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UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS

IOE follow-up response to OHCHR's call for comments and proposals on the draft "elements" document for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights

1. Introduction

The International Organisation of Employers (IOE) would like to make the following response to OHCHR's latest [call for comments and proposals](#) on the draft "[elements](#)" document for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

This submission should be read alongside [the joint response of the international business community](#) by BIAC, FTA, ICC and the IOE (published on 20 October 2017) and all the interventions made by the IOE and its members during the third session of the open-ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (IGWG) from 23 to 27 October 2017.

In this latest response, we wish to reiterate the position of the business community and reinforce some of our earlier points.

2. Position of the international business community

Respecting and advancing human rights is a priority for the IOE and its members, as well as the international business community, and we are actively engaged in multiple efforts and initiatives to promote human rights across the world. We continue to endorse the UN Guiding Principles on Business and Human Rights (UNGPs); we are committed to respecting and advancing human rights; and we support companies to make a positive contribution to the Sustainable Development Goals (SDGs).

We do not believe, however, that the work of the IGWG to date makes a helpful contribution to the field of business and human rights. Having actively participated in all three sessions of the IGWG, including the third one held in October 2017, the IOE would like to re-state our strong opposition to the "elements" paper that was released by the Chairperson-Rapporteur in the autumn of 2017 and our concerns about this process moving forward.

As our earlier [joint business response](#) explains, we strongly believe that the proposals outlined in the "elements":

- Represent a big step backwards and they jeopardise the crucial consensus achieved by the UNGPs, whose spirit and wording they undermine.
- Are counterproductive for the business and human rights agenda:
 - The proposal to impose direct international human rights obligations on transnational corporations (TNCs) and other business enterprises (OBEs) takes the debate back to the politically-charged era of the UN Norms.¹
 - While the elements often refer to "TNCs" and "OBEs", the proposed scope is on the "activities" of a company "that has a transnational character" and the suggested international enforcement mechanisms reference only TNCs. This scope creates unhelpful confusion by not following the approach of the UNGPs and it is far from clear what "the activities of TNCs and OBEs that have a transnational character" mean in legal and practical terms.
 - Under the "elements", TNCs would be legally liable for the conduct of all companies and business partners down the entire supply chain, including globally. This is a breach of the UNGPs and severely risks dampening investment flows to industrialised, emerging and least developed economies.
 - Obliging TNCs and OBEs, under international law, to carry out human rights due diligence on "their activities" – which is undefined – risks unintended consequences and creating confusion with the UNGPs.
 - The broad concept of jurisdiction in the "elements" paper does not respect national sovereignty and attempts to focus on parent company liability and expand the concept of extraterritorial jurisdiction, which is not a silver bullet.
 - Encouraging States to adopt mechanisms that reverse the burden of proof violates due process principles and fundamental notions of fairness in numerous jurisdictions.
 - The "elements" suggest the primacy of international human rights law over other international legal regimes, including in the areas of trade and investment, something many stakeholders have resisted because there should be no hierarchy of international norms.
- Are unclear and distract from efforts to improve much-needed State performance on human rights. In particular, the "elements" raise many questions – which the IOE outlined in its previous joint response (largely under point 3) – that were not satisfactorily addressed during the third session.

In addition, we would like to re-state some important points about the nature of global supply chains; the many efforts that companies are taking to meet their responsibility to respect human rights; the importance of maintaining the distinction between the role of Government and business; and the unintended consequences that laws with transnational reach can have:

¹ The UN Norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights were abandoned in 2005.

