BIAC comments

Ecuador Proposal for a New Business and Human Rights Treaty

BIAC, representing the OECD business community, has a long record of supporting efforts to secure human rights, which is a key consideration for business. BIAC was actively involved in the elaboration of the UN Guiding Principles on Business and Human Rights and the 2011 update of the OECD Guidelines for Multinational Enterprises (MNE). The MNE Guidelines contain a chapter on human rights, which is largely based on and fully compatible with the UN Guiding Principles. These two voluntary instruments have created much positive energy in the business and human rights debate. BIAC members are committed to making an active contribution to implementing these instruments to make them work in practice. A lot has been achieved already, and these efforts need to continue.

BIAC strongly supports greater efforts to ensure the respect of human rights. However, we have very serious concerns about the proposal initiated by Ecuador for a new legally binding treaty on business and human rights and question the rationale and added value of such a treaty:

Indeed, the proposal is based on the false premise that the UN Guiding Principles were a “first step without further consequence”. On the contrary, substantial progress has been achieved over the past three years. The uptake to date of the UN Guiding Principles by enterprises, international organisations, multi-stakeholder initiatives, etc. has been impressive and is continuously making progress.

For this reason, we seriously question the usefulness and added value of starting a negotiation on a new legal instrument. Broad international agreement on a new binding instrument is very unlikely, and the process of negotiating such an instrument would take away emphasis, energy and resources from implementing the existing instruments. Rather than risking to detract from ongoing efforts and to jeopardize further progress, BIAC underlines the importance of continued promotion and consistent implementation of the UN Guiding Principles and the OECD MNE Guidelines. The MNE Guidelines are an important reference instrument – comprehensive, pragmatic and concrete – and ideally suited to serve as a basis for a global level playing field. They are formulated in such a way that they can be
accepted by all countries which participate in and benefit from world trade. Therefore, BIAC encourages additional focus on outreach activities.

Governments are already obliged to implement and enforce the main human rights conventions in their jurisdictions. The added value of a new treaty specifically on business and human rights would be limited, as inadequate enforcement is the main shortcoming of the current system, not a lack of norms or obligations. Therefore, additional efforts are needed to support States that are not in a position to implement international human rights conventions and enforce human rights effectively, through better and coordinated technical assistance to build up the corresponding legal and administrative structures, instead of just adding an additional commitment. The major problems in weak governance zones have to be addressed on a long-term basis and in coherent interaction between all major players.

Extraterritorial jurisdiction is no alternative to an effective national judicial system which handles the adverse impacts from national business operations, including state-owned enterprises. A focus on extraterritorial remedies would also miss an opportunity to generally improve law enforcement in national jurisdictions. The root causes of these governance deficiencies need to be addressed.

The impact of the development of a new treaty thus risks being negative. Instead of promoting implementation of the UN Guiding Principles, attention would turn to treaty negotiations with limited perspective of ever reaching agreement. Additionally, the consensus and constructive approach which John Ruggie achieved would be seriously jeopardised. All stakeholder groups would go back to the trenches to pursue their objectives with regard to the treaty instead of constructively pursuing joint solutions to the most pressing issues. Furthermore, BIAC agrees with John Ruggie's assessment that a number of questions have to be clarified before a decision can be taken on what the next steps should be.