

20 October 2017

## UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS

### Response of the international business community to the "elements" for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights

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#### 1. Executive summary

Respecting and advancing human rights is a priority for the international business community. BIAC, FTA-BSCI, ICC and IOE, which collectively represent millions of companies around the world, have been constructively engaged in the business and human rights agenda for many years. This includes the work of the Intergovernmental Working Group (IGWG). We submitted written observations on the UN treaty process in [June 2015](#) and [September 2016](#) and we participated in the IGWG's first two sessions.

The release by the Chairperson-Rapporteur of "elements for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights" ("[elements](#)") ahead of the third session is an important moment for the IGWG.

In this statement, we make it clear that the international business community does not support the "elements" because they represent a big step backwards and they jeopardise the crucial consensus achieved by the UN Guiding Principles on Business and Human Rights (UNGPs), whose spirit and wording they undermine. We explain that the "elements" are counterproductive for the business and human rights agenda and that they are unclear. In particular:

- We underscore our opposition to the proposal to impose direct international human rights obligations on transnational corporations (TNCs) and other business enterprises (OBEs), which takes the debate back to the politically-charged era of the UN Norms.<sup>1</sup>
- We demonstrate that the "elements" are, in fact, focused on TNCs not OBEs, and that seeking to introduce supply chain legal liability on TNCs is a major breach of the UNGPs and risks dampening investment flows to industrialised, emerging and least developed economies.

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

- We stress that the "elements" break the consensus achieved by the UNGPs and create unnecessary confusion by blurring and re-casting the respective duties and responsibilities of States and business enterprises under the UN three-pillar "Protect, Respect, Remedy" framework.
- We examine the deep flaws in the various proposals on trade and investment, extraterritorial jurisdiction and the reversal of the burden of proof.
- And we raise a number of questions about the many unclear and vague terms and proposals in the "elements" paper that add to its counterproductive nature.

It is difficult to respond to the "elements" paper in its entirety because of limited time to consult widely with our members and the fact that the "elements" cover an extensive list of ideas, points and proposals. It is also hard to understand, at this point in time, what the Chairperson-Rapporteur envisages for this process and, more fundamentally, for a possible binding instrument.

At the same time, we would like to underscore that our opposition to the "elements" paper does not diminish our commitment to helping to advance the business and human rights agenda. We continue to endorse, promote and disseminate the UNGPs, as well as other Government-backed instruments on responsible business conduct, among our members and networks. We also actively help businesses of all sizes to meet their responsibility to respect human rights in line with the UNGPs and to make a positive contribution to the Sustainable Development Goals (SDGs).

## **2. The "elements" are counterproductive and represent a big step backwards**

Below are the international business community's immediate reflections on the "elements", which we do not support because of their misguided approach:

- **Direct international obligations on TNCs and OBEs:** Seeking to impose international human rights obligations directly on TNCs and OBEs represents a big step backwards for the business and human rights agenda. This also breaks the consensus achieved by the UNGPs, and would have a chilling effect on foreign direct investment. It is worrying and peculiar that the Preamble section of the "elements" paper cites the "Norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights" when the UN abandoned them in 2005.

Imposing on companies, directly under international law, the same range of human rights duties that States have accepted for themselves, is deeply misguided. International human rights law binds States, not private entities. Non-State actors, including business, do not have the democratic mandate or the authority to assume the same responsibilities and functions of Governments, whose job it is to create an enabling environment to ensure people's fundamental welfare and dignity.

Establishing international human rights obligations directly on business when these duties often do not exist at the national level also suggests that States may be seeking to pass the buck onto private entities for their own failure or unwillingness to protect their people's rights. Delegating the State's duties onto companies would undermine Pillar 1 and Pillar 3 of the UNGPs and it would be an undesirable outcome for rights-holders, who

rely on Governments to develop and enforce national policies and regulations. Back in 2006, Professor Ruggie warned against efforts to transfer the State duty onto companies, saying that "corporations are not democratic public interest institutions and that making them, in effect, co-equal duty bearers for the broad spectrum of human rights...may undermine efforts to build indigenous social capacity and to make Governments more responsible to their own citizenry."<sup>2</sup>

Transferring States' responsibilities and tasks on to companies is also highly problematic since it would amount to the privatization of international human rights law. Only sovereign States can achieve the protection of human rights while balancing the range of societal and political interests. Companies neither have the mandate nor the capabilities to assume traditional Government functions. They can only help to advance human rights as a complement to, and not as a substitute for, national government efforts.

