

Thank you, Chairperson-Rapporteur.

This intervention is a response to Article 7 of the Third Revised Draft Treaty, which deals with “Access to Remedy”. It is my pleasure to provide my thoughts on behalf of the IOE.

I have several specific comments that reflect much broader concerns.

First, Article 7.2’s “access to information” provision does not contemplate existing legal obligations that already exist between states under well-established notions of legal comity and other associated doctrines. There is simply no need for this provision, and it would appear to unjustifiably upset the existing balance between state sovereignty and the free flow of information. Perhaps worse, this provision fails to even consider any privacy protections. If this provision is to remain in some form, it should very specifically narrow the categories of information that can be sought, state the reasons why this information can be sought, and at least provide some affirmative requirement that an applicable state should take steps to protect applicable privacy and other property rights.

Second, Article 7.5 seeks to eschew the well-established doctrine of *forum non conveniens*, on the continued and false assumption that this doctrine creates a “legal obstacle”. This doctrine is not a legal obstacle, but instead forms a foundational basis for a state’s sovereign duty to adjudicate disputes that concern matters and parties within its borders, while also ensuring that due consideration is made to the location of witnesses and evidence so that disputes can be meaningfully adjudicated consistent with well-understand notions of due process. This provision should be removed, and eschewing this doctrine would seem to prioritize a rights-holder’s attorney’s decision about where a dispute should be decided over a state’s solemn obligation to build and maintain judicial and associated infrastructure to adjudicate disputes.

Third, and finally, Article 7.6’s contemplated reversal of the burden of proof should also be removed. Much has already been said about this unfortunate provision that need not be repeated here. It suffices to restate that this clause contravenes fundamental and well-settled principles of “innocent until proven guilty” and that requiring an accused party to prove its innocence violates due process principles and fundamental notions of fairness in most jurisdictions. This revised draft treaty seems to continue to confuse “legal obstacles” with ensuring that parties have free and fair process to adjudicate any associated disputes.

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/ Michael G. Congiu

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