F. Article 14 (Implementation)

The Devil is in the Implementation: Article 14 as a Mirror Reflecting the Strength of Vision and Challenges of Realization of the Draft LBI

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Article 14 of the Draft LBI ostensibly treats the ordinary issues of implementation. And it does so in an equally ostensibly conventional way. And yet, as in other portions of the necessary "boilerplate" of this Draft LBI, these technical provisions contain potentially consequential effects on the way that the Treaty is actually constructed and applied on the ground to a host of the unsuspecting.

The text of Article 14 is broken up into five parts, each of which is pointed in quite different direction. Its bricolage suggests both the larger issues of organization in the Treaty draft, and the effort to use these sorts of provisions for conceptual clean up. In both respects the Treaty draft comes up short. And that is quite lamentable.

Let us first consider the text:

Article 14. Implementation

1. State Parties shall take all necessary legislative, administrative or other action including the establishment of adequate monitoring mechanisms to ensure effective implementation of this (Legally Binding Instrument).

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> 2. Each State Party shall furnish copies of its laws and regulations that give effect to this (Legally Binding Instrument) and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations, which shall be made publicly available.
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> 3. Special attention shall be undertaken in the cases of business activities in conflict-affected areas including taking action to identify, prevent and mitigate the human rights-related risks of these activities and business relationships and to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence.
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> 4. In implementing this (Legally Binding Instrument), State Parties shall address the specific impacts of business activities on while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons.
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> 5. The application and interpretation of these Articles shall be consistent with international human rights law and international humanitarian law and shall be without any discrimination of any kind or on any ground, without exception.

Even a cursory glance at these provisions suggests the way that Article 14 serves as an accurate mirror reflecting both the strength of visions and the challenges of realization that ultimately describe the entire enterprise of this draft. One gets a better sense of this (and generally of the flabbiness of international treaty writing as a vehicle for the objectives of the drafters in this case) by reflecting briefly on each one of the five paragraphs of Article 14.

Paragraph 1

Paragraph 1 is drafted in the form of a "necessary steps" provision. Had it been written in the conventional form it would have been unremarkable. But it contains two small textual oddities that are worth a closer examination.

The first appears to broaden of the scope of the "necessary steps" provision to include "administrative or other action." That raises interesting issues. On the one hand, as written the provision might impose on states a duty of regulatory and policy coherence. That would be welcome whether or not the Treaty is actually ever realized. But to the extent is becomes explicit here, then again it might acquire teeth through Article 16 — but only as long as some state is willing to demand such coherence by others, and only if the court is willing to read the provision that way. Of course, of that if what the drafters meant they might have been more explicit. Playing interpretive excavation games — the usual sport around treaties — does no one any favor.

The second and perhaps more acute oddity is the insertion in the list of "necessary steps" — almost in passing — a reference to "adequate monitoring mechanisms." Monitoring is the most intrusive and least realized elephant in the room that is the Draft LBI. It appears in several places in the Draft. Article 5 (Prevention) speaks to monitoring with respect to state duties to develop a municipal law that imposes on all persons conducting business activities an obligation to monitor human rights impacts (Article 5(2)(c), though as already discussed in ways that remain deeply undefined. It also imposes on states a similar legislative duty to impose on persons engaged in business activities a duty to communicate with and account to stakeholders respecting among other things policies and measures adopted to monitor any actual or potential human rights violations or abuses (Article 5(2)(d), and again on the basis of terms that may defy coherent application across legal systems.

Beyond Article 5 — and an imposition of monitoring requirements on persons engaged in business activities, the Draft LBI is silent with respect to monitoring by states (onto which such burdens appear light indeed) except here in Article 14(1), and again merely in passing. For a Treaty built on the foundations of the critical importance of monitoring for prevention, mitigation and remedy, it seems odd indeed that except for this provision the Treaty appears indifferent to any composition of a duty on states to more precisely monitor compliance and to monitor their own behavior either with respect to their Treaty duties or with respect to their own independent obligations under international law and norms. That is an enormous hole. It is a hole perhaps large enough to allow passage for state owned enterprises, state affiliated economic actors, and state finance and development mechanisms. The result would substantially weaken the Treaty.