Furthermore, some courts have determined that even customary international law on human rights – which is less defined than treaty law and, therefore, open to broader interpretations – does not impose any form of liability on corporations, whether civil, criminal, or otherwise.

As a practical matter, any instrument imposing direct obligations on companies under international human rights law is also bound to fail due to the sheer number of actors involved. In 2011, Professor Ruggie explained that we live in a world of "80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all."<sup>3</sup> Advancing human rights, therefore, cannot and will not be achieved by circumventing national political and legal frameworks. Instead, efforts should be focused on strengthening domestic State institutions and frameworks.

By re-opening the debate on whether companies have international obligations the UN is also sending a confusing message to the business community that six years after the UNGPs were endorsed companies should now "hang on" because the UN still has not made up its mind on how human rights risks apply to them. This impinges ongoing and much needed future implementation efforts of the UNGPs, which are essential to addressing harms in the here and now. Sending such a confused message is compounded by the fact that the UNGPs are embedded in many other instruments and it raises questions about how the UN wishes business to engage on social issues as part of the broader challenge to achieve the SDGs.

- **TNCs and OBEs?** The almost consistent pairing of "TNCs" alongside "OBEs" throughout the "elements" paper suggests an attempt to try and persuade Governments, international business and others that any new instrument would address *all* companies (domestic and multinational, private, public and state-owned) not only TNCs. However, closer inspection of the "elements" makes it clear that the scope remains primarily on TNCs. The "Scope of application" explains that the focus of such a binding instrument is about the activities of a company "that has a transnational character." Similarly, the options presented for "Mechanisms for promotion, implementation and monitoring" have three clear references to TNCs alone.

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<sup>2</sup> Professor Ruggie, February 2016, E/CN.4/2006/97

<sup>3</sup> A/HRC/17/31: <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>

Professor Ruggie warned<sup>4</sup> in 2014 against establishing a Treaty that focuses exclusively on TNCs. He explained that TNCs are no longer "vertically integrated, multidivisional organizations structured in the form of a pyramid", but "a far more complex economic entity." Today, TNCs have many types of business relationships including with subsidiaries, joint ventures, state-owned or other national companies, and through non-equity relationships. A TNC is "a bundle of contracts: contract manufacturing, contract farming, contracted service provision, franchising and licensing, to name but the more prevalent networked forms." Therefore, transnational and national firms are so intermingled that "drawing legal boundaries around a TNC can be exceedingly difficult, let alone imposing liability only on the foreign entity in any but the most obvious situations."

Focusing largely on TNCs would exclude most companies from the Treaty's ambit, as well as the majority of the world's workforce. It would also be extremely difficult, if not impossible, to monitor the vast array of activities that have a "transnational character" and reasonably determine liability for a harm that involves a cross-border transaction.

- **Supply chains:** We interpret the unclear proposal to impose obligations on TNCs and OBEs so they "comply with all applicable laws and respect internationally recognised human rights, wherever they operate, and throughout their supply chains" as a sign that the drafters largely seek to make TNCs legally liable for the conduct of all companies and business partners down the entire supply chain, including globally. The inclusion of the terms "wherever they operate" and "supply chains" is particularly relevant. They suggest that a future binding instrument would be focused on domestic and global supply chains.

It is important to note that some stakeholders incorrectly assert that cross-border supply chains are a unique and distinct entity that require new forms of global regulation. We strongly refute this. Human rights abuses and decent work challenges that occur in global supply chains in the vast majority of cases are not caused by cross-border trade. Instead, they mirror harms that occur in national economies generally. Therefore, the only way to ensure that affected individuals, communities and workers are equally protected is to develop strong national institutions that can implement and enforce domestic laws covering all companies within its borders, regardless of whether they participate in global supply chains or not.

