COALITION FOR
PEACE AND ETHICS

13 October 2022

His Excellency Ambassador Emilio Izquierdo
Permanent Representative of Ecuador to the United Nations in Geneva
Chair Rapporteur of the OEIGWG Resolution 26/9

Dear Ambassador Izquierdo:

It is my great privilege, on behalf of the Coalition for Peace and Ethics, of which I am a member, to transmit to you this intervention. It is my hope, as well as that of the Coalition for Peace & Ethics, that this intervention will prove useful to your Excellency, as you and your colleagues continue to seek to fulfill the mandate of the OEIGWG. We stand ready to aid that effort, to the best of our abilities. Please accept this intervention in the spirit in which it was drafted—one of loving sympathy for the fundamental goals of the LBI project, but one which believes that it is now time to provoke new thinking and discussion regarding LDI, a request already transmitted by your excellency. The intervention now follows:

Intervention

After a long silence--which provided much space for the sport of gossip that is never a good sign for the successful concoction of an international instrument--Ambassador Emilio Izquierdo, the Permanent Representative of Ecuador to the UN in Geneva and the Chair Rapporteur of the OEIGWG Resolution 26/9 at last conceded the obvious in a letter dated 6 October 2022 and circulated to the usual crowd of ″excellencies″ who have crowded around the treaty making process and crowded out anyone or anything that stood in the way of a vision stubbornly metastasizing its own inner demons.

The letter of 6 October 2022 to relevant excellencies expresses this in the more elegant and nuanced language to which people holding diplomatic office are more accustomed. A pity really--but the (longish) letter in its essence might be reduced in importance to its core objective, to ″provoke new thinking and discussion regarding the LBI″.

Indeed.

In several ways this variant of the Treaty project, like the meandering path of its predecessor project, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), has now exhausted itself in terms of ideas, approaches, ideological development, and the usual forms of international politicking that sometimes saves even the most ridiculously pathetic (the term is used in its literary sense, evoking pathos) projects from oblivion. The ″put up or shut up″ moment is now at hand. There is nothing that can be done to salvage this project that does not substantially alter its ideology, principles, character or form. The ″leading forces vanguard″ that has kept a tight control over its production has essentially conceded that as it now appears, the treaty form is fatally unpalatable and thus seek refuge under cover of a framework approach that is meant to salvage the ideology of the effort. Worse it is a tactic that borrows from others without either attribution or participation (control, after all may be a greater motivator than its product). As text the provisions remains a hot mess of failure to forthrightly transpose its governing ideology into use as law; as is usually the case, masters of ideology make poor students of legal textual drafting.

And in the end, this herculean effort to emit something significant will produce the equivalent of a burp: the Chinese may be tempted to ignore it, or turn it into a vehicle for the further development of Socialist human rights and internationalism; the Americans may be tempted to ignore it as well though like the Chinese will laud the effort while turning text to the greater glory of its own markets and profits driven project of a rules driven multilateral order under the leadership of the US. Developing states may be tempted to use it strategically as a bargaining object in their state-to-enterprise wheeling and dealing for money, jobs, and a cut of the action (with a side glance to the human rights and sustainability implications of its dealings). And the Europeans will continue to bask in the glory of ideological grandstanding the reality of which will be buried within multilateral commissions designed to talk through specific issues of compliance--the template being the deals with Cuba in 2016 and now China.

Still, the effort to add a legal superstructure is a worthy project, made worthier within the dominant cultures of public-private compliance oriented legalization that is the hallmark of the present age. So here is some new thinking that is as likely to be ignored as anything that isn't both newly provoked and scrupulously aligned with the current structures and ideologies of the third draft LBI:

> 1. The changes to the definition section continue to elaborate a motley *dreamscape* of legal *bricolage* the greatest value of which will be its post-modern textual mellifluidity. It must be read; not done. Strictly read, terms like ″adverse human rights impact″ are impossible to apply--except as plainsong at vespers. And it has a certain beauty--chanted. Human rights abuse is necessary except for its narrative emphasis (this is especially evident where the drafters fail to use the term even where it is necessary in the definition of human rights due diligence). Remedy consists of a concoction of quasi-contract sensibilities but which, given the context sound in tort (and thus serves as an endless vat of confusion; ″effective remedy″ effectively undercuts the

underlying normative principle in ″remedy″ and implies the quasi-administrative (and thus victim de-centering) character of remedy; and ″relevant state agencies″ adds little but posturing by defining the apparatus of state as the combination of institutions that comprise the apparatus of state.

