

"Elements for draft legally binding instrument on transnational corporations and other enterprises with respect to human rights" circulated by Ecuador on 2 October 2017

Draft EU Questions – 20-10-2017

Details:

1. General framework

1.1. Preambles (p.1-3)

- Is there a reason for various instruments to be presented on an equal footing given that some of those mentioned are legally binding and others are not. For example under "other Conventions", the draft refers to the "Universal Declaration on the Rights of Indigenous Peoples", the "Declaration on the Right to Development" and puts these on an equal footing with conventions such as the ILO Conventions.
- The EU is very committed to foster the universal ratification of the 8 ILO fundamental Conventions including the new ILO Protocol on Forced Labour. The ILO has launched a campaign for achieving this universal ratification. All EU member states have ratified the 8 ILO fundamental conventions and many EU member have already ratified the new ILO Protocol or are close to finalise ratification. However a number of countries, including large economies, have not yet ratified these conventions and this weakens the protection of human rights at work. Mixing up Declarations with conventions that are legally binding after ratification will not help in strengthening business and human rights .Why is the text not referring to the need for supporting the global ratification of these ILO conventions.
- When listing Declarations the text does not include the 2008 ILO Declaration on Social Justice for a Fair Globalisation. This is the most comprehensive Declaration relevant for business and human rights. Why is this missing?
- Is there not a risk that some of the draft's provisions undermine the important progress in other areas such as responsibility to protect? E.g. "*State Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States, and that nothing in this Convention shall entitle 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*"; similar language under 1.2. (p.4). Referring to **UN Guiding Principle 2** and the commentary which says that while states may not be required they are also not prohibited from exercising jurisdiction where there is a reasonable basis - and that basis is not simply "exclusive reservation by the other states' domestic law". For example, genocide is subject to universal jurisdiction regardless of what national law says. Is that being contested here?

1.2. Principles (p.3)

- Is the provision: "*Primary responsibility of States to protect against human rights violations* meant to be understood as "obligation of the State" as recalled by the UN Guiding Principles on Business and Human Rights?

- The Elements recognise as a Principle that 'The universality, indivisibility, independence and inter-relationship of all human rights which therefore must be treated in a fair and equal manner, on the same footing and with the same emphasis.' This position is supported by academia internationally. How does this principle agree with another statement under the Principles recognising the necessity of special protection of certain human rights?
- *Is the provision "Recognition of the primacy of human rights obligations over trade and investment agreements" mean to be understood as: "trade and investment agreements need to be consistent with the implementation of human rights obligations".* How would this be seen to impact any future negotiations - would this mean the involvement of colleagues from WTO, UNCTAD, WIPO? A hierarchy of international obligations has not previously been agreed - how would the challenges identified in the International Law Commission's report on this topic be addressed?
- The provision on *"Duty of State Parties to prepare human rights impact assessment" is already a practice in the EU.* Here you can recall the obligation of EU institutions and bodies, offices and agencies and EUMs to assess the impact of all EU Charter of Fundamental Rights obligations when they are implementing Union law.¹

1.3. Purpose (p.3/4)

- The main points seem to match provisions of the UN Guiding Principles. Could the Chairperson Rapporteur elaborate on whether there is major difference?
- Is there Possible contradiction between *"Reaffirm that State Parties' obligations regarding the protection of human rights do no stop at their territorial borders"* and provisions under 1.1.?
- The purpose of the Treaty is unclear, because the focus is on the transnational nature of the actors, instead of the transnational nature of the problem requiring an international response. What exactly is intended to be covered? A) Domestic violations by TNCs and OBEs established domestically; B) Domestic violations by companies which are established (or moved) abroad; C) Violations which domestic companies commit abroad?

(NB Such aspects need to be decided before engaging in detailed discussions.)

- The Elements do not specify very clearly the exact problems that the Treaty will try to address. Is there a legal justification as to which extent each of the proposed Elements: A) Addresses issues that can only be solved at the international level, as compared to domestic; B) Addresses issues that are not covered in existing international instruments; or C) Addresses issues that are already covered in existing international instruments but cannot be achieved to the same extent in those instruments and D) Does not go beyond what is necessary to address the respective issues?

