



## **Advancing international cooperation in the service of victims of human rights violations in the context of business activities**

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The zero draft of a “legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (hereafter referred to as LBI) was released by the Permanent Mission of Ecuador on behalf of the Chairmanship of the United Nations Human Rights Council’s (HRC) Open Ended Intergovernmental Working Group (hereafter referred to as OEIGWG) established under HRC Resolution 26/9<sup>1</sup>. The zero draft comes during a period when multilateralism has been facing attacks at multiple fronts<sup>2</sup>, including attempts to weaken multiple multilateral mechanisms for facilitation of international cooperation. Yet, voices from all over the world, especially from developing countries and civil society, that support the initiative towards an LBI reflect a belief in, and insistence on, international cooperation as means to advance human rights aspirations and protections.

The zero draft of the LBI opens up an opportunity for those voices to be heard. It aims at ensuring “an effective access to justice and remedy to victims of human rights violations in the context of business activities of transnational character, and to prevent the occurrence of such violations”<sup>3</sup>. A victims-oriented focus for a future LBI<sup>4</sup> had emerged as a common denominator among stakeholders that have participated in the process of discussing an LBI, particularly during the first three meetings of the open-ended intergovernmental working group on this issue<sup>5</sup>.

This brief provides some reflections on the approach to the State’s role and obligations under the zero draft of the LBI. The reflections are based on analyzing the draft text in light of the discussions and proposals that have been made during the three meetings of the OEIGWG<sup>6</sup> held in 2015, 2016 and 2017.

### **Abstract**

A zero draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, is the subject of discussions in an inter-governmental open ended working group under the auspices of the Human Rights Council (15-19 October 2018). The draft aims at harnessing international cooperation among home and host states of business enterprises in order to address barriers to get remedies to victims of human rights violations in the context of business activities of transnational character. This brief discusses the approach to States’ role and obligations as proposed under the zero draft.

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Un avant-projet d’instrument juridiquement contraignant visant à régler les activités des sociétés transnationales et autres entreprises au regard du droit international des droits humains est débattu au sein d’un groupe de travail intergouvernemental à composition non limitée sous l’égide du Conseil des droits de l’homme (du 15 au 19 octobre 2018). L’instrument a pour ambition de mettre en valeur la coopération internationale entre les États d’origine et les États hôtes des entreprises afin d’éliminer les obstacles que rencontrent les victimes de violations de droits humains commises par des sociétés transnationales pour accéder à des voies de recours. Le présent rapport examine le rôle et les obligations des États tels qu’ils sont abordés dans l’avant-projet.

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La elaboración del borrador preliminar de un instrumento jurídicamente vinculante para la reglamentación de las actividades de las empresas transnacionales y otras empresas comerciales en el derecho internacional de los derechos humanos es objeto de debate en un grupo de trabajo intergubernamental de composición abierta creado bajo los auspicios del Consejo de Derechos Humanos (15 a 19 de octubre de 2018). El instrumento tiene por objeto fomentar la cooperación internacional entre los Estados de origen y de acogida de las empresas comerciales a fin de eliminar los obstáculos que afrontan las víctimas de violaciones de los derechos humanos relacionadas con las actividades comerciales de carácter transnacional para obtener reparación. En este Informe sobre políticas se examina el planteamiento del borrador preliminar respecto a la función y las obligaciones de los Estados a este respecto.

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## **A vision of international cooperation resting on strengthening domestic systems**

The zero draft seems to embody a vision that rests on advancing international cooperation and governance through strengthening national legal and institutional systems<sup>7</sup>. The approach proposed on behalf of the Chairmanship of the OEIGWG adopts a traditional treaty making approach, whereby a future LBI will be implemented and enforced by State Parties to the instrument. It focuses on advancing national systems in a way that addresses practices by business enterprises, and their implications on the States' ability to fulfill State obligations under international human rights law.

Depending on the legal system of a country, treaties such as this future LBI become part of national law either automatically upon ratification of the instrument thus making it directly enforceable by national courts and other implementing authorities, or upon legislative action by the national legislature through an act incorporating the instrument into domestic law. Additionally, the implementation of the instrument will also require more specific legislative action or implementing legislation, especially in regard to those provisions which are not detailed with enough specificity but provide for policy space to adopt different approaches (see for example Article 9 of the zero draft on Prevention). Accordingly, the parliaments and other implementing authorities will play a major role in enabling the proper implementation of such an LBI. This approach is similar to other human rights treaties such as the Convention on the Rights of Persons with Disabilities<sup>8</sup>.

The "Non-exhaustive list of documents consulted during the preparations", which was circulated by the Permanent Mission of Ecuador to the United Nations and other International Organizations in Geneva, on behalf of the Chairmanship of the OEIGWG, shows that multiple human rights instruments have been consulted in the process of developing the zero draft. This explains the similarity in the wording of several provisions to other human rights treaties (see for example the Article on Mutual Legal Assistance). This might make it easier for States to engage in negotiations on and future implementation of the LBI.

