

RIGHTS, RESPONSIBILITIES & RETURNS ON INVESTMENT
MAPPING THE NEGOTIATION FOR AN INTERNATIONAL TREATY ON
BUSINESS AND HUMAN RIGHTS

Master of Arts Capstone Project

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THE FLETCHER SCHOOL

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Dedicated to the memory of Berta Cáceres, Honduran indigenous
rights activist assassinated on March 2, 2016

*Berta, tu coraje, pasión y amor son más poderosos que los que te
mataron.*

Table of Contents

Executive Summary	1
Introduction	2
1 Background to the current treaty process	4
1.1 Initial attempts to address the business and human rights issue at the international level.....	4
1.2 From Framework to Guiding Principles.....	6
1.3 National Action Plans on Business and Human Rights	7
1.4 Gaps in successful implementation of the GPs	8
1.4.1 Access to remedy for victims.....	8
1.4.2 Piecemeal global uptake, both by states and by businesses	8
1.5 Back to the drawing board: A new initiative to develop a binding treaty.....	8
2 Law and policy review	9
2.1 Existing international legal obligations & applicability of international law.....	9
2.1.1 The positive and negative obligations of states.....	9
2.1.2 Are businesses subjects of international law?.....	11
2.2 “Soft” and “hard” law at the international level	13
2.2.1 Rules & norms vs. obligations & duties	13
2.2.2 Practice as norm creation: voluntary CSR initiatives.....	14
2.2.3 Other relevant international hard law regulating businesses	14
2.3 Trends in domestic and regional regulation on businesses	15
3 Negotiation analysis theory	16
3.1 The basics of negotiation analysis	16
3.1.1 Separate the personal from the issue at hand.....	17
3.1.2 Evaluate interests, not just positions.....	17
3.1.3 Define criteria of legitimacy.....	17
3.1.4 Know your BATNA, don’t set a bottom-line	18
3.1.5 Avoid the “negotiator’s dilemma”	18
3.2 The two levels of international negotiations.....	19
4 Analysis of the BHR treaty negotiation	19
4.1 Public positions of key parties.....	20
4.1.1 States	20
4.1.2 Human rights NGO community.....	24

4.1.3	<i>International business interest groups</i>	30
4.1.4	<i>Nonexistent – or invisible – opposition</i>	32
4.2	Principal issues of the negotiation.....	32
4.2.1	<i>What kinds of companies?</i>	32
4.2.2	<i>Duty bearers: states, businesses, individuals?</i>	33
4.2.3	<i>Which body of human rights norms?</i>	33
4.2.4	<i>The extent of states’ extraterritorial obligations?</i>	34
4.2.5	<i>To pierce or not to pierce the corporate veil?</i>	35
4.2.6	<i>Enforcement mechanisms?</i>	35
4.2.7	<i>Relationship with existing UN-level BHR mechanisms and initiatives?</i>	36
4.3	Underlying interests of key parties	36
4.3.1	<i>States</i>	36
4.3.2	<i>Human rights NGO community</i>	39
4.3.3	<i>International business community</i>	41
4.4	Best Alternatives to a Negotiated Agreement.....	44
4.4.1	<i>States</i>	44
4.4.2	<i>Human rights NGO community</i>	44
4.4.3	<i>International business community</i>	45
4.5	History of communication and relationship building	45
5	Opportunities & obstacles for a negotiated agreement	46
5.1	Possible criteria of legitimacy.....	46
5.1.1	<i>Common definition of domestic and transnational businesses</i>	46
5.1.2	<i>Common definition of parent company and subsidiary</i>	47
5.2	Opportunities for agreement	48
5.2.1	<i>Common interests</i>	48
5.2.2	<i>Compatible interests</i>	49
5.2.3	<i>Opposing interests</i>	52
5.2.4	<i>Zones of Possible Agreement</i>	53
5.3	Barriers to agreement.....	58
6	Conclusion & initial strategy advice for NGOs	60
	Bibliography	63
	Appendix: Abbreviations Guide	73

Executive Summary

The most recent expressions of the growing global consensus that businesses can be involved in human rights abuses was the 2011 endorsement by the United Nations Human Rights Council (HRC) of the Guiding Principles on Business and Human Rights (Guiding Principles or GPs), which set standards for the prevention of and protection from human rights violations related to business activity and for access to remedy for violations committed.

Though the GPs have received widespread support from many states and businesses, others, particularly among the human rights community, argue that they fall short in addressing the full extent of business and human rights issue by merely encouraging businesses to respect human rights and to provide remedy for any violations rather than imposing a legal obligation to do so. To that end, many human rights nongovernmental organizations (NGOs) and a few states have called for an international treaty to create such obligations, calls that culminated in the July 2014 approval by the HRC of a resolution to draft a treaty to regulate business activities with relation to human rights. At least initially, the international business community and some states vigorously opposed this treaty initiative, raising the question of whether these opposing positions preclude a negotiated agreement on a business and human rights treaty.

In this paper, I use a negotiation analysis model to consider whether the underlying interests of the business and human rights communities present prospects for a constructive and mutually beneficial policy outcome that actually protects human rights in practice. I find that some overlapping interests and incentives do exist, which opens the possibility for the negotiation of a mutually beneficial solution.

However, the history of often confrontational relationships between the international business and the human rights community, and their competing positions, or the perception thereof, requires careful strategy, for which I provide insights into steps the human rights community can take to develop proposals, build coalitions, and lobby key stakeholders in order to achieve their desired policy outcome. Nonetheless, the road to a treaty is riddled with obstacles, and I conclude with a word of caution to human rights NGOs, urging them to carefully consider whether the current treaty process will best meet their underlying interest of effective prevention, accountability and remedy for human rights abuses.

Introduction

Worldwide, consensus continues to grow that business enterprises can be involved in human rights abuses. One of the most robust expressions of this consensus was the 2011 endorsement by the United Nations Human Rights Council (HRC) of the Guiding Principles on Business and Human Rights (Guiding Principles or GPs), which set standards for the prevention of and protection from human rights violations related to business activity and for access to remedy for violations committed.

Though the GPs have received widespread support from many states and businesses, many, particularly in civil society, argue that the GPs have proven inadequate by merely encouraging businesses to respect human rights and to provide remedy for any violations rather than imposing on them a legal obligation to do so. To that end, many nongovernmental organizations (NGOs) – including a new coalition called the Treaty Alliance – and a few states, have called for a UN binding mechanism on the business and human rights (BHR) issue; in other words, they seek to convert the soft law of the GPs to the hard law of a treaty.

Those calls led to the July 2014 approval by the HRC of a resolution, sponsored by Ecuador and South Africa, to initiate a process to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”¹ In July 2015, the Intergovernmental working group (IGWG) charged with proposing treaty language convened for the first time. However, international business associations and some states have, at least initially, vigorously opposed this treaty initiative – a position that would appear to preclude a negotiated agreement on a BHR treaty.

Nonetheless, negotiations theory suggests that public positions do not always represent underlying interests, and that analysis of those interests can uncover options for mutually beneficial solutions. In this paper, therefore, I use a negotiations analysis model to consider whether the underlying interests of the international business and human rights communities in

¹ Human Rights Council, *Resolution 26/9 (2014)*.

fact present prospects for a constructive and mutually beneficial policy outcome that protects human rights in practice.

Granted, the human rights and international business communities are not homogeneous, but my research revealed significant coalescence around common positions, as demonstrated by the public positions taken by international business associations and human rights NGO coalitions; some deviation from these common positions exists, particularly among the international human rights community, which I briefly explore.

Uncovering the existence of such overlapping interests between the human rights and international business communities would reveal possibilities for the negotiation of a mutually beneficial solution. However, negotiating such a solution poses great difficulty, given perceptions of competing positions and a history of confrontational relationships. Therefore, I provide insights into steps the human rights community can take to conduct further analysis, build coalitions, develop proposals and lobby key stakeholders in order to achieve a policy outcome that may serve their primary interest of effectively protecting human rights in practice.

In part one, I briefly review the history of attempts to develop international norms and legal instruments for addressing human rights violations related to business activity and describe the existing UN framework on business and human rights. In part two, I examine the broader legal and policy debates on the obligations, duties and responsibilities of states and businesses with regard to human rights; the pros and cons of hard versus soft law at the international level; and a number of national and regional level initiatives to address some of these questions. In part three, I present a basic guide to negotiations theory and explain its utility for the present negotiation. In part four, I directly apply that theory in order to analyze the public positions, underlying interests, alternatives and relationship history of the parties to the present negotiation. In part five, I use the analysis from part four to diagnose the state of the present negotiation, proposing a set of criteria of legitimacy, possible options for agreement, and potential barriers to agreement. In part six, I draw on lessons from that diagnosis to conclude and provide some initial points of strategy advice for the human rights NGO community.