(NB The EU should insist that the principles of subsidiarity, proportionality and necessity re respected – these are core principles in EU and international law)

1.4. Objectives (p.4)

¹ Tool 28 "fundamental rights and human rights" of the Better Regulation Toolbox: https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-28_en_0.pdf.
 Explanations to the Charter: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007X1214\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007X1214(01))

- Could the Chairperson-Rapporteur elaborate on the provision (similar to the point under 1.3.): "To reaffirm the primacy of human rights law over trade and investments agreements and establish specific State obligations in this regard"?
- Was there any legal analysis regarding the relationship between the Elements for the Treaty and other legal instruments? To which extent there is assumed that there is a legal conflict or an inconsistency of international law between this Treaty and trade and investment agreements?

(NB: If questions are raised on investment agreements, we should point to the fact that such discussions are already taking place in UNCTAD, which is the right forum for such discussions – the latest meeting was held early this month and was open to civil society, academics, States, etc.).

2. Scope of application (p.4)

- Isn't there much ambiguity on the language the "activities of TNCs and OBEs that have a transnational character, regardless of the mode of creation, control, ownership, size or structure"? Does it/can it exclude domestic enterprises? Would this cover a national oil company engaged in a joint venture with a multinational? Would it cover a corner grocery store that sells tomatoes imported from across the border? If not, what would be the basis for distinction and for saying these companies don't have to respect rights?
- How will the proposed Treaty guarantee non-discrimination between the legal regime applicable to foreign-owned companies and the one applicable to domestic companies?

(NB The question is about legal guarantees in international law, i.e. specific provisions that should be included in this respect in the Treaty. This must be presented as a condition for the EU to participate in further discussions. Mere reassurances or promises that countries would try to apply the same obligations to their domestic companies are not acceptable.)

- What are the reasons behind the proposed obligations with regard to human rights do not or should not apply to domestic companies? If the argument is that domestic companies are regulated by the domestic law of their country, the same applies to the TNCs and OBEs which are established in the territory of the same country – why should they be regulated and the others not?

2.2. Acts subject to its application (p.5)

- In line with opening remarks, we see the risk of limiting the scope with language such as "any business activity that has a transnational character": could we have reassurances that clear provisions will be inserted in the text in order to guarantee that the Treaty will cover all enterprises in a non-discriminatory way?
- Could the Chairperson-Rapporteur elaborate on the paragraph which is unclear to us: is the aim to establish causation? A contribution to an abuse? A linkage? What does "resulting from" mean - is this causation only? Also what is meant by "indirectly controlled" - is it about economic control, strategic control or...? If a multinational company is the main purchaser of goods from a small, local company in a given country, would this mean that this national company would be brought within this definition because its sales are "controlled" by a single purchaser?

- To which extent is the transnational character of the addressee of the obligations (TNCs, OBEs) relevant for the scope of the Treaty, instead of the transnational character of the human rights violations?

(NB In the first case, the Treaty would target domestic breaches of companies which are established domestically but are foreign-owned, while excluding domestic breaches of companies which are domestically-owned. Both types of companies are regulated domestically and only one type of company (foreign-owned) would be regulated internationally. In the second case, the Treaty would prevent and address any breaches which entail a transnational element (i.e. the risk of companies escaping jurisdiction or "shopping" for lower standards) – these are issues that cannot be addressed at national level. The choice between the two approaches should result from negotiations prior to deciding on all the other aspects and the discussion should be based on clear arguments for each option.)

2.3. Actors subject to its application (p.5)

- The lack of definition raises questions as this means acts committed by any business entity, including local businesses that produce any part of any product that might cross a border. Would the ultimate corporate parent or buyer of any such product be held liable irrespective of whether or not it caused or contributed to the harm.
- How will the proposed obligations with regard to human rights apply to State-owned enterprises in the exercise of business activities?

(NB SOEs can be covered if they have delegated powers, so it is important to emphasize the context of business activities, which puts them in the same circumstances as the TNCs.)

- How will the potential Treaty address corporations which are mixed in ownership/cross owned and where 'nationality' is not evident?

3. General obligations (p.5)

- Is the provision: "primary responsibility of States and the recognition of general obligations of TNCs and other BEs" departing from the UNGPs referring to States obligations and responsibility of enterprises?
- Is there a limitation in the scope with the provision "negative impact on human rights resulting from transnational operations"?
- To which extent the Treaty will contain commitments for the States themselves? Will the Treaty contain general obligations for the signatory States to respect and enforce "all internationally recognized human rights" (as stated in scope 2.1- protected rights)? Or will the Treaty only contain obligations for the States to ensure the respect of human rights by TNCs and OBEs? In the latter case, how will the Treaty guarantee that there will be no transfer of responsibility from State to private actors, i.e. how will the Treaty prevent that States impose on TNCs/OBEs obligations that they do not accept or enforce for themselves or their agents?

