

COMMENTS BY SINGAPORE ON THE DRAFT ELEMENTS FOR THE LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS

1 With reference to the Office of the United Nations High Commissioner for Human Rights' Note Verbale (TESPRDD/DESIB/HRESIS/LW/NS) dated 25 January 2018, inviting States and stakeholders to submit comments and proposals on the draft elements for the legally binding instrument (LBI) to regulate the activities of transnational corporations and other business enterprises with respect to human rights, Singapore's comments on the draft elements document are set out below, on a without prejudice basis.

1. General Framework

1.1 Preamble

2 Singapore would like to reserve our position on references to international legal instruments in the preamble. The acceptability of these references would depend on how the references are eventually phrased.

1.2 Principles

3 Singapore notes that the phrase "*without conditions attached*" in the third bullet point, i.e. States' "*general obligation to respect, promote and protect all human rights and fundamental freedoms at the national and international level and conducted without conditions attached*" could give rise to misunderstanding, insofar as it could be interpreted to mean that there can be no restrictions on human rights, which is an inaccurate statement of existing international human rights law. Restrictions on human rights are recognised in human rights instruments, *inter alia*, the Universal Declaration on Human Rights (UDHR). In this regard, the intended interpretation of "*conducted without conditions attached*" should be clarified.

4 Singapore also notes that the principle in the sixth bullet point i.e. "*recognition of the primacy of human rights obligations over trade and investment agreements*", has no basis in current international legal norms. This principle is also found in sections 1.4 (Objectives) and 3.1 (Obligations of State) i.e. "*primacy of human rights over pecuniary or other interests of corporations*".

While we understand that the underlying rationale of this principle is to address the potential limitations imposed by trade and investment agreements on a State's ability to regulate harmful corporate conduct in its domestic law, which we acknowledge to be a legitimate concern, we have a few concerns with this. It is uncertain what practical implementation of this principle will entail, in the context of states' existing international legal obligations, especially vis-à-vis non-states parties to the LBI. As such, not only would the principle be difficult to implement in law, the possibility that it could potentially conflict with States' existing treaty obligations may also prevent States from becoming party to the LBI. We are also concerned that States could disregard obligations in trade and investment treaties under the guise of protecting human rights.

5 Singapore would like to seek clarification on the 11th bullet point i.e. "*duty of State Parties to prepare human rights impact assessments prior to the conclusion of trade and investment agreements*". As there are no universal thresholds for assessing potential human rights impact, it is unclear how implementation and compliance can be specifically monitored (as proposed in Section 9: Mechanisms for promotion, implementation and monitoring). In this regard, the intended form and outcome of these impact assessments should be clarified.

1.3 Purpose

6 Singapore would like to seek clarification on the full extent of the principle in the fifth bullet point i.e. "*reaffirm that State Parties' obligations regarding the protection of human rights do not stop at their territorial borders*". The language suggests that States are already under an obligation to protect human rights outside their territories. However, it is unclear whether this principle is meant to reflect the existing scope of a state's obligations, taking into account that a state's jurisdiction may extend beyond its territory, or to go beyond that.

2. Scope of Application

2.1 Protected Rights

7 Singapore notes that the approach taken in this section of incorporating obligations under "*all human rights treaties*" would make it difficult to get the buy-in of States that have not signed on to all these human rights treaties. We suggest that the working group consider an alternative approach based on existing

human rights recognised by States under the treaties they have signed on, and under customary international law.

2.2 Acts subject to its application

8 Singapore notes that the elements proposed in this section seek to attribute liability to businesses for the activities of entities that would be legally considered separate from these businesses, as they refer to activities committed by businesses’ “*branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them*”. There are also proposed elements in sections 5 (legal liability) i.e. “*throughout their operations*” and 7 (jurisdiction) i.e. “*their subsidiaries throughout the supply chain domiciled outside their jurisdiction*” that suggest the same. These suggest a departure from existing legal principles for the attribution of liability to separate legal entities. However, it is not clear what exactly the proposed rule for attributing legal liability is in this instance, and also raises further questions, including whether the proposed rule is based on the notion of direct or indirect control of one business over another business, and if so, how “control” is defined. These should be clarified.

3. General Obligations

3.1 Obligations of States

9 Singapore notes that the relationship between the LBI and existing human rights treaty implementation regimes requires closer examination, to ensure the LBI and mechanisms thereunder do not duplicate the work of other treaty bodies and result in incoherent standards.

10 On the second last bullet point i.e. “*State Parties shall take all necessary and appropriate measures to ensure that TNC and OBEs design, adopt and undertake human rights and environmental impact assessments that cover all areas of their operations*”, Singapore also notes that the conditions under which human rights and environmental impact assessments are required should be further considered.