2. These problems are merely symbolic of the deeper drafting issues that convert the treaty into an object of legal farce. It is time to realistically acknowledge that the task the small and tightly self-referential group that is responsible for this is an impossible one--to use the language and sensibilities of markets oriented liberal democracy against the liberal democratic project of bottom up, profits oriented, privately driven choices in the operation of economic activity. Or better yet to just reveal the object and write something that more cleanly serves not just to expose but to efficiently translate that new anti-markets state based administrative bureaucratic management model the object of which is to realize a particular vision of human rights and to de-center economic activity as one of its primary tools into the language of an honest and clear set of treaty provisions. That certainly is an ideal held by important actors (e.g., Justice is Everybody's Business campaign). Still, at bottom this is a political and normative discussion that far exceeds the bandwidth of a project of legalizing the cost-value structures of economic activity engaged in by public and private actors across borders. That, of course, is the problem--such a project is at best premature, and at worst so disconnected from the current political reality that its realization is, as it is said in some quarters, dead in the water. Worse, it is in some senses dishonest by hiding rather than foregrounding the transformative principles that drive it and with respect to which the resolution f which ought not to be left (at least in liberal democratic societies) to the tastes and desires of any group of self-appointed ″leading forces.″

3. It is heartening to see in the Ecuadorian Mission revisions a firm and consistent commitment to a framework model. A pity that the Mission lacked the courage to acknowledge this concession, or to credit its authors--but that is a function of the petty squabbles among academics that tend to dirty the profession with the sort of melodrama best left to *telenovelas*. Still, there is value in the turn from the sort of preachy Savonarola heretic burning approach of the earlier drafts to something more realistically accommodating. Yet--as a provocation--why do this on the sly? It is time to simply cast aside this Zombie version of the *Norms*.

4. What works is not variations that amount to a sad re-animation of what must be understood as Zombie Norms. More fertile ground may be found in the modalities of mandatory human rights due diligence and diligence reporting regimes. These are palatable, and they can serve as the core around which a legality of both human rights and sustainability in economic activity can be built in and through international instruments. What works is a framework approach to the building of unity around core principles but at least initially --in the language of the proposed changes to the OEIGWG 3rd draft, ″consistent with its domestic legal and administrative systems." What one speaks to here is a system built around the institutionalization of compliance based institutional mechanisms within enterprises--an LBI built around the core European

principle of margins of appreciation. This is a framework treaty in its essence as a hub of principles effectuated through spokes of margins of appreciation producing wheels of compliance .

5. The LDI still suffers from many of its original sins--respecting its incompatibility with corporate law and governance principles, with principles of jurisdiction, and of the recognition and execution of judgments, and a sort of heavy handed though indirect principle that its provisions void every other article of international and national law inconsistent with its provisions. And perhaps the greatest sin of all--the failure to confront the ultimate paradox of the UNGP's state duty to protect human rights--states are not bound by "internationally recognized human rights"; enterprises are but only in markets and transnational space. States enforce those rights to the extent they desire and up to the limits of their willingness to convert recognition to legal form. Solving the fundamental problem of international law--that it binds states only to the extent they permit it, cannot be solved by avoidance or through the quite interesting effort to turn enterprises into an abstracted territory for the direct application of "internationally recognized human rights" by the very states that resist the concept in the vindication of the constraints of the modern state system itself. The resulting fracture would produce a generation of instability in the administration of law among and between states. The selective application of the rules to some but not all economic actors produces multiple sets of legal obligation and a caste system for economic collectives that again turns the clock back not forward.

6. All of this needs to be cleaned up. A suggested best course--it is time for the Chair Rapporteur to declare the end of this portion of the Treaty writing project; that he appoint small group of people unconnected to the drafting of the current draft to revise (1) the form of the draft from its current to a framework approach; (2) to strip the draft of its granularity and revert to the articulation of core principles around which margins of appreciation of human rights and sustainability could be developed; and (3) stricter accountability measures could be built in around the principles of mandatory due diligence measures.

None of this will come to pass. The logic of the treaty process must play out--and its drivers must be permitted the role of Greek tragic figures blaming everyone but themselves, and their control mania, for the wreck that this project appears to be becoming. But this is neither the first nor the last time that these naive, overplayed projects in idealism will come to a bad end. The tragedy is that this could be avoided. But human be as humans are.

The Coalition for Peace & Ethics, and its members, stand ready to assist in the great task of re-orienting the LDI toward a framework structure grounded in what the present draft already foregrounds--the critical importance of margins of appreciation around a core set of consensus normative principles, and a focus on the modalities of due diligence based compliance creating more intimate connections between business operations and the public apparatus of state in appropriate ways. We understand that there are those already well prepared to assist in the development of appropriate language, and thus the call for a

new, untainted, technical writing committee in our point 6 above. We are hopeful that a framework/margins of appreciation approach more closely aligns with the international normative agendas of the socialist, liberal democratic, and development states, and that conversations among them might on this basis be possible to deepen. Lastly, we understand that many, including substantial allies among state and non-governmental actors might be disappointed. At CPE, we sympathize, but also understand, as John Ruggie did in 2006, that long, complex, transformative journeys cannot be accomplished quickly or in one swift stroke—not, anyway, if it is to last. The long journey of the OEIGWG has just begun. Our European stakeholders have already pointed to that initial regulatory wedge through which the larger normative project might begin to make sustained progress. It is a wedge, in the form of the centrality of compliance oriented mandatory due diligence, that has already been embraced by the LBI, though not as pristinely as it might be. We hope that this path might eventually produce a less charged atmosphere where progress, under the leadership of Ecuador, might be attained.

We close by sending you our best wishes.

Larry Catá Backer
For the Coalition for Peace & Ethics