IOE, *Business at* OECD (BIAC) and BusinessEurope position on the Third Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises

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I. Introduction

The International Organisation of Employers (IOE), Business at OECD (BIAC) and BusinessEurope welcome the opportunity to submit again comments to the Intergovernmental Working Group (IGWG) on this further elaboration of a draft Treaty on Business and Human Rights. The business community remains committed to taking actions that respect human rights and engaging in a balanced way in the policy debates on this topic. IOE, BIAC, BusinessEurope and their members, representing tens of millions of companies worldwide, are working together to raise awareness and build corporate capacity based on the UN Guiding Principles on Business and Human Rights.

Business, the intended target of this text, reminds the IGWG of its earlier submissions to the various drafts[1] that have emerged from this process. We revisit those outstanding comments and concerns in this document, where they remain relevant to the consideration of this new draft.

Contextual issues

The value of business involvement

While acknowledging that this is an inter-governmental process, we again insist that ***representative business should be at the table*** in the actual drafting of any such text. ILO standard setting processes, as well as UN processes, in particular the Guiding Principles on Business and Human Rights, have, over time, shown the value of an inclusive approach, not only in the drafting process but also in creating the consensus needed to give effect to a standard, other instrument or in this instance, treaty.

Distinguishing between the role of States and business

It should not be forgotten that ***such a treaty requires ratification by a State for its content to become an obligation*** that the State then must fulfil. Then a translation by the State into national laws, triggers compliance by business. The State has the obligation to protect human rights when that arises from ratification or accession to a treaty by that State, from customary international law, or because the State domestically legislates an obligation. The UN Declaration on Human Rights, for example, does not of itself create obligations on States. Also, no private body or person is required legally to carry

[1] https://www.ioe-emp.org/news/details/final-position-paper-on-the-second-revised-treaty-on-business-and-human-rights

out obligations that are not imposed by law or by agreement, even if there is clearly a moral obligation when it comes to respecting human rights, which business is fully committed to.

The importance of even ratification and implementation

Unfortunately, the draft text is still based on the premise that all States are legally bound to the same human rights framework, which is not accurate. A quick look at the ratification of Human Rights instruments shows this disparity amongst States https://indicators.ohchr.org/

It also ***assumes that every State has the same capacity to give effect to such a treaty following ratification, which is also unfortunately not the reality***. This is one of the key root causes of human rights abuses across the globe. Reports to the ILO`s Committee of Experts on the ratification by States of ILO standards clearly shows, often year after year, a lack of capacity or will to implement a international labour standard in national law. This lack of capacity is also present in many national legal systems. Remedy is only possible where the judiciary is well-resourced, free from political influence and corruption.

These aspects can lead to uneven ratification, whereas this is crucial to ensure a common global approach, as well as certainty for business and for those who might be adversely affected by their actions.

Focus must be on all third parties

Whilst States must further protect against human rights abuse within their territory and/or jurisdiction, all third parties should respect human rights. The idea of a silo approach to human rights protection by just addressing business is flawed. Business is not the only actor that can infringe on human rights within a country. This requires taking appropriate steps to prevent, investigate, punish, and redress such abuse by all actors through effective policies, legislation, regulations, and adjudication.

States in this process need to look beyond the role of business and to ensure that all third parties are protected by the State and that where there are related laws, everyone fully respects them.

The fact that 61,2 per cent of the global workforce and commercial activity take place in the ***informal economy*** limits the rule of law which is fundamental for effective human rights protection. In addition, when not addressed by States, informality also leads to a lack of human rights protection for those who are most often at risk of serious harm. This creates a human rights imbalance and States must find ways to address this to avoid creating double standards for human rights on the ground, where some are protected and others not, which is an unacceptable situation for all.

Rule of law is where the focus should be. States should ensure that existing political, legal, and judicial infrastructures are competent to ensure effective enforcement of extant legal protections. This should be a state-specific exercise.