This silence with respect to monitoring speaks to a silence with respect to accountability that ought to cause some concern. In the rush to use states as a vehicle for the imposition of obligation on enterprises and others engaged in business activities — and to oblige them to monitor and to be held to account — the Treaty provides precious little by way of mechanisms for state accountability. This is certainly worrisome with respect to the effectiveness of the mechanics of the Treaty itself and the success of its implementation. More importantly, it appears to create a potentially important gap in a context in which states are not merely regulators but also sovereign participants in business activities. Accountability ought to be at the center of the Treaty — it remains at the periphery, not just with respect to economic actors, but also with respect to the state as well.[2]

Paragraph 2

2 For a discussion of accountability see Larry Catá Backer, *Unpacking Accountability in Business and Human Rights: The Multinational Enterprise, the State, and the International Community* in ACCOUNTABILITY AND INTERNATIONAL BUSINESS ORGANIZATIONS:PROVIDING JUSTICE FOR CORPORATE VIOLATIONS OF HUMAN RIGHTS,LABOR,AND ENVIRONMENTAL STANDARDS (Liesbeth Enneking, et al., eds. Routledge, forthcoming 2019) also available at SSRN: https://ssrn.com/abstract=3163242 or http://dx.doi.org/10.2139/ssrn.3163242.

This paragraph is interesting for its omission that rather than for its text. It imposes an obligation of transparency on states; and it expands that transparency by the creation of a central repository for "laws and regulations that give effect to this (Legally Binding Instrument) and of any subsequent changes to such laws and regulations or a description thereof." That is to be welcomed.

But if transparency is the goal, one must ask to whom it is directed. If it is directed to the international business and human rights governing classes then this provision works well. But if it is meant to empower people who might potentially fall into the legal category of "victim" — and if those victims are members of traditionally marginalized sectors of a local society (women, indigenous people, the poor and illiterate) then it is not clear how this provision could possibly contribute to the core objectives of the Draft LBI and especially its Articles 3-5. Indeed, as written, the provisions merely enhances the power of elite international actors (including elite human rights defenders) to act for a large class of people who are themselves invested with rights and protected from harm but now in ways that are beyond their capacity to act autonomously for themselves.

What might have helped? Here are a few suggestions: (1) a requirement that all such provisions or descriptions be published in local languages (however there may be many that do not constitute an official language of a state); (2) that where it is likely that people cannot read that alternative means of furnishing the information be provided; (3) that special measures be undertaken for specially-abled people traditionally excluded from transparency schemes (the deaf, the blind, etc.); (4) that the state reports annually on efforts to ensure that its rules are effectively communicated to all people; (5) that people be given an effective right to engage with state authorities in the development and enactment of any such measures and that the state be required to report on the effectiveness of such engagement; and (6) that the Human Rights Council annually prepares a report on the compliance by all signatories with the provisions of the Treaty.

Paragraph 3

This paragraph correctly draws attention to the special circumstances in what the Treaty calls (but fails to define) as "conflict-affected areas." As written the paragraph appears to serve more as a"feel good" provision than as something that can, by its own terms, have any effect. Let me suggest some of the issues. First, the broadness of the term dissipates its impact. Certain areas of Chicago, USA can as easily be considered conflict affected areas because of murder and violence rates comparable to those of the most conflict intense provinces in the Congo. A definition would avoid strategic misuse of the term and its obligations. Second, and more importantly, the special obligations imposed require a substantially greater amount of state capacity and resources to actually implement, and implement well. Yet conflict affected areas tend to exist in their worst forms precisely in those states that lack capacity and resources. And, indeed, conflict affected areas tend to exist in those territories in which state authority is at its weakest.

