

29 September 2016

## **UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS** *Further considerations by the international business community on a way forward*

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### **The international business community's engagement to date**

Human rights are a high priority for the international business community. BIAC, ICC, IOE, and WBCSD and their millions of member companies around the world have been engaged in this subject for many years. Each of these representative organizations have endorsed the UN Guiding Principles on Business and Human Rights and continue to be active in promoting and disseminating the UN Guiding Principles and related implementation guidance among their membership and associated networks.

As part of this ongoing activity, BIAC, ICC, IOE, and WBCSD and their members have constructively participated in the work of the Intergovernmental Working Group (IWG). After submitting initial written observations on the UN treaty process in June 2015, the groups actively participated in the IWG's first meeting in July 2015 and have since then proactively engaged in the process.

### **Observations on the occasion of the 2<sup>nd</sup> Meeting of the IWG**

BIAC, ICC, IOE, and WBCSD are concerned that certain parameters of the IWG's early discussions, if reflected in an initial draft treaty text, would severely constrain the effectiveness of any eventual proposed treaty on business and human rights that may emerge from the IWG's deliberations. The IWG process and the broader debate its work has engendered offer a unique opportunity to advance understanding and galvanise action by States, business and civil society to enhance the protection, respect and fulfilment of human rights in practice. The trajectory of the IWG's discussions to date, however, risks narrowing that vital discussion and failing to address, in any draft legal instrument, the majority of human rights impacts associated with the activities of businesses. In particular, the scope of the instrument, as currently proposed, would not cover the majority of the businesses operating in the world today, including purely domestic companies, and state-owned enterprises operating domestically. BIAC, ICC, IOE and WBCSD are also concerned that the present focus of some treaty proponents on transnational accountability mechanisms is misplaced and, if pursued to the exclusion of identifying mechanisms to strengthen nationally-based accountability for business-related human rights impacts, a tremendous opportunity will have been wasted.

#### **1) The treaty should strengthen the implementation of the UN Guiding Principles on Business and Human Rights.**

The proposed instrument could require ratifying States to develop and implement National Action Plans (NAPs) and thereby encourage States to use the guidance provided by the UN Working Group on Business and Human Rights.

The IWG should also consider measures to increase peer pressure between States to strengthen implementation of the UN Guiding Principles, such as explicitly requiring States to report on their implementation of the UN Guiding Principles and NAPs to the appropriate UN supervisory mechanisms, such as the Universal Periodic Review.

These and other ideas could be facilitated by closer involvement of the UN Working Group on Business and Human Rights in the IWG's work, which would allow the IWG to benefit from the experience of the UN Working Group in the promotion of the UN Guiding Principles as well as to ensure policy coherence across the UN.

**2) To be effective, the treaty's jurisdictional scope must include all business enterprises.**

A truly victim-centred approach to business and human rights requires motivating all actors to prevent, mitigate and, where necessary, remedy adverse human rights impacts; victims of business-related human rights impacts do not care whether their suffering resulted from the action of a domestic company or a multinational one, a privately-held entity, one that is publicly-traded or one whose shareholders include sovereigns or which are financed by sovereign assets – the key issue is that the negative impact of the company's conduct is mitigated and remedied.

In light of this victim-centred approach, the current deliberations on the treaty are worrying, as the first IWG's meeting decided that the mandate of the IWG established in Human Rights Council Resolution 26/9 could not be understood to include purely domestic enterprises and, furthermore, that it was outside the IWG's mandate to modify its own mandate as stated in the text of the Resolution.<sup>1</sup> The views taken in the first session of the IWG can of course inform the second session, but it remains within the IWG's power to reassess the conclusions reached last year. In revisiting the scope of the proposed instrument, we wish to offer the following observations:

- a) State-owned enterprises of a transnational character or with transnational operations are clearly within the scope of the IWG's work.** It is the view of the undersigned business organizations that State-owned enterprises (SOEs) that are by structure "transnational corporations" or which "have a transnational character in their operational activities" are clearly already included within the scope of the IWG's mandate and therefore within the potential jurisdictional scope of any binding instrument.

