E. Article 5 (Prevention)

Article 5 (Prevention); From Text to Concept and Politics.

Flora Sapio

Article 5 in the Draft LBI has a stated goal that goes beyond mandatory human rights due diligence. This article has the goal to intervene in the delicate dynamics of state-market interaction. It solves decades of political and academic debates about the merits of different theories of state-market relations by adding a sentence absent from the Zero Draft:

"State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction."

Unregulated markets are more a theoretical construct than a reality. So are fully regulated markets. The first sentence in Article 5 seems to ignore this reality, and instead creates the obligations for State Party not only to regulate the most important actors on private markets — business enterprises. But also to regulate them effectively. According to the logic of this article, the elements of human rights due diligence are no longer limited to identification, prevention, mitigation and communication.

Article 5 is entitled "Prevention", and this may give the idea that the drafters of the LBI conceived of human rights due diligence mostly in terms of prevention – leaving out the elements of identification, mitigation and communication. But in reality, Article 5 tries to broaden the idea of human rights due diligence well beyond these elements. To it, human rights due diligence requires a successful regulation of the activities of business enterprises as a whole.

Which results can make regulation "effective" in reality is an entirely different question, that will have to be answered by those who will have to apply the LBI, or to monitor its implementation?

After imposing on its potential signatories the obligation to shift the equilibria of their domestic and transnational economic policies in favor of the state, article 5 goes on mandate the inclusion in domestic legislation of an obligation to respect human rights and to prevent human rights violations and abuses. This is a generic obligation, that in my opinion should not be confused with human rights due diligence. That is, Paragraph 1 of article 5 only

requires state parties to adopt a specific model of state-market relations, and to include in their legislation a broad and generic obligation for persons conducting business activities to respect human rights.

Mandatory human rights due diligence obligations are distinct from this obligation. Human rights due diligence is only mentioned in Paragraph 2. Also, human rights due diligence measures are qualified as something that shall be adopted "for the purpose of Paragraph 1". These measures exist "for the purpose" of Paragraph 1. Is the purpose of Paragraph 1 the introduction of mandatory due diligence obligations in domestic legislation? No, it is not. That was the purpose of Paragraph of article 5 of the Zero Draft, that stated:

1. State Parties shall ensure in their domestic legislation that all persons with business activities of transnational character within such State Parties' territory or otherwise under their jurisdiction or control shall undertake due diligence obligations throughout such business activities

Article 9 is not entitled "Mandatory human rights due diligence", but "Prevention". As I have explained, Paragraph 1 does not mention the concept of human rights due diligence. That concept is mentioned only in Paragraph 2. Paragraph 2 is modeled after the UNGPs, but with the following differences:

(a) the Draft LBI ignores the concept of supply chains. Instead, it adopts the concept of "contractual relationships", leaving the concrete definition of what "contractual relationships" are to national states.
(b) The Draft LBI uses the narrower concept of "human rights violations or abuses", according to the definition already discussed in this blog post series. This concept also rests on the disjunctive conjunction "or", which creates the following alternatives: either you identify human rights violations, or you focus on abuses. Once the focus on this component of human rights due diligence has been chosen, the state has the further option to decide to focus on business activities, or on contractual relationships. The wording of Paragraph 2.a poses two sets of alternatives, which is always useful to fragment human rights due diligence obligation to the point when they become meaningless

The rests of Paragraph 2 may use a different language, but that does not matter. Prevention, mitigation and communication can occur only after adverse human rights impacts have been identified. If a business does not know what adverse human rights impacts are taking place, that business cannot prevent or mitigate them, or even "communicate".

If the identification of human rights impact is selective, prevention, mitigation and communication strategies will be selective too.

Paragraph 3 just enables a further fragmentation of mandatory human rights due diligence. This Paragraph contains a menu of measures that may facilitate the work of

domestic legislators. After all, Paragraph 3 provides a convenient legislative model, that may just be transplanted into domestic legal systems with little concerns for questions as whether this model will take roots, and if so how.

So, under the current wording of the Draft LBI human rights due diligence may well become a "paper tiger". Unless, of course, domestic states are strong enough to be able to use mandatory due diligence obligations for ends that go beyond the management of markets.

Paragraph 4 may produce interesting results in the institutions of signatory states. On the one hand, states may simply decide to attribute National Action Points the task to implement the Draft LBI rather than the UNGPs. The UNGPs would then soon become dead letter. But, on the other hand, states may see Paragraph 4 as an additional opportunity to distribute resources to domestic interest groups. States may decide to create domestic agencies parallel to NAPs. If the Draft LBI and the UNGPs are not two competing documents, but instead they complement each other, then two different bureaucracies are needed to ensure the best possible level of human rights protection.

Paragraph 5 poses states the obligation to protect implementation of the Draft LBI from domestic and foreign corporate interests. This Paragraph starts from the assumption that the state and corporations are holders of diverging interests, that they are competing actors. Paragraph 5 may work well in those contexts where the state sees foreign corporations as adversaries. But if the state sees domestic and/or foreign corporations as allies, then it is doubtful that it will not take the interest of entrepreneurial groups into account. This latter logic, after all, has been embraced by Paragraph 6 too. So why would the state act differently?

Paragraph 6 demolishes the edifice of mandatory human rights due diligence as follows:

State Parties may 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.

First, **this Paragraph conceives of mandatory human rights due diligence as a "burden"** that the state places on enterprises, **rather than as a legal duty of enterprises**. This "burden" is furthermore **"undue"**. This choice of wording perhaps reveals how the Revised Draft really conceives of human rights due diligence. According to the wording of Paragraph 6, human rights due diligence is an undue additional burden. At least for small and medium-sized enterprises. But, presumably, also for multinational corporations that decide to adopt the form of a small and medium size enterprise to take advantage of "incentives and other measures to facilitate compliance."

Second, it is not clear what the "incentives and other measures" that should facilitate compliance by SMEs are. One can imagine that the state may decide to provide direct and

indirect monetary and non-monetary incentives, such as fiscal exemptions etc. to SMEs. But those states where SMEs are one of the key constituencies may prefer to launch capacity building initiatives, perhaps funded by the International Fund for Victims. In the meantime, states may decide to use "other measures" and just exempt SMEs from human rights due diligence obligations for as long as it will be necessary.