1 Background to the current treaty process

1.1 Initial attempts to address the business and human rights issue at the international level

Over the last several decades, various initiatives at the UN have attempted to address concerns about the impact that business might have on human rights. This began in the 1970s with an initiative under the auspices of the Economic and Social Council to establish a code of conduct for transnational corporations. However, this initiative failed to build consensus, in no small part due to pressure by individual corporations and from industry associations like the International Chamber of Commerce (ICC).²

This failure provided an opening for the business community and others to shift the focus of the BHR conversation towards one of voluntary initiatives and “free market mechanisms” for achieving “corporate social responsibility”.³ From this shift emerged the Global Compact in 2000, which describes itself as “the world’s largest corporate citizenship and sustainability initiative.”⁴

However, the debate on business and human rights did not subside, particularly as oil, gas and mining operations expanded in “complicated” regions and offshore production of textiles increased.⁵ A 2003 initiative of the UN expert body the Sub-commission on the Promotion and Protection of Human Rights, which would have placed on businesses the same human rights obligations and duties that bind states, also failed,⁶ after fervent opposition from corporate

² CIEL, “Written Statement,” 3; Martens, “Corporate Influence on the Business and Human Rights Agenda of the United Nations,” 6–7.

³ UN Conference on Environment and Development, “Agenda 21,” Chap. 30, para. 3.

⁴ “Global Compact: Participants and Stakeholders.”

⁵ Working Group on Business and Human Rights, “Background: The U.N. ‘Protect, Respect and Remedy’ Framework for Business and Human Rights,” 1.

⁶ Sub-Commission on the Promotion and Protection of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*.

interest groups like the ICC⁷ as well as from many developed countries.⁸

Instead, the Sub-commission asked the UN Secretary General to appoint a Special Rapporteur who could help in “clarifying the roles and responsibilities of states, companies and other social actors in the business and human rights sphere.”⁹ In naming Harvard professor John Ruggie to the post, the Secretary General selected someone who belonged to the camp that tended to favor voluntary initiatives over regulation, and who had helped shape the Global Compact.¹⁰

After three years of research and analysis, Ruggie presented the ‘Protect, Respect, and Remedy Framework,’ (hereafter ‘the Framework’) based on the three “pillars”: 1) The state duty to protect against human rights violations; 2) The business responsibility to respect human rights; 3) The responsibility of both to provide access to remedy.¹¹ While the Framework acknowledges corporations can be involved in human rights abuses, it asserts that business responsibility to respect rests broadly on “social expectations,” without acknowledging that businesses often have a very heavy hand in shaping social expectations.¹²

Some human rights and other civil society organizations argued that Ruggie developed the Framework in parallel to, and perhaps was influenced by, efforts of corporate actors to portray themselves as “good corporate citizens seeking dialogue with governments, the UN and decent concerned ‘stakeholders’, and able to implement environmental, social and human rights standards through voluntary Corporate Social Responsibility (CSR) initiatives,” and that such initiatives sidelined efforts to place binding obligations on corporations.¹³ The problem with CSR-type initiatives, argues the human rights community, is that many provide businesses with

⁷ Working Group on Business and Human Rights, “Background: The U.N. ‘Protect, Respect and Remedy’ Framework for Business and Human Rights”; Martens, “Corporate Influence on the Business and Human Rights Agenda of the United Nations.”

⁸ Economist Intelligence Unit, “The Road From Principles to Practice: Today’s Challenges for Business in Respecting Human Rights,” 8.

⁹ Working Group on Business and Human Rights, “Background: The U.N. ‘Protect, Respect and Remedy’ Framework for Business and Human Rights.”

¹⁰ Martens, “Corporate Influence on the Business and Human Rights Agenda of the United Nations,” 11.

¹¹ Ruggie, *Protect, Respect and Remedy Framework*.

¹² *Ibid.*, 17.

¹³ Martens, “Corporate Influence on the Business and Human Rights Agenda of the United Nations,” 5.

the freedom to pick and choose which issues to address; a human rights approach would require respect for all human rights.¹⁴

1.2 From Framework to Guiding Principles

The HRC welcomed the Framework, and renewed the Special Representative's mandate with a request that he could provide concrete recommendations.¹⁵ In 2011, he presented to the HRC the 'Guiding Principles on Business and Human Rights,' (hereinafter 'Guiding Principles' or 'GPs') which elaborated on the Framework and provided further guidance on implementation. In the text, Ruggie made clear that neither the Framework nor the GPs purport to create new international legal obligations.¹⁶

In the same session in which it adopted the GPs, the HRC established the UN Working Group on business and human rights, to, *inter alia*, disseminate and promote the implementation of the Guiding Principles and of good practices, and study and make recommendations on enhancing access to remedy. It also created an annual multi-stakeholder Forum on Business and Human Rights to assist and inform the Working Group,¹⁷ though without endowing either with any decision-making power or political mandate to pursue regulatory instruments or investigate alleged human rights abuses.¹⁸

Business response to the Framework, GPs and the Working Group was largely positive, including from the international associations like the ICC and the International Organization of Employers.¹⁹ On the other hand, many human rights organizations expressed strong disappointment at what they saw as the tepid reach of the GPs and worried they would do little to

¹⁴ Business & Human Rights Resource Centre, "Business & Human Rights - A Brief Introduction."

¹⁵ Human Rights Council, *Resolution 8/7 (2008)*.

¹⁶ Ruggie, *U.N. Guiding Principles on Business and Human Rights*.

¹⁷ Human Rights Council, *Resolution 17/4 (2011)*.

¹⁸ Martens, "Corporate Influence on the Business and Human Rights Agenda of the United Nations," 22.

¹⁹ *Ibid.*, 16; IOE, ICC, and BIAC, "Joint Recommendations to the United Nations Working Group on Business & Human Rights." Martens, "Corporate Influence on the Business and Human Rights Agenda of the United Nations," 16.

change the status quo.²⁰ Human Rights Watch stated at the time that the HRC had “squandered an opportunity to take meaningful action to curtail business-related human rights abuses,” and that “the council endorsed the status quo: a world where companies are encouraged, but not obliged, to respect human rights.”²¹

1.3 National Action Plans on Business and Human Rights

Since its formation the Working Group has particularly focused on encouraging states to adopt National Action Plans (NAPs) on Business and Human Rights. The idea for NAPs as a means to assess state conformity with the GPs and lay out concrete recommendations for improvement originated at the 1993 World Conference on Human Rights. After adoption of the GPs, the Working Group took up the idea and issued policy assessments and strategy documents to assist states in achieving conformity with the GPs through NAP development and adoption.²² To date, the Scandinavian countries, the UK and Lithuania have published NAPs, and 25 more have them in progress, including the US, many EU countries, and several Latin American countries.²³

Some NGOs have engaged in civil society efforts to promote NAP adoption by states, and consider them useful in “strengthening good governance and the rule of law,” as well as providing tools for comparison between states.²⁴ However, others consider NAPs more a public relations tool for states than anything else.²⁵ Furthermore, the NAP process places the entire onus for leadership and change on states, rather than on states and business.

²⁰ ESCR-Net et al., “Joint Civil Society Statement.”

²¹ Ganesan, “UN Human Rights Council: Weak Stance on Business Standards.”

²² UN Working Group on Business and Human Rights, “Guidance on National Action Plans on Business and Human Rights Version 1.0,” ii; Methven O’Brien et al., “National Action Plans on Business and Human Rights Toolkit,” 8.

²³ Business & Human Rights Resource Centre, “National Action Plans.”

²⁴ Methven O’Brien et al., “National Action Plans.”

²⁵ Ibid.

1.4 Gaps in successful implementation of the GPs

1.4.1 Access to remedy for victims

Recent studies by independent experts have identified access to judicial remedy for victims of human rights violations as the area in which states have made the fewest advances in implementing the GPs.²⁶ A study commissioned by the UN Office of the High Commissioner for Human Rights (OHCHR) identified the patchwork nature of different domestic law remedies as largely failing not just victims but also some states and many companies because of the distortions, uneven playing field, and legal uncertainty it creates.²⁷ After reviewing its study and other research, the OHCHR established in 2014 a program of work to assist states in establishing more consistent, effective and fairer domestic law remedies.²⁸

1.4.2 Piecemeal global uptake, both by states and by businesses

A Chatham House study by Joylon Ford of the BHR agenda demonstrated that since 2011, “[the] GPs, or elements of them, have... begun to be integrated into intergovernmental, governmental and business policy and management systems.”²⁹ Nonetheless, he identified a “patchwork uptake of the GPs,” with many States inactive on the issue, at least domestically.³⁰ This patchwork has also tended, in some places, to support a “race to the bottom” among states as they compete to attract foreign investment.³¹

1.5 Back to the drawing board: A new initiative to develop a binding treaty

In July 2014 the Human Rights Council approved a resolution, sponsored by Ecuador and South Africa, to form an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights to lead a process to “elaborate an

²⁶ Skinner, McCorquodale, and De Schutter, “The Third Pillar,” 11–18.

