

IOE Comments on Article 9 of the third revised draft treaty

Chair

Article 9 continues to create huge legal uncertainties and continues to be not implementable.

Indeed, the new draft defines that a company is considered domiciled where it has “activity on a regular basis”. This is not only very vague language, but would mean universal jurisdiction for many multinational companies.

The extensive jurisdictional scope of the draft is further exacerbated when considering the breadth of the “activities” to be regulated, which include electronic transactions.

Adding to this jurisdictional uncertainty, the draft continues to explicitly reject the doctrine of the forum non conveniens, the retention of which has been called for above in our comments on 7.3.

Additionally, the text fails to provide for practical and effective pathways to remedy at a local level, allowing States to sidestep any responsibility for maintaining their fundamental obligations regarding remedy under Pillar III of the UN Guiding Principles. Since access to remedy in the vast majority of cases is most likely to come through better and more effective judicial systems at a national level where violations occur, efforts and resources should be focused on improving national judicial systems in host countries and where violations occur.

Finally, the use of poorly defined terms such as “activity on a regular basis”, “the presence of assets” and “substantial activity of the defendant” all add to the legal uncertainty this article brings.

Thank you.