People also need to be protected from the actions of a State, which are contrary to its assumed obligations.

It needs to also be clear that where a State operates as a business, it is required to meet the same human rights standards as any other business and cannot take steps to exempt, transfer or otherwise dilute those responsibilities as set out in Article 30 of the Universal Declaration on Human Rights.

II. The UN Guiding Principles on Business and Human Rights

Ten years on from the adoption of the UN Guiding Principles on Business and Human Rights by member States, a lot of lessons can be drawn from both actions by States but also from actions of business. There is a strong argument that States are already equipped with the tools they need under Pillar one to give effect to the human rights obligations they have assumed, whilst also emphasising that more focus needs to be put on States' implementation of Pillar one of the UNGPs rather than the current trend to focus on business. If the treaty is to go forward, the IGWG needs to fully consider the assessments of the work done within the framework of the UNGPs and ensure that if it is to continue, that it is fully aligned.

The IGWG should refer to the following texts, which outlines the positive steps companies have taken since 2011 but also that States are not waiting for a treaty to act, in consultation with local business and other actors, to implement human rights requirements. Any treaty must avoid diluting those collective efforts or create confusion and conflict between steps already taken.

Link UNGPs Plus 10 IOE document

III. COMMENTS ON THE THIRD REVISED DRAFT TREATY

Most of the critical issues raised in the revision of the second draft Treaty remain unresolved in this new version and, unfortunately, the minimal revisions introduced do not address the concerns articulated by business and many governments to date. The third revised draft treaty does not address the actual challenges, diverges from core concepts of the UN Guiding Principles and diverts resources and focus away from current implementation efforts.

This document emphasizes the views of the business community, as represented by IOE, BusinessEurope and BIAC, on some of the critical issues that continue to pose serious obstacles to the business community's endorsement of the Treaty process.

As a general comment and to avoid repetition, it is important for all language used to be clear and free from ambiguity or subjectiveness. Language must also clearly distinguish between State "obligations" as opposed to businesses responsibilities to comply with law and "respect" human rights – in line with the widely used and broadly implemented three pillar-approach promoted by the UNGPs.

Business is extremely concerned about the following aspects of the revised draft treaty:

Preamble

All words are important as they determine the way in which a treaty may be interpreted should it be ratified. The Preamble is no exception.

PP2. Adoption of instruments by the UN is not the same as the obligations that come from their ratification by States. The Preamble should not leave the distinction in doubt.

PP3. What is meant by relevant ILO Conventions? Any reference here should only be to those that a State has ratified and if not, then the reference should be to the ILO 1998 Declaration on Fundamental Principles and Rights at Work. What applies to a country should not be left open to interpretation. Again here, "all internationally agreed human rights declarations" by the UN as a body do not carry with them human rights "obligations" on individual States.

PP11. Treaties that incorporate internationally recognised human rights are addressed to States, creating no obligations for companies. Companies should however, in the words of the UNGPs, respect human rights. This means that they should avoid infringing on the human rights of others and provide for remedy in case of an actual infringement, just like any actor in a society.

Section 1

Article 1. Definitions

1.1 **Victim.** "Victim" is a term used to describe a person who has suffered harm and been found to have so suffered by a court of law. Until then, they are a person alleging an abuse. The misuse of the term here gives a pejorative status to a person as a victim before the harm itself has been proven. Victim is not used in the UNGPs and should not be used here. The text needs to include the fact that until harm is proven it is an alleged harm and the better term to describe what is meant here would be to use the word "**plaintiff**" or "**complainan**t".

