



**4<sup>th</sup> session of the Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights  
(15-19 October 2018)**

**Article 5: Jurisdiction**

**Thank you Chair,**

The [IOE](#) is fully aligned with the remarks made by the panelist from Littler. In addition, we refer people to the [Joint Business Response](#) on the Zero Draft Treaty and Draft Optional Protocol, which explains in more detail our deep concerns with the Article on Jurisdiction.

**Ladies and gentlemen**

As well as the problems of the provision calling for States to ensure universal jurisdiction over human rights violations that amount to crimes, the draft Treaty's other provisions on extraterritorial jurisdiction raise many other concerns:

- Giving so much attention to extraterritorial jurisdiction does not respect national sovereignty, the principle of territorial integrity and non-intervention in the domestic affairs of other States. Overall, the draft text fails to define the conditions under which the sovereignty and obligations of Host States would not be infringed.
- The provisions take the focus off the urgent need for many States to improve victims' access to effective remedy at the domestic and local level. By focusing only on allegations against multinationals, it also leaves victims of harms caused by purely domestic companies or State-owned enterprises without access to remedy.
- Many of the Zero Draft Treaty's provisions are equally unclear and unrealistic. For example, the language concerning the "domicile" of a person (or association of natural or legal persons) who could face prosecution is imprecise and overreaching. There is no clear legal definition of "substantial business interest."

It could, for example, be interpreted as someone who has ownership of more than three percent of shares in a company or than five percent of income is derived from this interest. Similarly, the terms "agency, instrumentality, branch, representative office or the like" are far too broad and unclear. They could apply to everything from telecommuting to contracting and they undermine applicable national corporate laws and other important considerations, such as national tax structures.

- The practical and procedural shortcomings of ETJ are also ignored in the Zero Draft Treaty. These include:

- The tremendously higher costs involved in pursuing remedies in foreign courts and sustaining such cases over several years;
  - The huge challenges presented to national courts when they must rule according to foreign legal principles and jurisdiction;
  - The struggles that many courts' have in resolving multiple objections being raised at the same time and threshold questions;
  - The challenge of “forum shopping” and the fact that courts in different countries may make different and contradictory judgements on the same case;
  - The difficulties in obtaining evidence and testimony abroad; and
  - The legal uncertainty it brings for victims as well as companies.
- Furthermore, when considering one national law that has been the subject of great debate on ETJ, a report by OHCHR on amicus curiae briefs filed by States in Alien Tort Statute (ATS) cases between 2000 and 2015 found that arguments against the use of ETJ centred on four considerations:
    - (i) Legal objections: according to the USA, the ATS was never intended to apply extraterritorially and other States disputed the existence of “universal civil jurisdiction.”
    - (ii) Foreign policy objections: concerns were raised about the possible adverse implications of extraterritorial litigation for diplomatic relations and the realisations of foreign policy strategies. Others voiced concerns about the possible closing-off of foreign policy options, including economic engagement. Finally, the potential of unintended clashes between the laws of the USA and the laws of other States should ATS be extended extraterritorially were cited with concern.
    - (iii) Economic and legal development objections: Firstly, there were concerns about the impact on trade and investment which help “lift people out of poverty” by bringing open markets that “ignite growth, encourage investment, increase transparency, strengthen rule of law.” Secondly, States argued that “by allowing ATS claims with little nexus with the US, some States might be given reason to down-play or even ignore their responsibilities for implementing their human rights obligations”. In addition, a State noted that “adverse pronouncements by one State on the quality of justice in another State can become ‘self-fulfilling’.”
    - (iv) Commercial and practical objections: States raised concerns on the difficulties and expenses associated with the litigation, the problems associated with gathering and presenting evidence from outside the forum State, the lack of efficiency of extraterritorial litigation, the excessive burden placed in the US courts, and issues of legal uncertainty and general unfairness. Other concerns raised include the issue of “forum shopping” and the difficulties of enforcing judgements in cases where jurisdiction is disputed.