F. Articles 11 – 12, and 16 (International Cooperation; Consistency with International Law; and Dispute Resolution

Articles 11 (International Cooperation) and 12 (Consistency with International Law) With a Nod to Article 16 (Dispute Resolution): Technical Provisions With Normative Punch

Larry Catá Backer

The last two Articles in Section 2 of the Draft LBI consist of two provisions common to international agreements. The first, Article 11, in its two paragraphs touches on international cooperation, but beyond those referenced in the mutual legal cooperation treated in Article 10. The second, Article 12, in its six paragraphs, touches on the relationship between the Draft LBI, international law and municipal legal orders through and after the transposition process.

Article 11

Article 11 Paragraph 1 obligates States Parties to "cooperate in good faith to enable the implementation of commitments under this (Legally Binding Instrument) and the fulfillment of the purposes of this (Legally Binding Instrument)." That obligation might be read together with Article 16 (Settlement of Disputes) which obligates State Parties to settle their disputes "by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute." (Article 16(1)). Article 16(2) then specifies only two alternatives (subject, no doubt to reservation). These include submission to the Court of Justice, or to arbitration or both. If both are chosen, then Article 16(3) provides a suggestion about the hierarchy of choice. Together these raise a number of interesting issues.

1. A small drafting issue—Article 11(2) speaks to settlement of disputes to enable commitments under the Treaty *and* the fulfillment of its purposes. Read literally it might suggest that disputes about cooperation might be limited to (and dispute resolution modalities might be activated only when) situations or events in which both predicates are satisfied. Yet that may not make much sense, especially in light of Articles 2 and 3 on scope

and purpose. But there it is and for risk averse lawyers who might prefer to avoid an interpretive trap of unknown consequences, these small drafting points might pack consequences well above their perceived "value" to the core objectives of the Treaty.

2. Cooperation under the Treaty is limited to State Parties. Yet in this victim centered document, and one that also seeks to extend a protective shield to certain human rights defenders, Article 11 might have been a useful place to extend reciprocal rights to cooperation among all key affected parties. That would harmonize the principles inherent in Articles 4-6, and would realize in a useful way the scope and purpose provisions of Articles 2 and 3. Cooperation is central to the objectives of prevention, mitigation and remediation; and state duties under the Treaty will be impossible to implement through a strict top down traditional approach. The objection, that this is a treaty directed to states has surface appeal.

And yet, there is no impediment for treaties to extend to non-State parties some of the benefits of the Treaty document itself, even if it would be undertaken in the context of direct state duty or within an obligation to provide for such rights within municipal law. And, indeed, it is hard to miss that Article 11(2) encourages cooperation "in partnership with relevant international and regional organizations and civil society." Each of them—along with victims (Article 4) ought to be able to proactively participate in the management of duty in Paragraph 11, at least to the extent duty (to write this into municipal law or to act by direct operation of the Treaty) can be extracted from its text.

3. Article 11 Paragraph 2 purports to frame the scope of the cooperation contemplated in Paragraph 1. At its heart are three areas of cooperation:

> a. promoting effective technical cooperation and capacity-building among policy makers, operators and users of domestic, regional and international grievance mechanisms;
> b. Sharing experiences, good practices, challenges, information and training programs on the implementation of the present (Legally Binding Instrument);
> c. Facilitating cooperation in research and studies on the challenges and good practices and experiences for preventing violations of human rights in the context of business activities, including those of a transitional character.

Like Article 11(1), Article 11(2) might be best read together with Article 13 and its establishment of something that might begin to function like a secretariat. That is useful. Yet by placing this here and without a cross reference to Article 13, the Treaty runs the risk of being read as limiting cooperation to the universe of activities that fall within those specified in Article 11(2)(a) – (c).

Article 12

Article 12 serves, as do these sorts of provisions elsewhere, for the expression of the ideology of state supremacy in international law contextually framed by the needs that the treaty is meant to serve. It is in that context that Article 12(1) appears booth ordinary and

unremarkable. It is also, as ordinary and unremarkable, quite amenable to infiltration by the traditional modalities of international law that makes extraterritorial application of the law of states with a mind to project their law in that way.

Article 12(2) is written in the form of an exception to Article 12(1):

> Notwithstanding art 7.1, nothing in this (Legally Binding Instrument) entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

It is not exactly clear what this means. One way of reading it to provide a waiver of the principle of sovereign integrity by allowing extraterritorial interventions when the host or receiving state consents. Another way of reading this text is that it applies only to that (undefined) class of activities that fall within a definition of "exercise of jurisdiction" and the "performance of functions that are reserved" to a host state by its own law. In that context, the application of Article 16 again becomes interesting. Thus, it might suggest that were Projecting State A to seek to project itself through law or control activities in Host State B, might Host State B find itself subject to dispute resolution under Article 16 (and especially the choices under Article 16(2), were it to enact blocking legislation. That would be an odd result under Article 12(1) but plausible. If that blocking legislation is deemed contrary to the Treaty but its invalidity be deemed contrary to the constitutional values of Host State B what result?

