional criteria in order to achieve such independence and impartiality may be desirable in order to secure such fundamental ethical values.

## Standards Requirements

As individuals responsible for carrying out the Special Procedure’s mandate, members of the WG on Business and Human Rights must abide by the provisions of Human Rights Council Resolution No. 5/2, which establishes the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council<sup>1</sup> (“Code of Conduct”). This instrument requires, under Article 3, that these experts act in an independent capacity and free from any kind of extraneous influence, incitement, pressure, threat or interference. Moreover, the Code of Conduct requires experts to focus exclusively on the implementation of their mandate, and neither seek nor accept instructions from any government, individual, governmental or non-governmental organization or pressure group whatsoever. Finally, **mandate holders should refrain from using their office or**

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<sup>1</sup> The Code of Conduct requires, under its Article 3, that the experts who hold a Special Procedures Mandate act in an independent capacity, and free from any kind of extraneous influence, incitement, pressure, threat or interference. Moreover, the Code of Conduct requires experts to focus exclusively on the implementation of their mandate, neither seek nor accept instructions from any Government, individual, governmental or non-governmental organization or pressure group whatsoever. Finally, mandate holders should refrain from using their office or knowledge gained from their functions for private gain, financial or otherwise, or for the gain and/or detriment of any family member, close associate, or third party.

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Besides the Code of Conduct, the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission<sup>2</sup> (“Regulations”), also applicable to the mandate holders of the Special Procedures, provide that such officials shall not be actively associated with the management or holding of a financial interest in business or other entities in which they benefit due to their position with the United Nations. In the event of such an interest, the official shall dispose of that financial interest or formally excuse himself from participating in any activity that might raise a conflict of interest.

### Unique Features of the WG on Business and Human Rights Membership

Although Resolution 5/2 and the Regulations provide for the independence and impartiality of Special Procedures, the WG on Business and Human Rights presents some specific features that deserve careful attention:

- **Professional record and potential conflicts of interests.** Although the Code of Conduct applicable to all Special Procedures requires mandate holders to assess if their professional record is compatible with the tasks to be performed within the UN, in the case of the WG, the potential conflicts of interest between individuals with a private sector background and their role as UN mandate holders are magnified. Although it may be argued that the presence of members with a private sector backgrounds adds value to the work of the Group, it is also legitimate to ask whether such members should be subject to specific rules, in particular when this group receives and reviews complaints regarding business enterprises. It is entirely possible that eventual allegations of human rights abuses could be directed against companies with which WG members have had important relations in the past;
- **Commitment to reduction of asymmetries among stakeholders.** Even if members of the Group, while exercising their mandate, abdicate positions that require their involvement in the affairs of business enterprises, the fulfilment of the Group’s mandate requires that, additionally, mandate-holders are deeply committed to the reduction of the economic and political asymmetries between the victims of corporate abuses and their perpetrators;
- **Capacity to dialogue with multiple stakeholders.** In order to fulfil their duties as set forth in the Resolution that established the WG, its members must have the capacity to engage and maintain a real dialogue with all relevant stakeholders, including States, private firms and businesses, affected communities and civil society organizations.

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<sup>2</sup> The Regulations are applicable on a complementary basis to the mandate holders of the Special Procedures, and provide that they shall not be actively associated with the management or holding a financial interest in business of other concern to benefit from this situation by reason of their position with the United Nations. If such is the case, they shall dispose of that financial interest or formally excuse from participating in any activity that might raise a conflict of interest (Regulation 2 (h)).

- **Personal investments in securities issued by business enterprises.** Conflicts may also arise between the mandate of the WG members and their investments in securities (e.g. shares, bonds) issued by private companies.

### Recommendations

The following recommendations are designed to enhance the independence, impartiality, credibility, and legitimacy of the WG on Business and Human Rights:

- a) **Disclosure System:** The disclosure system already in place as per UN rules<sup>3</sup> provides a minimum standard regarding information disclosure by members of the UN Working Group on Business and Human Rights. However, as a measure to enhance this mechanism, we recommend that current and prospective members of the UN Working Group on Business and Human Rights voluntarily prepare and disclose a document declaring his or her professional record, including employment in specific companies, as well as board memberships, and comment on any potential conflicts of interest which might arise from their professional background and the position as mandate-holders, as well as measures to mitigate such conflicts.
- b) **Diversity:** It is recommended that the mandate-holders are selected not only on the basis of their geographical distribution, but rather, and more importantly, so that the composition of the WG reflects a diversity of profiles, worldviews, mindsets and backgrounds, with trajectories in governmental entities, private corporations, academia, civil society organizations and individuals recognized for their activism in advancing human rights standards. Such a diversity requirement could considerably contribute to the fulfilment of the duties of the Group as Human Rights Council Special Procedure and yield efficiency and legitimacy to its projects.
- c) **“Cooling off” or quarantine mechanism:** This conflict of interests mitigating mechanism is commonly enshrined in rules that govern the transition of individuals leaving public office to the private sector.<sup>4</sup> The adoption of this mechanism to the reality of the WG on Business and Human Rights could consist, for example, in a requirement that members, for a period of two years after the end of the respective mandates, refrain from undertaking certain activities that could potentially raise a conflict of interest with their status as former UN mandate-holders, such as serving as consultants (or performing any other paid activity) or exerting any kind of influence on

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<sup>3</sup> Under the UN rules, any official or expert in mission, which is equivalent to the function of HRC mandate holder, the UNSG may request the disclosure of financial statements from these experts (Regulation 2 (i)).

<sup>4</sup> Under the European Union Code of Conduct, there is a cooling-off period of 18 months. Under different US jurisdictions, this period varies from 1 to 2 years. Under Brazilian law, former justice courts are barred from defending their clients’ interests before the courts for which they previously served for a period of 2 year after the end of the mandate. Currently, the UN does not have this type of regulation.

the conduction of business enterprise affairs, such as being appointed as a member of the board of directors.

- d) Funding:** The sources of funding for the work of the Group are indispensable for their independence. Thus, we recommend that all forms of financing originated from business enterprises to the Group shall be prohibited. We recommend that the activities of the WG on Business and Human Rights receive funding through the establishment of a fund located at an “arm’s length” between the sponsors (States) and the WG itself, which implies that States should avoid earmarking resources they donate to the WG.

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