The Preamble, setting the context in which the treaty will eventually be interpreted and applied, emphasizes the States' "obligations and primary responsibility to promote, respect protect and fulfill human rights and fundamental freedoms", adding that "States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law"<sup>9</sup>. Indeed, the approach in the zero draft keeps the focus in many articles on State obligations - e.g. most provisions start with 'State parties shall'. While this approach might be considered as expanding the burdens on States under international human rights law, it is also a recognition that the accountability of business enterprises, includ-

ing transnational corporations, will not advance unless national systems are enabled to facilitate victims' access to a forum to bring claims against violating entities, and to advance cooperation among the jurisdictions linked to the business activity. This approach, in the end, will facilitate the State's fulfillment of its obligations under international human rights law.

The effectiveness of such a treaty, if adopted along the lines of the approach proposed in the zero draft, will rest on building effective implementation mechanisms at the national level, including investing in judicial systems and investigation authorities. Furthermore, effective implementation would require States to enable jurisdiction of their courts in cases where their nationals and business entities are implicated in wrongdoing including in their conduct abroad (Article 5). This is in addition to developing national legislative systems to prevent violations and ensure due diligence, including through "effective national procedures" to "enforce compliance" (Article 9), advancing the national legislative framework for civil, criminal and administrative liability in the context of business activities (Article 10), and improving institutional frameworks in order to enable effective fulfillment of commitments pertaining to international cooperation and mutual legal assistance (Articles 11 and 12).

It is worth highlighting that in multiple areas, the proposed zero draft puts the victims of human rights violations in the context of business activities in the driving seat. For example, Article 8 is dedicated to "Rights of Victims" and Article 7.2 provides that victims may request that "all matters of substance regarding human rights law relevant to claims before the competent court may be governed by the law of another Party where the involved person with business activities of a transnational character is domiciled". Furthermore, Article 10.4 provides that courts asserting jurisdiction under the LBI may require reversal of the burden of proof for the purpose of fulfilling the victim's access to justice.

Overall, the zero draft seems to present a vision of international cooperation between the home and host states of business enterprises, along with those jurisdictions with close links to the business activity, such as jurisdictions where there is 'substantial business interest' of the concerned business entities<sup>10</sup>. Collaboration among these jurisdictions would be essential in order to advance the fulfillment of the States' human rights obligations in relation to the conduct of business activities. Indeed, in today's world, profit-seeking activities are often internationalized and interconnected. Human rights violations within this context would require a response at the international level without marginalizing domestic systems.

Overall, this approach reflects a realization that international cooperation starts with strong and effective domestic institutions and capacities. One can notice a stark contrast between this vision and that embodied in the rules under the international investment protection regime. The latter, based on more than 2,300 international investment agreements (IIAs)<sup>11</sup>, is void of a vision for cooperation

between the home and host states of investors. An investor-state dispute settlement (ISDS) system enabled through international arbitration, which is provided for in more than 95% of IIAs<sup>12</sup>, facilitates the direct confrontation of investors with States, and an intrusion into the State's policy space to undertake legitimate regulation in the public interest. It also contributed to marginalizing the role of the national judiciary in both developed and developing countries<sup>13</sup>.

### **States to clarify the obligations of business enterprises under domestic law**

The proposed LBI does not include direct obligations for business enterprises, but recognizes in the preamble, in line with the Guiding Principles on business and human rights<sup>14</sup>, that *"all business enterprises, regardless of their size, sector, operational context, ownership and structure shall respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur"*<sup>15</sup>.

It is worth recalling that the discussions during the OEIGWG have considered propositions pertaining to developing direct obligations of business entities under a future LBI<sup>16</sup>. There were different views on the utility and need for such an exercise under the LBI. Generally, the debates in the OEIGWG demonstrated an overall convergence that there are no particular barriers under international law that would hinder establishing such direct obligations for business entities. However, rather than establishing treaty-based direct obligations on business entities, the approach adopted in the LBI's zero draft focuses on clarifying norms that States would agree to implement through their domestic systems. It has been argued that "[t]his conventional treaty approach ... should make it easier for wary States to join in serious treaty negotiations and, eventually, in a treaty."<sup>17</sup>

The articulation of this issue in the draft preamble of the LBI, especially paragraph 6<sup>18</sup>, could be read as a step forward in relation to the responsibilities of business enterprises under the voluntary Guiding Principles on Business and Human Rights, as it would be an integral part of a legally binding instrument. The recognition of such responsibilities, if confirmed, could open the door towards further efforts and initiatives to clarify direct obligations of business enterprises under international law. While a lot of aspirations rest on the LBI to deal with the challenges emerging from the imbalance of rights and obligations of transnational enterprises under international law, the process in pursuit of an LBI is just one part of a broader multilateral endeavor to address this challenge. For example, clarifying the obligations of transnational investors is one major part in the endeavor to reform and rebalance international investment treaties in a manner that makes them conducive to development and not in tension with the States' obligations to fulfill their human rights obligations<sup>19</sup>.