This definition continues to extend the term "victim" to apply to "immediate family members or dependents of the direct victim". A victim is that person or persons who suffered the proven harm of the act of abuse. That is the case in most legal constructs. Extending the label of victim to those who may not have suffered harm is a misuse of the term victim and diminishes the person or person who was harmed. The issue of who a victim is, is a matter for the law to determine on the facts of a particular case and should not create a preferential category of rights holders by the inclusion of immediate family members or dependents. **This additional language should therefore be deleted.**

1.2 **Human rights abuse**. Here the treaty looks to expand what a human rights abuse is from the framework it articulates as being the internationally recognised human rights law in the preamble to now include a "safe, clean, healthy and sustainable environment". The meaning of these words is nowhere defined in the text and open to interpretative inconsistency. This overreach by the text lacks any legal basis as again obligations on social actors including

business are only those articulated by a State in its own laws. **This additional language should be deleted**

1.3 **Business activities**. What is meant by "other activity"? The examples that follow are all economic in nature, which is at the core of any business activity, so what is the draft trying to capture here? Those "other activities" need to be elaborated and explained or the **language deleted.**

What do the words "undertaken by electronic means" actually mean? The vagueness of this is concerning. As well as being unclear, these words vastly expand the regulatory scope of the draft. For example, internet transactions may involve both known or unknown intermediaries such as banks or bank vendors that are beyond any degree of control by a company. This issue is compounded when considering smaller enterprises, which are using telephone technology for financial transactions, particularly in developing markets. Either the text should be clarified so that a proper understanding can be discussed, or it should be **omitted.**

1.5 **Business relationship.** The draft continues to define a business relationship as "any relationship between natural or legal persons to conduct business activities, … or "any other structure or relationship" (…) including activities undertaken by electronic means". Defining business relationships as "any relationship" or "any other structure" is unworkable, as it is indefinite, vague, and overly broad. This language expands the potential scope of diligence duties and liability to companies' relationships to entities – including third parties – with whom they have no contractual relationship and into whose operations the companies have no insight nor control.

1.6 The UNGPs, as well as OECD MNE Guidelines, which constitute another important internationally recognised standard for responsible business conduct, by contrast clearly underline that "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.

This blanket language blurs the line between the States obligations under ratified human rights instruments and the role of business and that of other actors. The fact that business should respect human rights is clear – business accepts that they should act responsibly towards its employees, customers, consumers, and communities. However, other actors should also do that. As referenced in the Universal Declaration on Human Rights, businesses are part of society, but they are not the only group that the State needs to consider when looking to create obligations at the national level. As Article 29 of the Universal Declaration states, "everyone has duties to the community". The draft should not seek to avoid addressing the exact concerns that the language "any relationship" or "any other structure" create. Courts should not be left to try and infer a meaning from these vague expressions. The draft should be clear, or **those terms omitted.**

Article 2. Statement of Purpose

2.1 b As mentioned above, obligations only fall on companies where the law requires it or they themselves have agreed to be bound. The draft cannot therefore impose those obligations without individual State ratification and legislation. This needs additional language clarifying that this applies "**where required by national law".**

2.1 d Here the reference is to "justice" whereas the focus should be on remediating the harm caused and that includes through judicial and non-judicial means. Justice without remediation is not in line with the UNGP approach of trying to restore a harmed individual as close as possible to the state they enjoyed before the harm occurred. The wording here should be **"To ensure access to remediation process both judicial and non-judicial and effective…"**

Article 3 Scope

3.1 This, for clarity should specifically refer to the final language of these terms as found in the definitions section.

3.2 It is not unreasonable to allow a State to determine, at least in part, how to operationalise a treaty at the national level. However, this should not be an absolute power. Governments need to continue to improve the realisation of human rights in their territories and not act in a way that results in the infringement of human rights or the exclusion of human rights protections. These exceptions should be explained, be truly exceptional and time bound and be subject to regular domestic review with stakeholders. Businesses of all sizes can create human rights risks and therefore share the responsibility to respect human rights and provide remedy where harm occurs.

3.3 We welcome the draft clarifying that it shall cover all internationally recognised human rights "**binding on States"** as a prerequisite to the creation of State obligations.