²⁷ Zerk, “Corporate Liability for Gross Human Rights Abuses,” 7, 63.

²⁸ Office of the High Commissioner for Human Rights, “Initiative on Enhancing Accountability and Access to Remedy” (emphasis added).

²⁹ Ford, “Business and Human Rights,” 5.

³⁰ *Ibid.*, 6.

³¹ International Commission of Jurists, “Needs and Options for a New International Instrument in the Field of Business and Human Rights,” 34.

international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises,” though a footnote makes clear that domestic businesses are not included.³² The resolution passed by a plurality, but not a majority.

At the same session the HRC adopted by consensus another resolution, 26/22, presented by Norway, in coordination with Argentina, Ghana and Russia, and with received strong from the US and the EU. This resolution expresses clear support for the GPs and seeks to continue and strengthen their implementation and to fill in gaps, with particular emphasis on the role of NAPs and national legislation as the appropriate vehicles. It also provides the mandate to the OHCHR to continue with its accountability and access to remedy program, noted above. The only near mention of a binding legal mechanism is the recognition “that it may be further considered whether relevant legal frameworks would provide more effective avenues of remedy for affected individuals and communities.” Notably, this resolution refers to all businesses, not just transnational corporations (TNCs).³³

In July 2015, the IGWG convened for the first time. During the first session much of the discussion focused on a footnote in the resolution, which appears to limit the scope of the treaty to TNCs; those discussions did not, however, clarify the legal substance of an eventual treaty.³⁴

2 Law and policy review

2.1 Existing international legal obligations & applicability of international law

2.1.1 The positive and negative obligations of states

Starting with the Universal Declaration on Human Rights, and later with the International

³² Human Rights Council, *Resolution 26/9 (2014)*.

³³ Human Rights Council, *Resolution 26/22 (2014)*; US Mission in Geneva, “Explanation of Vote.”

³⁴ ICAR, “Fifth Annual Meeting of the International Corporate Accountability Roundtable.”

Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (ICESC), states have recognized the basic civil, political, economic, social and cultural rights of all individuals; they have further recognized states' obligations to respect human rights by not interfering with or curtailing the enjoyment of those rights, to protect individuals and groups against human rights abuses by third parties, and to fulfill human rights by taking positive action to facilitate the enjoyment of basic human rights.³⁵

These treaties make clear that states have both negative obligations (duty to refrain from acting) as well as positive ones (duty to protect, including protection from acts by third parties).³⁶

Positive duties have been exercised, for example, by the imposition of labor standards, which conventions of the International Labor Organization require states to implement.³⁷ Of course, not all states have consented to be bound by all the existing positive duty-imposing treaties, nor have all states that have consented to be bound fully implemented those treaties, leaving open a wide gap in recognition, implementation and enforcement of such positive duties.

Continued debate on the extent and precise content of states' legal duties in relation to human rights violations by business

As described above, the Framework and Guiding Principles brought together into one document the existing duties and obligations on states, but did not create new ones. They also made explicit the intention not to have states place such obligations on businesses, neither at the national nor at the international level.³⁸ Herein, then, lies a key element of the treaty debate.

Much of this debate centers on the question of whether the 'home' or the 'host' state bears the duty to protect, or some combination thereof.³⁹ While some argue that only the states that host business enterprises hold international obligations, many others contend that home states to such

³⁵ Office of the High Commissioner for Human Rights, "International Human Rights Law."

³⁶ Ford, "Business and Human Rights," 13.

³⁷ Fernández Sixto, "Business and Human Rights: A Study on the Implications of the Proposed Binding Treaty," 10.

³⁸ Ford, "Business and Human Rights," 20.

³⁹ Zerk, "Corporate Liability for Gross Human Rights Abuses."

businesses also hold extraterritorial obligations.⁴⁰ The aforementioned UN-commissioned study found that domestic legislation around the world demonstrates varied understandings of host vs. home state obligations, as well as a mishmash of criminal and individual liability in many domestic legal settings.⁴¹

2.1.2 Are businesses subjects of international law?

In framing Pillar 2 as the business responsibility to respect human rights, the Framework attempted to build consensus around the notion that only states have obligations to protect. This reflects the long-standing understanding and practice since the founding of the Westphalian system that states are the exclusive subjects of international law, meaning that only they can be bound by international legal obligations. Though the preamble to the Universal Declaration on Human Rights refers to “organs of society,” which could include companies, it is generally accepted that the preamble is not hard (binding) law.⁴²

Furthermore, general human rights treaties impose obligations on states, but lack specificity on the duties of states to impose obligations on non-state actors like companies.⁴³ So, even while “[it] is well-established that international law may impose legal obligations and confer legal rights on non-state actors”⁴⁴ in the arena of human rights, “[imposing] direct obligations onto corporations for all human rights challenges one of the most well-established principles of international human rights law, which is that states, and states only, bear responsibilities in that area.”⁴⁵

Businesses have many rights under international law

Nonetheless, businesses have been afforded, in recent decades, many rights under international law, particularly through international investment agreements (IIAs), rights that restrict in certain

⁴⁰ CIEL, “Written Statement,” 4.

⁴¹ Zerk, “Corporate Liability for Gross Human Rights Abuses,” 35.

⁴² Fernández Sixto, “Business and Human Rights: A Study on the Implications of the Proposed Binding Treaty,” 10.

⁴³ Ibid.

⁴⁴ Cerone, “Defining Soft Law,” 11; See also: Cassel and Ramasastry, “White Paper: Options for a Treaty on Business and Human Rights.”

⁴⁵ Bernaz, “Including Corporate Criminal Liability for International Crimes in the Business and Human Rights Treaty.”

cases states' abilities to exercise the duty to protect. For example, so-called stabilization clauses in many IIAs limit the application of domestic regulations on foreign investors and can include provisions for indemnification of incurred costs. In doing so they can prevent governments from protecting their own citizens and can also disadvantage domestic companies vis-à-vis TNCs.⁴⁶

Additionally, investor-state dispute settlement (ISDS) mechanisms in IIAs tend to privilege investor rights over host states' obligations, allowing businesses to sue states in special tribunals in order to protect their profit-making interests,⁴⁷ with "devastating" implications for human rights protection, according to the UN Independent Expert on the Promotion of a Democratic and Equitable International Order.⁴⁸

"Governance gap" created by the influence, rights, and degree of accountability of businesses

These restrictions imposed in IIAs, the long-standing understanding that states are the sole bearers of international human rights obligations, and the varied and at times contradictory landscape of domestic legislation regarding BHR have led many human rights NGOs and international law scholars to argue that an imbalance exists in the international legal system, creating, as it were, "a gap in human rights protection as it relates to business activity."⁴⁹ This "governance gap"⁵⁰ can be exacerbated by the power asymmetries between affected communities and victims on one side and companies and governments on the other.⁵¹

Furthermore, many argue, if businesses enjoy rights under international law, so too should they have obligations, thus assuming full status as subjects of international law. Such calls resonate particularly in the case of countries with weak institutions,⁵² where the weight of influence and

⁴⁶ Thompson Reuters, "Stabilization Clause."

⁴⁷ CIEL, "Written Statement," 5.

⁴⁸ de Zayas, "How Can Philip Morris Sue Uruguay over Its Tobacco Laws?"

⁴⁹ CIEL, "Written Statement," 4; See also: Ford, "Business and Human Rights."

⁵⁰ Ruggie, *Protect, Respect and Remedy Framework*, 3.

⁵¹ Tierra Digna, "Seguridad y Derechos Humanos: ¿Para Quién?," 28.