### **Regulating with extraterritorial reach**

The draft text recognizes the need for States to impose due diligence obligations with an extraterritorial reach, covering entities under the State's "jurisdiction or control". Throughout the discussions in the OEIGWG, this element has been considered fundamental in the process of closing gaps pertaining to prevention and access to remedies by victims. Moreover, the LBI proposed that States *"shall ensure that effective national procedures are in place to enforce compliance"* with the obligations that the States should establish in such due diligence regulations with extraterritorial reach.

Human rights due diligence is a central part of the Guiding Principles (GPs) on Business and Human Rights. When it comes to the draft, it has been pointed out that the approach it adopted is different from that adopted under the GPs, and might require adjustment to align with the agreed language of the GPs<sup>20</sup>. Other commentators have pointed out that "[t]he draft Treaty's focus on corporate human rights due diligence is a key point of complementarity with the Guiding Principles and builds on international trends to consolidate mandatory transparency and due diligence in a binding instrument"<sup>21</sup>. The GPs focus on identifying, preventing, mitigating and accounting for business enterprises' impacts on human rights<sup>22</sup>. Indeed, the approach of the zero draft does not replicate the GPs; however, it does not seem to depart from the GPs either. The draft text seems to compress the elements under GPs 17, 18, 19, 20 and 21. Given that States have adhered to the GPs, it is expected that a future LBI ought to be applied in a manner that is aligned and consistent with the GPs. The details included in the GPs regarding identifying, preventing, mitigating and accounting for business enterprises' impacts on human rights ought to inform the implementation of a future LBI. Furthermore, the zero draft falls in line with the views expressed by the Committee on Economic, Social and Cultural Rights (ESCRs), as reflected in its General Comment 24, which stated that "[c]orporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located"<sup>23</sup>.

In commenting on the approach laid out by the zero draft, particularly in relation to due diligence coupled with the proposed basis for civil liability, Richard Meeran noted that "[a]s they are intended to be legally binding they represent a natural but critical progression from the human rights due diligence principles in Pillar II of the UNGPs. They potentially extend and globalise the parent company duty of care principles that to-date only apply under UK law and in states that follow English law"<sup>24</sup>. The approach under the zero draft has also been associated with the latest country practices in imposing mandatory transparency, such as under the modern slavery legislation in the US, UK and Australia, the European regulation on disclosure of non-financial information<sup>25</sup>, as well as mandatory due diligence, such as under the

French *Devoir de Vigilance* (due diligence) law of 2017<sup>26</sup>.

Furthermore, the LBI's zero draft provides that due diligence obligations should be imposed taking into consideration "the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities"<sup>27</sup>. This is in line with the GPs that provide under GP 17 that human rights due diligence... "[w]ill vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations...".

Generally, the approach proposed in the zero draft builds on that proposed in the Elements document of 2017<sup>28</sup>, which provided that preventive measures "shall apply to all the TNCs [transnational corporations] and OBEs [other business enterprises] in [a State's] territory or jurisdiction, including subsidiaries and all other related enterprises throughout the supply chain". Commenting on this approach during the 3<sup>rd</sup> meeting of the OEIGWG, Olivier de Schutter<sup>29</sup> pointed out that such an approach to the extraterritorial reach of States' obligations under human rights law is in line with the position of human rights treaty bodies. For example, the Committee on ESCRs, in its General Comment 24<sup>30</sup> on State obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the context of business activities, provides that "[e]xtraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory"<sup>31</sup>. In that regard, the Committee added that "[t]he extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective"<sup>32</sup>. It is worth recalling that the CESCR has underlined that "although the imposition of such due diligence obligations does have impacts on situations located outside these States' national territories since potential violations of Covenant rights in global supply chains or in multinational groups of companies should be prevented or addressed, this does not imply the exercise of extraterritorial jurisdiction by the States concerned"<sup>33</sup>.

### Does the proposed LBI exclude State-owned enterprises?

The question has been raised as to whether the approach proposed under the zero draft of the LBI excludes State-owned enterprises (SOEs). This issue is expected to be raised and addressed throughout the negotiations. While this issue cannot be extensively

addressed in this paper, the following provides a few observations in this regard.

SOEs play a noticeable role in several economies, both developed and developing country economies. Some SOEs are active domestically only, while others have substantial transnational activities. For example, the Organisation for Economic Co-operation and Development (OECD) notes that "[i]n many OECD countries, state-owned enterprises (SOEs) represent a substantial part of GDP, employment and market capitalization. A number of non-OECD countries have significant state-owned sectors, which in some cases are even a dominant feature of the economy"<sup>34</sup>. Besides the role of SOEs in developing countries, the International Monetary fund (IMF) points out that SOEs play an important role in the economies of emerging Europe, and SOEs make up significant shares of employment and output in several of these countries. While SOEs are created by a government in order to partake in commercial activities on the government's behalf, it is often the case that a SOE is not wholly but only partially owned by a government. While there is no legal definition of SOEs that is agreed multilaterally, several multilateral institutions provide an economic classification of SOEs. For example, according to the IMF's classification, "publicly-owned enterprises are owned or controlled by the state, which means that enterprises which are minority-owned by the state are also publicly-owned enterprises"<sup>35</sup>. Thus, SOEs are entities where the State can be a minority or majority shareholder. Yet, control by the State over the SOE could arise despite the State being a minority shareholder, such as through the State having a golden share<sup>36</sup>.