The problem is not the absence of a binding international instrument on business and human rights, but States' failure or lack of capacity to implement and enforce their own domestic laws and existing international human rights treaties that they have ratified. In many cases, domestic law has not kept pace with changes in the world economy. We need States to meet their existing obligations required under the UNGPs, and we need more effective and comprehensive law enforcement in general. Indeed, in the absence of robust national laws and policies, enforcement, judicial and non-judicial remedy mechanisms at the local level, foreign-imposed "solutions" are unlikely to have long-term, sustainable and replicable impact for rights-holders.

Global supply chains are understood to be "complex, diverse and fragmented"<sup>5</sup> and they are constantly changing in response to economic factors and market conditions. Buyers do not control their supply chains and their ability to influence the business conduct of a

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<sup>4</sup> [http://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie\\_SR\\_SG\\_BHR.pdf](http://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie_SR_SG_BHR.pdf)

<sup>5</sup> Conclusions from the 2016 International Labour Conference: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_489115.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_489115.pdf)

supplier largely depends on their market position. Not only do small and medium-sized enterprises (SMEs) often have little leverage over their suppliers, but large TNCs may also find themselves similarly constrained when they source only a small amount of the supplier's production, or when the supplier has a monopoly. As is the case with some intermediaries, the supplier may be a much bigger company than the TNC. Furthermore, it is often impossible or impractical, either economically or logistically, to control all suppliers and subcontractors. Many Government-backed instruments, such as the UNGPs and the OECD Guidelines for Multinational Enterprises, recognize the practical limitations on business enterprises to effect a change in their supplier's behaviour. These relate to product characteristics, the number of suppliers, the structure and complexity of the supply chain, the market position of the enterprise vis-à-vis its suppliers or other entities in the supply chain.

Linked to this, *all* individuals, communities and workers should have their rights protected. Therefore, we should avoid creating a two-tiered compliance system, whereby individuals, communities or workers that suffer business-related harm that may involve foreign-based companies or exporters have higher standards, but the rest get lesser or diluted protections and remediation.

In addition, global supply chains have existed for centuries and we should be careful not to undermine their hugely positive impact on social development. Cross-border supply chains have been ladders of development and instrumental in bringing economic and social progress in industrialised, emerging and developing countries. Cross-border exchange fosters economic growth and creates jobs including by lifting people's chances of getting a foothold in the world of formal work. It promotes technological progress, enhances productivity, stimulates innovation that leads to skills-upgrading, and contributes to the reduction of poverty. Studies show that many jobs created in global supply chains provide better working conditions in a number of developing countries than jobs in purely domestic supply chains or work in the informal sector.

The overly-restrictive and punitive approach envisaged in the "elements" paper would have a number of unintended consequences. It would harm countries efforts to achieve inclusive economic growth; discourage companies from working with other stakeholders on social development and progress; and dampen investment flows to emerging and least developed economies.

- **Trade and investment:** Language in the "elements" on the aim to assert the primacy of human rights responsibilities in trade and investment regimes, including by imposing international human rights obligations on international organisations, lacks the necessary detail and appreciation for how these differing legal regimes co-exist.

Professor Humberto Cantú Rivera<sup>6</sup> explains that States freely enter into negotiations and agreements in different fields at the international level "as an expression of their sovereignty and in pursuit of their different economic and development interests and national policies". This can result in conflicting obligations for States due to an overlap of existing duties and commitments. Thus, States may not be able to honour all their international obligations simultaneously; they may either breach their duty to protect a foreign investment or the rights of the people in its territory or under its jurisdiction. Given the lack of hierarchy of international norms, Professor Cantú Rivera states that "this

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<sup>6</sup> Professor Humberto Cantú Rivera: "Negotiating a treaty on business and human rights: the early stages", UNW Law Journal, Volume 40(3).

conflict would not be easily resolved by a general provision establishing that states should always give precedence to human rights over other international obligations (including trade or investment commitments)."

