

7 October 2020

Position on the second revised binding treaty on business and human rights

Introduction

Human Rights are a key focus for the International Organisation of Employers (IOE), Business at OECD (BIAC), BusinessEurope and their member federations, which represent tens of millions of companies around the world. The federations have been strongly engaged in raising awareness and building capacity based on the UN Guiding Principles on Business and Human Rights (UN Guiding Principles).

The UN Guiding Principles have been a game changer. The uptake of the UN Guiding Principles in the last nine years by enterprises, international organisations, multi-stakeholder initiatives and governments has been impressive. Over the last several, Human Rights Due Diligence in line with the UN Guiding Principles has become a major focus of companies, governments and international institutions. The UN Guiding Principles, as the authoritative framework, created clarity on the respective responsibilities of all States and businesses and resulted in a much more focused approach in the promotion of business and human rights.

This does not mean that we have achieved all of our objectives, but it was never envisaged that after only nine years the issue of business and human rights would be settled. However, the strides businesses have made in implementing the UN Guiding Principles, and the successful work of the UN Working Group on Business and Human Rights show that we are on the right track and that we should continue to work according to the framework outlined by the UN Guiding Principles.

However, the following challenges persist:

- There is an inadequate focus on systemic governmental issues such as weak governance, poor implementation of laws already “on the books,” and corruption. These issues are often the root cause of human rights challenges and lead to companies being confronted with complex situations. Companies cannot and should not be expected to replace Governments and take over their role in law enforcement and the provision of basic services.
- Access to remedy relies on independent, effective and efficient national judicial systems, which enjoy the trust of society and business. In too many countries, the national judicial systems do not have sufficient resources, lack capacities, and are not free from political influence and corruption. Strengthening the judicial systems is key to improving access to remedy at the local level and ensuring that human rights are protected.
- More than 60 per cent of the global workforce is in the informal economy. It is there, in the informal economy, where the human rights risks are the greatest and gravest, and this is where urgent attention and action is required. The need to address the informal sector is widely shared among business, workers and governments, but the action of the relevant governments

is inadequate. Without finding innovative ways to address the human rights challenges in the informal economy, progress towards improving the situation on the ground will be limited.

- There has been an overly dominant focus on due diligence legislation. Although due diligence is an integral part of the UN Guiding Principles and a central piece of the human rights work of a company, it does not necessarily address more systemic challenges.
- Small and medium enterprises (“SMEs”) are the backbone of all economies. There have been insufficient approaches to support SMEs in meeting their responsibility to respect human rights. Too often, approaches do not fully appreciate and reflect on the specific needs and opportunities of SMEs.
- More support for collaboration and cooperation between the relevant actors is necessary as an effective way to address systemic issues. Collective action, subject to any antitrust sensitivities, is particularly relevant in view of the fact that individual companies won’t be able to solve systemic issue deep down in their supply chain on their own.

Unfortunately, the second revised draft treaty does not address any of these challenges. Instead, it diverges from the UN Guiding Principles and diverts resources and focus away from current implementation efforts.

In particular, business is extremely concerned about the following thirteen aspects of the revised draft treaty:

The Scope: The Scope has been a controversial issue from the very beginning. Originally, the treaty was intended to cover only multinational companies. Even though the new draft broadens the scope “to all business enterprises, including but not limited to transnational corporations,” the Intergovernmental Working Group (IWG) Chair announced during recent consultations, that the scope will only be decided at the very end of the negotiation process. It is not acceptable to first negotiate a treaty, and then decide on its scope. Moreover, any treaty must be consistent with the UN Guiding Principles and should not be limited only to MNEs. On the contrary, public entities and non-profit organisations should be explicitly included in the scope, as they are also exposed to human rights risks and have a responsibility to respect human rights.