However, the attempt to give the same status to the Universal Declaration of Human Rights and the ILO 1998 Declaration is a confusion. Declarations are not binding per se unless a State has incorporated those provisions into law. Even the ILO, in creating the Declaration, recognised this, as well as calling on States who had not ratified the conventions from which the principles were drawn to work towards their realisation. The draft should not require States to do something they have decided not to do or to elevate those non accepted requirements into an obligation. Furthermore, the introduction of "fundamental freedoms" are an issue of major concern. This concept is not recognised in the majority of jurisdictions around the world and would create conflicting legal requirements.

Instead, the draft should refer to the authoritative list of the core internationally recognised human rights as defined in UNGP 12, viz. the International Bill of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the principles as set out in the Declaration on Fundamental Principles and Rights at Work.

This language also raises the question about the content of this draft instrument when a State has ratified few of these instruments.

Section II

Article 4. Rights of Victims. Please refer to our earlier comments in clause 1.1 on the use of this word.

Who is responsible for the obligations to "ensure", "guarantee", "protect" etc? These are rights for a State to guarantee and should not be transferred to a business. What about in States where any number of these rights are not protected? These may be well intentioned, but they are of no use to a person who has a genuine allegation to bring up but cannot do so due to a State failure to protect.

4.2 a. "Psychological wellbeing" is a matter for a trained medical professional to determine rather than parties to the draft and it is impossible to ensure as it is not necessarily a static condition.

c. How a complainant accesses remedy (the word "justice "is inappropriate as explained in **2.1** should be a matter for domestic law to determine. The words "individual or collective reparation" should therefore be omitted. Similarly, the list of remedy should be described as examples rather than using the words "such as" as again, it is for individual States to determine how they want to provide remedy.

d. This should be reworded. "**Be guaranteed the right to choose to submit claims including through a duly instructed and authorised representative to courts and non-judicial grievance mechanisms of the States Parties**"

This rewording addresses the removal of class actions (unless provided for in accordance with national laws). There is no reason for specifically introducing collective redress instruments as claims can be filed by individuals. Class actions bear the danger of abuse and an effective arrangement that prevents abuse is hardly possible. This is particularly valid where not only government agencies have standing to execute collective redress procedures, but also NGOs and private organisations. In fact, class actions entail a transfer of law enforcement to private entities. Furthermore, the possibility to file class actions bears potential for exerting undue pressure on a company in pre-trial negotiations (via settlement) which has to be rejected. Class actions are particularly dangerous if they are designed with a so-called opt-out procedure: The group of claimants will then include persons who do not expressly object; it may grow up to several thousands of persons. This is contrary to the right of self-determination of the victims (linked to the principle of access to justice) who can no longer decide for themselves whether they want to participate in a lawsuit. If they do not even know that the case concerns them, it will also violate the right to be heard. Together with a booming third-party litigation industry who have nothing but a financial interest in judicial claims, all the ingredients are there to create a massive litigation culture which will help no one.

f. The rules on legal aid must, on the one hand, ensure that the individuals who claim to be victims of human rights violations have access to justice, and, on the other hand, they must not

facilitate frivolous or bad faith claims. To achieve this balance of interests, certain conditions for a right to legal aid are needed, which the text continues to omit. Furthermore, "access to information" should be tempered with an effective recognition of the vital importance of the confidential nature of certain information.

The Article 4 provision does not recognise fairness or balance as it addresses none of the rights that a business or person should be given during a complaint against them. The presumption of innocence is a basis of law that should not be interfered with by a treaty body. They too are entitled to due process equity, confidentiality, and privacy etc. **Such a provision should be included here.**

4.3 This can only apply where a nation state has agreed to be bound by them and have reflected that in national law and regulation.

Article 5 Protection of victims

The same concern exists here as in Article 4. Not all States unfortunately give such protections, and the draft Treaty is silent on any consequences on States that fail to do so. This means that these ideals are not likely to be implemented, as such States would probably not ratify a treaty such as this.

