Comments on Article 12 of the third revised draft treaty on behalf of IOE

Thank you, Chairperson-Rapporteur. This intervention is a response to Article 3 of the Third Revised Draft Treaty, which deals with the "scope" of the draft treaty.

The text of this article is very short, but its impact is extremely consequential.

Ever since the start of this treaty process, the "scope" of this draft treaty has been particularly controversial. Indeed, earlier drafts sought to cover only multinational companies, leading to great disagreement.

This Third Revised draft, *on its face*, appears to broaden the scope to "all business activities, including business activities of a transnational character."

However, *in practice*, this apparent broader scope would be undermined and severely narrowed by the very next sub-section in Article 3, which allows for States Parties to determine, via national law, which enterprises are actually covered under the scope of this treaty. Indeed, the States Parties can carve out these exemptions based on vague factors such as the enterprise's "size, sector, [or] operational context." Some of the proposals we heard from States Parties appear to intend to formalize these exemptions within the text of the draft Treaty.

The bottom-line is that the States Parties have a wide berth in picking and choosing which enterprises will be subjected to the onerous provisions of this draft treaty, including the almost impractical due diligence obligations, the wide-ranging criminal, civil, and administrative liability, and the broad extraterritorial jurisdictional provisions.

This is a recipe for States Parties to engage in calculated protectionist measures to protect their State-owned enterprises, as well as their local small-and-medium scale enterprises.

Some of the most egregious human rights abuses that the Draft Treaty seeks to address are committed by exactly these types of organizations. Indeed, in 2016, a UN Working Group published a seminal report[1] to the HRs Council on the often-ignored role of State-Owned-Enterprises in human rights abuses, and how such abuses constitute a grave derogation of the States' duty to protect against human rights abuses.[2]

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[1] U.N. Human Rights Council, Rep. on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument, U.N. Doc. A/HRC/31/50 (Feb. 5, 2016).

[2] Indeed, UN Guiding Principle 4 requires that "States should take *additional* steps to protect against human rights abuses by business enterprises that are owned or controlled by the State …."

Allowing States Parties to carve out such protectionist exemptions is in stark contrast to the UN Guiding Principles which applies to "*all* business enterprises, both transnational and others."

Human rights victims have no preference as to whether their perpetrators' operations are State-owned or private, domestic or global, and the proposed language would lead to absurd results. For example, where a State-owned-enterprise is in a joint venture with a private company, and the joint venture results in human rights abuses, only the private company would be held accountable.
Given that my time is up, I thank the Chairperson and the Intergovernmental Working Group for their kind attention to these serious concerns of the international employer community.

Thank you.

/s/ Lavanga V. Wijekoon

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