This is an important clarification because SOEs are significant economic actors in the global economy: the proportion of SOEs among Fortune Global 500 companies has grown from 9.8% in 2005 to 22.8% in 2014, with US\$389.3 billion of profit and US\$28.4 trillion in assets. A similar growth was seen in the broader Fortune 2000, with SOEs comprising 14 percent of the Fortune 2000 in 2014, with the value of their sales, both domestic and international, being equivalent to approximately 19 percent of the value of global cross-border trade in goods and services.<sup>2</sup> Indeed, in many of the most impactful industries, SOEs comprise anywhere from 13-43% of the top 10 firms in each industry, according to the OECD (see Figure 1).

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<sup>1</sup> Resolution 26/9's preamble refers to "all the work undertaken by the Commission on Human Rights and the Human Rights Council on the question of the responsibilities of transnational corporations and other business enterprises with respect to human rights," and in a footnote, defines "Other business enterprises" as "denote[] all business enterprises that have a transnational character in their operational activities, and does **not apply** to local businesses registered in terms of relevant domestic law."

<sup>2</sup> The E15 Task Force for Investment Policy, Think Piece: Governments as Competitors in the Global Marketplace: Options for Ensuring a Level Playing Field (OECD, February 2016) (joint effort of International Centre for Trade and Sustainable Development and World Economic Forum).

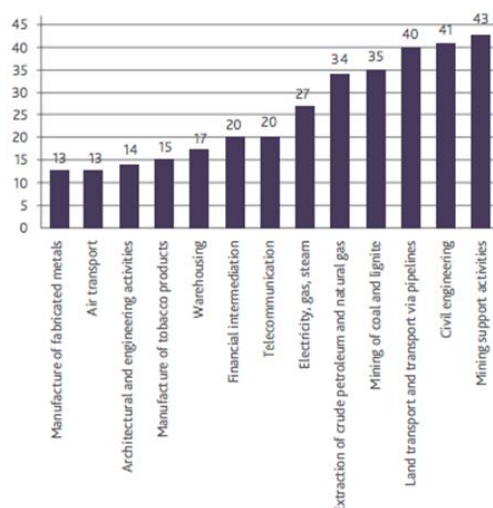


FIGURE 1:

Importance of SOEs among sectors' top 10 firms in percent

Note: Figures represent equally-weighted averages of SOE shares of sales, assets and market values among the sector's top ten companies, where SOEs are defined as majority state-owned entities on the Forbes Global 2000 list. Only sectors with shares above 10% are shown.

Source: OECD (2013a).

The E15 Task Force for Investment Policy, Think Piece: Governments as Competitors in the Global Marketplace: Options for Ensuring a Level Playing Field (OECD, February 2016) (joint effort of International Centre for Trade and Sustainable Development and World Economic Forum).<sup>3</sup>

More pertinent to the IWG's mandate, however, is the fact that most of the world's economies with a particularly high share of SOEs among their largest enterprises are important players in international trade in goods and services. Moreover, those segments of the raw materials, manufacturing and services sectors that have the strongest SOE presence account for significant shares of world trade, with these sectors known to play important upstream and downstream roles in international supply chains.<sup>4</sup> There are also signs that in recent years, the transnational nature of SOE activity has been on a rapid rise, out-pacing the same activity by private companies (see Figure 2). In fact, there has also been a rise of M&A activity by SOEs within purely domestic markets, confirming the overall trend of their ascendance as major economic players. Thus, to ignore SOEs would dramatically limit the relevance and effectiveness of a future instrument from the very beginning.

- b) Excluding domestic enterprises would render the focus on transnational corporations ineffective and would likely fail to cover the vast majority of business-related adverse human rights impacts.** Margaret Jungk, former member of the UN Working Group on Business and Human Rights, pointed out in an article in the Huffington Post that "the vast majority of economic activity is carried out by small-scale companies, ones you've never heard of, mostly in the informal sector. Their goods don't travel across borders, and when they exploit their workers or harm communities, you don't hear about it". Indeed, according to the ILO World Employment Social Outlook 2015, only 20.6 per cent of the global workforce is linked to Global Supply Chains (ILO WESO, page 132).

