

BIAC – ICC – IOE – WBCSD

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UN Treaty Process on Business and Human Rights – Initial Observations by the International Business Community on a Way Forward

(Draft)

Human rights are a high priority for the international business community. BIAC, ICC, IOE and WBCSD, which collectively represent millions of companies around the world, and their members, have been engaged on this subject for many years. They 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, including associated networks.

Against this background BIAC, ICC, IOE and WBCSD and their members are committed to constructively engaging with the work of the Intergovernmental Working Group (IWG). Within this context, the organisations provide the following initial observations on the UN treaty process.

Extensive progress has been achieved over the past four years – the UN treaty process must not undermine the ongoing implementation of the UN Guiding Principles

The UN Guiding Principles are the authoritative international framework on business and human rights. The uptake of these Principles by enterprises, international organisations, multi-stakeholder initiatives, etc. has been impressive thus far. The EU Commission acts on them and governments around the world have launched, or are in the process of launching, national action plans (NAPs) for implementation. Furthermore, a new human rights chapter, which is consistent with the UN Guiding Principles for Business and Human Rights, was added to the OECD Guidelines for Multinational Enterprises (MNEs) when they were updated in 2011. The OECD MNE Guidelines, which are the most comprehensive instrument for promoting responsible business conduct, are supported by National Contact Points, which provide a non-judicial grievance mechanism.

There is also substantial progress at company level and within industry initiatives. These range from policy commitments, operational guidance, governance mechanisms related to human rights, understanding impacts across diverse functions, undertaking human rights due diligence in diverse forms, and training programmes and capacity building within the company and business partners. Progress to date does not of course mean that all the objectives have been achieved; after all, such issues demand continuous improvement, and it takes time to ensure the institutionalization of new practices and as well as buy-in from both internal and

external stakeholders. It is clear too that the current efforts need to continue in order to engage the next wave of corporations of all sizes from diverse industries and geographies.

Much more can also be done by governments to create an enabling environment that supports the efforts of enterprises to fulfill their responsibility to respect human rights. The encouraging uptake of the UN Guiding Principles and the accomplishments of the UN Working Group on Business and Human Rights indicate that there is widespread global support for the Principles and we should continue to work towards implementing them.

The UN treaty process should address all companies, not only multinationals

A key characteristic of the UN Guiding Principles is that they apply to all companies, regardless of whether they are multinationals or purely domestic companies, large, medium-sized or small companies, private or state-owned companies. As the vast majority of companies around the world are purely domestic, the effectiveness of any UN treaty on business and human rights would be limited if its scope were to include only multinational companies. All companies can encounter risks related to human rights and the UN treaty process should take this into account. Moreover, as many multinational companies are exposed to human rights risks as a result of their engagement with smaller purely domestic suppliers and other business partners, multinational companies' efforts to respect human rights in accordance with a proposed treaty or otherwise would be substantially undermined if their business partners were left outside the scope of the instrument.

A potential UN treaty process should build on the UN “protect-respect-remedy” framework

The UN “protect-respect-remedy” framework, which the UN Human Rights Council endorsed in 2008, clearly defines the different roles of States and companies with regard to human rights. The UN treaty process, to be successful, must build on this framework. The failure of the so-called “Draft Norms” on business and human rights in the early 2000s was in part due to the lack of differentiation made between the responsibilities of States and companies, which risked leading to the privatisation of human rights. Therefore this new process must reaffirm and support the UN “protect-respect-remedy” framework to avoid running the same risks.

In particular, we draw attention to academic research which demonstrates that, while the average State has ratified a steadily increasing percentage of human rights treaties, the percentage of States reported to be repressing basic human rights with regard to the security of persons has generally increased. The widening gap between the rate at which States are joining the international human rights regime and efforts to bring their protection of human rights into compliance with treaty norms at a minimum should caution against pursuing a strategy that relies exclusively on treaty development and ratification for the protection of human rights. This basic reality drove much of the “principled pragmatism” behind John Ruggie’s mandate.