At the same time, the strategic use of trade policies, such as bilateral free trade agreements, that condition trade benefits on improvements to the State-parties' efforts at improving the enforcement of existing local labour laws are instructive. Indeed, agreements such as the USA-Jordan Free Trade Agreement and the Cambodia Bilateral Textile Agreement between the USA and Cambodia could provide models on how such agreements may impose obligations on the State-parties to protect certain, enumerated labour rights of their respective citizens. The "elements" paper, however, does not appear to contemplate the use of such trade regimes in a requisite nuanced manner that balances the protection of human rights and the free flow of trade.

- **Human rights due diligence:** Point 4 on "preventive measures" recommends that State parties "require TNCs and OBEs to design, adopt and implement effective due diligence policies and processes... and to identify and address human rights impacts resulting from their activities." This proposal goes on to suggest that TNCs and OBEs adopt a "vigilance plan", presumably inspired by the recent French corporate "duty of vigilance" law in relation to human rights, health and safety and the environment.

It is important to note here that the UNGPs only suggest that States should take additional steps such as requiring business enterprises that are owned or controlled by them, or those that receive substantial support and services from States agencies to undertake human rights due diligence. They do not recommend this course of action for *all* business enterprises.

Carrying out human rights due diligence in line with the UNGPs is already a key component of the corporate responsibility to respect human rights. Many companies are doing this and openly communicating their efforts in this regard using tools like the UNGPs Reporting Framework and other reporting mechanisms. The phrasing of the "elements" paper on this point creates unwelcome confusion on an otherwise clear and settled expectation and standard.

UNGP 17 clearly explains what is meant by human rights due diligence and reflects the different ways that a company can be involved in a human rights harm (ie: by causing, contributing, or being direct linked to a harm). However, the language in the "elements" paper on obliging under international law TNCs and OBEs to carry out human rights due diligence on "their activities" risks bringing about unintended consequences and it creates unnecessary confusion. It will likely drive the business and human rights agenda into a largely legal compliance direction that would result in one-size-fits-all, box-ticking compliance and boiler-plate reporting, instead of critical thinking undertaken by different company functions to put the respect for human rights into practice. Also, companies may decide to start sourcing or operating in countries that pose a low risk of being involved in an adverse human rights impact and avoiding suppliers where harms may be a problem. The "elements" should not run counter to the spirit and effectiveness of the UNGPs, which encourages companies to use their "leverage" to mitigate harms to the greatest extent possible. Furthermore, the introduction in the "elements" paper of a new undefined and unclear scope for binding human rights due diligence ("their activities") unnecessarily muddies what was previously a clear and accepted concept. Creating confusion on such a central and effective piece of the UNGPs is not helpful.

- **Extraterritorial jurisdiction:** The elements' "broad concept of jurisdiction" does not respect national sovereignty and is a clear attempt to focus on parent company and business partner liability and expand the concept of extraterritorial jurisdiction. This cannot be accepted by the international business community. Instead, States should work more assiduously to improve access to remedy at the local and national level.

Extraterritorial jurisdiction in its pure form has many shortcomings. These include the tremendously higher costs involved in pursuing remedies in foreign courts and sustaining such cases over several years; the challenges presented to foreign courts when they must rule according to foreign legal principles; the difficulties in obtaining evidence and testimony abroad; the struggles that many courts' have in resolving multiple objections being raised at the same time and threshold questions; the risk of forum shopping and the fact that courts in different countries may make different judgements on the same case; and most importantly, the problem that extraterritorial jurisdiction is mainly open for allegations against TNCs and not purely domestic companies, which leaves victims of domestic companies without access to remedy.

Linked to this, many of the human rights abuses that could be subject to a new binding UN instrument occur in the operations of State-owned enterprises (SOEs). However, the exercise of extraterritorial jurisdiction can face the barrier of sovereign immunity making SOEs exempt from the Treaty's reach. Assuming that some enterprises, including SOEs, would be out of the treaty's scope, this would again create a two-tiered system whereby individuals, communities or workers that suffer harm that may involve private foreign-based companies or exporters have higher standards, but the rest associated with SOEs or other national enterprises get lesser or diluted protections and remediation.

