F. Articles 6 – 12

The Genesis of Articles 6 - 12

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This essay briefly sketches out the genesis of Articles 6 – 12 of the Draft LBI, using inputs provided during the Fourth Session of the OEIWG, which were previously summarized by this author.[1]

A. Article 6 – Legal Liability

Article 6 was drafted on the basis of Article 10 of the Zero Draft.[2] The topic of legal liability was discussed together with those of mutual legal assistance, and international cooperation, and their discussion took three hours. Following the discussion, Article 10 of the Zero Draft was completely rewritten. The first paragraph of Article 6 is a new addition to the Draft LBI. This paragraph seems to be based on suggestions that were made by members of the United Nations Working Group on Business and Human Rights. Those suggestions concerned the ability of rights holders to be able to seek, obtain and enforce a broad array of remedied, having deterrent, preventive and redressive elements. The inclusion of wording about administrative liability was suggested by members of the United Nations Working Group on Business and Human Rights.

During discussions on this article, some states observed how liability for legal persons does not exist in their domestic legal systems, and how the inclusion of liability for legal persons in a future treaty would be an obstacle to their choice to ratify the new treaty. Also, an earlier version of this article did not impose liability on parent companies for violations committed by their subsidiaries. This gap attracted the concerns of mostly academic experts, practitioners, and a minority of the states that submitted their comments on the Zero Draft.

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1 See *Commentary by States, Civil Society and Other Actors on the Zero Draft*, THE COALITION FOR PEACE AND ETHICS, available at https://www.thecpe.org/projects/research-projects/treaty-project-project-on-the-effort-to-elaborate-an-international-instrument-on-business-and-human-rights/commentary-by-states-civil-society-and-other-actors-on-the-zero-draft-2018/

2 See *infra*, Flora Sapio, What Changed from the Zero Draft--A Side by Side Comparison.

Originally, this article contained a provision on the reversal of the burden of proof. Members of the United Nations Working Group on Business and Human Rights, and some states, expressed their doubts on this provision, which is now absent from the Draft LBI. Wording about effective, proportionate and dissuasive sanctions was carried over from the Zero Draft, even though some states observed how this wording would present an obstacle to their ratification of the future treaty.

The provision about the incorporation or implementation of universal jurisdiction over human rights is absent from the Draft LBI. During discussions on the Zero Draft, doubts about universal jurisdiction were expressed by the majority of states. Instead, Paragraph 7 of this article contains a long list of international conventions, which may have been included in an attempt to circumvent the doubts expressed by states.

B. Article 7 – Adjudicative Jurisdiction

Article 7 is based on article 5 of the Zero Draft.[3] Compared to its previous version, this article underwent little changes. Article 7 qualifies the jurisdiction as an "adjudicative jurisdiction", adding clarity to the title of the 2018 version of this article — which was "jurisdiction" — but also narrowing down the scope of the power of the future treaty. The renaming of this article may have been induced by the comments submitted by some academic experts, who observed how the Zero Draft was attempting to codify a type of jurisdiction that was adjudicative, rather than prescriptive or executive.

In consultations that were held on the Zero Draft, the majority of states expressed doubts and reservations about the need to introduce the concept of universal jurisdiction in the future treaty. As a consequence, wording that created an obligation for states to include provisions about universal jurisdiction for human rights violations in their domestic law was eliminated from the Draft LBI. However, Article 7 tries to re-introduce universal jurisdiction from the backdoor, by attributing jurisdiction on human rights violations covered by the Draft LBI to courts in the state where victims are domiciled. Wording about jurisdiction being vested in the courts of the state where victims are domiciled were added in 2019, despite the doubts voiced by the majority of states about the earlier version of his article. Several states involved in the consultation also observed how the wording used by this article may have provoked conflicts of jurisdiction.

Paragraph 2 of Article 7 defines the notion of "domicile" of multinational corporations. While in 2018 the notion of "domicile" included the place where a corporation had a "subsidiary, agency, instrumentality, branch, representative office or the like", now the concept of "domicile" as it exists in the Draft LBI has been narrowed down, because this paragraph was deleted from the Zero Draft.

3 Ibid.

This article no longer includes a clause that may have allowed third parties to submit claims on behalf of individuals or groups, even in the absence of any form of consent on their part. This clause was deleted following the suggestion of some states, that observed how it could have legitimized the making of various kinds of claims, which could have been in conflict with domestic legislation, or entirely spurious.