⁵² Ford, "Business and Human Rights," 9.

impact of business activity, particularly transnational ones, tilts even farther in favor of businesses. And although in the coming years businesses, in the face of the aforementioned legal uncertainty created by the piecemeal domestic law systems regarding human rights, may increase efforts to implement CSR-type initiatives and even push for certain kinds of regulation, the impetus, Ford argues, must come from outside the business community, “because a comprehensive and just human rights system must necessarily be based on mandatory provisions grounded in public law.”⁵³

2.2 “Soft” and “hard” law at the international level

2.2.1 Rules & norms vs. obligations & duties

The GPs are, by definition, not hard law because they pose no new legal obligations, whether on states or on businesses. Instead, they are a version of nonbinding “soft law.” Though definition of soft law is vague and debated, it is often thought of as generally accepted rules and norms. Importantly, “a set of norms that influences behaviour does not alone indicate the soft law character of those norms... Consideration also has to be given to author, addressee, formulation, and acceptance by states in terms of practice and sense of legal obligation.”⁵⁴ Soft law can stay soft law forever, or it can convert into hard law through one of two processes: ‘hardening’ into customary law through increasing acceptance and use, or through treaty creation.⁵⁵

The process of hardening into customary law can be a particularly slow and varied process, and no assurances exist that a body of soft law will in fact become hard law.⁵⁶ As clearly stated in the introductory language of the Framework, it was designed to be a series of recommendations, and as such is soft law, with as of yet little, slow, and piecemeal application to be close to hardening via customary law. The current treaty process seeks to accelerate and consolidate the process, because the establishment of a treaty obligation implies a binding legal obligation, even if it is a

⁵³ Ibid.

⁵⁴ Cerone, “Defining Soft Law,” 10.

⁵⁵ Cerone, “Defining Soft Law.”

⁵⁶ Ibid.

voluntary pledge, or even a pledge to make a voluntary pledge.⁵⁷ However, a treaty can only become a legally binding instrument if enough states consent to be bound by it, and then only legally binding on those states that consent to be legally bound.

2.2.2 Practice as norm creation: voluntary CSR initiatives

Wanting to avoid treaty-based obligations, many states and businesses have opted for participation in voluntary initiatives in order to attempt to address growing concerns related to business and human rights. These range from “internal self-regulatory undertakings to multi-stakeholder hybrid approaches with more mandatory elements.”⁵⁸ Though such initiatives can contribute to norm creation by molding behavior, and such behavior change could influence states’ decisions to impose legal obligations on businesses, any such norm creation that these initiatives engender will never lead to law – customary or otherwise, because businesses are not authors of international law, as states are.

Furthermore, many in the human rights community have identified the danger of lack of accountability and “white-washing” of corporate images through such voluntary initiatives. For example, with regard to the Extractive Industries Transparency Initiative (EITI), several NGOs have noted that as some governments have attempted to achieve “validation” through the EITI, and that in a rush to advance such processes some have “[overridden] key aspects of the EITI such as ensuring the legitimate participation of civil society, respecting their internal selection and organization processes, as well as achieving the necessary balance to build consensus among companies, governments and civil society.”⁵⁹

2.2.3 Other relevant international hard law regulating businesses

Though international human rights obligations on businesses do not currently exist, other bodies of international law have begun to impose some obligations on business. The NGO Corporate Accountability International (CAI) has highlighted the World Health Organization’s Framework

⁵⁷ Ibid., 4.

⁵⁸ Ford, “Business and Human Rights,” 10.

⁵⁹ Due Process of Law Foundation et.al., “Letter from Civil Society of the Americas.”

Convention on Tobacco Control (FCTC) as a useful model and precedent for an international treaty regulating business activity, one that includes “strong, clear and binding provisions” to prevent tobacco company intervention in public health policy. The FCTC, writes CAI, “advances conflict of interest as a concept in international law that preserves and protects the primacy of human rights over commercial enterprise.”⁶⁰ Of course, the narrow issue of tobacco production and sales does not provide a fully useful model, though other organizations suggest that negotiating processes for the Anti-Personnel Land Mines Convention and the ICC Statute as could also serve as useful models.⁶¹

2.3 Trends in domestic and regional regulation on businesses

A bill is currently awaiting a vote in the French Senate, after already having won approval in the House, to require large France-domiciled firms to produce *plans de vigilance*, outlining their plans for due diligence in respect for human rights, environment and anti-corruption norms in their activities abroad; fines up to €10 million could be levied for non-compliance.⁶²

The Swiss Council of States in 2014 ordered the Swiss Federal Council to study possibilities for assuring effective remedy for victims of human rights violations committed by Swiss-domiciled companies abroad. Though a March 2015 vote in the Swiss Parliament’s lower chamber narrowly defeated a measure for mandatory due diligence by Swiss companies, further moves in that direction are expected.⁶³

At the regional level, The Council of Europe adopted in November 1998 the *Convention on the Protection of the Environment through Criminal Law*, Article 9 of which provides for certain kinds of corporate liability. The Convention requires ratification by two more states to enter into force. Nonetheless, it has inspired a proposal for an *International Convention on Environmental Crimes*, under which states would pledge to “recognize, investigate, and prosecute a specific set

⁶⁰ Corporate Accountability International, “OHCHR Consultation,” 4–5.

⁶¹ Martens, “Problematic Pragmatism,” 14.

⁶² Ford, “Business and Human Rights,” 16.

⁶³ Ibid.

of clearly defined environmental crimes under domestic law and provide mechanisms to enhance international cooperation and build domestic capacity for such investigations and prosecutions.” These offenses would, to some extent, cover serious violations of the rights contained in the ICESC.⁶⁴

Similarly, since 2012 the African Union has been considering a protocol that would create a criminal chamber of the African Court of Justice to address a wide range of international crimes, including many international human rights crimes, and which would expand the Court’s jurisdiction to cover “all legal persons” over 18 years of age, which the protocol makes clear includes corporate persons. The protocol has not yet been adopted, however, by the African Union, meaning it has not entered into force.⁶⁵

Initiatives such as these could prove useful in increasing businesses’ respect for human rights but also would have the negative effect of increasing the domestic regulatory patchwork and governance gap.

3 Negotiation analysis theory

3.1 The basics of negotiation analysis

Negotiation analysis rests on the premise on that negotiations can be ‘principled’ and more successful if negotiators focus on the merits of the issue at hand rather than engage in ‘positional bargaining’.⁶⁶ In order to do so, however, negotiators must carry out careful analysis and follow a few key tenets.

⁶⁴ International Commission of Jurists, “Needs and Options for a New International Instrument in the Field of Business and Human Rights,” 40.

⁶⁵ African Union, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*; van Schaak, “Immunity Before the African Court of Justice & Human & Peoples Rights—The Potential Outlier.”

⁶⁶ Fisher and Ury, *Getting to Yes*, xviii; See also: Lax and Sebenius, *3D Negotiation*; Hopmann, “Two Paradigms of Negotiation: Bargaining and Problem Solving”; Fisher, “Beyond YES.”

3.1.1 Separate the personal from the issue at hand

No negotiation occurs in a vacuum; in addition to the subject of the issue under negotiation, nearly all negotiators have a relationship history and future, including in diplomatic negotiations. As a result, many negotiators make inferences and assumptions about their counterparts without a basis in facts about the other's real intentions and attitudes, thus becoming distracted by issues unrelated to the substance of the negotiation.⁶⁷ However, even though one cannot know with full certainty another's true intentions and attitudes, careful preparation and analysis can provide much useful information. It can help understand perceptions and challenge those perceptions, both one's own perceptions and those of the other parties. It also provides insights for tailoring messaging to address central concerns and for communicating constructively and with a shared purpose.

3.1.2 Evaluate interests, not just positions

Principled bargaining requires thorough preparatory analysis of the lay of the land in order to avoid the pitfalls of positional bargaining. This analysis includes an examination of the substance of the problem and the underlying interests, not just the public positions, of all parties, as understood from their own viewpoints. Such an examination can often uncover otherwise hidden opportunities for mutual gain, or what some scholars call Zones of Possible Agreement (ZOPAs).⁶⁸

3.1.3 Define criteria of legitimacy

For topics about which parties have conflicting interests, principled negotiation necessitates the use of objective, independent standards to facilitate agreement on those topics. Such criteria serve to provide common ground, a baseline standard, and a sense of fairness on controversial

⁶⁷ Fisher and Ury, *Getting to Yes*, 22.

⁶⁸ Lax and Sebenius, *3D Negotiation*, 88.

topics, helping to focus the negotiation on the substantive issues.⁶⁹ Depending on the negotiation, setting such criteria does not always work, but when it does it can prove a powerful tool.

