



LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: ASSESSMENT OF THE SECOND REVISED DRAFT

This assessment of the Second Revised Draft of the Legally binding instrument (LBI) on transnational corporations and human rights tries to identify improvements and setbacks with regard to the Revised Draft, positive aspects, shortcomings and necessary improvements - without claiming completeness, and mostly formulated in keywords, with reference to the respective articles in the columns at right.

Overall, the 2020 draft has improved remarkably on the 2019 draft concerning structure, solidity of the content, compromises found, benefit of many provisions and partly language. Still, many issues and details remain to be integrated, improved, strengthened or resolved, including language; but the draft seems to be ready for proper negotiation.

1 IMPROVEMENTS AND POSITIVE ASPECTS

Issue	2nd Rev.	Rev.
more precise and appropriate language at many places (e.g., «business relationship» instead of «contractual relationship»), content partly more differentiated and more solid		
hardly any restrictions anymore by language like « subject to domestic law » or « in accordance with domestic law »		
clear distinction between human rights «abuse» and «violation», focus on «abuse»	1.2	
explicit inclusion of State-owned enterprises	1.3	
States may differentiate prevention obligations according to size, sector, context and human rights risks of business enterprises (corresponding with UNGP 17)	3.2	5.6
also « fundamental ILO conventions » and thus labour rights are covered	3.3	
victims have the right to submit claims through class action	4.2.d	
clause recognizing higher levels of protection of victims	4.3	
repartition of the previous art. 4 «Rights of Victims» into arts. 4 «Rights of Victims», 5 «Protection of Victims» and 7 «Access to Remedy»	4, 5 and 7	4
State parties shall require business enterprises to respect human rights and prevent and mitigate human rights abuses throughout their operations , a provision confirming extraterritorial human rights obligations of States	6.1	5.1
art. 6 «Prevention» is more in line with standards from the UNGPs	6	5
coherence regarding forms of participation (UNGPs: cause / contribute to / be directly linked) between the Draft and the UNGPs has improved with taking into account «contribute to» (although «being directly linked» still doesn't appear, but is presumably covered by «business relationship»)	8.4, 8.7, 8.8, 9.1	

Issue	2nd Rev.	Rev.
reporting requirements under HRDD includes information about group structures	6.3.e	
sanctions for not complying with duties of HRDD, linking the issue of prevention with the issue of liability/sanctions	6.6	
assistance for victims to initiate proceedings in another State party	7.3.d	
rules ensuring that allocation of legal costs at the <u>conclusion</u> of legal proceedings do not place an unfair and unreasonable burden on victims	7.3.e	
doctrine of forum non conveniens is not applicable	7.5, 9.3	
reversal of the burden of proof may be enacted instead of being left at the discretion of courts	7.6	4.16
domestic law shall provide system of legal liability of both natural and legal persons	8.1	
liability shall include HR abuses from business relationships	8.1	
liability of a company for failing to prevent another company from causing or contributing to human rights abuses is already established when the former controls the <u>company</u> and not the specific activity in question	8.7	6.6
HRDD shall not automatically absolve from liability	8.8	
the catalogue of offences has been replaced by the more flexible term «criminal offences covered in the listed areas of international law» (although the «listed areas» may not be clear)	8.9	6.7
domestic law shall provide for « criminal or functionally equivalent liability of legal persons [...] States Parties shall [...] advance their criminal law» might be a good compromise for introducing criminal liability for legal persons on a global scale	8.9	6.7s
Substantially broader basis for jurisdiction ; art. 9.4 will admit combined claims against a subsidiary in a host State and the parent company in the forum State (circumventing the corporate veil); art. 9.5 will admit claims against a subsidiary in a foreign State (when, e.g., the parent company is domiciled in the forum State) and thus amounts to forum necessitatis (subject to the condition of sufficiently close connection to the State Party);	9.4, 9.5	
statutes of limitation shall allow a reasonable period of time also in cases where the harm may be identifiable only after a long period of time	10.2	8.2
clearly stated that it is the victims who can request the application of the law of another State (although this only «may» be applied)	11.2	9.2
new provisions regarding mutual legal assistance in criminal cases	12.4	
sovereignty, security and other essential interests have been dropped as grounds for refusing recognition and enforcement of a judgement, only <i>ordre public</i> is left	12.9.c.	10.10.c
regarding consistency with international law, trade and investment agreements are explicitly mentioned , and it is clearly distinguished between existing and new agreements	14.5	12.6