Furthermore, this section's suggestion that TNCs and OBEs - which we interpret to mean parent companies - directly or indirectly control "their branches, subsidiaries, affiliates, or other entities" does not reflect the reality of most business relationships and it goes against the consensus and principled pragmatism of the UNGPs. Indeed, Professor Ruggie reiterated that companies do not control their entire supply chains, domestic or global, in his open letter to the ILO Director General in 2016.<sup>7</sup> Business is committed to respecting human rights and using its "leverage" where it has the ability to effect change in the harmful practices of another entity that causes a harm. It cannot, however, be held legally liable for harms caused by an "entity" or "affiliate" in its value chain where the impact is directly linked to its operations, products or services by a business relationship. Indeed, to assume that human rights abuses will cease if only a (downstream) business partner is held liable, vastly misunderstands the reality of how business relationships work, the myriad ways in which decisions are made between and among business partners, where and how leverage actually applies in practice, and the degree to which a foreign relationship can adequately address a local issue.

- **Reversal of the burden of proof:** The "elements" paper proposes that States adopt mechanisms that reverse the burden of proof, whereby in situations when a TNC or OBE is accused of a human rights harm the ultimate burden of proof lies with the accused party, and not the accusing party. This proposal contravenes the well-settled principle that "ultimately ... it is the litigant seeking to establish a fact who bears the burden of proving it" (Nicaragua v. United States of America. ICJ, Reports, 1984, p. 437 §

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<sup>7</sup> John Ruggie letter to Guy Ryder, DG : <https://business-humanrights.org/sites/default/files/documents/Ruggie-letter-Ryder-30-May-2016.pdf>

101). Indeed, requiring that the accused party prove its innocence violates due process principles and fundamental notions of fairness in numerous jurisdictions.

### 3. The "elements" are unclear

The "elements" paper re-opens a debate settled by the endorsement of the UNGPs in 2011, and in doing so raises many questions. Many "elements" are unclear and vague. Below are some immediate queries that we have:

- The proposal to impose obligations on TNCs and OBEs to "comply with all applicable laws and respect internationally recognised human rights, wherever they operate, and throughout their supply chains" raises the immediate and urgent questions: What does "all applicable laws" mean exactly? How would "all applicable laws" be applied in the context of global supply chains, given the different ways in which a business can be involved in a harm?
- What is the point of including "OBEs" alongside all but three references to TNCs when the clearly-stated goal (under point 2.2: Acts subject to its application) is for a new binding instrument to focus on the violations or abuses of human rights resulting from any business activity *that has "a transnational character"*?
- The "elements" paper proposes a new approach by focusing on the "activities of TNCs and OBEs that have a transnational character" and in doing so avoids the challenge of establishing a definition in international law of "TNC" and "OBE". However, shifting the focus on to the "activity" instead of the "entity" raises an automatic question which the "elements" paper does not answer: what do "the activities of TNCs and OBEs that have a transnational character" mean in legal and practical terms? Furthermore, what would be the scope of the term "transnational character"? How would such a proposal consider the activities of TNCs and OBEs in countries that are part of intergovernmental bodies, such as regional organisations?
- The UNGPs clearly explain that a business "activity" can cause and contribute to a harm and that harms can be directly linked to a business' "operations, products or services by their business relationships", even if they have not contributed to those impacts. Meanwhile the "elements" paper uses the terms "activities" and "operations" but does not reference "products", "services" or "business relationships" as the UNGPs do. Why?
- Some elements appear to mirror the obligations of States to protect human rights in the manner that is articulated under the UNGPs. Why then is an additional UN instrument needed or desirable if a key challenge is the inability of States to meet their existing duties that are already enumerated in the UNGPs, other instruments, and applicable domestic law? What regulatory effectiveness would such a new international binding instrument have when many States already do not enact and enforce national laws or strengthen judicial systems to protect human rights and allows for effective remedy?
- If discussions on a future binding instrument continue to take a vastly different approach to the UNGPs on determining the scope of responsibility to respect human rights, what does that mean for the UNGPs? Would they become redundant and/or only applicable to States that do not ratify a new binding instrument?