A two-speed human rights framework would therefore be brought into existence by such a treaty and undermine the proven universal and inclusiveness of States, business and others working within the framework of the UNGPs.

5.3 This again raises the issue of State capacity. Even the most advanced State would probably struggle to investigate all human rights abuses. It also negates the responsibility under the UNGPs for business to act through due diligence to identify and remediate abuses they find as well as preventing, as far as possible, a recurrence.

Article 6 Prevention

6.3 This provision should be replaced by the wording from the UNGPs namely

"To meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights;
(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute".

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process

should include assessing actual and potential human rights impacts, integrating, and acting upon the findings, tracking responses, and communicating how impacts are addressed.

Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products, or services by its business relationships;
(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve

To gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.

This wording is known and understandable to business, States and other stakeholders.

Furthermore, a specific clause is needed to give State Parties the possibility to exclude micro-companies and small and medium enterprises (SMEs) from legally binding due diligence obligations with the aim of not causing undue additional administrative burdens and respecting their constraints. SMEs are the backbone of all economies and in all existing national due diligence laws there are specific thresholds to exclude smaller companies from legally binding obligations. According to UNGP 14, the scale and complexity of the means through which enterprises meet their responsibility may vary according to their size. SMEs have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms.

6.4. As a starting point, this clause should be deleted in its entirety and replaced with the language of the UNGPs:

In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

(a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;
(b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;
(c) In turn, not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

a. However, if this clause is retained, the wording used is problematic. We will comment on the reporting issue later in these comments, but this new provision introduces the term "assessments". This is beyond other provisions in this draft and adds cost and complexity without highlighting the rationale for this addition. Who is the audience and what is its purpose? It also broadens the scope to other topics, e.g. environmental, climate change, without highlighting a clear link to human rights. This sort of blanket provision broadens the obligations on business, creating more burdens, without a clear justification. It should therefore be **omitted.**

The draft includes the publishing, by the company, of "actual or potential human rights abuses that may arise from their own business activities or from business relationships". The reference to "potential" abuses makes this too broad. Whilst business attempts to make all efforts to avoid possible human rights abuses, this requires supposition/prediction by a business as to future events, which is very difficult to assess. This risk is heightened when factoring in the responsibilities regarding business relationships. Given the penalties provided in 6.7, a company could be found to have not reported on something which it did not predict, which would open it up to legal liability, in particular given the removal of the safe harbour provision.

b. The integration here should be "as appropriate" rather than "at all stages", as it may not be an issue at the start but becomes more so as due diligence progresses.

c. Subjective language should always be avoided. What is meant here by the word "meaningful"? Who will determine what is meaningful? What is meaningful to one side may not be meaningful to the other. This word should be **omitted**.

d. This assumes international agreement around free, prior, and informed consent which stretches the amount of agreement that may exist. **Omit** "with the internationally agreed standards".

e. This needs to be subsequently amended due to the inclusion of environment and climate. Also, standards do not necessarily exist in each State on these topics and the compliance cost on business to meet what is in effect an exercise of predicting event is inappropriate and should be **omitted.**

f. This wording does not take into consideration the way commercial contracts are created. Such inclusion should be encouraged, not mandated, and it should recognise that the use of such inclusions would take time as existing contracts are most likely to be silent on such language. It is also unclear why such inclusion should "make provision for capacity building or financial contributions, as appropriate". Who are these additional words aimed at and what are they for? Those words should be **omitted.**

6.6 How are the requirements here to be implemented and do all States have the resources and capacity to do this "effectively"?

6.7 Given the provision of penalties envisaged by this paragraph, it is important that the uncertainty and vagueness here and in the preceding paragraphs is adequately addressed. What are "adequate penalties" and what are they deemed to be adequate for? The complainant? To dissuade? To Punish? People, including companies, need clarity of the obligations expected of them under the law. In any case, penalties should be set in line with national judicial systems.