2 SETBACKS

Issue	2nd Rev.	Rev.
loss of certain rights of victims: - legal assistance with all procedural requirements (not only for initiating proceedings) - explicit obligation on States to apply all rights of victims also to HR defenders	7.3.d	4.12.d 4.15
the criterion of «substantial business interests» for the place of domicile of a company has been replaced by «principal place of business» which lessens access to justice	9.2	7.2

3 SHORTCOMINGS AND PROPOSED IMPROVEMENTS

Issue	2nd Rev.	Rev.
focus on human rights abuses by (private or public) enterprises excludes human rights infringements by public authorities in the area of transnational business and human rights, as in activities like granting land, mining and logging concessions, export credits or insurances, negotiating trade and investment agreements or in public procurement → the text shall include - the obligation for States to carry out human rights, environment and gender impact assessments of public activities, plans/projects and decisions in transnational business context (also when negotiating business-related bi- and multilateral agreements) liability for neglecting impact assessments - corresponding remedies for affected people - the provision that the LBI applies to all branches of the State, including public procurement, export credit/insurance agencies etc.		
Potentially affected persons (persons at imminent risk or under immediate threat) are not recognized as «victims» or included in the definition of «victims», enjoying their rights, protection and access to remedy - although business enterprises have to identify « <u>potential</u> human rights abuses» (art. 6.2.a) and communicate regularly to « <u>potentially affected</u> persons» (art. 6.2.d) and victims may bring claims arising from acts or omissions that « <u>may</u> result in human rights abuses» (art. 9.1)	1.1	
The definition of «human rights abuse» includes «in the context of business activities» → this second term needs not to be repeated in the text	1.2	
According to resolution 26/9, transnational business activities should be of central importance in the statement of purpose in order to best maintain the original objectives of the resolution and the LBI.	2	
(International) prosecution still has not a prominent position and role , although it should be the third pillar besides prevention and access to justice. Transnational prosecution should explicitly be included in the Statement of purpose (art. 2) and have an article of its own (or at least be strengthened within art. 12), also providing for an international prosecution mechanism (as proposed by South Africa).	2 12	
The scope (art. 3) addresses the subjects of the regulation (business enterprises) and the rights covered, but not the duty bearers. Whilst it is evident that the States as parties to the LBI are duty bearers, it is not clear whether the LBI applies also to intergovernmental organisations, including International Finance Institutions. Like the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights in its principles 15 (Obligations of States as members of international organisations) and 16 (Obligations of international organisations), the LBI should address	3	

Issue	2nd Rev.	Rev.
the human rights obligations of States as members of international organisations and the human rights obligations of these organisations themselves.		
Other than in the Revised Draft, the scope is encompassing « business enterprises » rather than « business activities ». This is potentially narrowing down the scope, and «business enterprises» are not defined in art. 1 as compared to «business activities».	3.1	3.1
persons at imminent risk or immediate threat must have the right to require precautionary measures / interim injunctions (and the State must have the corresponding duty to order such measures)	4	
« access to information » should explicitly apply to all documents enabling the disclosure of all legal entities of a corporate group (including parent/subsidiaries, principals and subcontractors, investors and lenders) involved in a case.	4.2.f, 7.2	
where information is withheld despite the right to information and the corresponding disclosure obligation, the judge should be able to make or confirm a rebuttable presumption about the company's connections or the companies involved and the corresponding liabilities	4	
victims must have the right to sue and seek redress from any entity involved in a group of companies on the basis of joint and several liability	4	
Does art. 5.3 really belong to «Protection of Victims» or rather to the issue of prosecution (an issue that deserves an article of its own, see below)?	5.3	4.10
The first step in HRDD - the identification and assessment of current or potential human rights abuses - should require the meaningful, substantial and ongoing participation of the communities and/or the labour force concerned and their representatives.	6.2	
impact assessments and consultations with affected groups should not be carried out by the companies themselves, but on an independent and transparent basis. Affected groups should have legal means to file complaints about impact assessments having been omitted or having been incorrectly executed.	6.3	
State Parties shall act to protect not only public policies from the influence of commercial and other vested interests , but also legislative processes	6.7	
It shall explicitly be stated that the provision that « legal costs at the conclusion of legal proceedings do not place an unfair and unreasonable burden on victims» applies also in the case that the claimants have lost the case (except it has obviously been abusive).	7.3.e	
The States should have the right and duty to order precautionary measures if an imminent human rights abuse is to be averted (just as threatened individuals and groups should have the right to require such measures)	7	
reversal of the burden of proof is only a «may-provision» on national level without clear conditions for its application - it shall be a binding provision in the LBI with clear conditions for its application	7.6	4.16
«criminal offences or other regulatory breaches that amount or lead to human rights abuses» should supposedly rather be formulated the inverse way as «human rights abuses that amount or lead to criminal offences or other regulatory breaches» (as in art. 8.9); maybe also the wording in art. 8.11 has to be complemented: «acts or omissions that constitute attempt, participation or complicity in a human rights abuse that amounts to a criminal offence»	8.4 8.11	