- Global supply chains are very complex, diverse and have become increasingly fragmented. The "elements" document does not sufficiently reflect that a company's ability to influence the supply chain depends to a large degree on the number of suppliers it has (for example, many large companies have several thousand suppliers), the structure and complexity of the supply chain, and crucially the company's market position. This growing complexity is already recognized by the UNGPs and the OECD Guidelines for Multinational Enterprises, which outline how a company can respect human rights in this reality.
- The "elements" do not sufficiently take into account that participation in cross-border trade has created jobs and opportunities for millions of people, which would not otherwise have occurred in these economies. In addition, more than just job creation, academic research indicates that these are better jobs: across a variety of developing countries, supply-chain connected firms exhibit better working conditions compared to alternative, domestic firms which often operate in the informal economy. The positive impact of trade on job creation is particularly important in view of the demographic trends in many producing countries, as millions of young people reach working-age every year and desperately look for opportunities to enter the labour market. Participation in cross-border supply chains raises their chances of getting a foothold in the world of formal work and their ability to do well for themselves and their families and to contribute to the broader society and economy around them. It is for this reason that cross-border supply chains are described as "ladders of development". There are, of course, decent work challenges in some global supply chains. However, these challenges - in the vast majority of cases - are not caused by cross-border trade but they mirror the decent work challenges in those economies generally.
- The "elements" paper ignores that many companies are very engaged in working with their suppliers to prevent and mitigate the risks of abuses in their supply chains. There are numerous initiatives, alliances and measures that companies use to meet their responsibility to respect human rights. It should be acknowledged that many companies are already very active with regard to risk prevention and mitigation in their global supply chains through private compliance efforts including auditing, supplier capacity-building and even supplier financing. In addition, the number of companies that develop and integrate human rights, CSR and sustainability strategies into their core business continues to grow.
- The "elements" do not respect that the roles of governments and companies should be differentiated. Companies should respect human rights and they can play a useful role in contributing to sustainable development, but they cannot replace State action. Only governments have the authority and mandate to ensure people's fundamental welfare and dignity. This task cannot be delegated to companies. The UNGPs crystallise the correct division of roles through the three-pillar "Protect – Respect – Remedy" framework, under which it is the duty of the State to protect people in its territory against human rights harm and it is the responsibility of companies to respect human rights.
- Introducing legal obligations on companies with a transnational reach can have unintended consequences on both inclusive economic growth and the ability of

companies to work together with other stakeholders to gradually improve conditions for workers and communities. Through business engagement, companies can supplement – but never substitute – policymakers’ efforts, such as regulation and enforcement, to improve social development. Indeed, the UNGPs the OECD Guidelines call on companies to focus on risk prevention and mitigation through engagement with their business partners. An overly-restrictive and punitive approach to global supply chains risks discouraging such engagement and it could dampen investment flows to emerging and least developed economies. For example, research has shown the unintended consequences of Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, passed by the US Congress in 2010. Since 2014, companies registered with the US Securities and Exchange Commission have been required to disclose whether they are receiving tantalum, tungsten, tin, and gold from the Democratic Republic of Congo, and whether those minerals are connected to conflict sites. Due to fear of being labelled as a user of conflict minerals, many companies stopped sourcing from the country altogether resulting in dramatic economic losses and hardship for workers and their families. In an interview, an NGO operating in South Kivu said that "this law (Dodd-Frank) has taken food out of the mouths of the artisanal miner's family."² .

Overall, the third session of the IGWG in October 2017 has not given business confidence that this initiative will provide a credible solution to such complex human rights issues.

3. Additional comments and proposals

Following the third session, we would like to provide additional comments and proposals on the "elements" paper and the IGWG. To reiterate, these points complement - and do not substitute - our joint business response on the "elements" on 20 October 2017.

- i. There should be no deviation from the approach of the UN Guiding Principles on Business and Human Rights (UNGPs)

While some claim that the IGWG is coherent with the UNGPs, the "elements" paper clearly demonstrates a completely different approach that would seriously undermine the UNGPs. This has always been a chief concern for business and it must be avoided.

The UNGPs, whose principles are reflected in other key instruments such as the OECD Guidelines for Multinational Enterprises and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, are the accepted standard on business and human rights and for good reason. They brought much-needed clarity on the different human rights duties and responsibilities of States and business and they combine practical reality with transformative change especially in helping to realise the sustainable development goals. In 2016, Professor John Ruggie described how the UNGPs can bring transformative impact to communities due to "the requirement that companies’ responsibility to respect human rights is not limited to their own operations,

² Lauren Wolfe, Foreign Policy, 2015: <http://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/>

but extends to human rights impacts connected to their products and services throughout their network of suppliers and other business relationships. The UNGPs recognize that companies do not control every dimension of these relationships, so they introduce the concept of leverage. Where people's 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. I venture to predict that this is where business can make its single biggest contribution to the people part of the sustainable development agenda."³

