Thank you, Chairperson-Rapporteur.

This intervention responds to Article 8 (Legal Liability) of the Second Revised Draft Treaty. In the interest of time, I limit my thoughts to 3 main points.

First, as we saw in Article 6 of the draft treaty, in a significant departure from the UN Guiding Principles, the draft’s due diligence process requires that companies actually prevent human rights violations. The draft thus seeks to transform due diligence from a process-based standard to an outcome-based standard, which may, in some instances, be impossible for businesses to satisfy. However, Article 8 then imposes administrative, civil, and criminal liability on companies for not meeting this, sometimes impossible, standard. In short, Article 8 imposes a harsh framework of liability that is simply not workable.

Second, since Section 2 of Article 8 extends liability to natural persons as well, this opens the door for States to hold liable companies’ directors or even shareholders. Not only this, Section 11 of Article 8 then extends this liability “for acts or omissions that constitute attempt, participation or complicity” in rights violations. Thus, the draft treaty seeks to “pierce the corporate veil” in imposing broad liability – including criminal liability – on a broad swath of entities and individuals, for a broad range of actions, omissions, and non-actions, raising questions of due diligence and fairness.

Third, Section 8 of Article 8 appears to eliminate – or at least, erode – any “safe harbor” for companies that conduct due diligence, but still result in adverse human rights impacts. The erosion of this safe harbor defense may fail to reward the good faith efforts of companies to conduct due diligence, and will therefore eliminate one of the most powerful incentives for companies to conduct due diligence. This provision is also antithetical to many jurisdictions’ approach to corporate due diligence – either in the human rights context or other contexts. For example, courts have found that the CA Transparency in Supply Chains Act creates a safe harbor against consumer protection claims against companies that make disclosures under that law.[[1]](#footnote-2) Similarly, the proposed human rights due diligence law in Germany has been interpreted to create a safe harbor against rights violations for companies that make the required disclosures. As another example, in a slightly different context, in the UK, if a company has “adequate procedures” in place to prevent bribery, it will have a complete defense against a claim under the UK Bribery Act. Thus, the erosion of this “safe harbor” argument from the treaty is a critical missed opportunity to incentivize companies to engage in human rights due diligence.

Thank you.

*/s/ Lavanga V. Wijekoon*

Lavanga V. Wijekoon

1. *Wirth v. Mars, Inc*., Case No. 1:15-cv-1470, 2016 U.S. Dist. LEXIS 14552, at \*3 (C.D. Cal. Feb. 5, 2016) (concerning cat food products that may have included ingredients from forced labor); *see also Barber v. Nestle USA, Inc*., 154 F. Supp. 3d 954, 961 (C.D. Cal. 2015) (same). [↑](#footnote-ref-2)