Thus, a treaty which proceeds along the lines suggested during the IWG's first session would exclude the vast majority of companies from its ambit as well as the majority of the world's workforce. Moreover, as stressed in the business organization's submission last year, to the extent that transnational corporations do cause or contribute to adverse human rights impacts or are directly linked to such impacts, in many cases, this is a direct result of those multinational companies' engagement with smaller, domestic suppliers and other business partners.

Accordingly, multinational companies' efforts to respect human rights in accordance with a proposed treaty or otherwise would not have the same impact if their business partners were left outside the scope of the instrument, because those actors would feel

<sup>3</sup> Available at <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-OECD-FINAL.pdf>

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they could act with impunity. Human rights and decent working conditions have to be ensured for all workers and all people – not only for the minority of the global workforce that are linked to MNEs. Thus, the IWG should revise the scope of the proposed instrument accordingly. Alternatively, this question can be referred back to the Human Rights Council for consideration as it looks to possibly renew the mandate of the IWG in 2017.

In response to the suggestion that domestic enterprises should be covered under the term “other business enterprises,” it was argued at the last meeting of the IWG that domestic companies are already covered under domestic laws and therefore do not need to be within the mandate of the IWG’s work. But this creates a false distinction which does not hold-up under even a cursory examination: the simple truth is that transnational companies are also covered by the existing laws and regulations in every jurisdiction in which they operate. There is accordingly no regulatory gap to be bridged at the international level for transnational corporations any more than there is for domestic ones. Rather, the challenge with respect to both is to ensure better implementation and enforcement of regulation at national level.

### **3) The UN treaty process should build on the UN “protect-respect-remedy” framework and respect the established division of roles between states and companies.**

**The IWG process should not result in an instrument that undermines well-established norms for allocating duties to governments and responsibility to enterprises.** According to the UN Guiding Principles States have the duty to protect human rights and companies have the responsibility to respect human rights. This means that a company’s respect for human rights can never be a substitute for national governments’ duty to protect, respect and fulfill the human rights of their citizens. There are strong democratic governance rationales for not privatizing core duties of the state to business, and because all human rights are “indivisible; interdependent and interrelated” and all potentially apply to business, there would be no clear line marking where government obligations end and business obligations begin, nor would there be appropriate administrative law and checks and balances (e.g., election of officials, etc.) to ensure that business decisions are coherent with citizens’ preferences. It is a slippery slope that it is best not to set foot upon.

**The IWG process should not undo the settled expectations of proper allocation of responsibilities among businesses along supply chains.** The UN Guiding Principles also clarified responsibilities of different companies in a supply chain. As the Commentary to Article 22 of the UN Guiding Principles explains, in efforts to remediate adverse impacts to which an enterprise is directly linked through its operations, products or services, but which it has not caused or contributed to, the “responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.” Similarly, the OECD Guidelines indicate that when an impact is directly linked to an enterprise’s operations, products or services by a business relationship, that “[t]his is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship” (MNE Guidelines, II.A.12). The IWG process must not undermine these well-established norms for allocating responsibility to enterprises. The IWG should not create new liabilities for companies for social standards along global supply chains and any new treaty should avoid imposing direct obligations on companies isolated from the responsibilities of states.

This important allocation of responsibilities only increases in importance if the IWG process continues to consider that “other business enterprises” cannot by definition include purely domestic enterprises. Unlike the Guiding Principles, which appropriately drive action at the site of the harm caused by the primary wrongdoer, under the terms of the proposed instrument, those very enterprises would be given a pass on liability and would never be incentivized to

prevent, mitigate or remedy adverse human rights impacts. The results of this would be disastrous.

#### **4) Access to remedy must be local to be effective; extraterritorial jurisdiction is no panacea**

A major issue within the IWG, but also more generally in the debate on business and human rights, is access to remedy. Business fully supports efforts to improve access to remedy and recognize its responsibility to play an appropriate role in the provision of remedy for actual harms. Access to remedy in cases of human rights violations is not only a human right per se, but a prerequisite for the full enjoyment of these human rights. It is only when people have access to justice and remedy that rights become meaningful. Article 8 of the Universal Declaration of Human Rights states that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

**What is broken is domestic access to remedy.** As this statement makes clear, promoting the rule of law and access to remedy is first and foremost a responsibility of the State. However, in many countries governments are not properly fulfilling their duty to provide access to remedy or respect the rule of law. Deficiencies include inadequate financial support and overwhelming caseloads, lack of independence, accountability and transparency in judicial systems, inadequate judicial education and professional training as well as corruption. These challenges not only restrict access to remedy for those whose rights have been adversely affected by MNEs, but for all those in need of remedy for a violation of their human rights.