Under international law, attribution of SOEs' actions to a State is possible if the State controls the enterprise or if the enterprise exercises governmental or public functions. Under the Draft Articles of State Responsibility for Internationally Wrongful Acts of the International Law Commission<sup>37</sup>, and in jurisprudence of the International Court of justice, regional courts and ISDS tribunals<sup>38</sup>, the conduct of a person or a group of persons directed or controlled by the State is attributable to the State. For example, Article 8 of the Draft Articles of State Responsibility for Internationally Wrongful Acts entitled "Conduct directed or controlled by a State", provides that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"<sup>39</sup>. Under international investment treaties, the attribution of SOEs' conduct to the State had allowed investors to bring ISDS cases against States for breach of contract with a state-owned enterprise<sup>40</sup>.

While the draft text does not explicitly address SOEs, it also does not explicitly exclude SOEs from the realm of the proposed LBI's coverage. It is worth recalling that the zero draft of the LBI lays out State's obligations towards those entities under "their jurisdiction or control". See for example Article 9 on prevention and due diligence obligations of business entities, which provides that "*State Par-*

ties 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..." Accordingly, it is expected that the due diligence requirements provided for under the zero draft would potentially apply to SOEs, if the LBI is adopted along the lines proposed in the draft document. Similarly, the preamble of the zero draft that "...States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control..." At the same time, the subjective scope proposed under the zero draft covers "any for-profit economic activity..."<sup>41</sup>, which does not distinguish based on the ownership of the legal entity.

While the proposed LBI does not exclude SOEs, the question remains as to whether the LBI would be the appropriate vehicle with which to undertake the exercise of clarifying the standards of attribution of responsibility between the State and the SOEs that arises under international human rights. Indeed, will the LBI be the appropriate way for examining the extent to which a State should be held directly responsible for its SOEs' acts or omissions relating to human rights issues, or addressing the issues pertaining to the human rights duties of states as owners/controllers of SOEs, or clarifying the responsibilities of SOEs for their own human rights related conduct<sup>42</sup>?

### **Courts at the center of enabling remedy and access to justice**

The zero draft of the LBI has a major focus on judicial mechanisms. Empowering the domestic courts and enhancing the effectiveness of the national judiciary systems in order to be able to deal with cases arising from misconduct in the context of transnational economic practices is a central focus in the proposed text. State Parties to a future LBI, if adopted along the lines proposed in the zero draft<sup>43</sup>, should be ready to empower their domestic courts to assert jurisdiction over cases arising from the conduct that results in violations of human rights by actors acting in their territory, or having their statutory seat, central administration or substantial business interest there. Domestic courts of the place of 'subsidiary, agency, instrumentality, branch, representative office of the like'<sup>44</sup> shall as well be able to assert jurisdiction over such cases. Jurisdiction by the domestic courts seems to be posed broadly in a way that could enable them to respond to the ever-changing practices and legal restructuring by transnational enterprises.

It is important to note that the proposed approach to jurisdiction under the LBI does not go far from the latest developments in authoritative opinions and in practices by several States. The Committee on Economic, Social and Cultural rights has pointed to the obligations of States parties to the Covenant on Economic, Social and Cultural rights regarding the corporate sector

domiciled in their territory and/or jurisdiction, including whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory.<sup>45</sup>

The example of the European Union's (EU) Brussels Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters<sup>46</sup> has been highlighted during the discussions of the OEIGWG. The Brussels Regulation carried forward a rule positing jurisdiction in the Member State where the defendant is domiciled<sup>47</sup>, whereby domicile is understood to mean the place where a company has its statutory seat, or central administration, or principal place of business. This, in effect, made *forum non conveniens* not applicable in cases covered under this regulation.

Furthermore, this approach seems to be based on the proposition in the Elements document of 2017, and in line with the objectives stated there that "...the inclusion of a broad concept of jurisdiction will also allow victims of such abuse by transnational corporations to have access to justice and obtain remediation through either, the forum where the harm was caused, or the forum where the parent company is incorporated or where it has a substantial presence..."

It is useful to note that some States are considering such jurisdictional issues under their investment treaties. For example, the 2016 Nigeria-Morocco agreement imposes a number of human and social obligations on investors, and incorporates an enforcement mechanism for investor obligations, whereby the investor can be held civilly liable in its home state for damages caused in host states<sup>48</sup>. The reference under the zero draft to the place of "substantial business interest" (see Article 5.2.c of the zero draft) could be read to encompass "principal place of business" as well as place of "substantial business activities"<sup>49</sup>. Both these links have been the basis for investors to acquire protections under international investment treaties. While the term 'interest' could be construed as broader than 'activities', this point could be further clarified in the negotiations to be undertaken on the draft text.

### **Recognizing that the State's international trade and investment commitments should be in line with its obligations under human rights law**

The zero draft proposed that "*States Parties agree that any future trade and investment agreements they negotiate, whether amongst themselves or with third parties, shall not contain any provisions that conflict with the implementation of this Convention ...*"<sup>50</sup>, and that "*that all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their obligations under this Convention*"<sup>51</sup>.