3.1.4 Know your BATNA, don't set a bottom-line

While it can seem natural to set a bottom-line entering into a negotiation, scholarship indicates a more useful tool: a Best Alternative To a Negotiated Agreement (BATNA), or the best outcome a party could hope to enjoy if a negotiated solution cannot be reached. A BATNA is not the same as a bottom-line; whereas establishing a bottom-line creates an inflexible, rigid position, understanding one's own BATNA allows a party to better understand its own underlying needs and interests and encourages the flexibility necessary to benefit from information gleaned during the negotiation in order to invent creative solutions that could meet the interests of all parties. Furthermore, identifying BATNAs allows parties to better know when to reject a deal that may actually create a worse outcome for its own interests, and when to accept a deal that is, in fact, favorable to its interests, even if different than its original public position.⁷⁰

Proper negotiation analysis requires identifying not just a party's own BATNA, but also those of the other parties involved, so as to more fully understand the power and interest dynamics of the negotiation and optimize one's own negotiating power.

3.1.5 Avoid the "negotiator's dilemma"

The negotiator's dilemma refers to the competitiveness that often arises in negotiations, shrinking the possibility for cooperation and mutual gain. This dynamic can lead to deadlocks, mediocre agreements, and spiraling conflicts, and avoiding such dynamics can greatly increase chances of reaching a mutually beneficial negotiated solution.⁷¹

⁶⁹ Arrows et al., "Introduction," 44.

⁷⁰ Fisher and Ury, *Getting to Yes*, 99–102.

⁷¹ Lax and Sebenius, *3D Negotiation*; Sebenius and Antrium, "Formal Individual Mediation and the Negotiators' Dilemma: Tommy Koh at the Law of the Sea."

3.2 The two levels of international negotiations

Although these basic principles apply to all negotiations, international negotiations are infinitely more complex than two-party negotiations, not just because of the additional parties involved but also because of the two – or more – levels of negotiation occurring simultaneously.

Level I of international negotiations refers to the ‘official’ negotiation among the parties to the negotiation; Level II to the negotiations that happen between the parties and the constituencies to which they must answer. Often the latter can be the more difficult, because the determinants of the interests and positions taken by states in international negotiations involve, according to negotiations scholar Robert Putnam, the politics of “parties, social classes, interest groups (both economic and noneconomic), legislators, and even public opinion and elections, not simply executive officials and institutional arrangements.”⁷² In such two-level negotiations, then, negotiated solutions are only possible when a Level 1 agreement has a large enough ZOPA to encompass enough of the Level 2 constituencies of all official parties.

Though these multiple levels add immense complexity to international negotiations,⁷³ they also provide opportunities for non-state actors to influence the outcomes of negotiations by participating in Level II negotiations. In order to decide if and how to exercise influence, non-state actors must, just as do states directly involved in a negotiation, conduct a thorough analysis of the negotiation, including stakeholder mapping, before developing a strategy. After all, negotiation has limits, and requires considerable investments of time and energy, so a thorough analysis is necessary to determine if engaging in the process is worth it, particularly for non-state actors not directly required to participate.

4 Analysis of the BHR treaty negotiation

As described above, a successful principled negotiation requires detailed analysis. In this section I map the positions, interests, and BATNAs of key stakeholders, and then identify the principal

⁷² Putnam, “Diplomacy and Domestic Politics: The Logic of Two-Level Games,” 432.

⁷³ *Ibid.*, 434.

issues to be negotiated. This kind of mapping should allow identification of options for mutual gain, if these exist, or see whether a negotiated solution actually serves the interests of specific parties. I include in this mapping a brief mention of certain blocs of states, since states, holding the power to make the final decision on a treaty, are the Level I negotiators in this negotiation, but I focus the bulk of this mapping exercise on human rights NGOs and the international business community as the primary Level II stakeholders in this negotiation.

4.1 Public positions of key parties

4.1.1 States

To identify the positions of states, I examine the votes taken and statements made during the HRC's 26th session in which the treaty resolution, Resolution 26/9, was adopted. For additional information I also take into account statements made by states shortly before or after the 26th session, and during the first meeting of the IGWG.

Proposing the treaty: Ecuador & South Africa

Protection of state sovereignty and agency in the face of major problems caused by TNCs

In presenting Resolution 26/9 in 2014, Ecuador's representative to the UN stressed the need to protect the victims of human rights violations, using the specific example of the extensive contamination believed to be caused by oil extraction operations of Texaco (now owned by Chevron) from the 1960s to 1990s in the Ecuadorian Amazon, over which Ecuador and the company have been embroiled in a lengthy and expensive legal battle.⁷⁴ The case was clearly paradigmatic for Ecuador; remarking on the Chevron-Texaco case earlier that year, Ecuador's foreign minister declared, "This is but one example of how international trade and investment

⁷⁴ Business & Human Rights Resource Centre, "Texaco/Chevron Lawsuits (re Ecuador)."

agreements place transnational corporations above sovereign national law, allowing them to use their money, influence and lobby groups to escape accountability for their actions.”⁷⁵

Similarly, during the debate on the resolution, the Ecuadorian, South African and Indian representatives alluded to the lawsuits from TNCs that many small states have had to confront, in which in some cases the TNC’s budget surpasses the GDP of the country in question, making it nearly impossible for the state to hold the TNC accountable.⁷⁶

International consistency in corporate compliance

At the 2014 BHR Forum, which took place after the approval of 26/9, the South African Representative “emphasized the constant challenge of ensuring consistency across boundaries with regard to corporate compliance,” and noted that even as states developed NAPs, “it was necessary to pursue an international legal convention to ensure a common global standard.”⁷⁷

Supporting a treaty: Many African, SE Asian, Asian, and some Latin American, countries

Additional states that voted in favor of the resolution were India, Russia, the majority of African states, Cuba, Venezuela, Vietnam, Pakistan, and China with conditionality.⁷⁸ I note that the resolution was proposed and supported solely by developing countries.

Inability of states to enforce national laws against powerful TNCs

In its explanation of its vote, India stated, in a manner similar to that of Ecuador, “these guiding principles have their own limitations and have had little impact for the victims whose human rights have been violated by business operations of transnational corporations.”⁷⁹

⁷⁵ “Ecuador Pushes International Treaty on Human Rights.”

⁷⁶ Ladino, “El Camino Hacia Una Convención Sobre Empresas Y Derechos Humanos.”

⁷⁷ Ibrahim, “Summary of Discussions of the Forum on Business and Human Rights,” 10; Ruggie, “The Past as Prologue?”

⁷⁸ Fernández Sixto, “Business and Human Rights: A Study on the Implications of the Proposed Binding Treaty,” 49.

⁷⁹ Permanent Mission of India, “Explanation of Vote by India.”

Greater clarity in obligations of TNCs

In a 2013 letter to the president of the HRC, the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador stressed the importance of a UN-sponsored process for establishing a legally binding framework to regulate TNCs and argued that the Framework was a “‘first step’ without further consequence,” and stressed that a legally binding instrument “would clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to states.”⁸⁰

Remedies for victims when domestic jurisdictions cannot provide it

The same letter also called for “the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to prosecute effectively those companies.”⁸¹ It is noteworthy that these states seem prepared to cede a fair measure of sovereignty in order to not have to bear the full burden of providing remedy.

Against a treaty: US, UK, most of the EU

The US, UK, Japan, South Korea, nearly all European Union (EU) states, and several others voted against the resolution. Reportedly, the US, EU, and Norway also actively lobbied, and perhaps even pressured, other states not to support the resolution.⁸²

GPs are good enough and need more time for implementation

Following the vote, the U.S. representative in the HRC told delegates, “The United States will not participate in this IGWG, and we encourage others to do the same.” He explained this position by arguing that states had not been “given adequate time and space to implement the Guiding Principles.”⁸³ Other treaty opponents expressed similar sentiments, and also emphasized

⁸⁰ “Statement on Behalf of a Group of Countries at the 24rd [sic] Session of the Human Rights Council.”

⁸¹ Ibid.

⁸² Villareal and van Schaik, “Más Cerca de Un Tratado Vinculante Sobre Derechos Humanos Y Empresas.”

⁸³ US Mission in Geneva, “Explanation of Vote.”

the belief that the GPs' approach of regulation of businesses at the domestic level is adequate.⁸⁴ They also argued that the initiative would stymie what they saw as the consensus approach built by Ruggie, undo the many years of work of the HRC, and create a parallel process that would sidetrack and compete with other efforts.⁸⁵

A treaty should include all business enterprises

The EU shared similar sentiments to those of the US, but also mentioned concerns that the resolution focused only on TNCs, “while it is the fact that many abuses are committed by enterprises at the domestic level.”⁸⁶

However, since the IGWG held its first session, the EU position seems to have shifted, at least slightly. According to a member of civil society present at the IGWG July 2015 meeting and the November 2015 BHR Forum, the EU did participate in the IGWG session, and though it made initial moves that appeared designed to obstruct the process, later backed down after strong pushback from other states and civil society.⁸⁷

Unknown: Latin American economic powers, Gulf States

In 2013, 85 African, Middle Eastern, and other states, led by Ecuador, presented a joint statement at the 24th session of the HRC in September 2013, in which they called the GPs a “partial answer” to the issue – though only named TNCs as culprits – and declared that the GPs, “fell short” of adequately dealing with issues of accountability and remedy for victims.⁸⁸ Despite having signed this letter supporting a treaty initiative, the Gulf States abstained from the resolution vote, as did Latin American economic powers like Mexico, Argentina, Chile and Brazil.

