

## INTRODUCTION

This briefing has been prepared in advance of the fifth session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to human rights (“OEIGWG”)—and with specific reference to the revised draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (“the draft treaty”).

As the institutional representative of more than 45 million companies worldwide, the International Chamber of Commerce (“ICC”) fully recognises the critical importance of ensuring that businesses have the knowledge, skills, and incentives to respect human rights. Earlier this year, [ICC issued a landmark Declaration](#) setting our commitment to enable business worldwide to secure peace, prosperity and opportunity for all. Ensuring that the billions of people whose lives are impacted by corporate activities are treated with respect for their dignity and fundamental well-being is, to be sure, a core tenet of this vision.

In this context, this briefing sets out our institutional perspective on a number of key developments and challenges in the business and human rights landscape—as well as some specific observations with regard to the draft treaty to be discussed by the OEIGWG from 14-18 October 2019.

## THE PRIMACY OF THE UN GUIDING PRINCIPLES

ICC continues to believe that the United Nations (“UN”) Guiding Principles on Business and Human Rights (“UNGPs”) offer a transformational roadmap to a future where people and businesses alike can thrive and prosper. Eight years on from their adoption, however, we share the frustration of many stakeholders that their implementation remains incomplete—and fear that the global collaborative approach enshrined in the UNGPs may be at risk of erosion without concerted action.

In this connection, it is of significant concern that only a limited number of governments have brought forward national action plans under the UNGPs to date. We urge all governments who have not done so to commence the development of robust action plans without delay. Our global network stands ready to contribute constructively to the elaboration of any new action plans—with the singular goal of ensuring meaningful action from the private sector at all levels.

With specific reference to business, the work of embedding the UNGPs into corporate practices is picking up impressive speed—with risk assessments, enhanced supply chain due-diligence and human rights training all now routinely implemented in many enterprises. It is imperative that we work together to accelerate these positive trends. The challenge ahead is two-fold: (i) to ensure that these new practices translate into improved human rights performance; and (ii) to enable all businesses—regardless of size, sector or location—to embed respect for human rights throughout their operations.

ICC is actively supporting its members to scale implementation of the UNGPs—including through the deployment of accessible training and toolkits—and we will continue to intensify these efforts to achieve the maximum on the ground impact. ICC also encourages the UN and its member states to increase the efficacy of follow-up mechanisms under the UNGPs to allow for enhanced sharing of best practices and to catalyse collaborative approaches to enduring challenges.

## PRINCIPLES FOR FUTURE LEGAL DEVELOPMENTS

While much remains to be done in operationalising the UNGPs, ICC remains unconvinced that a treaty-based approach can be truly effective in dealing with the web of complex interrelationships between business and human rights.

We do not in any way discount the potential for further legal developments in this space. Indeed, many of our members in a number of jurisdictions are active in consultations with their respective governments and stakeholders around emerging approaches and frameworks, with a view to clarifying and to improving the standards of responsibility and accountability for states and businesses throughout the world.

In this context, ICC would like to take the opportunity to stress the imperative for any future national frameworks to: (i) be internationally consistent; and (ii) align fully and completely with the standards embodied in the UNGPs. Absent of meeting these criteria, it is our concern that future legal developments may inadvertently disrupt the efforts of companies already working to implement the UNGPs—as well as eroding incentives for actors who have yet to step up to their responsibilities to take action.

We encourage all governments considering possible independent legislative initiatives to have full regard to these two principles as a cornerstone of any future efforts aimed meeting business and human rights challenges.

## THE DRAFT TREATY

With regard to the specific provisions of the draft treaty, ICC recognises that efforts have been made to revise the draft text—including by attempting to clarify issues that many governments and business groups have raised in past OEIGWG sessions. We thank the facilitators of the OEIGWG for their efforts in this regard.

Nevertheless, there are still many areas of the draft text that require greater clarification and discussion amongst government delegations. Most notably, these pertain to well-intentioned efforts to expand access to remedy for victims of human rights abuses. In this regard, we believe that further discussion is required to ensure that any future provisions align both with UNGP standards and international legal norms.

Without prejudice to the above comments on the appropriateness of a binding treaty, we would like to highlight the following issues in particular:

- > **Scope**—While ICC welcomes the removal of the power for states to exempt small and medium-sized businesses from the ambit of the instrument, the provisions of the draft treaty still appear to apply principally to transnational corporations. Clarity in the scope of legal rights and obligations in any new instrument is critical, and it is our view that wording in proposed Article 3(1)—that the legally binding instrument shall apply ‘particularly but not limited’ to those activities of a transnational character—appears to create a tiered level of application that serves to undermine clarity of the draft treaty’s scope. Given the heterogeneous nature of global supply chains, we remain concerned that this approach may inadvertently create further gaps in human rights protections. Further work is required to address these concerns.
- > **Rights of victims and remediation**—ICC respectfully enquires as to whether the new inclusion of rights to “environmental remediation” and “ecological restoration” are within the mandate of the IGWG.
- > **Financial provision**—ICC notes that, under the provisions of the draft treaty, states could require companies to underwrite insurance bonds or other guarantees to cover potential claims of compensation. It is a fundamental concern that this could lead to problematic situations where individuals and companies are extorted for money for alleged violations of a future treaty.
- > **Balance**—Proposed Article 4(12)(e) contemplates liabilities for legal expenses in two cases: (i) where “appropriate remedy to redress the violation” is obtained by the victim; and (ii) where the victim has “failed to obtain appropriate redress or relief as a remedy”. In the first case, the Article states that the victim shall not be required to reimburse any legal expense of the other party to the claim. In the second case, it states that the alleged victim shall not be liable to reimburse any legal expense of the other party provided the alleged victim demonstrates insufficiency of resources.

Notably, the Article does not contemplate scenarios where claims are brought that have zero merit—i.e. where there can be no “appropriate redress or relief”. Article 4(13) also states that inability to cover administrative and other costs shall not be a barrier to the commencement of proceedings, providing that such costs shall be waived.

Our concern is that these provisions, when read together, may encourage the commencement of vexatious and unmeritorious claims. While we do not wish to unfairly limit access to justice for alleged victims, we are concerned of the financial effects that the bringing of vexatious claims will have on responsible businesses.

- > **Burden of proof**—The draft treaty provides in proposed Article 4(16) for states to allow courts (in some cases) to reverse the burden of proof, with the burden placed on companies to prove their innocence—rather than the burden resting with the plaintiff. While standards of proof vary in international human rights contexts, this reversal of the burden of proof is incompatible with fundamental principles of due process and the legal right of the presumption of innocence, and we believe would be unacceptable in many national jurisdictions.
- > **Jurisdiction**—The provisions of the draft treaty provide for legal action that could be brought in a vast array of jurisdictions. It is our concern that this could lead to vexatious forum shopping and multiple parallel proceedings without appropriate limitations built into the text.

We hope that these comments will be helpful for government delegations as the OEIGWG commences its fifth session from 14-18 October 2019—and hope that they will provide a constructive basis for a discussion among all stakeholders on how to accelerate implementation on the UNGPs.

It is incumbent on us all to serve those at risk of human rights abuses and to do so in ways that have real impact—not on paper or the halls in Geneva—but on the ground. We stand ready to work with all stakeholders to this end.