These approaches have been described as "reasonable compromises"<sup>52</sup>. Indeed, these provisions do not go as far as some proposals heard during the OEIGWG meetings. The latter included suggestions that the LBI should include recognition of the primacy of human rights obliga-

tions over trade and investment agreements, including through inserting a supremacy clause establishing that it overrides trade and investment agreements<sup>53</sup>. The legal effect of such a supremacy clause has been a contentious issue of discussion, as it was considered as potentially causing conflicts with existing obligations of States originating from trade and investment law<sup>54</sup>.

Other proposals put forward during the discussions of the OEIGWG were that the LBI should ensure the respect of human rights in trade and investment disputes including through the incorporation of human rights obligations and clauses in future trade and investment agreements, and establishing the obligation that States conduct human rights impact assessments before, during and at the end of the negotiations of a new trade and investment treaty. One commentator on the zero draft characterized it as “a missed opportunity to deal with arbitration and alternative dispute settlement mechanisms and their legitimacy conditions, especially considering that foreign investors do have access to international remedies and there is an imbalance when it comes to their responsibilities.”<sup>55</sup>

The zero draft might be seen as not going far enough in this area, especially at a time when free trade and investment protection agreements are under scrutiny, given their intrusive impact on the space for States to undertake legitimate regulation serving the public interest and the fulfillment of human rights. It is worth recalling that the CESCR had recognized that the negotiation and conclusion of trade and investment agreements could potentially obstruct States from complying with their obligations under the Covenant<sup>56</sup>. Furthermore, General Comment 24 of the CESCR recommended that “[t]he interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations”<sup>57</sup>. The Maastricht Principles provided that “States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations”<sup>58</sup>. Moreover, multiple authorities in the field of human rights have pointed to the concerns pertaining to the implication of trade and investment agreements on human rights<sup>59</sup>.

One question to consider in this debate is what could be the ideal contribution of a human rights instrument to the process of reforming international investment and trade agreements. For example, can such a human rights instrument be used to amend the substantive content of existing trade and investment agreements, including the consent to investor-State dispute settlement (ISDS)? It is worth recalling that States are seeking reform of trade and investment agreements, including the mechanism of ISDS, through multiple avenues. Some are withdrawing from treaties or renegotiating those that are assessed to be in conflict with developmental objectives and to be intrusive on the right to

regulate. Multilateral and regional discussions on these issues are undertaken in multiple fora, including at the United Nations Conference on Trade and Development (UNCTAD)<sup>60</sup> and the United Nations Commission on International Trade Law (UNCITRAL)<sup>61</sup>.

While the draft text of the LBI seems to be cautious in approaching these issues, it does recognize the need to address both future and existing agreements. When it comes to existing treaties, the draft text envisions a role for the LBI in mending the gap between trade and investment on one hand and human rights on the other through the interpretation of the treaties. Generally, when these treaties are interpreted by private arbitral tribunals, human rights are usually not addressed<sup>62</sup>. The task of mending the contradictions through interpretation requires a State as respondent party in a dispute to be more active in bringing the human rights language and commitments as part of its defense, for example through their submissions in front of the arbitral tribunals<sup>63</sup>. The zero draft proposes that interpretation shall be in a way that is “least restrictive” on State’s obligations in the realm of the proposed human rights instrument (see 13.7 of the zero draft). Negotiating parties might consider language that ensures that interpretation be in a manner consistent and not in conflict with their human rights obligations.

Yet, as is the case with international law generally, and particularly international human rights law, monitoring and enforcement mechanisms for the proposed State obligations will be a major challenge, especially since they are located at the crossing point of two separate international law regimes. The propositions under the draft LBI seem to reflect an understanding that an international human rights instrument cannot replace a reform process that is already underway and progressing in the realm of the international trade and investment regime, but can contribute to the enabling environment that allows States to align their commitments under trade and investment treaties with those under human rights law.

## **Concluding reflections**

The zero draft of the LBI could be described as an attempt that is well informed by the discussions of the OEIGWG, the latest developments in authoritative opinions on international human rights law, including those of UN Treaty bodies, as well as country practices. At the same time, the text seems to take serious account of the political dynamics within which this discussion has been taking place, which have been reflected during the last three years of discussions at the OEIGWG.

States already have the obligation to protect against human rights abuse within their jurisdiction by third parties, including business enterprises. The zero draft of the LBI develops principles and mechanisms that would reinforce the States’ capacity to fulfill this obligation when activities of a transnational character involve human right violations. Indeed, in today’s world, fulfilling sovereignty requires cross-border cooperation between jurisdictions to ensure that private entities operating in a closely inter-

twined global economy remain accountable for their actions.

The zero draft comes at a time when the world is looking at reforming several policy areas concerning global governance including international investment and taxation. A future LBI ought to be seen as part of, and complementary to, those reform efforts.

