

**USCIB Statement on first Grouping (Preamble – art.3) of the draft LBI on BHR**

**8th Session OEIGWG**

24-28 October 2022, UN Palais, Room XX, 10:00–13:00 and 15:00-18 :00 CET

Thank you Chair, I am speaking on behalf USCIB. As said by my colleague from IOE, I will focus my intervention on art. 2 and 3 in the first grouping.

Let me turn to some specific proposals from the seventh session that continue to be unimplementable:

In provision 2.1.b, there is a need of additional language clarifying that this applies “where required by national law”. Obligations only fall on companies only where the law requires it or they themselves have agreed to be bound.

In 2.1. a bis. The new proposed point aim “to regulate the activities of transnational corporations and other business enterprises within the framework of international human rights law”. This should be omitted in full as this framework does not exist and has no legal basis. Current obligations only fall on companies where the law requires it or they themselves have agreed to be bound.

In 2.1.c. It remains ambiguous and vague what are the “effective mechanisms of monitoring and enforceability” and how will these work? What does “environmental harm from business activities in both conflict and non-conflict affected areas by creating and enacting effective and binding mechanisms of monitoring, enforceability and accountability” mean, in practice. These additions are calling for new mechanisms while it is precisely the current States failure at the national level to enforce existing laws that directly or indirectly regulate business respect for human rights that are responsible for the major human rights abuses.

In 2.1 d. the focus should be on remediating the harm caused and that includes through judicial and non-judicial means not the reference to “justice” . The wording here should be “**To ensure access to remediation process both judicial and non-judicial and effective**…”.

As for point 2.1.d and 2.1. e. the new proposals want to include “violations” and focus the scope of the draft to be applicable to transnational companies only and not, as it has correctly been and should be, to all business activities.

Turning now to article 3.

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 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 l 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, while making “an example” of foreign private businesses.

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.”

We have emphasized this point in prior sessions, but it bears repeating: Human rights victims have no preference as to whether their perpetrators’ operations are State-owned or private, domestic or global. Moreover, 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.

Thank you.