Article 12(3) characterizes the principles of the Draft LBI and its obligations as a minimum that can be altered to impose greater duty under the conditions specified in that question. Of course, the triggering standard — "more conducive to the respect, promotion, protection and fulfillment of human rights in the context of business activities and to guaranteeing the access to justice and remedy to victims of human rights violations and abuses in the context of business activities"—invites incoherence in interpretation among jurisdictions. But this Draft LBI has already evidenced a substantial toleration of such dissonance in the service of permitting at least some (key influence driving) state to "do it right" as that might have been understood by the drafters. But guarantees are hard to make in the field of politics, and harder to make good where the burden is on a judiciary to help make it so.

Article 12(4) is yet another textual orphan in this Draft LBI. It provides that "The provisions of this (Legally Binding Instrument) shall be applied in conformity with agreements or arrangements on the mutual recognition and enforcement of judgments in force between State Parties." Its provisions might have been more usefully placed at Article 10. Alternatively, a cross reference might have been useful. In any case, the provisions will be limited to the extent that such instruments are binding on the relevant states. It is likely that the drafters had certain key agreements in mind—referenced, of course in Article 10. Yet Article 10 might be read as effectively modifying them, so absent some harmonization, this provision creates an issue of interpretation.

Lastly Article 12(6) sets out the interpretation provisions of the Draft LBI. It consists of two parts woven together with the always dangerous-for-textual-interpretation connector "and". States Parties agree that any bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, shall be compatible and shall be interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols.

The first part is unremarkable. It imposes a reasonable obligation to ensure coherence among legal instruments. The proof is in the implementation, of course; but it always is. And it must be read in its temporal and essentially temporary sense. These sorts of provisions last only as long as the cumulative obligations to which they refer are not, in turn, superseded by a later in time legal instrument. This is also well known—to the elites who will be expected to operate this system for the benefit of those for whom it is written but who would be essentially incapable of making sense of its layers of complexity.

The second part also unremarkable but perhaps more interesting. It can be read in one of two ways. The first and more conventional way would be grounded in the essential constraining function of the word "and" between "compatible" and "shall." That would require only that subsequent agreements should be developed in accordance with and interpreted in conformity to the understandings in the Draft LBI. That is an imperative that, as mentioned before, is only as binding as the will of the States Parties to remain committed to the Treaty. Just as a prior legislature may not bind future legislatures, this provision is unlikely to be useful as a means of disciplining future action. It is of course necessary to interpret this provision in light of the limitations of Article 15 on the applicability of protocols, but the approach adopted in the Draft LBI is also unremarkable.

But it may also be possible to interpret the provision as permitting an action under Article 16 against states which, taking advantage of their authority to enter into these multilateral and regional agreements, do so in ways that might run contrary to the Draft LBI. In that event the provision could be quite potent. Lastly, and more as an aside, one might also be tempted to pull the language "interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols" out of its context to suggest to courts the baseline for interpreting domestic law applications or transpositions of the state obligations under the Draft LBI—also potentially litigable under Article 16.

* * *

Where does that leave the individual seeking, in good faith, to apply the Treaty against the constitutional traditions of states within an intertwined system of production that crosses borders without regard to the resulting conflicts among the "niceties" of legal (sub)systems? First it leaves all litigants and other actors substantially in the same place they were before the Treaty—national and international law transposed into domestic legal orders poses a complex issue for states which have either been ignored or resolved in potentially incompatible ways. Second, it constructs dispute resolution as a marginal actor but one with potent possibility. Dispute resolution lurks around the edges like a brown

recluse spider—deadly but with broken webs built within dark and moist recesses of closets. And always there is ambiguity built into a text that already concedes too much fracture. Third, compatibility merely makes it possible for groups of states to develop regional approaches to the Treaty. These might then be used to untangle global relations among the emerging global trading systems—the Chinese Belt and Road Initiative States, and the U.S. America First system. Beyond these centers of emerging empire the rest of the global political community will either have to choose sides, or they will have to subject themselves to simultaneously applied legal systems on their territories. In effect, the Treaty ensures the loss of sovereignty and sovereign power over domestic legal orders by ensuring that weaker states will effectively have to cede substantive control over that portion of production chains subject to the control of the home states of apex enterprises within production chains. And the "victim" there is only the quite cold comfort that they too much cede autonomy to those who have the capacity and resources to vindicate rights on their behalf. It is to them that the victim will be beholden—and not just beholden, but obliged to conform to the expectations that they will inevitably impose. It is in those relationships that law will effectively be made well outside the shadow of the Draft LBI.