

Oral statement

Seventh session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

(OEIGWG)

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*Seventh session - OEIGWG: Plenary discussions in accordance with the programme of work – Article
Thursday 27 October 2021*

Delivered on behalf of: AI-Haq, ECCJ, FIDH, IUCN Netherlands, SOMO and WILPF.

28 October 2021

Thank you, Mister Chair. I make this contribution on behalf of AI-Haq, ECCJ, FIDH, IUCN Netherlands, and SOMO.

We welcome the general direction in which the draft text has evolved.

With the aim of further clarification of the text, and to prevent misinterpretations and inconsistencies in the implementation of the instrument by the State Parties, we would like to suggest the following changes to article 8 on liability:

- Article 8.3 should explicitly include criminal sanctions. Therefore, we suggest the word “criminal” is followed by “as well as”.
- Article 8 tries to deal with the different forms of liability (civil, criminal and also administrative) resulting in complex wording and long paragraphs. For the sake of legal clarity, we recommend separating civil liability and criminal liability into separate articles.
- We recommend re-integrating the reference to “other regulatory breaches that amount to or lead to” in art. 8.3 as these are breaches that lead often to abuses and should be dealt with specifically as part of effective prevention.
- To clarify the conditions for liability under article 8.6 could be drafted as follows:

“8.6 States Parties shall ensure that their domestic law provides for the civil liability of a business enterprise, for harm to a third person caused or contributed to by another legal or natural person in the context of business activities, when:

- a. the business enterprise factually or legally controls, manages or supervises such other person, **or***
- b. the business enterprise foresaw or could have foreseen the risk of harm to which they are linked through a business relationship or services not covered under 8.6.a, unless they can prove they took necessary measures to effectively prevent it;*

Where two or more business enterprises fall under sub-paragraphs 8.6.a and 8.6.b, states parties should ensure their domestic laws provide for their joint and several liability.

Additionally, we suggest adding a paragraph including strict liability in activities which are inherently dangerous:

“In business activities that are hazardous or inherently dangerous, States Parties shall provide measures under domestic law to establish strict liability. “

- Furthermore, **due diligence shall never act as a shield** from liability. In this regard, art. 8.7 does not contain a clear obligation. We suggest clarifying this provision by making clear that “States shall ensure through legislative measures that due diligence does not automatically absolve from liability for human rights abuses.”
- Similarly, clarifying that this defence is not available when companies cause or contribute to human rights abuses through their own operations is paramount. We thus suggest removing the last sentence of article 8.7 as, in our view, it could undermine the effectiveness of the provision itself.
- Finally, the proposal to add an Article 8 bis will trump the objective of article 8 which is to facilitate access to justice by victims and accountability of mother companies, including in jurisdictions of domicile.

Thank you, mister Chair.

This oral statement was in part informed by an expert consultation participated in by academics, litigators, and civil society experts, held on 7 October 2021 at the Asser Institute in The Hague (The Netherlands).