- Concerning the proposed "Obligations on TNCs and OBEs", when it says that "TNCs and OBEs shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights." While companies should respect human rights and they can help advance human rights using their "leverage", why should they have an international obligation to "promote" human rights and how would this duty be applied? Further, does the word "influence" here imply the "sphere of influence" concept or did the drafters mean to say "leverage" instead?
- While many elements focus on international cooperation between States and mutual assistance, why does the "elements" paper not propose measures to increase peer pressure between States to strengthen implementation of the UNGPs?
- In respect of the unresolved debate between States on the notion that companies (corporations as legal persons, not natural persons) do not have obligations for gross abuses - such as genocide, crimes against humanity, and war crimes under the Rome Statute – how likely is it that Governments would be able to agree to the "elements" proposal that companies have far wider direct international human rights obligations?
- In the section on "Protected Rights" (2.1), what does "intergovernmental instruments related, inter alia, to labour rights, environment, corruption" mean? Why and how would this possible instrument address issues other than internationally-recognised human rights, such as those related to labour, the environment and corruption?

#### 4. Process flaws

The work of the IGWG is one of many processes that our organisations and members engage in globally, regionally and nationally and we are committed to the principle of multi-stakeholder dialogue which has become part of the fabric of business and human rights. While we may not always agree with every stakeholder on *how* to achieve widespread respect for human rights, we are committed to advancing human rights under the approach laid out by the UNGPs, which is embedded in other global instruments, and we strongly believe in constructive dialogue to achieve this shared end goal.

We have all known that the "elements" would be the key feature of the third session negotiations ever since the Human Rights Council adopted resolution 26/9 in 2014. Making the "elements" paper public just three weeks before the third session, especially when we were originally told that we would see it in June, has impeded consultation and preparation efforts. This difficulty has been compounded by the release of the draft third session Programme of Work only three working days before the meeting.

This is not a minor point. The success of an initiative as ambitious and complex as this is, in part, determined by the process. What is more, the substance of the IGWG and the process are inextricably linked. Serious and sensible negotiations on such myriad and complicated topics are hampered if stakeholders do not have sufficient time to read, digest and prepare responses on the "elements" or know the session's draft agenda until days before the event.

## 5. Conclusion

The international business community does not support the “elements” paper. It represents a big step backwards, undermines the broad consensus achieved by the UNGPs by blurring the roles of governments and companies, creates unnecessary confusion, and absorbs attention away from UNGPs implementation.

The UNGPs have been a huge success for many reasons that are lacking from this process. They achieved a broad consensus among States on a complex topic that was hitherto bogged down in a political impasse; they clearly delineated the respective duties of States and the responsibilities of business enterprises; they clarified that respecting human rights applies to *all* enterprises regardless of their size, sector, operational context, ownership and structure; and they gave a practical blueprint for action by companies to respect human rights in a manner that reflected the reality of their activities, operations and business relationships and the three possible ways in which a company can be involved in a human rights harm. Furthermore, the UNGPs introduced two innovative ingredients to drive corporate respect for human rights: human rights due diligence and the use of leverage. In short, the UNGPs’ principled pragmatism and endorsement in 2011 showed that the UN is serious and sensible about clarifying and incentivising business action on this important field.

However, this IGWG process runs the risk of taking the business and human rights agenda back into a period of political stalemate. Most proposals in the elements paper are divorced from a clear understanding of how companies operate in reality. Some proposals encourage the notion that States are powerless and/or unwilling to protect human rights, which risks becoming a self-fulfilling prophecy. There is also the concern that a future binding instrument would be pitched at such a high level of abstraction that it is unlikely to have any value.

Given the breadth of issues; the multiple proposals, many of which raise additional questions; and the lack of time for stakeholders to consult meaningfully on the “elements”, we cannot help but question the value of this process. The business community is committed to respecting human rights and continuing constructive dialogue. However, the “elements” paper does not give us confidence that the IGWG can provide a credible solution to such complex human rights issues.