⁸⁴ Ladino, “El Camino Hacia Una Convención Sobre Empresas Y Derechos Humanos”; Sethi, “UN to Draft Treaty on Human Rights Violation by Multinationals”; US Mission in Geneva, “Explanation of Vote.”

⁸⁵ Ladino, “El Camino Hacia Una Convención Sobre Empresas Y Derechos Humanos”; Sethi, “UN to Draft Treaty on Human Rights Violation by Multinationals”; US Mission in Geneva, “Explanation of Vote.”

⁸⁶ Sethi, “UN to Draft Treaty on Human Rights Violation by Multinationals.”

⁸⁷ NGO representative, Interview with author.

⁸⁸ “Statement on Behalf of a Group of Countries at the 24rd [sic] Session of the Human Rights Council.”

4.1.2 Human rights NGO community

After the adoption of Resolution 26/9 over 400 organizations from around the world and almost 750 individuals, including nearly all of the NGOs actively working on the business and human rights issue, formed what they called the “Treaty Alliance” and signed a statement demonstrating supports a stronger international legal framework and believes that a treaty process “complements other instruments and initiatives in the field of business and human rights.”⁸⁹ A summary of their primary demands, as well as the positions of a number of other human rights NGOs, follows.

Significantly increase access to remedy

As described above, many, both within the human rights NGO community and without, agree that the third pillar of the GPs, access to remedy, has been the least successful of the three pillars. Human rights NGOs have continued to stress the need for remedy, and emphasized that remedy must be truly accessible and not limited, for example, just to those with the ability to travel to the seat of the HRC in Geneva.⁹⁰ Accessibility must be arranged, they argue, in a way that “allow[s] people with a claim access to judicial remedies not only in their own home states, but in all other states that have jurisdiction over the concerned business enterprise.”⁹¹

Increased definition of and protection for collective rights

Particularly for indigenous groups and other ethnic populations, the further definition of and respect for collective rights is a major concern.⁹²

Establish global applicability of norms and laws

Many human rights NGOs have criticized, as do the scholars cited above, the patchwork approach of the GPs in general, not just with regard to access to remedy. Given the integrated

⁸⁹ Global Movement for a Binding Treaty, “Statement: Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse.”

⁹⁰ Participant in ICAR 5th annual meeting, September 10-11 2015, name withheld.

⁹¹ Treaty Alliance, “Resolution on Binding Human Rights Standards Passes in Human Rights Council.”

⁹² International Commission of Jurists, “Needs and Options for a New International Instrument in the Field of Business and Human Rights.”

nature of the global economy, they stress the need for a binding instrument that requires states to adopt legislation and other measures requiring companies to “adopt policies and procedures aimed at preventing, stopping and redressing adverse human rights impacts wherever they operate or cooperate,”⁹³ and that “reach all of the actors that form a part of an enterprise’s value chain.”⁹⁴

Decreasing the ability of international investment agreements to block states from taking action

As described above, IIAs have afforded businesses many rights but few obligations. Numerous NGOs therefore insist that a treaty must readjust this imbalance, perhaps by requiring home states of offending businesses to implement their duty to protect human rights.⁹⁵ Others, taking up Ecuador’s argument in introducing the resolution, highlight that the ISDS system affords, in some cases, greater rights to foreign companies operating in a particular country than those rights enjoyed by domestic business enterprises, and that such imbalance requires a rebalance.⁹⁶

Direct responsibility of parent companies and subsidiaries

Although much of the global economy is quite integrated, the web of supply chains is extremely complex and can serve to shroud a business enterprise from the misdeeds of a legally related entity. Therefore, the Treaty Alliance argues that a treaty should “elaborate on the modalities in which TNCs and other business enterprises participate in the commission of human rights abuses, including corporate complicity and parent company responsibility for the offences committed by its subsidiary.”⁹⁷

⁹³ Treaty Alliance, “Resolution on Binding Human Rights Standards Passes in Human Rights Council.”

⁹⁴ ICAR, “Second Submission to the Open-Ended Intergovernmental Working Group.”

⁹⁵ CIEL, “Written Statement,” 5.

⁹⁶ Carasik, “In Pro-Corporate Tribunals We Trust.”

⁹⁷ Treaty Alliance, “Resolution on Binding Human Rights Standards Passes in Human Rights Council.”

Increased transparency and responsiveness in business operations

Many NGOs, particularly those working with affected communities, stress the need for transparency and direct communication by businesses with the communities their activities will affect, including involving them in decision-making processes, for example through more robust free, prior and informed consent processes.⁹⁸ In the words of a Colombian NGO working with affected communities, the GPs have been inadequate as a tool for achieving social justice and full respect for human rights because, among other reasons, they do not include calls for the effective participation of affected communities in their formulation, and because they do not have the pro-victim focus of much of the rest of international human rights law.⁹⁹ The treaty process, therefore, must seek to “address the needs and realities of people and communities whose human rights have been infringed, or are being threatened, by corporate conduct.”¹⁰⁰

Protection of human rights defenders & whistleblowers

Similarly, Treaty Alliance argues that a treaty should “contain provisions requiring states to respect, protect and facilitate the work of human rights defenders and whistle-blowers,”¹⁰¹ who are often targeted for speaking out.¹⁰²

Defining the kind of business conduct that would lead to liability

The Treaty Alliance and other NGOs have noted that the GPs lack specificity on business obligations, and clarification is needed on the kind of business conduct that would trigger legal liability.¹⁰³

⁹⁸ Tierra Digna, “Seguridad y Derechos Humanos: ¿Para Quién?” 114; Due Process of Law Foundation et.al., “Letter from Civil Society of the Americas.”

⁹⁹ Tierra Digna, “Seguridad y Derechos Humanos: ¿Para Quién?” 125.

¹⁰⁰ Treaty Alliance, “Resolution on Binding Human Rights Standards Passes in Human Rights Council.”

¹⁰¹ Ibid.

¹⁰² Global Witness, “Deadly Environment.”

¹⁰³ Tierra Digna, “Seguridad y Derechos Humanos: ¿Para Quién?” 125; Treaty Alliance, “Resolution on Binding Human Rights Standards Passes in Human Rights Council.”

Establish enforcement mechanisms

Recognizing the necessity of oversight and enforcement to assure the effectiveness of any treaty, the Treaty Alliance has called for inclusion of “an international monitoring and accountability mechanism” and urged that a “complementary international jurisdiction” should also be considered.¹⁰⁴

Partial Consensus: applicability to all businesses, not just TNCs

While some NGOs seem content with a binding treaty that would apply just to TNCs, as proposed in the Ecuador resolution and currently under consideration by the IGWG, the Treaty Initiative, an NGO collaborative with membership overlapping with but different from the Treaty Alliance, has stressed the need for any treaty to include both national and transnational businesses. In a statement signed by a wide range of NGOs including Amnesty International, the International Commission of Jurists, Earthrights International, and others, the Treaty Initiative argued that any treaty purporting to address the needs of potential victims of business activity, “must address all business enterprises that can potentially carry out abuses and not only on [sic] those with transnational links,” given that all business enterprises have the potential ability to adversely impact human rights.¹⁰⁵

Further, they argue, a system that applied to some businesses and not others would be “unworkable” for states and violate rule of law principles requiring equal applicability of the law. Instead, they push for global standards, like the recognition by all states of corporate legal liability, which would serve to “create the basis for a more uniform global approach to the problem of business abuse of human rights,” but which could include a flexible approach that takes into account factors like company size and other factors.¹⁰⁶

¹⁰⁴ Treaty Alliance, “Resolution on Binding Human Rights Standards Passes in Human Rights Council.”

¹⁰⁵ Treaty Initiative, “Joint Oral Statement.”

¹⁰⁶ Ibid.

Civil society opposing, or at least skeptical of, a treaty

Several NGOs, while acknowledging the potential for the treaty process to spur action by governments and increase access to justice for victims, have expressed serious skepticism about the current treaty process.¹⁰⁷ John Ruggie, now no longer the Special Rapporteur, has also strongly criticized the process. Their principal critiques of the process follow.