In that context, the development of elaborate special obligations can have little impact. Certainly such states will happily write such rules into their systems. And that is where it will end. More likely, these states will serve as the analogue to individuals categorized as "victim" and lose to some extent their sovereign capacity. Extraterritorial projections of state authority from other places, or the expectation of the governmentalization of enterprises with resources available form elsewhere may be a tempting way to meet the implementation gap. But these ought to prove worrisome. The worry arises from the willingness of globally floating elites to manage the effects and realities of state sovereignty and move actors around to meet substantive requirements without a careful (and accountable) consideration of the embrace of sovereign equality (Article 12(1)).

Lastly, it is worth noting that this sort of provision is only as effective as the monitoring and reporting mechanisms that are built into them. In the absence of both transparency and accountability, this provision will likely be dead letter (except for academics and policy makers who will continue to earn their living pointing out these obvious consequences in context). And yet all one is left with is the high minded ideal with any sort of mechanics for its effective implementation and operation. Much more thought is required here.[3]

Paragraph 4

Paragraph 4 serves the valuable purpose, like that of Paragraph 3, of focusing on special needs populations. In this case the focus is on marginalized populations, as defined in the paragraph. Yet the drafting might raise some issues. It directs states to "address the specific impacts of business activities on while giving special attention to those facing heightened risks of violations of human rights within the context of business activities."

First a couple of commas, strategically placed might have improved the readability of the section and acknowledged that there are two obligations specified ("specific impacts on" and "giving special attention to"). These are or can be quite distinct obligations. But it is hard to tease that out form the terse language used here. Second, while the provisions might be understood as bringing remedial parity to all affected groups, care will have to be taken to prevent the Treaty from becoming driven solely by the focus on the identified groups. That can have a pernicious consequence if as a result the state law based obligations ignore other groups (on the "it is enough if we focus Treaty obligations solely on the identified groups and treat all others under a different set of standards"). Second, this sort of provision, like Paragraph 23, requires strong mechanisms for transparency and accountability. Their absence has the potential to turn this provision, too, into a "feel good" effort with no real effect.

3 For a discussion see Larry Catá Backer, *Corporate Social Responsibility in Weak Governance Zones,* SANTA CLARA LAW REVIEW 14(1):297-332 (2016) also available at SSRN: https://ssrn.com/abstract=2561113 or http://dx.doi.org/10.2139/ssrn.2561113).

Paragraph 5

This last provision is also unremarkable, but also the least likely to be actually implemented. But it also raises two difficulties.

The first touches on the first part of the sentence: it memorializes an approach to the jurisprudence and legal effect of international law that does not reflect (and indeed is rejected) by several important states, and more importantly by their constitutional orders as enforced by their judiciaries. In the face of that difficulty, it is not clear what this declaration does to advance the ability of states to use this Treaty to advance the scope and purpose rules of Articles 2 and 3. At best, this sort of provision will be read within the constitutional and regional traditions of states. The European Court of Justice will likely read this with substantially different eyes than the US Supreme Court. And the Supreme People's Court of China will likely approach the issue of the internationalization of Chinese law from yet a different and likely much more narrow perspective. Now the question that follows is whether such differences can constitute either breaches of the Treaty or disputes cognizable under Article 16. The question is interesting but unlikely to be pressed. And that is a pity.

The second touches on the end of the sentence: "and shall be without any discrimination of any kind or on any ground, without exception." Again, the sentiment is lofty. A reference to the relevant conventions against discrimination as a baseline might have been useful. Otherwise the terms are free floating and will acquire meaning(s) only within the constitutional traditions of states. But that gets the Treaty effort nowhere. If that is the case there was no point to actually including its terms in Paragraph 5. So what does it add? That remains mysterious. First it suggests an aspirational standard—again the head of the question of the Treaty as a framework document rather than a Treaty comes back to the foreground. Second, if applied literally, then it imperils the sentiments of Article 14(3) and (4) to the extent they are meant to permit affirmative responses. That is not what was meant, but it certainly within the plausible range of interpretation to use this section to limit the ability to use Articles 14(3) and (4) to provide affirmative protections for traditionally marginalized grounds. As usual in Treaty writing, even the best intentions can produce unintended textual and interpretive consequences.