6.8 This provision is exclusionary and restricts freedom of speech and expression enshrined in Article 19 of the Universal Declaration. Business has a key and legitimate role to play in speaking to the development and implementation of business and human rights policies. Indeed, this article questions and undermines the legitimate right of business to be involved in expressing its views in such dialogues at national level and impacts on the tri-partite discussions that are embraced by the ILO and other UN agency approaches to consultation and dialogue. This paragraph must be **omitted.**

Article 7 Access to Remedy

7.2 This "access to information" disregards existing international obligations of various States regarding this subject matter, these existing obligations must be complied with. Moreover, where such facilitation is introduced, it must comply with laws such as the requirements of Privacy laws. The information to be accessed should be strictly/narrowly defined, to ensure that it is directly relevant to the matter before a court and to protect the commercial and other property rights of the respondent.

7.3 The clause starts from a false assumption that legal requirements are obstacles to deciding on the location or forum for a specific matter. This denigrates the legal rights of all parties in a matter. Those protections are there for a purpose and cannot be so simply dismissed.

The doctrine of **forum non conveniens** is largely a common law legal doctrine and as such should be respected by non-common law jurisdictions. Moreover, this clause 7.3 disregards the fact that various national, international and/or European law instruments exist that provide for rules of jurisdiction. These cannot and should not be qualified as "legal obstacles". The State should protect its own laws and allow its courts to ensure that the details of any proceedings are properly founded, including the location or forum to be used. A complainant's request for where a matter should be heard is itself a matter of law. Therefore, this is for the Courts to decide in line with their independence. Rejecting this doctrine creates enormous legal uncertainty as to where a company may face a complainant and leave them with no ability to challenge that request. This is particularly true given the vague definition of "business relationship" in Art 1.5.
This entire clause should be **omitted.**

7.5 This clause 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. It is not acceptable to suggest that putting complainants in the position of proving a human rights breach is unfair, as they are the ones with the evidence of the harm

claimed. An argument of complainants being in a weaker position than a company is already addressed in the earlier provisions of this clause.
This clause must be **omitted.**

Article 8 Legal Liability

8.5 This provision is unreasonable, has no place in national legal frameworks and is in breach of rights that are afforded to natural and legal persons under national laws. Moreover, from a practical perspective, the amounts of required funding would be completely disproportionate and beyond the financial means of many companies. This could also act as a deterrent to trade and investment in countries, whereas this generally has a positive impact on economic and social development and human rights. Also, companies cannot afford to lock up capital, simply in case of a future event, as this capital would be much better channelled into sound business investments and practical measures to ensure respect of human rights. Therefore, the clause must be **omitted.**

8.6 In a significant departure from the UNGPs, the draft's due diligence process requires that companies prevent human rights violations from happening, or face liability. The UNGPs, 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 remediate for human rights impacts. This draft continues to seek to transform due diligence from a process-based standard to an outcome-based standard.

Any liability arising from a failure to prevent a human rights harm should be subject to the foreseeability and avoidability of the event and be mitigated by a company's efforts through its due diligence. The language used in the draft is contrary to the UNGPs which requires remedy only where the business caused or contributed to the human rights violation. Liability requires a negligent violation of an individual's human rights caused by the respondent and which causes an impact requiring remedy. The draft foresees civil liability without sufficient causality. It introduces a parent company liability and a liability for the whole supply chain aka vicarious liability). This is not in conformity with UNGP No. 15 and 22. Furthermore, this is an unproportionate burden for business and contradicts basic legal traditions in many national legal jurisdictions which are based on the principle of legal autonomy. Furthermore, remediation and restoration of environmental damages is a complex issue. Most of the national legal systems decide not to opt for a general right of legal standing in these matters.