**Extraterritorial jurisdiction offers a hollow hope for remedying the vast majority of adverse human rights impacts.** A narrow focus on only enhancing the availability and exercise of extraterritorial jurisdiction for human rights harms is not the panacea to access to remedy. Not only would it exclude the vast majority of workers and potential impacts, but also, it does not address the root causes of inadequate access to remedy entrenched in poorly functioning state processes or create incentives for those processes to gradually improve. In addition, extraterritorial jurisdiction is not without its own shortcomings, including the tremendously higher costs involved in pursuing remedies in foreign courts and sustaining such cases over several years; the challenges presented to foreign courts when they must pass judgment on the adequacy of other countries’ laws, institutions and legal processes and rule according to foreign legal principles; as well as the difficulties in obtaining evidence and testimony abroad. So, what needs to be done?

- BIAC, ICC, IOE, and WBCSD underline the need to increase international and domestic pressure on governments to improve judicial systems. The international supervision of efforts for improving access to local remedies within UN member countries should be strengthened. The treaty process should be used to elaborate on ways in which established mechanisms such as Universal Periodic Review mechanism could be used to this end.
- The UN Human Rights Council adopted in June this year recommendations to improve access to remedy. IOE, ICC, BIAC and WBCSD commend these recommendations, to the IWG.

#### **5) A positive and constructive approach is needed which also focuses on support for business.**

Companies are the source of employment, growth and poverty reduction. Moreover, they are part of the solution to human rights challenges. The development and the content of the proposed instrument should reflect this. What is already being done by companies must be supported/promoted and not threatened. The third UN Guiding Principle states that governments should “*ensure that other laws and policies governing the creation and ongoing*

*operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights*". Moreover, according to the third UN Guiding Principle, States should "provide effective guidance to business enterprises on how to respect human rights throughout their operations". Thus, the proposed instrument could require ratifying States to:

- **provide companies with guidance on national law and human rights obligations.** This is especially relevant in countries with a large informal or a grey sector in which enforcement of the law is weak, as well as in countries where the law has been developed through legal proceedings.
- **support companies with information.** Companies analyse the impacts of their business activity with regard to human rights through a due diligence process. Smaller companies in particular often find it difficult to collect accurate and relevant information on the target regions of their investments. The proposed instrument could require ratifying States - possibly through international organisations – to set up support structures which provide companies with valid information on the concrete situation on the ground and country- and sector- specific risks.
- **undertake an assessment of the biggest obstacles for companies to fulfil their responsibility to respect human rights in the country of operation, and whether state legislation is in line with international human rights instruments and actually enforced.**

Moreover, the proposed instrument should focus on real human rights issues: Any new initiative should be focused on human rights in order to contribute to the aims it intends to achieve. Many expectations are being placed on a potential treaty on business and human rights which goes far beyond the core issue, such as climate change, youth unemployment, etc. Whilst these are important concerns, it is clear that a UN treaty on business and human rights cannot address all of these issues and that these issues are in any case being addressed by other international mechanisms and initiatives.

## The way forward

Much progress has been already achieved in the last five years with regards to the up-take of the UN Guiding Principle at the political level and the company level as well as by international and national initiatives and instruments, and BIAC, ICC, IOE, and WBCSD will continue to promote further up-take and implementation of the UN Guiding Principles. The aim is to continue this highly successful endeavour in order to encourage more governments to effectively implement the UN Guiding Principles and to extend their effective reach to corporations of all sizes from diverse industries and geographies. The IWG should not waste its opportunity to contribute to that important mission.

BIAC, ICC, IOE, and WBCSD will also continue to constructively engage with the IWG. In this regard they reiterate the need for an inclusive process. A major challenge in this regard has been that many business associations were not able to join the meetings of the IWG so far, because they do not have consultative status in ECOSOC. Business expects the chair of the IWG to tackle this problem and address the situation in time for this year's IWG.

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