Furthermore, although the business community appreciates that the revised draft treaty explicitly covers also State-owned enterprises, the revised draft inexplicably creates a loophole that potentially allows States to exempt State-owned enterprises and “other businesses” from the more onerous obligations in the treaty. Thus, in effect, the scope of this treaty may once again focus only on multinational enterprises, failing to articulate the key message to urge States “to lead by example on business and human rights, starting with those enterprises closest to them - State-owned enterprises” and creating an uneven playing field.

1. **The definition of “Victim”:** The revised draft treaty stipulates that the term victim shall include the immediate family members or dependents of the direct victim, and persons who have

suffered harm in intervening to assist. This use of the word “shall” means that family members and dependents are necessarily included as “victims” – regardless of the circumstances. This overbroad definition should be revised to use the term “may” instead of “shall.” Indeed, most jurisdictions do not automatically extend judgments or damages to prevailing plaintiffs’ families in all circumstances. Moreover, the notion of “emotional suffering” is not a concept of damages that is recognized in many legal systems. Finally, there should be a clear distinction between the term “victim” and the “plaintiff” – the status of victim being given only after a sentencing. From this distinction, remedies can be granted only to the victims.

2. **Definition of “Business relationships”:** The revised draft treaty defines a business relationship as “any relationship between natural or legal persons to conduct business activities, (...) including activities undertaken by electronic means”. Defining business relationships as “any relationship” expands the potential scope of diligence duties and liability imposed on companies to an impractical extent. Indeed, this formulation will encompass entities in global supply chains with whom companies have no contractual relationship and into whose operations the companies have no control or visibility. This new language also represents a major step backwards, as the previous draft of the treaty appeared to recognize that the relationships to be regulated were limited to “contractual relationships.” Moreover, the term “electronic means” also exponentially expands the regulatory scope, as, for example, internet transactions may involve intermediary entities in jurisdictions that have nothing to do with the parties to the transaction.
3. **Due Diligence as an outcome-based standard:** In a significant departure from the UN Guiding Principles, the draft’s due diligence process requires that companies actually prevent human rights violations in their supply chains, or face liability. The UN Guiding Principles, on the other hand, more appropriately present human rights due diligence as a process in which companies take adequate measures to seek to prevent, mitigate and account for human rights impacts. The revised draft thus seeks to transform due diligence from a process-based standard to an outcome-based standard, which may be impossible for businesses to satisfy in view of the fact many enterprises have thousands, if not 100000s of suppliers and that a company’s leverage over its supplier is often limited, as well as that many issues are beyond the control of the businesses and are rooted in systemic governmental problems such as lack of good governance and a weak rule of law.
4. **Liability:** The revised draft treaty extends liability to a company’s failure to prevent human rights abuses, which is not the standard under UN Guiding Principles (see above). Principles No. 15 and 22 of the UN Guiding Principles require remedies only where the enterprise caused or contributed to the human rights violation. Furthermore, the provision contradicts the basic legal premise adopted in most countries that liability should only be imposed where a clear and foreseeable link exists between the victim’s harm and the business held responsible.

Since liability is extended to natural persons as well, this opens the door for States to hold liable even human rights managers in companies. Thus, the revised draft seeks to “pierce the corporate veil” in imposing broad liability on a broad swath of entities and individuals.

5. **No Safe Harbour clause:** The draft treaty explicitly rejects any “safe harbour” for companies that conduct solid due diligence, that may still result in human rights incidents. The elimination of this safe harbour may fail to reward the good faith efforts of companies to conduct due diligence, and thus may eliminate one of the incentives for companies to conduct due diligence.
6. **Jurisdiction:** The proposed scope of adjudicative jurisdiction still reflects a concept of extraterritorial jurisdiction so vast that businesses are faced with grave uncertainties as to where they may be taken to court. The revised draft allows for concurrent jurisdiction in an MNE’s host country where the harm occurred, the home country where the MNE is located, or even in a third country “if the claim is closely connected with a claim against a legal or natural person domiciled in the territory of the forum State.” The term “closely connected” is vague and has no clear legal meaning. Moreover, where a person is domiciled is a matter of national law. The applicable tax laws and governance structure is built around the national definitions, it is not possible to redefine this without changing the entire structure of corporate law.