When it comes to the question of liability rules, we call for a "stay and behave" instead of a "cut and run" approach and mindset. Companies are ready and willing to positively improve situations in global supply chains. A far-reaching regulation on supply chain liability, however, could lead to counterproductive consequences. Companies would have to withdraw from countries with a difficult human rights situation if they would be held liable for adverse effects on the ground.

Since liability is extended to natural persons, this opens the door for States to hold liable even human rights managers in companies. Thus, the draft seeks to "pierce the corporate veil" in

imposing broad liability on a broad swath of entities and individuals. Who is to be subject to liability needs to be determined by national law and be subject to broader issues of commercial liability which may or may not include natural persons.

8.7 As it is currently worded, this clause denies a company an important mitigation in defence of a claim made against it, i.e., good faith due diligence. This exclusion is contrary to the rules of natural justice. A Court should not be prevented from considering these mitigating factors in determining liability. Such a requirement is omitted from the second sentence of the draft and should be included. "Competent authority" is included here without defining what that is and how it will function in such a process. If that is to be retained, it needs to be defined.

Such language also acts as a deterrent for companies investing in what would be seen as high-risk countries, whereas this generally has a positive impact on economic and social development and promoting human rights.

Article 9 Adjudicative Jurisdiction

The proposed scope of article 9 continues to promote extraterritorial jurisdiction.

Indeed, the new draft defines that a company is considered domiciled where it has "activity on a regular basis". This is not only very vague language, but would mean universal jurisdiction for many multinational companies that are active in most economies around the world.

The extensive jurisdictional scope of the draft is further exacerbated when considering the breadth of the "activities" to be regulated, which include electronic transactions. (See above).

The new draft also appears to allow for concurrent jurisdiction in the company's host country where the harm occurred, the home country where the company is located, or even in a third country. Adding to this jurisdictional uncertainty, the draft continues to explicitly reject the doctrine of the forum non conveniens, the retention of which has been called for above in our comments on 7.3.

Additionally, the text fails to provide for practical and effective pathways to remedy at a local level, allowing States to sidestep any responsibility for maintaining their fundamental obligations regarding remedy under Pillar III. Since access to remedy in the vast majority of cases is most likely to come through better and more effective judicial systems at a national level where violations occur, efforts and resources should be focused on improving national judicial systems in host countries and where violations occur, instead of focusing on expanding the availability of extraterritorial jurisdiction and on building new international legal structures.

The use of poorly defined terms such as "activity on a regular basis", "the presence of assets" and "substantial activity of the defendant" all add to the uncertainty a business will face and can actually restrict their legal rights in mounting a defence.

Article 10 Statute of limitations

10.1 The determination of statutory limits for the receiving of complaints also needs to recognise a State's existing law in this regard. States should certainly consider any limitations that exist, but they should retain the competency to alter, amend or affirm their own statutes in this regard. The language used here is too absolute.

Article 11 Applicable law

The draft continues to grant the plaintiff wide discretion to select the applicable law and will encourage plaintiffs to forum shopping. Any such request would need to be subject to a legal enquiry and ruling by a court. As it is written now, this undermines the general principle that the applicable law is that of the forum State. Not only does this create uncertainties as to which laws will apply, it also creates issues of competence in that jurists in one country may not be equipped to interpret the laws of another State Party. Furthermore, this regulation contradicts the internationally recognised principle of the Rome II-Regulation, according to which the law of the jurisdiction where the tort occurred shall apply in general.

This has proven to be effective also to avoid conflicts regarding the applicable law, as allowing a company complying with national laws to be prosecuted in that same country by a plaintiff seeking redress under the laws of another State would create in effect a double standard within the one State.

Article 12 Mutual legal assistance and international judicial cooperation

International assistance and cooperation are important to promote human rights and access to remedy. Countries must undertake more efforts to support each other through technical cooperation, peer learning and the exchange of experience to strengthen judicial systems.