#### Endnotes:

<sup>1</sup>Resolution 26/9 was adopted by the HRC during its 26th session on 26 June 2014. The zero draft is available at the following website: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOOnTNC.aspx>.

<sup>2</sup>See for example: Martin Khor, "Tariff war threatens world trading system," 18 September 2018 available at: <https://www.thestar.com.my/opinion/columnists/global-trends/2018/09/24/tariff-war-threatens-world-trading-system-us-and-china-today-raise-tax-rates-on-more-of-each-others/>; Richard Gowan, "Multilateralism in Freefall?", United Nations University, Center for Policy Research, 30 July 2018 available at: <https://cpr.unu.edu/the-multilateral-freefall.html>; Kemal Dervis, "A Fragmented Multilateralism, 11 September 2018, available at: <https://www.project-syndicate.org/commentary/multilateralism-trump-international-institutions-by-kemal-dervis-2018-09>.

<sup>3</sup>See Article 2.1.b of the zero draft, available at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOOnTNC.aspx>. See also: Richard Meeran, "The "Zero Draft": Access to judicial remedy for victims of multinationals' ("MNCs") abuse", available at: <https://www.business-humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty>.

<sup>4</sup>See the Note Verbale by the Chairmanship of the working group regarding the release of the zero draft legally binding instrument, available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/NoteVerbaleLBI.PDF>.

<sup>5</sup>See "Assessment of the discussions pertaining to an international legally binding instrument on TNCs and OBEs with respect to human rights", presentation by the South Centre during the First Open Consultation on the Implementation of Resolution 26/9, available with the author.

<sup>6</sup>See more about the three meetings at the Office of the High Commissioner for Human Rights (OHCHR) website: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOOnTNC.aspx>.

<sup>7</sup>See for example the statement of purpose of the LBI under Article 2 of the draft text, available at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOOnTNC.aspx>.

<sup>8</sup>See for example: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities, Chapter Five: National legislation and the Convention - Incorporating the Convention into domestic law, available online at: [https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-](https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the)

[convention-on-the-rights-of-persons-with-disabilities/chapter-five-national-legislation-and-the-convention.html](https://www.un.org/development/desa/disabilities/chapter-five-national-legislation-and-the-convention.html).

<sup>9</sup>See the preamble of the LBI zero draft available at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOOnTNC.aspx>.

<sup>10</sup>See Article 5 on Jurisdiction from the zero draft of the LBI, available at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOOnTNC.aspx>.

<sup>11</sup>See <http://investmentpolicyhub.unctad.org/IIA>.

<sup>12</sup>For example, the Organisation for Economic Co-operation and Development (OECD) 2012 survey of investment treaties showed that 96 % contained ISDS provisions allowing foreign investors to raise claims through international arbitration. Source: Gaukrodger, David and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, p. 64, at <http://dx.doi.org/10.1787/5k46b1r85j6f-en>. Referenced in UNCITRAL Doc. A/CN.9/WG.III/WP.142, p. 3. See also: UNCTAD World Investment Report 2018, page 107.

<sup>13</sup>For example: Rob Howse, law professor, noted the following in regard to ISDS: "Foreign investors are able to frame questions of domestic constitutional and administrative law as treaty claims, and take those claims to a panel of private international arbitrators, circumventing local, state or federal domestic administrative bodies and courts. Freed from fundamental rules of domestic procedural and substantive law that would have otherwise governed their lawsuits against the government, foreign corporations can succeed in lawsuits before ISDS tribunals even when domestic law would have clearly led to the rejection of those companies' claims. Corporations are even able to relitigate cases they have already lost in domestic courts. It is ISDS arbitrators, not domestic courts, who are ultimately able to determine the bounds of proper administrative, legislative, and judicial conduct. This system undermines the important roles of our domestic and democratic institutions, threatens domestic sovereignty, and weakens the rule of law". Source: "International investment law and arbitration: a conceptual framework", Excerpt from: Helene Ruiz-Fabri, ed. International Law and Litigation, Nomos Press, 2017 (forthcoming), dated: 23 March 2017. Available at: <http://isds.bilaterals.org/?international-investment-law-and-33006&lang=en>. See also a 2018 report by the Columbia Center on Sustainable Investment, prepared by a group of experts in international economic governance, which provides that: "The ISDS system has led to the marginalization of domestic courts and legal institutions that can often be bypassed as a result of provisions in IIAs." See page 115 of the report entitled "Rethinking International Investment Governance: Principles for the 21st Century", available at the following link: <http://ccsi.columbia.edu/files/2018/09/Rethinking-Investment-Governance-September-2018.pdf>. Furthermore, the proposed new North American Free Trade Agreement (NAFTA, or United States-Mexico-Canada Agreement (USMCA)) Investment Chapter eliminates Chapter 11-B, NAFTA's Investor-State Dispute Settlement (ISDS). Source: Public Citizen, "What Does NAFTA 2.0 Mean for Investor-State Dispute Settlement", available at: [https://www.citizen.org/sites/default/files/gtw\\_nafta-isds-facts-oct-2018\\_final.pdf](https://www.citizen.org/sites/default/files/gtw_nafta-isds-facts-oct-2018_final.pdf). See also: "More Than 300 Re-



publican and Democratic State Legislators From All 50 States Urge End of Investor-State Dispute Settlement System in NAFTA” available at: <https://www.citizen.org/media/press-releases/more-300-republican-and-democratic-state-legislators-all-50-states-urge-end>.

