This forum has focused exclusively on the actual and potential harms that can be laid at the doors of multinational companies. Without denying such harms exist, is it impossible to admit that there are positive sides to business — that it brings jobs, products, and services that create wealth, improve lives and foster prosperity and development? In that regard, and with respect to liability rules, is it better for companies to “stay and behave” or would you rather have them “ cut and run.”? The companies I represent are ready and willing to work to improve situations in their supply chains. Regulations on supply chain liability that go too far are likely to lead to counterproductive consequences: companies would likely find it necessary to withdraw from places with difficult human rights situations if they are held liable for adverse effects on the ground over which they have little or no control.

There is no legal certainty in the draft text on the conditions under which companies would be held liable, particularly since the definition of human rights due diligence in Article 1 does not wholly reflect that of the UNGps. Since liability is extended to natural persons, this opens a vast uncertainty. As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprises’ alleged contribution to a harm, although these may not be framed in human rights terms.

The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has substantial effect on the commission of a crime. As it stands, Article 8.3would go far beyond this standard. There is no reference here to the level of implication needed for a business to be considered complicit. This allows wide latitude for national courts to decide who to hold liable and goes against the essence of the UNGPs. Conducting appropriate human rights due diligence should help enterprises address the risk of legal claims against them by showing they took every reasonable step to avoid involvement with an alleged human rights abuse. The treaty should incentivize companies to do the right thing, not punish them if their efforts in that regard are imperfect.