E. Article 5 (Prevention)

Article 5 (Prevention); A Partial Legalization of the UN Guiding Principles Corporate Responsibility to Respect Human Rights Pillar—Textual and Conceptual Analysis.

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Article 5 of the Draft LBI is a curious oasis in an environment in which the focus of attention has been on the construction of a legal subject--the victim--and a remedial structure around the notion of actionable harm. The curiosity goes both to its form and content. It goes as well to its relationships with other key provisions of the Draft LBI--all of which are left to conjecture (or better put, to the vagaries of litigation and the post hoc complaining of the academic classes and civil society dissatisfied with ruling that might not go their way). From a strategic and political point of view the curiosity springs from what appears to be an effort to shoehorn the guts of the UN Guiding Principles Second Pillar[1] hallmark, its human rights due diligence framework, within the structures of the Draft LBI.

But let's start at the beginning. Article 5 speaks to "prevention." The etymology of the word tell us much about its psychology (or at least what the Draft LBI's drafters had in mind).

> mid-15c., "action of stopping an event or practice," from Middle French *prévention* and directly from Late Latin *praeventionem* (nominative *praeventio*) "action of anticipating," noun of action from past-participle stem of praevenire (see prevent).[2]

Where Article 2 spoke to "purpose" (strengthen, prevent, promote), Article 3 spoke to "scope" (business activity playing coquette to that roguish element--transnational character, covering "all human rights"), and Article 4 spoke to victim's rights (special rights and special consideration for individuals whose allegation of harm from human rights

1 U.N. GUIDING PRINCIPLES FOR BUSINESS AND HUMAN RIGHTS ¶¶ 11-24 (New York and Geneva, United Nations, 2011).

2 Prevention, ONLINE ETYMOLOGY DICTIONARY, available https://www.etymonline.com/word/prevention.

violations or abuse catapults them into the status of victim and thus eligible for its Article 4 privileges), Article 5 turns its attention to *victim maker*s.

Article 5 then creates an almost poetic oppositional binary. The Draft LBI's purpose and scope are broad; victims are beneficiaries of special consideration and positive rights that are triggered by the allegation of harm suffering, which they are encouraged to advance. In contrast, *victim makers* are to be stopped. They are to be stopped from engaging in certain practices; they are to be stopped from certain decisions or transactions. This stopping and avoiding is meant to occur *before the fact* — Article 5 imposes a framework grounded in anticipation rather than in remediation (that comes later). This single word — prevention — when correctly understood in its cultural-historical context tells one much about the framing and development of the 6 paragraphs that follow. Yet that is not quite true, for what follows then strip's away the broad scope of the overtones of the title of the Article in ways that mirror both the weakness of the Draft LBI's drafting and the politically questionable constraints on its scope and application. what follows

These greatest of these lacunae: *victim makers* do not include the state nor other actors who might engage in economic activities (an enormous irony equaled only by the hole in the treaty that lacuna represents). Instead, and in a rather sloppy way (in part because it appears to play fast and lose with the discipline of the definitions crafted for Article 1) Article 5 speaks to "business enterprises" (§1) and to "persons conducting business activities" (§2); but it also speaks of "commercial and other vested interests of persons conducting business activities" (§ 5). And, drawing from the quite limiting scope of the definitions of business activities and contractual relations. These make it clear that the principal focus of the Draft LBI are the commercial activities of private parties — the state and other institutions whatever their connection with economic activities get a pass.

That this fundamentally weakens the treaty in a world in which states are increasingly engaged in commercial activities, and always engaged in economic activities, and other institutions also affect the lives of those around them in ways quite intimately connected with the spirit of "human rights" (we will get to the knotty problem of definition later), ought to give substantial pause. But the cynic would not have qualms; for them it might merely conform that the object of the treaty is to advance the interests of those who wrote it against the groups these might consider their political, economic, social or cultural enemies. This hardly inspires confidence, and reduces the likelihood of legitimacy of any final product. In this respect Article 5 seems to pain the Draft LBI as a sort of perverse time machine sucking its reader back into that maelstrom which was the New International Economic Order.