<sup>14</sup> The Guiding Principles can be found on the following link : [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf). The “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

<sup>15</sup> See Preamble of the zero draft of the LBI available at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>.

<sup>16</sup> See for example the webcast recording available at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>.

<sup>17</sup> Douglas Cassel, “At Last: A Draft UN Treaty on Business and Human Rights”, 2 August 2018, available at: <https://www.business-humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty>.

<sup>18</sup> The paragraph referred to here provides for the following : “Underlining that all business enterprises, regardless of their size, sector, operational context, ownership and structure shall respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur”.

<sup>19</sup> See *Rethinking International Investment Governance: Principles for the 21st Century*, book released by the Columbia Center for Sustainable Investment, available at: <http://ccsi.columbia.edu/2018/08/13/rethinking-international-investment-governance-principles-for-the-21st-century/>. See the work of the United Nations Conference on Trade and Development (UNCTAD) on investment and sustainable development at [https://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](https://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx). See also the work of the International Institute for Sustainable Development (IISD) at <https://www.iisd.org/event/investment-sustainable-development-incorporating-investor-obligations-trade-and-investment>. For example, the Nigeria-Morocco agreement (2016) imposes a number of human and social obligations on investors, and incorporates an enforcement mechanism whereby the investor can be held civilly liable in its home state for damages caused in host states. See Article 15 of the named agreement on ‘Investment, Labour and Human Rights Protection’ and Article 20 on ‘Investor Liability’.

<sup>20</sup> See Carlos Lopez. “Towards an International Convention on Business and Human Rights” Parts I and II, available at: <https://www.business->

[humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty](https://www.business-humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty).

<sup>21</sup> See Phil Bloomer and Maysa Zorob, “Another Step on the Road? What does the “Zero Draft” Treaty mean for the Business and Human Rights movement?”, Business & Human Rights Resource Centre, available at: <https://www.business-humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty>.

<sup>22</sup> See Guiding Principles on Business and Human Rights, available at: [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>23</sup> See para. 33 of General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, available at

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQclMOuuG4TpS9jwIhCjCxiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUBw6ujlnCawOrJx3hlK8Odk6DUwG3Y>.

<sup>24</sup> See Richard Meeran, “The “Zero Draft”: Access to judicial remedy for victims of multinationals’ (“MNCs”) abuse”, available at: <https://www.business-humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty>.

<sup>25</sup> See Directive 2014/95/EU of the European Parliament and Council, of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

<sup>26</sup> See Phil Bloomer and Maysa Zorob, “Another Step on the Road? What does the “Zero Draft” Treaty mean for the Business and Human Rights movement?”, Business & Human Rights Resource Centre.

<sup>27</sup> See Article 9.1 of the zero draft of the LBI.

<sup>28</sup> Available at the following website: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>

<sup>29</sup> Member of the Committee on Economic, Social and Cultural Rights

<sup>30</sup> Committee on Economic, Social and Cultural Rights, General Comment (GC) No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, available at:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQclMOuuG4TpS9jwIhCjCxiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUBw6ujlnCawOrJx3hlK8Odk6DUwG3Y>.

<sup>31</sup> Para. 28 of the GC 24.

<sup>32</sup> Para. 30 of GC 24.

<sup>33</sup> Para. 33 of GC 24.

<sup>34</sup> OECD Guidelines on Corporate Governance of State-Owned Enterprises (Draft for public comment), May 2014, available at <https://www.oecd.org/daf/ca/SOE-guidelines-update-draft-text-may-2014.pdf>. See also: IMF Working Pa-



per 2017, "State-owned enterprises in emerging Europe: the Good, the Bad and the Ugly", by Uwe Böwer.

<sup>35</sup> See "Financial Performance of State Owned Enterprises", Institute of Public Finance, available at: <http://www.ijf.hr/upload/files/file/ENG/FISCUS/5.pdf>.

<sup>36</sup> A golden share is a type of share that provides its holder special voting rights, usually controlling at least 51% of the voting rights. See more on <https://www.investopedia.com/terms/g/goldenshare.asp#ixzz5U1Sbdlah>.

<sup>37</sup> Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). See also article 5 of the same document.

<sup>38</sup> See for example Emmanuel Gaillard, Jennifer Younan, *State Entities in International Arbitration*, Juris Publishing, Inc., 2008.

<sup>39</sup> See Draft Articles of State Responsibility for Internationally Wrongful Acts of the International Law Commission.

<sup>40</sup> See for example *Maffezini Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11; *Eureka v. Poland*; *Nykomb v. Latvia*.

<sup>41</sup> See Article 4 of the zero draft of the LBI.