The vastness of the draft’s jurisdictional scope is even further enhanced when considering the breadth of the “business activities” to be regulated, which include electronic transactions. (See above).

Adding to the legal uncertainty and in conflict with principles of international law as well as various national laws the revised draft explicitly rejects *forum non conveniens*, which is a procedural mainstay in many jurisdictions designed to prevent forum shopping.

7. **Applicable Laws:** Contrary to many bodies of law, the new draft grants the plaintiff wide discretion to select the applicable law. This creates great uncertainties as to which laws will apply and will encourage plaintiffs to forum shopping.
8. **Focus on rights of plaintiffs:** The treaty focuses on the rights of the plaintiffs, at the expense of the rights of the defendants, such as due process and confidentiality rights. For example, the revised draft seeks a “reversal of the burden of proof,” which contravenes a fundamental and well-settled legal principle of “innocent until proven guilty” and the notion that “he who asserts must prove.” Indeed, requiring that the accused party prove its innocence violates due process principles and fundamental notions of fairness in most jurisdictions. While there was some discussion during previous IWG sessions that this “reversal” is intended to mean the more commonplace “burden shifting mechanism” utilized by certain jurisdictions in limited cases, such a clarification does not appear in this new draft. Moreover, the rules on legal aid must, on the one hand, ensure that the victims of human rights violations have access to justice, and on the other hand, they must not facilitate abusive claims. To achieve this balance of interests, certain conditions for a right to legal aid are needed.
9. **Environmental rights:** The term “environmental rights” is included in the definition of “Human rights abuse’. The term ‘environmental rights’ itself is not defined, nor is it included in any international human rights treaty. Therefore, the inclusion of this term in the draft creates

uncertainty as to the scope of the rights subject to the treaty and has no basis in international human rights law.

10. **Foreign Judgments:** Under international law, an important check on a foreign court's adjudicative jurisdiction has always been the power of a national court to refuse to recognise the enforcement of that foreign court's decision. This is an important safeguard that allows a national court to reject a foreign court's decision to exercise jurisdiction over a defendant located in the country of the national court. However, this important safeguard has been removed by the revised draft treaty because it mandates that all State Parties recognise and enforce another State Party's court order – with very limited exceptions.
11. **Financial guarantees:** The new provision on financial guarantees to cover potential claims of compensation is unclear, not practical, and therefore not acceptable, especially for small companies in a context of COVID-19 crisis.
12. **Class Action:** The draft treaty foresees the possibility of collective redress/class actions. However, the introduction of group lawsuits against companies is not a concept that is recognised in many legal systems.

Conclusions

The second revised treaty does not address major concerns that many governments, business and other stakeholders raised in the last meeting of the IWG and the subsequent consultations and will not promote the business and human rights agenda. It does not address the existing gaps in the effective promotion of business and human rights. It fails to outline practical and effective pathways to remedy at local level. It also does not build on the huge momentum of the implementation of the UN Guiding Principles. On the contrary, by continuing to diverge from the UN Guiding Principles, the new version of the draft treaty creates huge uncertainties about roles, responsibilities and expectations and jeopardises the further efforts of business in successfully implementing the UN Guiding Principles.

The revised draft is yet another missed opportunity to provide a consensus-based document, which would highlight effective and efficient approaches to move the business and human rights agenda forward. Therefore, the international business community disapproves the second revised draft treaty in its entirety.

Business is prepared to work with all stakeholders in promoting business and human rights in line with the UN Guiding Principles and building on achievements so far. The human rights impact of the Covid-19 pandemic has shown the critical need for collective action and constructive collaboration. The next meeting of the Intergovernmental Working Group should reverse direction and focus on addressing the root causes of human rights challenges in line with the UN Guiding Principles.

* * * *