The second, the elephant in the room that is Article 5, is the UNGPs, whose human Rights Due Diligence forms the core of Paragraph 2, and whose focus on prevention and mitigation infuses the rest. And yet, neither reference nor connection is to be found in Article 5. The Draft LBI is not the first instrument that borrows form the UNGPs. Indeed, that honor might well go to the OECD's Guidelines for Multinational Enterprises — but there the connection was positive and transparent. States have begun to use some or all of the

concepts around human rights due diligence, and its Second Pillar related concepts of prevention, mitigation and transparency in their own CSR law making. In February 2019, for example, the German Federal Ministry for Economic Cooperation and Development was reported to have drafted a law on mandatory human rights due diligence for German companies and their supply chains.[3] *The issue is not one of vanity. It is one of interpretation and of regulatory coherence.* Here the problem of interpretation is acute — especially for an instrument that purports to be law not policy or framework. A court faced with the obvious would have to decide: is Article 5 written (a) against the UNGPs; (2) in a way that is meant to incorporate only some of its terms; (3) to draw on the UNGP sfor interpretation and gap filling; or (4) without reference to the UNGPs, their rich history and their interpretive baselines?

That takes us to a brief consideration of each of the sections that make up Article 5.

Paragraph 1

Paragraph 1 is fairly straightforward. It provides:

> State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction. For this purpose States shall ensure that their domestic legislation requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses.

Paragraph 1 is written in the style of a European Union directive but without the enforcement heft behind it. It speaks to a duty undertaken; certainly, a legally binding duty — binding on state parties. But it creates no direct rights on which people (including the Draft LBI's "victims") may effectively rely on ass law within the courts of the state sin which they might seek to vindicate their rights (pre or post harm). There is nothing wrong with that, to be sure. But it does not advance a legal regime.

That advancement is further hobbled by the terms of the duty undertaken in Paragraph 1. The obligation is vague; that obligation is overly broad and sloppy in a way that invites bad implementation (and worse hermeneutics) by courts less well versed in the "in group" speak that characterizes much of Article 5. The evaluative standard ("regulate effectively") is desperately in search of a measure. But the scope of the "regulate effectively" standard is over-broad. It reaches to "the activities of business enterprises within their territories." They must have meant those activities related to the harms actionable under the Treaty. But that is not what exactly what they wrote. In defense of this provision, of course, one can point to the last sentence of Paragraph 1 which appears to cabin the duty to legislate to "persons conducting business activities. . . . to respect human rights and prevent human

3 *German Development Ministry drafts law on mandatory human rights due diligence for German companies*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, available at https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies (Oct. 1, 2019)

rights violations or abuses." There is a further constraint touching on the limits of the territorial or jurisdictional reach of the legislating state, but for many states that is hardly a constraint. But what, as a matter of law does it mean (measured by conduct) to "respect human rights." Of course, the shadow of the UNGPs hangs heavy over these words. But there is no reference to the UNGPs. A court is left to surmise. As are we. Respect is an important operational framework; it works far less well as a legal standard that can be enforced in a predictable and consistent way.

Paragraph 2

Here we have the short version of the more nuanced and sophisticated approach to human rights due diligence elegantly set out in the UNGPs (Paragraphs 16-21). The Draft LBI version suffers form a number of weaknesses that substantially erode the good intentions of its drafting. First, to use the expression "human rights due diligence" without either a definition or a cross reference to the UNGPs creates a term of art detached from its history and meaning *outside the text of the treaty*. At worst it is an act of arrogance — the use of a term that "insiders" are well aware of but that outsiders are not. That backfires when the outsider is a court or a legislature. Without an anchor in the UNGPs or in something else, the term "human rights due diligence" can be whatever it is a legislature conjectures. Second, the five-point truncated version of the UNGPs human rights due diligence (Art. 5 Paragraphs(a)-(d)) presents, art worst, an invitation to deviate from the development and application of the UNGPs framework, That produces a potential for dissonance (two standards by the same name) and potentially incompatible standards. Not that the abbreviated human rights due diligence framework is necessarily bad. It is just (1) too late and (2) unhelpful in light of the development of the identical concept and its increased traction in a related (and unmentioned) document. On the plus side, the paragraph appears to permit some wide variation in legally binding human rights due diligence practices. That is good for sovereignty and context; it is quite the opposite of coherence and effectiveness. Here is a place where a multi-state compact would be in order. And yet there is no encouragement here in a document otherwise full of encouragements.

Beyond that some small points. A standard of prevention (Paragraph 2(b)) is unreasonable. One might take steps to prevent, and one might be liable where prevention fails and harm occurs. But to write the standard in this way might invite an interpretation that suggests punishment for the failure to prevent in itself in addition to the provision of remedy to those harmed by the failure. That would be unfortunate, but it is a plausible reading fo the provision as written. In addition, Paragraph 2(d) is unfortunately disconnected from its own human rights constraints. Surely the intention of communication is not meant to override the rights of individuals to privacy and to the protection of privacy by business. But this is not made clear. Again a legal document requires precision of the sort missing here. As a framework principle, of course, this works tolerably well.