The UNGPs have been embedded across many different standards and they are being adopted by an ever-increasing number of actors. For example, so far 19 States have produced a "national action plan" (NAP) on business and human rights with a further 20 plus States reportedly in the process of developing a NAP.⁴ Relevant international, national and industry bodies have incorporated the UNGPs into their standards, in particular their formulation of the corporate responsibility to respect human rights. More and more companies of all sizes, sectors and geographies are voluntarily carrying out human rights due diligence in line with the UNGPs and a diverse number of internal company functions are implementing the UNGPs at the operational and site level. Furthermore, the investment community, lawyers (such as the International Bar Association), sports bodies and NGOs are actively using the UNGPs in their work.

Seeking to re-define the principled pragmatic approach laid out under the UNGPs and undercut their momentum – as the "elements" paper does – seriously undermines the business and human rights consensus. Governments, the business community, investors, lawyers, academia, civil society, trade unions, international and regional organisations and sports bodies have coalesced around the UNGPs. It makes absolutely no sense to re-cast the respective duties of States and responsibilities of business. Doing so sends the dangerous message that the UN is not able to make its mind up on the role of business in achieving the sustainable development goals at a time when efforts should be focused on implementing existing standards and it also absorbs State attention away from their fulfilling their own duties, which is widely recognised as a key problem.

- ii. Future work should focus on clarifying the many questions and re-considering the unhelpful proposals raised by the "elements" paper instead of rushing to develop a draft treaty

Despite HRC resolution 26/9 stating that the intention for the IGWG's third session was for "substantive negotiations" on the "elements" paper, in reality the discussions to some extent mirrored the first two IGWG sessions (in 2015 and 2016) with a large number of statements from academia, civil society and business and some interventions from Governments.

³ <http://www.ohchr.org/Documents/Issues/Business/ForumSession5/Statements/JohnRuggie.pdf>

⁴ This information is according to the [webpage](#) of the UN Working Group on Business and Human Rights.

At the same time, many interventions from States, business and civil society requested further clarification on the intention, meaning and practicality of a large number of the proposals in the "elements" paper. For example, the IOE raised at least ten questions in its joint submission (chapter 3), as well as making other queries from the floor during the session.

Given the confusion among stakeholders on many proposals in the "elements" paper, the IGWG should dedicate its work to further discuss the many legitimate questions posed by the "elements" paper. The fact that many Governments in the IGWG in particular requested more time to respond to the "elements" paper (hence OHCHR's "call for comments and proposals") demonstrates that the "elements" have raised more questions than they have answered. Therefore, the IGWG should not rush ahead and instead it should devote proper reflection and discussion on the many key questions that the "elements" raised.

iii. The IGWG should strengthen its communication and engagement with all relevant stakeholders, including business, on the process and substance

The international business community and many other stakeholders, including many Governments, have already noted the challenge that they faced in responding to the "elements" document prior to and during the third session of the IGWG in October 2017. We appreciate having the opportunity to make an updated submission.

We would like to reiterate that meaningful and regular consultation with all stakeholders and proper deliberation and reflection on all the proposals and questions raised are required. Linked to this, we would urge that the report of the IGWG sessions more accurately capture and reflect the many interventions of the business community.

Lastly, we believe that this IGWG should follow the common practice of other IGWGs in the Human Rights Council (HRC) by routinely engaging with all Member States on the future direction of its work. The IGWG should, therefore, return to the HRC to get clear terms of reference for its future sessions.

4. Conclusion

The IOE would like to reiterate that our opposition to the "elements" paper does not diminish our commitment to helping to advance human rights. We continue to endorse, promote and disseminate the UNGPs, as well as other Government-backed instruments on responsible business conduct among our members and broad networks.

The convergence behind the UNGPs is wide and deep and any deviation from these principles would seriously undermine the compromise reached on business and human rights.

The "elements" paper has raised many worrying questions. The IGWG should pause and carefully reflect upon the confusion and potential damage of its proposals and seek to better consult with all relevant stakeholders, including business.