

*Panel 7: Jurisdiction - 3rd Session of Open-ended Intergovernmental Working Group on
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I would like to sincerely thank the Chairperson-Rapporteur for granting me this opportunity to provide my perspective on this critical and threshold issue of the jurisdictional scope of the Proposed Treaty. I would also like to thank my respected colleagues on the panel – Sandra and Gabriela – and to all the other participants for their contributions and insights.

I am a labor & employment lawyer in the U.S., and my perspective is informed by my work and consultations with my clients, who range from large multinational companies to small “mom and pop” businesses. These businesses are deeply concerned with many aspects of the Proposed Treaty. But they are especially concerned with the jurisdictional aspect that has been proposed, and is the subject of discussion of this Panel.

As presented in the Elements paper that was distributed by the Chairperson-Rapporteur, the jurisdictional scope of the Proposed Treaty is sweeping.

It is sweeping in 2 aspects: first, it seeks to foist potential liability on the broadest possible array of entities. Second, it creates extraterritorial jurisdiction allowing litigants to sue entities in countries that are removed from the geographic situs of the alleged harm.

As for this first aspect, the Proposed Treaty seeks to allow a State Party to hold a company liable for undefined and amorphous corporate activities that occur in that State Party’s territory, even when the company is not physically present in that territory. As an illustration, under this proposal, a multinational company that has no physical presence in a State Party’s territory, but has a supplier operating there, could fall under the jurisdiction of the Proposed Treaty.

Turning to the second aspect – extraterritorial jurisdiction – the Proposed Treaty intends to allow alleged victims to seek justice through either the forum where the harm occurred – known as the “host state,” or the forum where the parent company that directly or indirectly controlled the violative activities is incorporated, headquartered, or conducts substantial business – known as the “home state.”

These two aspects of broad jurisdiction run counter to norms of international law, including the doctrines of international comity, political question, *forum non conveniens*, exhaustion of local remedies, and, in some cases, sovereign immunity. Taken together, these doctrines reflect a general presumption against extraterritorial jurisdiction. Attempts to overcome this presumption can have dire political consequences that will imperil delicate diplomatic relationships between the nation States present here today.

Foisting liability on companies that have little or no presence in the territory where abuses occur, for activities of entities over which those companies have little or no control, ignores the complex reality of supplier relationships in the globalized economy. Indeed, multinational companies often rely upon multiple levels of suppliers. However, beyond their first-tier

suppliers, these companies have little or no control over second-tier suppliers or suppliers further downstream.

Nonetheless, pursuant to the UN Guiding Principles, companies have voluntarily sought to exercise leverage over the downstream suppliers by – among other things – placing monitoring and auditing pressure on their first tier suppliers to ensure that *their* suppliers are compliant. These voluntary efforts should not be met with the threat of liability over activities those companies can barely control in practice. Indeed, companies do not have the capacity or popular, democratic mandate to police and remedy the operations of every supplier that is connected to the supply chain. That, is the province of sovereign States.

Indeed, this broad sweep of jurisdiction ignores that virtually all countries currently have laws that provide redress for human rights abuses that occur within their territories. Unfortunately, the allegations of human rights abuse are most numerous in countries where the enforcement of those laws is weak. These are countries that have fragile democratic institutions, and where the rule of law is weak or arbitrary. Ironically, these are the countries that have readily signed on to many international human rights treaties, including the International Labor Organization Conventions on forced labor, minimum age, and child labor.

Clearly, in these countries, what is needed is not yet another law on the books. Instead, what is needed is better enforcement of the existing laws, so that victims of abuse can seek effective redress in their home countries. The "elements" paper for this Proposed Treaty does not appear to change this regrettable situation. In fact, the current proposal only adds to the current uneven landscape of enforcement because it creates new uncertainties on jurisdictional outcomes.

So, as an alternative, as the Proposed Treaty intends, can victims of abuse then seek effective redress in a forum outside of the territory where the harm occurred, where the parent company is incorporated, in other words, the “home state”? The answer is probably not.

The manner in which this Treaty process has unfolded reveals a giant obstacle for victims to seek redress in home states. A vast number of multinational companies are incorporated or headquartered in States that have either stated that they do not intend to ratify this treaty, or harbor deep reservations regarding the process. If indeed, these countries refused to ratify the Proposed Treaty, then victims would not be able to access those countries’ courts.

So, victims are left facing the *status quo*, in that their only forum for redress are the domestic mechanisms in their home countries, where the endemic problems of lack of enforcement, lack of an independent judiciary, and corruption create almost insurmountable barriers to access to justice. Put another way, jurisdiction is only as good as the States that ratify the Proposed Treaty.

I earlier listed a number of doctrines that the proposed scope of jurisdiction runs against. In the interest of time, I won’t dwell on all of them. But one of them – sovereign immunity – is worth considering in some detail at the early stage of the Treaty Process. This doctrine arises in the context of allegations against State-Owned-Enterprises. Many of the States gathered here today own or control State-Owned- Enterprises, whether they be telecommunications companies, oil &

gas companies, construction companies, and so on. Any binding instrument should apply to these companies, as well as all other types of companies. However, many countries have laws that generally bar legal actions against human rights violations by sovereign entities – including State-Owned Enterprises. Of course, sovereign immunity is not strictly a legalistic construct – it is also a political construct that has deep foreign policy ramifications. Indeed, bringing suit against a SOE amounts to one sovereign State putting another sovereign State on trial.

If sovereign immunity were to apply, then it would serve as a legalistic barrier to extraterritorial jurisdiction over alleged abuses caused by State-Owned Enterprises, thus immunizing a vast swathe of abuse allegations. So, this doctrine serves to further fragment the liability regime under the Proposed Treaty, where State-Owned Enterprises may join domestic companies in being beyond the Treaty's scope, thus leaving private TNCs the only subject of the Treaty.

The Intergovernmental Working Group should keep in mind that broad sweeping jurisdiction has proven to be no great panacea in at least one prominent instance. The Rome Statute gave the International Criminal Court a broad sweep of jurisdiction with strong enforcement mechanisms. However, 15 years after its inception, many agree that the ICC has not lived up to its expectations, in that only 4 individuals have been convicted, maintenance of the court has been very expensive, and the court's legitimacy has been questioned because of its disproportionate focus on alleged violations that occur in Africa.

Instead of a jurisdictional scope that will encounter these serious legal, political, and practical headwinds, I respectfully propose that the Chairperson-Rapporteur and Intergovernmental Working Group consider measures to strengthen the incentives for countries to enforce their own laws that are already on the books – including the international human rights laws to which those countries have committed.

I wish to close by stating that, businesses want to operate in countries where the rule of law is strong. Businesses want to make sure that commercial disputes are efficiently settled, that property rights can be reliably protected. The mechanisms that ensure those protections are the same mechanisms that allow for the protection of human rights – consistent enforcement of laws by the executive, an independent judiciary, and lack of corruption. Therefore, it is absolutely in the interest of businesses – including my large and small clients – to support efforts to improve the rule of law in the domestic arena.

Thank you again Mr. Chairperson-Rapporteur for allowing me the opportunity to voice these views.