

# Congress of the United States

Washington, DC 20515

November 18, 2022

President Joseph R. Biden  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, DC 20500

We write to you to share our concerns regarding the Administration's positions at the recently concluded 8th annual negotiations of the UN open-ended intergovernmental working group (IGWG) on transnational corporations and other business enterprises with respect to human rights.

On October 21<sup>1</sup>, Representative Grijalva wrote to you to strongly encourage the Administration to engage constructively in the IGWG negotiations following years of U.S. disengagement. We are encouraged that the U.S. delegation did attend and at times provided direct input on the text of the draft treaty, which is formally referred to as the 'legally binding instrument to regulate the activities of transnational corporations and other business enterprises', or 'LBI'.

Taken as a whole, however, we believe that the recommendations of the U.S. to the draft LBI did not strengthen the text. Advancing an international policy position that seeks to weaken the draft LBI undermines the Administration's domestic goal to protect "fenceline communities" facing abusive corporate activities.

For example, the U.S. delegation recommended removing protections for Indigenous People, women and girls, those at risk of retaliation, or those who may be at heightened risks of vulnerability or marginalization (such a Black and LGBTQIA+ community members) from human rights due diligence provisions, which are a central element of any future LBI. Such a policy position is very hard to reconcile with the domestic policy positions of your Administration, or the stated intention of the U.S. at other points in the negotiations, to protect human rights defenders, many of whom are from the groups of people covered by these provisions. This position also runs counter to your Administration's support of marginalized Black and Indigenous communities in harm's way in Cancer Alley and other parts of the country.

In addition, several times throughout the negotiations the U.S. delegation recommended reducing the future LBI to a "core text", dealing with an unspecified range of provisions, and developing "optional protocols in which issue or industry specific areas could be negotiated separately and signed on to by state parties". This approach risks stripping the text of core protections and delaying development of vital protections to a lengthy and uncertain optional protocol process, undermining the fundamental purpose of the instrument.

This treaty must, first and foremost, serve Black and Indigenous fenceline communities, such as the predominantly Black historic community in Wallace, Louisiana, who are organizing themselves in an already heavily polluted area to stop development of Greenfield LLC's grain terminal, which will only add to the dangerously toxic air that is seriously affecting the health and well-being of local residents. Corporate actors, like many of those harming Indigenous and Black communities in Cancer Alley and elsewhere in the country, have long operated with impunity for human rights violations, and countless communities around the world have been advocating for more than forty

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<sup>1</sup> <https://grijalva.house.gov/rep-grijalva-urges-biden-administration-to-engage-in-igwg-un-negotiations-on-transnational-corporations-and-human-rights-to-support-fenceline-communities/>

years to have their rights adequately protected by a UN treaty. It is a grave insult to these “fenceline communities” for the U.S. to recommend a two tier approach that strips out central protections from the main treaty, leaving an anemic core text alongside a set of separate optional protections for the most marginalized people.

A treaty of this kind holds the promise of providing uniform regulatory standards across jurisdictions. The U.S.’s recommendations in this round of negotiations provide less clarity for businesses that are trying to respect human rights by further entrenching regulatory uncertainty. The Administration’s insistence on adding qualifications to provisions in the text that require various articles to be “consistent with domestic legal and judicial systems” only serves to codify into the international legal system the patchwork of national systems companies and others already have to navigate. Including text of this kind throughout the document is not about “flexibility”, as the U.S. stated repeatedly in the negotiations, but rather it is about accepting the status quo of regulatory unevenness that burdens the business community with lack of clarity, and encourages a “race to the bottom” where states that lower their human rights standards receive greater investment at the expense of workers, communities and the environment.

While joining the international community in these negotiations is a good start, your Administration must now move forward policy positions that reflect the needs of “fenceline communities”. Not only does this approach mirror and advance your Administration’s domestic policy priorities, but will also help in meeting some of the key recommendations made recently by the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD). Alarmed by the grave situation facing fenceline communities in the U.S., CERD stated it was “concerned at the disproportionate health, socio-economic and cultural impact of pollution, climate change and natural disasters on racial and ethnic minorities and Indigenous Peoples, caused by extractive and manufacturing industries, such as petrochemical facilities and methanol complexes [in the US].”<sup>2</sup> CERD called on the U.S. to “take appropriate measures to prevent adverse effects of economic activities by transnational corporations”.<sup>3</sup> Engaging in the IGWG process to develop a strong LBI that primarily serves the needs of these communities is an important means of fulfilling this recommendation.

Based on these observations, we request answers to the following questions:

1. Why did the U.S. delegation recommend removing protections for Indigenous People, women and girls, those at risk of retaliation, or those who may be at heightened risks of vulnerability or marginalization?
2. What is the justification in human rights terms for the recommendation to reduce the future LBI to a “core text”, with “optional protocols in which issue or industry specific areas could be negotiated separately and signed on to by state parties?”
3. How does the Administration believe a LBI which codifies an uneven patchwork of national legislation into an international law provides regulatory simplicity and certainty to the business sector?
4. How does the U.S. plan to implement the recommendations outlined by CERD?


We look forward to staying engaged in this vital policy arena to ensure the best outcome for all.

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<sup>2</sup> Committee on the Elimination of Racial Discrimination (CERD), Aug 30, 2022, *Concluding observations on the combined tenth to twelfth reports of the United States of America*, para. 45. Available at: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD\\_C\\_USA\\_CO\\_10-12\\_49769\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_10-12_49769_E.pdf)

<sup>3</sup> Above n 6, para 46.

Sincerely,

  
Raúl M. Grijalva  
Member of Congress