12.5 The list of proposed actions here to promote cooperation between States such as: "executing searches and seizures"; "examining objects and sites"; and "facilitating the freezing and recovery of assets" are not appropriate as they are not subject to legal due process. These wide-ranging examples could enable politically motivated abuse and frivolous prosecutions against business, as well as compound existing problems in a number of States in relation to other bad-faith or harassing actions against companies.

12.10 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 continues to be removed by this draft as it still mandates that all State Parties recognise and enforce another State Party's court order – with very limited exceptions. This could result in the State creating a breach of their obligation to protect their own citizens human rights.

Article 13 International cooperation

13.1 This wording contradicts the wording of **12.12** and other provisions in the draft that give States direct powers. This needs to be aligned considering the concept of the sovereignty of the State.

Article 14 Consistency with International Law principles and instruments

The absolute language used in the article fails to recognise the right of freedom on negotiations and the balancing role that States need to take in terms of possible competing issues and priorities. States can always be encouraged to consider such expectations, but the draft cannot require that outcome. It is also unclear what, if any, consequences there would be, if a State did not comply with the requirements stemming from this wording.

Article 20 Entry into Force

What is the threshold for such a treaty to come into force? Given that the treaty would be between multiple States to become operative, this would require a large number of ratifications before coming into force and being effective.

Concluding Remarks

From the outset, business has expressed valid concerns about the feasibility and application of this draft Treaty, as it deters from the successful approach of the UNGPs and due to its content, which unfortunately as yet does not take account of the comments made by business and many governments. We have actively engaged in informing the IGWG of our concerns as well as highlighting the success of the UNGPs on the development of respect of human rights by business. That success is well documented and clearly highlighted in the current context of the 10th anniversary of their adoption by States, who are also part of this process.

On this basis, the Treaty in its current form remains an unnecessary and inappropriate response to the ongoing challenges on protection and respect of human rights and access to remedy. We continue to be convinced that States could achieve more by continuing to work within the framework of the UNGPS, jointly with business and other stakeholders, and through their own, existing domestic laws. Where that is happening, a lot has been achieved with many States now creating, with business at the table, various regulatory responses to a variety of human rights challenges. The treaty drafting process needs to recognise that progress should not hinder, contradict, confuse, or otherwise delay these efforts. Should the work on the draft treaty be continued, it is important that the numerous pitfalls, contradictions and misconceptions are corrected.

We continue to believe that this treaty as currently planned would generate very little to no added value, but instead contributes to uncertainty, and that States could achieve more by continuing to work within the framework of the UNGPs and advancing their own domestic laws.

More specifically, we question the lack of alignment with fundamental principles and approaches championed by the UNGPs, including a clear sense of duties and responsibilities borne by governments

and business and balanced considerations for risk-based, process-oriented due diligence. We further stress that the Treaty's lack of clarity and its vague provisions would likely constitute a source of considerable legal uncertainty, and may well lead to interpretative disputes and unintended consequences. Finally, we remain highly concerned about the potential implications of the treaty's deviations from fundamental and well-settled legal principles, as well as the absence of appropriate safeguards.

As outlined in our joint contribution to the roadmap for the next decade of implementation of the UNGPs, we believe in the importance of pursuing alternative/additional lines of actions, including improvements to sound governance and rule of law in high-risk areas, improvements in the access to remedy for rights holders and reinforced efforts to address the root causes of human rights violations, while also working to address the challenges of the informal economy.

In response to the recent and sad passing away of Professor John Ruggie, the principal author of the UNGPs, a spokesperson for the UN High Commissioner for Human Rights stated:

"…The Guiding Principles are firmly anchored in international human rights norms and standards and guided by an approach Ruggie famously termed "Principled Pragmatism". They provide a clear and common framework for addressing risks to human rights and contributing to a more equitable and sustainable global economy.

All of us engaged in human rights work can honour his memory by helping to make his vision reality and continuing to work for the effective implementation of the Guiding Principles everywhere."

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