



29 June 2015

UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS

Initial Observations by the International Business Community on a Way Forward

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 in 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, and associated networks.

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

I. Extensive progress has been achieved over the past four years – the UN treaty process should strengthen the 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 their implementation. Furthermore, a new human rights chapter, which is consistent with the UN Guiding Principles on Business and Human Rights, was added to the OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines) when they were updated in 2011. The OECD MNE Guidelines, which are the most comprehensive government-endorsed instrument for promoting responsible business conduct, are supported by National Contact Points in all adhering countries, which provide a non-judicial grievance mechanism.

There is also substantial progress at company level and within industry initiatives. These range from public commitments on human rights policies, enhancement of governance mechanisms related to human rights, including efforts to improve understanding of impacts across diverse functions and to undertake human rights due diligence in diverse forms, as well as training programmes and capacity building both within the company and with business partners. While recognizing this substantial progress, BIAC, ICC, IOE and WBCSD, do not overlook the fact that much work remains to be done to internalize and operationalize business respect for human rights. After all, such issues demand continuous improvement, and it takes time to ensure the institutionalization of new practices as well as buy-in from

both internal and external stakeholders. It is also clear that current efforts need to continue in order to extend their effective reach to corporations of all sizes from diverse industries and geographies.

Especially in view of the fact that a treaty process could, if successful, take a decade or more to be completed, it is important that, in the interim, governments continue their efforts to implement the UN Guiding Principles. This is also imperative to secure a global level playing field.

- 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). This would also be a positive step towards creating a global level playing field for business enterprises. In focusing on NAPs, the proposed instrument should also encourage States to use the guidance on NAPs provided by the UN Working Group on Business and Human Rights.
- It would also be important to strengthen national implementation by requiring States to report back to the UN supervisory mechanisms about measures taken. The IWG could consider further measures to increase peer pressure between States in order to strengthen implementation.

II. The UN treaty process should address all companies – domestic and multinational, private, public and state-owned – not only multinational enterprises

A key characteristic of the UN Guiding Principles is that they apply to all companies, regardless of their size or ownership structure, that is, whether they are multinationals or purely domestic companies, large, medium-sized or small companies, private or state-owned companies. All companies can encounter risks related to human rights and the UN treaty process should take this into account. Indeed, 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. Moreover, as many multinational companies are exposed to human rights risks primarily as a result of their engagement with smaller, domestic suppliers and other business partners, 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. In fact, a treaty that leaves purely domestic companies (including state-owned enterprises) outside of its scope would undermine itself from the outset. If the goal is effective and widespread respect for human rights, then all enterprises play a role.

- The Intergovernmental Working Group should revise the scope of the treaty process to ensure that all companies would be covered by a treaty.

III. A potential UN treaty process should build on the UN “protect-respect-remedy” framework and respect the established division of roles between state and companies

The UN “protect-respect-remedy” framework, which the UN Human Rights Council welcomed in 2008, clearly defines the different roles of States and companies with regard to human

rights. The UN treaty process, to be successful, should 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 the “Norms” made between the obligations of States and the responsibilities of companies, ignoring companies’ respect for human rights can only be a supplement to, never a substitute for, national governments’ duty to protect, respect and fulfill the human rights of their citizens. By way of example, economic, social and cultural rights touch on a large number of categories of rights which are transposed into national laws through rules in very different areas of law. The balance of societal and political interests in this process can only be established by sovereign states. Companies have neither the societal and political mandate, nor the capability to settle the conflicts of interests, that can arise here.

- Any new treaty or initiative should fully respect the UN “protect-respect-remedy” framework by properly differentiating between the role of the State and that of companies. Any new treaty or international initiative should avoid imposing direct obligations on companies isolated from the responsibilities of States.
- Any treaty or initiative must not undermine well-established norms for allocating responsibility to enterprises and should not create new legal liabilities for companies for social standards along the global 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).
- Any new treaty should ensure that equal weight is accorded to the three pillars of the “protect-respect-remedy” framework, including Pillar 3, which merits more attention than it currently receives. Access to remedy is very closely linked with the State duty to protect human rights, and so any treaty should promote Pillar 3 in conjunction with addressing the State duty to protect. 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. Accordingly, the IWG should seek ways to advance the rule of law in and through the treaty as a critical element in the protection of human rights, and should seek to improve adherence to human rights laws as well as ways for even the poorest people to seek redress through judicial mechanisms at local level. Continuing implementation of the UN Guiding Principles will also help national governments support companies in their efforts to offer effective remedies when called for under the Guiding Principles.

IV. The UN treaty process should be consultative and include all stakeholders

The very broad consensus on the UN Guiding Principles was the result of the consultative and inclusive approach of the UN Special Representative on Business and Human Rights, Prof. John Ruggie. A UN treaty process must take the same approach. A potential UN treaty on business and human rights will have the highest likelihood of success only if all stakeholders are listened to and their needs taken into account.

- The IWG should be as representative as possible, which means that business, trade unions and NGOs must be given sufficient opportunities to participate.
- BIAC, ICC, IOE and WBCSD also strongly support the participation of the UN Working Group on Business and Human Rights in the IWG in order to share its experience and ensure coherence between the UN treaty process and the ongoing implementation of the UN Guiding Principles.

V. The new treaty 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 scope of any treaty should be limited to business and human rights not being adequately covered by other political and judicial processes.

The way forward

The project of ensuring protection and fulfillment of human rights has been decades in the making. The encouraging uptake of the UN Guiding Principles and the success of the UN Working Group on Business and Human Rights show that we are on the right track and that we should continue with this approach. While the progress achieved so far is very impressive, it was never expected that the UN Guiding Principles would be completely implemented in only three years, or that they would be the final word on this subject. Therefore, for all the reasons articulated above, the promotion of the UN Guiding Principles must remain the highest priority for governments, businesses and other stakeholders, including those engaged in the Intergovernmental Working Group, which should take care not to undermine this important work by their own efforts, nor distract from the continuous improvements needed. Among other priorities, more can be done with regard to an enabling environment provided by governments for business to fulfill their responsibility to respect human rights.

Business concerns must be given due attention with regard to a potential UN treaty on business and human rights. On this basis, BIAC, ICC, IOE, and WBCSD and their members, are ready to constructively engage with the IWG and all other stakeholders in the treaty

process. To this end, BIAC, ICC, IOE, and WBCSD invite the supporters and sponsors of the treaty process to have meaningful consultations with the business community during the meetings of the IWG as well as during follow-up.

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