3.2 Obligations of TNCs and OBEs

11 Singapore notes that as a matter of general treaty law, TNCs and OBEs, as private entities, are typically not considered subjects of international law with certain narrow exceptions. On this note, the legal basis for imposing obligations

and liability on business entities within a treaty needs to be clarified. If the intent is to depart from international legal norms, including general treaty law, the working group may need to engage parties with key interest in processes to develop new principles or change basic principles of international law.

3.3 Obligations of International Organisations

12 Singapore would like to reserve our position on the proposed elements in this section, as their implications need to be fully understood in the light of other elements to be developed.

4. Preventive Measures

13 Singapore notes that it is proposed that all TNCs and OBEs, including subsidiaries and all other related enterprises, should respect human rights. However, it may not be practical or helpful in achieving the objectives of the LBI to apply the full range of due diligence measures contemplated in the draft (e.g. *vigilance plans, periodic inspections*) to all these business enterprises regardless of size, sector and operational context. In this regard, we would like to seek clarification on whether anything is being done to ensure private business entities are adequately represented in this process.

5. Legal liability

14 Singapore notes that the LBI proposes to depart from entrenched legal principles of separate legal personality and attribution of liability, but apart from so stating, does not specify the novel principles upon which liability is to be based. This should be clarified.

15 On the fourth bullet point i.e. “*State Parties shall adopt legislative and other measures to establish that criminal and civil liability of TNCs and OBEs for human rights violations or abuses from their activities and throughout their operations, does not exclude criminal and civil liability of company members, regardless of their position, and shall be independent from the finding of individual or collective civil and criminal liability*”, it is unclear whether the same rules are intended to govern the attribution of civil and criminal liability respectively vis-à-vis related companies.

16 We also note that the eighth bullet point i.e. “*State Parties shall ensure that civil liability of TNCs and OBEs shall not be made contingent upon the finding of criminal liability or its equivalent from the same actor*” implies that the threshold for imposing civil liability should be lower than that for criminal liability. Given the inherent differences in States’ domestic legal framework, it may not be feasible to prescribe rules within a treaty for how States should regulate the behaviour of private actors.

6. Access to justice, effective remedy and guarantees of non-repetition

17 On the sixth bullet point i.e. “*State Parties shall adopt adequate mechanisms to reduce regulatory, procedural and financial obstacles which prevent victims from having access to effective remedy, including the enabling of human rights-related class actions and public interest litigation; the facilitation of access to relevant information and the collection of evidence abroad; the reversal of the burden of proof; the adoption of protective measures to avoid the use of “chilling-effect” strategies by TNCs and OBEs to discourage individual or collective claims against them and the limitation to the use of the doctrine of forum non conveniens*”, Singapore notes that access to justice is a key feature to remedying any human rights transgressions by TNCs and OBEs. This is also recognised by States. However, prescribing mandatory mechanisms, such as class actions or public interest litigation may make it difficult to get the buy-in of States to the LBI, particularly from those where such mechanisms may not be readily implemented into their legal system. As it would be preferable for States to facilitate access to justice by means or mechanisms that fit within their respective legal systems, the working group may wish to bear this in mind in its deliberations on the LBI.

7. Jurisdiction

18 On the third bullet point i.e. States should “*adopt legislative measures so that their judiciaries consider claims concerning violations or abuses committed by TNCs and OBEs and their subsidiaries throughout the supply chain domiciled outside their jurisdiction*”, Singapore notes that the proposed basis for exercise of extra-territorial jurisdiction has not been specified. In addition, the feasibility of obliging States Parties to go beyond traditional bases for asserting extra-territorial jurisdiction vis-à-vis non-States Parties to the LBI also requires further consideration.

8. International Cooperation

19 One of the proposed elements in the second bullet point seeks to impose obligations on all States Parties to grant mutual legal assistance to other States Parties. We would like to seek clarification on whether these obligations would cover assistance in only criminal matters, or civil and administrative matters as well.

20 We also note that there are proposed elements in the same point that seek to regulate how States Parties recognise and enforce foreign judgments. We would like to seek clarification on whether these are judgments in civil matters, or also criminal and administrative matters. Singapore registers preliminary concerns that regulating the recognition and enforcement of foreign judgments under the LBI may be a duplication of existing efforts and weigh down progress on the LBI. For instance, there is an ongoing project at the Hague Conference on Private International Law to formulate a treaty on the recognition and enforcement of foreign judgments in civil and commercial matters, which indicates the complexity of the endeavour.

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