(NB the EU view is that human rights are underlying all activities carried out and have to be respected by signatories of human rights treaties and conventions. We see major failing when it comes to enforcement of the already existing obligations!)

3.1. Obligation of States (p.5)

- Several obligations contained in the draft already exist and are recalled in the UN Guiding Principles: as outlined in our opening remarks, wouldn't implementation and efficient enforcement of existing instruments constitute a way forward?
- What mechanisms are foreseen that would hold states that are yet to act on the UNGPs to account for this failure? A treaty provision restating states' existing obligations is not self-enforcing. The later section on mechanisms talks about a court for companies but apparently only another treaty body for states - what effect is this expected to have?
- *Provisions on disclosure: The EU can share its experience on the Directive on Disclosure on non-financial information.*

3.2. Obligations of Transnational Corporations and other Business Enterprises (9.6)

- Can you clarify the provision that TNCs and other business enterprises *shall comply with all applicable laws and respect internationally recognized human rights, wherever they operate, and throughout their supply chains*? Would enterprises be expected, for instance, to implement all rights including those outside their remit such as the right to education? How would this work in practice for TNCs and OBEs? "
- It appears that provisions extend obligations with regard to all rights into companies when the international community has, until now, been unable to agree on a treaty stating that companies are at least subject to obligations for international crimes. Could the Chairperson-Rapporteur respond to this challenge?
- Implementation of other provisions seem equally difficult to assess

3.3. Obligations of International Organisations (p.6)

4. Preventive measures (p.7)

- This section seems to refer to existing obligations. Could you shed light on the new additional envisaged obligations applicable to states?
- What is meant by "all other related enterprises through the supply chain"? Again, would this include small, national businesses?

5. Legal liability (p.7)

- Could the Chairperson elaborate on the reasons for adding the term "applicable" when referring to "international applicable human rights instruments"?
- What is meant by the term "complicit" and by the terms "participating in or benefitting from" human rights abuses? Would this mean that a small local business that is a reseller of electronic products manufactured abroad with human rights abuses connected to conflict minerals in its supply chain would be criminalized for selling that product?

- Some sections seem to build on OHCHR's Accountability and Remedy Project (such as ensuring that corporate liability is not contingent on a finding of individual guilt), which is positive - is that intended?
- What would it mean for a State to be complicit in a company's abuses - if it is a state-owned enterprise, is the complicity then automatic for any harms that that company commits?

6. Access to justice, effective remedy and guarantees of non-repetition (p.10-12)

- Whilst we could agree on an assessment in the chapeau regarding current barriers for access to justice, can the Chairperson Rapporteur indicate how the OHCHR Accountability and Remedy Project provide pragmatic and tangible recommendations?
- Rather clear provisions – to be checked against notably the 2017 FRA Opinion and the 2016 Council of Europe Recommendations of the Committee of Ministers;
- Clear language on "human rights defenders" is welcomed given their important role on this issue worldwide. But many of these provisions are well-established obligations of states that clearly need to be enforced in relation to business-related human rights harms but are not specific to those situations. How would this section go beyond restating the obligations that States are already subject to and help ensure real action?

7. Jurisdiction and applicable law

- The EU has clear provisions under Brussels I and Rome I and II regulations. This is very important area yet these provisions are very lightly sketched out: how would these work in practice? What about the provision regarding supply chains - how to reconcile this with the strict limitation in 1.1 above?

8. International cooperation

- At first sight, interesting provisions as EU has often advocated for additional steps on mutual legal assistance, progress on cross border investigation: isn't there already much being done for instance with the current workstreams, the OHCHR Accountability and Remedy Project on cross border corporation?
- What lessons have been learned from implementation of United Nations Convention against Corruption (UNCAC) which is also heavily focused on enhanced cooperation?
- Can the Chairperson rapporteur explain how the provisions will allow for implementation and pragmatic steps given current constraints e.g. lack of resources of prosecutor's office to investigate cases involving TNCs and OBEs?

9. Mechanisms for promotion, implementation and monitoring

- Can the Chairperson-Rapporteur elaborate as to whether the proposal for an "International court" derives from past discussion at the time of the elaboration of the Rome Statute? Is it an appeal to broaden the jurisdiction of the ICC?
- How would the Chairperson-Rapporteur propose to achieve progress on corporate liability for international crimes given the resistance at the time of the ICC negotiations?