C. Article 8 – Statute of Limitations

The 2018 version of this article contained rules about statutes of limitations for "violations of international human rights law which constitute crimes under international law", and for "other types of violations", included civil claims. Under that version, statutes of limitation would not apply to crimes under international law, and they should not be "unduly restrictive" for other types of violations, included those committed abroad. The goal of the 2018 version of Article 8 seems to have been allowing a sufficient period of time to investigate crimes committed by multi-national corporations, and also crimes that may have occurred abroad.

This article was not well received. The main points of criticism expressed by experts concerned the non-binding nature of its language, its vagueness, and the lack of clarity of the scope of the statute of limitation in civil and administrative cases. States criticized the use of the words "crimes under international law", observing how no definition exists for the concept of crimes under international law in the context of business and human rights. States also observed how no consensus exists on statutes of limitation for violations that are not crimes against humanity or war crimes.

Following these comments, Paragraph 1 was amended by substituting the notion of "crimes under international law" with the notion of "all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole". The vague wording about an "adequate period of time" for investigation and prosecution of violation was replaced by wording about "a reasonable period of time", and language about violations "occurred abroad" was replaced by the words "violations occurred in another state."

D. Article 9 – Applicable Law

The 2018 version of Article 9 allowed "victims" to request that the law of the host state of transnational corporations (but also physical persons) be applied in claims "victims" brought before local courts. This provision was contained in Paragraph 2, which was the "core" — so to speak — of this article. The Draft LBI may purport to be a "victims-centred" treaty, and yet it no longer allows "victims" to request the application of substantive legislation of the host state. From the point of view of a nation-state, the request to apply foreign legislation in criminal cases is simply unacceptable. From the very moment of its conception, the LBI was a treaty premised on the idea of the nation-state as the central actor in international economic relations. This was a core premise of the Zero Draft, and it is still one of the core premises of the Revised Draft.

Unsurprisingly, the majority of the states that submitted their comments on the Zero Draft were against the use of foreign criminal legislation in their domestic courts. States simply acted coherent with their nature and with their goals as autonomous actors. And so Article 9 of the Draft LBI allows states to apply foreign legislation in criminal cases, subject to their domestic legislation. Paragraph 2 further specifies the three conditions where domestic courts may apply foreign legislation. Nothing in these three conditions seems to prohibit administrative organs and agencies, individuals, or State-owned multinational corporations, to request that foreign legislation be used: (a) against their domestic competitors; (b) against multinational corporations headquartered outside the state.

E. Article 10 – Mutual Legal Assistance

In discussing Article 10, members of the UN Working Group on Business and Human Rights observed how they way in which this article dealt with the recognition and enforcement of foreign judgments was unclear. The relevant paragraph of Article 10, however, was not amended following this observation. Instead, a clause was added to Paragraph 8, allowing states to refuse the enforcement of foreign judgments in all those cases where such judgments would prejudice their sovereignty, security, public order or other essential interest.

States instead expressed a different position on this article, observing how the introduction of universal jurisdiction in national law would infringe their sovereignty, pose additional needs for technical assistance, and generally speaking result in an excessive burden, particularly for developing countries. Reactions voiced by states seem to have induced the amendment already described.

F. Article 11 – International Cooperation

This article was modified through the addition of a paragraph introducing the obligations, for state parties, to cooperate in good faith to allow the implementation of commitments under the new treaty, and the fulfillment of its purposes. This article attracted only three comments from states, all of which expressed appreciation towards international cooperation initiatives.

G. Article 12 – Consistency with International Law

The 2018 version of this article contained a paragraph (Paragraph 7) posing states the obligation to avoid conflicts between trade and investment agreements, and the Draft LBI. There seemed to be a strong consensus among states that their trade and investment policies could not be subordinated to the future treaty. Generally speaking, the treaty was seen as a document that could not affect existing rules of international law, and that might have introduced an unbalance between development and human rights. States therefore suggested that the Draft LBI refers to existing norms on the law of treaties, taking into

consideration various interest and concerns – included those related to the re-negotiation of all existing bilateral investment agreements.

As a result of the positions expressed by states, wording about the "existing and future trade and investment agreements" was replaced by a broader and much more generic reference to "any bilateral or multilateral agreements, including regional or sub-regional agreements", touching on issues relevant to the future treaty. Also, in response to concerns that the future treaty would prevail over other sources of international law, a paragraph was added, specifying that provisions in the future treaty will not affect the rights and obligations of states under international law.