Will be polarizing and could derail existing diplomatic consensus

Referencing what they see as the continued diplomatic consensus surrounding the GP framework, these critics argue that the treaty process will pit Western states against many developing countries, and will draw the wrath of many large companies, thus polarizing the BHR debate.¹⁰⁸

Risks limiting activism on corporate accountability

One critic argues that human rights NGO activism will focus on the treaty process to the detriment of other important fights in the larger business and human rights debate.¹⁰⁹

Distracts from efforts to implement GPs at national level and the enforcement of existing law

Similarly, others argue that the on-going treaty process provides states with the excuse of needing to see through the treaty process as a way to further postpone implementation of the GPs, enforcement of existing hard law, or any new domestic actions on corporate accountability.¹¹⁰ Ruggie notes that many states during votes on both resolutions expressed support for GPs and supported Resolution 26/22, yet those that supported 26/9 have not done much to implement the GPs and some of the NGOs opposed them when introduced in 2011.¹¹¹

¹⁰⁷ Ganesan, “Dispatches.”

¹⁰⁸ Ibid.

¹⁰⁹ Taylor, “A Business and Human Rights Treaty?”

¹¹⁰ Ibid.; Ford, “Business and Human Rights,” 23.

¹¹¹ Ruggie, “The Past as Prologue?”

Formation of an IGWG leads to competition between civil society & business to influence states

Rather than engaging in a long, drawn out and potentially unsuccessful treaty process, it would be easier and wiser, these critics argue, for civil society to try to confront powerful business interests at the national, rather than international, level, as they now must do if they want to influence the treaty process. “It is at the national level where regulation will have to happen anyway,” argues one critic, “and where a constituency in favour of regulating corporate abuses will have to be mobilized if enforcement is ever to be made a reality.”¹¹²

Could create race to the bottom

The convergence around a set of norms that a treaty would require could lead to a “‘race-to-the-bottom’, narrow the scope for redress, or generally risk stifling national legal development.”¹¹³

Exclusion of domestic enterprises makes any treaty untenable

Human Rights Watch argued after approval of Resolution 26/9 that the “fundamental flaw” in the initiative rests on the exclusive focus on TNCs; after all, any company can be involved in abuses. The exclusion of domestic companies could lead to “a situation where an international apparel company was bound by human rights standards, but abusive local factories aren’t.”¹¹⁴

It’s been tried and didn’t work

Ruggie criticizes the current treaty process by citing previous attempts, which all failed, as described above in Part 1.¹¹⁵

¹¹² Taylor, “A Business and Human Rights Treaty?”

¹¹³ Ford, “Business and Human Rights,” 24.

¹¹⁴ Ganesan, “Dispatches.”

¹¹⁵ Ruggie, “The Past as Prologue?”

Proposed scope is too large

Ruggie argues that one single treaty could not hope to address the entirety of the business and human rights question, given the immense array of issues involved. If a treaty would have hope of any success, it should be precise, narrow, and focused, for which he suggests that it only address gross human rights violations.¹¹⁶

4.1.3 International business interest groups

To analyze the positions of international business with regard to the treaty process, I study statements and submissions from the IOE, the Business and Industry Advisory Committee to the Organization for Economic Co-operation and Development (BIAC), the World Business Council for Sustainable Development (WBCSD) and the International Chamber of Commerce (ICC).

Begrudging engagement

In March 2014 the IOE issued a statement directly questioning Ecuador's initial proposal for a treaty, emphasizing its preference for the GPs and making clear its belief that the obligation to protect rests on states, not businesses.¹¹⁷ After the approval of the treaty, the IOE issued a communiqué decrying the initiative as a “genuine setback” and a “return to approaches that have failed,”¹¹⁸ and the ICC expressed “deep concern” that the resolution would “undermine progress already made by the widely supported” GPs.¹¹⁹

However, by June 2015, the business associations appeared to come to terms with the existence of the treaty process and have apparently decided to engage in the process. In the lead-up to the first working group meeting the IOE issued, along with the BIAC, WBCSD and the ICC, an “Initial Observations” document on the treaty process,¹²⁰ in which the associations stated, “human rights are a high priority for the international business community,” though again

¹¹⁶ Ibid.

¹¹⁷ Thorns, “IOE Secretary-General Questions Ecuador-Initiated Proposal for New Legally-Binding Treaty on Business and Human Rights.”

¹¹⁸ IOE, “Consensus on Business and Human Rights Is Broken With the Adoption of the Ecuador Initiative.”

¹¹⁹ ICC, “ICC Disappointed by Ecuador Initiative Adoption.”

¹²⁰ BIAC et al., “UN Treaty Process on Business and Human Rights.”

affirmed their endorsement of the GPs. Based on that statement and more recent ones, the following section represents the positions of the international business community.

Uptake of the GPs has been impressive, and needs more time to develop

The principle position of the business community is its support of the GPs and its belief that while uptake has been impressive, it requires more time.¹²¹

International legal obligations belong to states, not businesses

Business support for the GPs is predicated, either explicitly or implicitly, on a belief that legal obligations fall on, and should only fall on states, not businesses. Therefore, international business associations argue that the focus of any business and human rights treaty should remain on strengthening state capacities in the context of the GP framework.¹²²

Host state legal systems must be well-defined and “fair”

In stressing its view that “the most effective way to encourage respect for human rights and to enhance remedies for human rights violations is for the host states to have robust human rights protection mechanisms,” the IOE emphasized that such systems must be “fair,” possess clear rules, and operate in a timely fashion.¹²³

A treaty should address all businesses, not just TNCs

All of these associations also clearly emphasize their preference for a treaty that covers all businesses, not just TNCs. After all, writes one industry representative, “a two-tiered system where one segment is required to respect human rights and another segment is not, will allow adverse market forces to persist and could leave potential victims without access to remedies.”¹²⁴

¹²¹ Kromjong, “Intergovernmental Working Group on Proposed Treaty Needs to Have an Inclusive & Consultative Process”; Thorns, “IOE Secretary-General Questions Ecuador-Initiated Proposal for New Legally-Binding Treaty on Business and Human Rights”; BIAC et al., “UN Treaty Process on Business and Human Rights”; Mackall, “Limiting the Application of the Treaty to Certain Corporate Entities Could Leave Victims without Access to Remedy.”

¹²² Kromjong, “Intergovernmental Working Group on Proposed Treaty Needs to Have an Inclusive & Consultative Process.”

¹²³ Ibid., n.p.

¹²⁴ Mackall, “Limiting the Application of the Treaty to Certain Corporate Entities Could Leave Victims without Access to Remedy”, n.p.

The process should be participatory for all stakeholders

The business associations call for a participatory process involving all stakeholders, in which they most certainly include themselves.¹²⁵

4.1.4 Nonexistent – or invisible – opposition

Besides the initial treaty opposition from the IOE and others that has since evolved to begrudging engagement, I did not uncover any direct opposition to the treaty process from other business associations. Similarly, while the aforementioned NGO critics have expressed doubts, they do not appear to want to actively obstruct the process. This lack of visible opposition indicates that the parties take the treaty process seriously.

4.2 Principal issues of the negotiation

4.2.1 What kinds of companies?

The resolution presented by Ecuador and South Africa made clear, albeit in a footnote, its intention that the business enterprises covered by a future treaty would be transnational in nature and would not apply to local businesses.¹²⁶

However, as noted above, many in the human rights community, as well as in the international business community, have publicly stated their belief that any binding mechanism ought to apply to all businesses, not just transnational ones, so as not to provide “loopholes” for domestic enterprises.¹²⁷ For the NGO community, this belief rests on the understanding that any kind of businesses can be involved in human rights abuses and that excluding domestic enterprises from a treaty obscures the fact that many TNCs contract with domestic companies, significantly blurring the lines between the two kinds of business enterprises and the applicability of potential norms and obligations. The international business community, for its part, expresses concerns

¹²⁵ BIAC et al., “UN Treaty Process on Business and Human Rights.”

¹²⁶ Human Rights Council, *Resolution 26/9 (2014)*.

¹²⁷ See, for example: SOMO, “Oral Statement Joint Submission.”

that domestic enterprises would benefit from a competitive disadvantage¹²⁸ if new norms or obligations did not apply to them as well.

And to victims it of course makes little difference if it is a local or an international business responsible for the wrongs committed against them.