Paragraph 3

This paragraph is meant t flesh of the Draft LBI human rights due diligence provisions by highlighting those specific forms and practices of human rights due diligence that ought to be presumptively included. Each of these suffer from the problem of over generalization create wide spaces for variations that may effectively undo the effectiveness of the provisions. Section 3(a) for example speaks to impact analysis, but does not set either a floor for uniform standards or a means of making such standards otherwise transposable. It invites, in a perverse way, a competition among states either to develop the most effective standards for environmental and human rights protection, or for states in need of investment, the opposite. That leaves us exactly where we are today in the absence of a treaty.

Section 3(b) suffers from standards that are unenforceable in the absence of the development of measurable standards or an acceptance of arbitrary decision making. This is particularly a problem when the legally applicable terms include things like “meaningful" (otherwise undefined) or "potentially affected" or "special attention." The terms are effectively meaningless as legal terms without further definition. And none appears forthcoming in the Draft LBI. But someone will give these terms meaning, and it is likely that the meanings given may not always please (e.g. conform to the objectives or intent) of the drafters. Section 3(d) is useful, though more useful integrated into Section 2. Its limitation to contractual relations which involve business activities of a transnational character is unfortunate and unnecessarily limiting.

Lastly Paragraph 3(e) has its heart int he right place. It is just that it never manages to get that heart to beat. A reference to "enhanced human rights due diligence" is not helpful. If the treaty drafters want enhanced human rights due diligence they should not cast a spell — that is essentially the operative effect of the section as written. They should spell out what exactly these enhancements ought to be. Certainly the drafters are capable of this when they are of a mind (Section 3 itself is evidence of that). But here thew lack of specificity works against the value of the Treaty in an area where effectiveness is vital. A pity.

Paragraph 4

Again, the spectre of the UNGPs hangs heavy over this Section. It is a pity that the rich development of meaning in that effort does not appear to carry over. Even if one might be permitted to do so, it is also possible to read into this Section the possibility of rejecting the UNGPs approach in these matters and the substitution of something else. And again, the section suffers from lack of specificity precisely where it needs to be more pointed. Strategically, perhaps, a murky provision is one more likely to be acceptable. But it will be acceptable precisely because it implies no real burden.

The inclusion of the limitation on access (which is at variance with the provisions of Article 4 on access by victim support institutions — or at least could be read as inconsistent), "procedures are available to all natural and legal persons having a legitimate interest, in accordance with domestic law" appears at odds within an Article the purpose of which is to burst through the limitations of domestic law by obligating states to rewrite them. That was not what the drafters likely intended, but the door to this effect has been opened by the text

Paragraph 5

This paragraph moves from the adoption of legal measures, to the formulation of policy. At one level it is meant to avoid regulatory capture. But there is little to suggest that capture by other sis any less bad. Indeed, the phrase used is interesting — "to protect these policies from commercial and other vested interests of persons conducting business activities, including those of transnational character". There is a world of prejudgment in this turn of phrase. It is true that business will promote its own interests, but it is not always wise to presume that this interest is at odds with the public interest.

Moreover, it is not clear why those interests ought to be marginalized in the face of other members of the polity also pursuing their own (selfish) interests. This is a fundamental issue of politics in liberal democratic states that remains both troubling and unresolved. More interesting still is the problem of conforming this duty to the legally binding duty of states under their investment treaties. Even more interesting is the issue of the pursuit of business interests when it is a state instrumentality that is pursuing those interests. If there is a convergence of public and commercial policy in the behaviors of state owned enterprises, then it becomes harder to distinguish private enterprises form the interests of others who have access to and are stakeholder sin domestic political processes.

Paragraph 6

This is one of my favorite "back door" provisions. Having gone to the process of expanding the reach of business activities to cover those of domestic firms in traditional host states (Art. 1 Paragraph 3), this Paragraph 6 of Article 5 provides a means by which a state can again exclude these firms form the reach of the treaty through the enactment of provisions in ways that they might conclude would "provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens." Clearly that is not what it is formally meant to do. The paragraph well implemented goes to financial incentives and capacity building, and contextually relevant waivers to ease these firms into a compliance culture. Yet that is not what Paragraph 6 says. Again, the principal failing of the drafting of Article 5 appears here again. Moreover, in the absence of this necessary specificity that cements intent, it is quite plausible to interpret that provision as permitting this sort of waiver.