In light of the fact that the treaty sponsors, principally Ecuador, have acknowledged that a treaty process could, if successful, take a decade and more to complete, the above reality suggests that in the interim it would be essential that States pursue strategies and efforts at

implementing and enforcing the norms underlying the UN Guiding Principles, which are those of the International Bill of Rights and other internationally recognized rights to which the vast majority of States are already legally bound. We have yet to see any such efforts. The vast majority of sponsors and supporters of the creation of the treaty process, and many others who considered the matter, have been notably absent from the list of countries to announce their intention to further the implementation of the UN Guiding Principles by starting or concluding the drafting of a National Action Plan. This is a missed opportunity to begin now to build national governance structures that will enhance States' fulfillment of their duty to protect, promote and fulfill the human rights of their citizens regardless of the detail of final obligations imposed through a treaty process.

The UN treaty process should be inclusive

John Ruggie's achievement of a very broad consensus was as a result of his consultative and inclusive approach in the development of the UN Guiding Principles. The UN treaty process must take the same approach. A potential UN treaty on business and human rights will have the highest likelihood of success if all stakeholders are listened to and their needs taken into account. This means that the IWG must be as representative as possible, and that business, trade unions and NGOs must be given sufficient opportunities to participate. The UN Working Group on Business and Human Rights should also have a seat in the IWG in order to share its experience and ensure coherence between the UN treaty process and the implementation of the UN Guiding Principles.

Key Business considerations with regard to the UN treaty on business and human rights

- At this stage any treaty or international initiative on business and human rights should contribute to the effective implementation of the UN Guiding Principles on Business and Human Rights by requiring States to develop and implement National Action Plans (NAPs) for the UN Guiding Principles on Business and Human Rights. This would also be a positive step towards creating a global level playing field for business enterprises. It would also need to encourage States to use the NAPs guidance provided by the UN Working Group on Business and Human Rights.
- It would also be important to strengthening national implementation by requiring States to report back to the UN supervisory machinery about measures taken. The IWG could consider further measures to increase peer pressure between States in order to strengthen implementation.
- Any treaty or initiative which contradicts the UN "protect-respect-remedy" framework by not properly differentiating between the role of the State and that of companies would weaken the human rights regime and promote privatisation of human rights, which is neither in the interest of society nor of companies. Therefore, a treaty which would impose direct obligations on companies would be highly problematic. A treaty must not shift the responsibility from the entity perpetrating a human rights violation to the enterprise with which it has a business relationship.

- Furthermore, a treaty which simplistically focuses on building unnecessary new international structures, such as an international judicial entity, would raise expectations that would unlikely be fulfilled. Access to remedy in the vast majority of cases will not be granted through international institutions, but through better and more effective judicial systems at national level. Experiences from the International Criminal Court show the great limits and huge constraints faced by such international institutions.
- The shortcomings of extraterritorial jurisdiction are too often overlooked, including the tremendously higher costs of pursuing remedies in foreign courts and sustaining such cases over several years; the challenges to foreign courts when they must rule according to foreign legal principles; the difficulties in obtaining evidence and testimony abroad; and, most importantly, the problem that extraterritorial jurisdiction is mainly open for allegations against multinationals and not domestic companies, which would leave most victims of domestic violations without access to remedy.
- Also any new initiative should be really focused on human rights in order to contribute to the aims it intends to achieve. Many demands are being placed on the potential treaty on business and human rights which go 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. The scope of any treaty must be limited to business and human rights, which already enjoy extensive recognition by States as binding under international law.

The way forward

Business has a key role to play in the development of a potential UN treaty on business and human rights and the key business concerns must be given due attention. BIAC, ICC, IOE and WBCSD, and their members, are ready to constructively engage with the IWG and all other stakeholders in the treaty process. BIAC, ICC, IOE and WBCSD invite the supporters and sponsors of the treaty process to have meaningful consultations with business as soon as possible in order to prepare the first meeting of the IWG in July 2015.

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