Issue	2nd Rev.	Rev.
joint and several liability of all companies within a group should be established	8	
strict liability , especially in risky or dangerous contexts, should be addressed	8	
States should incorporate in their domestic law universal jurisdiction over human rights abuses that amount to crimes (as it was in the Zero Draft)	9	
It should explicitly be the victims who can choose the State where jurisdiction will be exercised according to the grounds of art. 9.1	9.1	7.1
missing part in the text: «... punishment of all violations of international [???] which constitute... » (in Rev. Draft: «... violations of international <u>human rights law and international humanitarian law</u> which constitute ...»)	10.1	8.1
Limitation periods should only start to run once the victims have discovered the damage, its cause and the polluter.	10.2	8.2
States should not be invited to conclude agreements on joint investigations , but the LBI itself should contain all the necessary provisions to function as such agreement for all State parties.	12.6	10.5
trade and investment agreements shall not only be «compatible» with human rights - the primacy of human rights over any other agreements shall be clearly stated	14.5.b.	12.6
the scope of art. 14.5.b shall be as broad as the one of art. 14.5.a: «any new bilateral or multilateral <u>agreement, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols</u> , including trade and investment agreements»	14.5.b.	12.6
art. 14.5 should prescribe the application of specific tools such as ex ante-impact assessments to achieve compatibility	14.5.b.	
The provisions on the Committee are much too detailed; a considerable part of it could be addressed in a protocol. The Committee shall comprise members of minorities (as indigenous peoples) and of civil society, which should be allowed to nominate its members. It should be able to deal with individual complaints and to judge them, investigate allegations, cases and the business behaviour of companies, visit countries and provide technical assistance to States. It should be possible to consult it on draft legislation and should be able to participate in dispute settlement between states.	15	13
Th Conference of States Parties shall have a central and important role to play, particularly in the future development of the LBI, in the drafting of optional protocols and in setting up supporting mechanisms like a monitoring mechanism. The relevant tasks are to be clarified and described in the necessary detail, as also the relationship with the Committee.	15	13
In order to ensure that the institutions set up by the LBI can operate independently of any financial conflicts of interest and with sufficient resources, funding of these institutions should be regulated already in the LBI. Consideration should also be given to whether and how the business community could be involved in funding.	15	13
The implementation is described very briefly in art. 16.1. The obligation to transpose the LBI into national law shall be regulated more explicitly and in greater detail. The States should commit themselves - to transpose the provisions of the LBI into domestic law as far as they are not directly applicable / to adapt domestic law to the LBI / to incorporate the relevant provisions of the LBI into their National Action Plans / to create the	16	14

Issue	2nd Rev.	Rev.
necessary institutions to implement and fulfil the LBI, or to expand the tasks and competencies of existing institutions such as national human rights institutions accordingly.		
peasants and the UNDROP should also be mentioned in the LBI		
the relationship between environmental aspects and human rights and the legal basis for the environmental aspects should be clearly established		
There should be a clear link with the sustainability agenda and the SDGs (only mentioned in the Preamble). Business' contribution to climate destruction and its impacts on human rights should be addressed.		