<sup>42</sup> It is worth noting that some argue that SOEs have direct responsibilities in international human rights law, making them "the only business entities which under international law *lege lata* have direct responsibilities". See: "Attribution of state responsibility for actions or omissions of State-owned enterprises in human rights matters", Judith Schonsteiner, published in *U. Penn. J.Int'l.L.*, volume 40, 2018.

<sup>43</sup> The LBI's zero draft provides that "Jurisdiction, with respect to actions brought by an individual or group of individuals, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this Convention, shall vest in the court of the State where: such acts or omissions occurred or; the Court of the State where the natural or legal person or association of natural or legal persons alleged to have committed the acts or omissions are domiciled" (Article 5.1). It adds that "A legal person or association of natural or legal persons is considered domiciled at the place where it has its: statutory seat, or central administration, or substantial business interest, or subsidiary, agency, instrumentality, branch, representative office or the like" (Article 5.2).

<sup>44</sup> See Article 5.2 in the zero draft of the LBI.

<sup>45</sup> See The Committee on Economic, Social and Cultural Rights, Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights (2011). See also: Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24).

<sup>46</sup> See : Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The referenced regulation can be found at the following website : <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215> .

<sup>47</sup> Article 4 (1) of the Brussels Regulation provides that a corporation which is 'domiciled' in an EU Member State could be sued in that Member State. Article 4 states: "1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State". Article 63 (1) of the Brussels Regulation: the domicile of legal persons or companies is determined by the jurisdiction where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business".

<sup>48</sup> See Morocco-Nigeria bilateral investment agreement (BIT), Article 20 on Investor Liability, which provides that "Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state". Treaty text available on UNCTAD IIA Navigator. It is worth noting that the first draft of the new Indian model bilateral investment treaty had also adopted a similar approach, although it was not kept in the final approved model treaty.

<sup>49</sup> One example is the latest model treaty released by the Dutch government. The proposed model provides that "investor" means "...any legal person constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party..." (extract from a longer definition) ."Substantial business activities" is taken to mean "Indications of having substantive business activities in a Contracting Party include (i) the undertaking's registered office and administration is established in that Contracting Party, (ii) the undertaking's headquarters and management is established in that Contracting Party (iii) an office, production facility and/or research laboratory is established in that Contracting Party, (iv) the number of employees based in that Contracting Party and (iv) the turnover generated in that Contracting Party. The criteria should be assessed in each specific case, taking into account the total number of employees and turnover of the undertaking concerned, and take account of the nature of the activities carried out by the undertaking in the Contracting Party in which it is established".

<sup>50</sup> Article 13.6 of the zero draft LBI.

<sup>51</sup> Article 13.7 of the zero draft LBI.

<sup>52</sup> See Douglas Cassel, "At Last: A Draft UN Treaty on Business and Human Rights", 2 August 2018, available at: <https://www.business-humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty>.

<sup>53</sup> Markus Krajewski, 'Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model Clauses for a UN Treaty on Transnational Corporations, Other Businesses and Human Rights', for *CIDSE* (2017), available at [www.cidse.org/resources](http://www.cidse.org/resources) .

<sup>54</sup> See "Conflicts between a Treaty on Business and Human

Rights and Investment and Trade Agreements”, submission by the University Essex Business and HR projects, to the Open-ended intergovernmental working group on transnational corporations and other business enterprises.

<sup>55</sup> Nicolás Carrillo-Santarelli, “Some observations and opinions on the “zero” version of the draft treaty on business and human rights”, available at: <https://www.business-humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty>. Reference here was made to Article 13 of the LBI, which provides that: “Nothing in these articles shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. The present articles are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law, including the obligations under any other treaty that governs or will govern, in whole or in part, mutual legal assistance”.

<sup>56</sup> See Para. 29 of General Comment 24 of CESCR.

<sup>57</sup> See Para. 13 of the General Comment 24.

<sup>58</sup> See as well the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, para. 17, available at: [https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23).

<sup>59</sup> These include: Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Special Rapporteur on the Right to Education, Special Rapporteur on Extreme Poverty and Human Rights, Special Rapporteur on the Rights of Indigenous Peoples, Special Rapporteur on the

Right to Food, Special Rapporteur on Human Rights and the Environment, among others. See for example Sanya Reid Smith, Third World Network, “Potential human rights impacts of the TPP” (2015). See as well the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, available at: [https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23).

<sup>60</sup> See for example UNCTAD’s work on IIAs at: <http://investmentpolicyhub.unctad.org/IIA>.

<sup>61</sup> See the mandate of UNCITRAL’s Working Group III at: [http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Investor\\_State.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html).

<sup>62</sup> See for example *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26

<sup>63</sup> See *Philip Morris v. Uruguay* case, where Uruguay was challenged by Philip Morris over its tobacco control measures. On July 8, 2016, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) dismissed all claims by Philip Morris, ordering it to bear the full cost of the arbitration and to pay Uruguay US\$7 million as partial reimbursement of the country’s legal expenses. More information available at: <https://www.iisd.org/itn/2016/08/10/philip-morris-brands-sarl-philip-morris-products-s-a-and-abal-hermanos-s-a-v-oriental-republic-of-uruguay-icsid-case-no-arb-10-7/>.



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