

**Check against delivery!**

**5th session of the Inter-Governmental Working Group on transnational corporations and other business enterprises with respect to human rights**

**(14-18 October 2019)**

**Prevention**

**Thank you Chair,**

I deliver this statement on behalf of the International Organisation of Employers ([IOE](http://www.ioe-emp.org/)). I note again the [Joint Business Response](https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=145680&token=9dbcc1f8414128d575cd6bef9f36b84ec106a386) to the Revised Draft Treaty, which describes the business community's points on "prevention" in more detail.

**Prevention**

* At first glance, the Revised Draft Treaty appears to have modified the previous text's proposal that human rights due diligence is a standard of "result" not "conduct." For example, the relevant provision on prevention calls for all persons conducting business activities to "take appropriate actions" to prevent human rights violations or abuses. However, reading this text alongside a subsequent provision on a "failure to prevent" in the article on legal liability suggests that the "standard of result" still applies in relation to contractual relationships.

Introducing the concept of a "failure to prevent" to business and human rights is misguided. It exists in a very small number of jurisdictions on issues such as anti-bribery and tax avoidance and in relation to criminal offences. It should not be adopted into a broad international legal human rights regime. We note two significant concerns about the inclusion of this concept. First, no definition is offered on what would constitute a "failure to prevent" including of the acts or omissions. The list of alleged "failures" could be unlimited given the myriad reasons why one business can be connected to a harm committed by another. Second, it would blur the boundaries of the State duty vis-à-vis the business responsibility by expanding the role of companies to carry out functions that should only be discharged by independent regulators and law enforcement.

* Second, the provision that obliges "all persons conducting business activities, including those of a transnational character" to carry out human rights due diligence on their own activities and contractual relationships is unrealistic. It gives no consideration for the size and capacity of all persons to carry out this extensive process. Equally, assigning liability to them on such a broad set of provisions - without including appropriate mitigating factors such as "safe harbour" clauses and a statutory defence of "adequate procedures" - would not encourage a proportionate, risk-based approach by national legislatures.
* Third, we think that the provision on SMEs is incoherent. Incentives and measures to ensure compliance with laws routinely involve punitive sanctions (whether criminal or administrative, such as fines), thus making the text that seeks to limit the burdens on SMEs meaningless. Even if the text offers exemptions to SMEs, it also gives no assurance that this would happen in reality and it provides no clarity as to how such exemptions would be applied. SMEs and micro-enterprises face distinct challenges in meeting their responsibility to respect human rights, not least because of resource and capacity constraints. They should be better supported to respect human rights, through capacity-building efforts, and not face unrealistic burdens.
* Fourth, the Revised Draft Treaty is inconsistent with the UNGPs on prevention. Despite many requests for the text to mirror the UNGPs' four-step human rights due diligence process, the Revised Draft Treaty continues to take a different approach. For example, it does not include the step about integrating and acting upon the findings of a company's risk assessment(s). Also, its proposal for all persons conducting business activities to "monitor" their human rights impacts is not the same as the UNGPs' expectation that businesses "track the effectiveness of their responses."
* Fifth, requiring all legal persons to undertake "environmental impact assessments," as well as report on "environment and labour standards," shows the IGWG going beyond its mandate. As mentioned, there remain unsettled questions on the link between the environment and human rights under international law and it is also unclear what and labour standards would be relevant to this instrument (most labour standards do not meet the level of a human right).
* Sixth, requiring "meaningful consultations" through "appropriate procedures" poses many legal, definition and practical implementation challenges. All persons conducting business cannot be expected to carry out a legal obligation to consult with an undefined and unlimited number of "stakeholders" in a manner that is unclear. The draft Treaty text would overburden business, not necessarily help companies to understand their human rights risks, and it would inhibit trust between the stakeholders.
* Seventh, the provisions obligating all persons (natural and legal) to communicate their due diligence efforts and report on financial and non-financial matters ignores other regulatory standards and practices governing corporate conduct. For example, such obligations would come into conflict with anti-competition practices, data protection laws and other customs that justify the need for companies to keep certain, sensitive commercial information confidential.
* Lastly, the Revised Draft Treaty ignores vital nuances on due diligence that exist in the UNGPs. Its provisions do not recognise that human rights due diligence will "vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations" (UNGP 17). It also ignores that "appropriate action will vary according to: (i) whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship; and (ii) the extent of its leverage in addressing the adverse impact" (UNGP 19). These essential elements of the human rights due diligence process must not be disregarded.

**Thank you very much for your attention.**