4.2.2 Duty bearers: states, businesses, individuals?

Central to the treaty debate is the question of whether businesses should become fuller subjects of international human rights law. As discussed above, businesses are currently partial subjects of international law as rights holders, but only in a very limited way as duty bearers. While many, particularly in the human rights community, would seek to make businesses full subjects, one of the objections lodged by the US to the resolution that established the treaty working group was that corporations are not subjects of international law.¹²⁹

If states did decide to impose obligations on businesses, they could do so in multiple ways, for example, just for international human rights-related crimes, for all human rights violations, or even some combination thereof. In addition, negotiators could go so far as to impose obligations on individuals within business enterprises, for example the CEOs of companies. The UK Bribery Act is one such example at the national level, which, in addition to criminalizing individual acts of bribery, also makes a crime the failure of a commercial enterprise to prevent bribery on its behalf and provides for individual liability of senior officers if the business has committed bribery.¹³⁰ The implementation of this law could provide a very useful case study for treaty drafters and proponents.

4.2.3 Which body of human rights norms?

According to Guiding Principle 12, “[the] responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those

¹²⁸ For more on competitive advantage and CSR, see: Porter and Kramer, “Strategy and Society.”

¹²⁹ Fernández Sixto, “Business and Human Rights: A Study on the Implications of the Proposed Binding Treaty.”

¹³⁰ UK Parliament, *Bribery Act 2010*.

expressed in the International Bill of Human Rights [sic] and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work." A future treaty, however, could widen the body of human rights norms to be applied to businesses, something many in the human rights community would like to see. That expansion could include *jus cogens* norms, like prohibition on the use of force, genocide, and crimes against humanity, though the exact content of this category of norms is not fully agreed-upon.¹³¹ Other options include those norms accepted by states in additional human rights treaties like the 1966 ICCPR, the 1996 ICESCR, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, and others.

Greatly expanding the body of rights that businesses could be obligated to respect could have positive and negative repercussions. On the one hand, Ford and others have noted the risk that a very broad definition of human rights can dilute the impact and efficacy of regulatory attempts.¹³² On the other, a narrow definition could lead to a mechanism that is overly specific, rendering its potential impact largely negligible. Similarly, if the treaty includes provisions for civil damages claims, negotiators will have to decide on the substantive norms used for such claims. Those norms could include international human rights law, common law tort standards (or in civil law countries the civil law equivalent).¹³³

4.2.4 The extent of states' extraterritorial obligations?

As described above, a principle source of concern and confusion surrounding the issue of states' extraterritorial obligations in this context relates to whether and how much host states have the jurisdiction and obligation to enforce human rights norms outside of their national boundaries, and where exactly jurisdictional boundaries lie. Nonetheless, international law experts Cassel and Ramasastry argue that, "[increasingly], the International Court of Justice, global and regional human rights treaty bodies, and UN thematic experts interpret human rights treaties not merely to permit, but to impose extraterritorial obligations, including with regard to regulation of business

¹³¹ Mamlyuk, "Jus Cogens."

¹³² Ford, "Business and Human Rights," 30.

¹³³ Cassel and Ramasastry, "White Paper: Options for a Treaty on Business and Human Rights," 36.

activities abroad.”¹³⁴ Drafters of a treaty that sought to address this issue would find it legally difficult to reverse the course of this current.

Whereas a number of states have demonstrated willingness to give up a measure of sovereignty in exchange for not bearing primary responsibility for provision of remedy for human rights abuses committed in their territory (see above reference to 2013 letter by dozens of states – principally Global South states), other states will likely bristle at ceding any measure of sovereignty in this regard. This tension will require careful navigation by negotiators and advocates.

4.2.5 To pierce or not to pierce the corporate veil?

Similarly, and as explained above, many in the human rights community have identified the lack of information on parent-subsidary relationships – the “corporate veil” – and unclear or nonexistent liability relationships between parents and subsidiaries as a primary obstacle to access to remedy as well as other regulatory concerns.¹³⁵ GP 2 makes vague reference to this question, referring to a “requirements on ‘parent’ companies to report on the global operations of the entire enterprise.” Treaty negotiations would do well, therefore, to consider, and provide clarity on, the extent to which a parent company is responsible for the activities of its subsidiaries, and vice versa.

4.2.6 Enforcement mechanisms?

A treaty has limited impact if not enforced. Options include expanding the jurisdiction of the International Criminal Court,¹³⁶ the creation of a new international legal body like an international arbitration tribunal,¹³⁷ obligations on states to implement common liability laws, and more. Treaty negotiators will need to consider the resources required for establishing enforcement mechanisms, including both financial and bureaucratic ones.

¹³⁴ Ibid., 42.

¹³⁵ See also: International Commission of Jurists, “Needs and Options for a New International Instrument in the Field of Business and Human Rights.”

¹³⁶ Ibid.

¹³⁷ Cronstedt and Thompson, “A Proposal for an International Arbitration Tribunal on Business and Human Rights.”

4.2.7 Relationship with existing UN-level BHR mechanisms and initiatives?

Given the strong preference expressed by some states, businesses and some civil society actors for continuing to implement already-established initiatives like the GPs, NAPs, the BHR WG, and the OHCHR's remedy project, negotiators will need to consider how a treaty could incorporate those initiatives, for example by making NAPs legally binding on states, or having the BHR WG serve as the monitoring body for treaty implementation and compliance.

4.3 Underlying interests of key parties

4.3.1 States

Proponents of the treaty

Protection of state sovereignty and power over companies operating in their territory

Given their statements during and surrounding debate of Resolution 26/9, Ecuador, Pakistan, and other treaty initiative supporters would appear to have clear interests in the protection of sovereignty, particularly with respect to strengthening their ability to seek compensation for damages caused by TNCs.

Protection of domestic economic interests

Related to the protection of sovereignty, some states may want to appease domestic constituencies unhappy with the actions of companies. The constituency such states would most likely seek to appease would be owners of domestic businesses, given their typically important role in economic development; this helps explain the insistence on the TNCs-only footnote.

According to the aforementioned NGO contact, the footnote was included in order to gain support of several Asian countries, many of which have robust domestic industries with strong ties to national governments – China being a prime example.

Some concern for, or at least interest in responding to, victims of abuses

Some states may also feel pressure from constituencies unhappy with the actions of companies, for example, the negative public opinion formed after disasters like the Rana Plaza factory fire. This pressure is likely weaker than that from the domestic business lobby, but could still be a factor. The aforementioned NGO contact, who was present at the first IGWG session and the

2015 BHR forum, remarked that Ecuador and South Africa both appeared to demonstrate a keen interest in the outcome beyond purely economic interest. Of course, a change in Ecuador's political landscape could dramatically shift this dynamic.

South-South solidarity?

It is not unusual for Global South states to form blocs when voting on UN resolutions and such motivations may have contributed to the outcome of the vote on Resolution 26/9. As Ford argues, “[some] may have voted not on the merits but rather due to political ‘vote-trading’ on current issues in UN forums, or for reasons of ‘Global South’ solidarity.”¹³⁸ However, Ford is not convinced that any such solidarity will last. He writes, “[it] is not obvious that pro-treaty states necessarily want, or expect to see, any treaty in the foreseeable future... Some of the states that voted for the 2014 resolution (notably China) are global economic players and may lack the incentives to maintain any strong momentum on the treaty path.”¹³⁹

Opponents of the treaty

Developed countries: Protection of domestic enterprises operating globally

The majority of states that voted against the resolution house the vast majority of TNCs and are, for the most part, fully developed countries;¹⁴⁰ their principal interest lies in protecting those companies and the domestic constituencies they represent. Even in the case of a country like Brazil, which abstained, a similar assumption of interests can be made: “Brazil’s abstention in June 2014 may reflect how its state-owned and private mining, energy, agribusiness and other firms have an increasingly global exposure.”¹⁴¹

¹³⁸ Ford, “Business and Human Rights,” 22–23.

¹³⁹ Ibid., 23.

¹⁴⁰ Deen, “After Losing Vote, U.S.-EU Threaten to Undermine Treaty.”

¹⁴¹ Ford, “Business and Human Rights,” 23.

Developing countries: Protection of foreign investment

At the outset of the debate, the majority of Latin American and Caribbean states took up a common position, but as the debate progressed Colombia, Chile, Peru, Mexico and Guatemala distanced themselves from resolution-sponsor Ecuador and supporters Venezuela and Cuba. Pressure from treaty resolution opponents like the US or EU countries may have caused this repositioning; these countries have the most foreign investment in the region,¹⁴² and were likely concerned about the potential negative effects on foreign investment in their countries.

Middle income countries: protection of domestic industries

The interest of a more-developed country like South Korea, on the other hand, is probably focused on perceived disadvantages to the country's strong domestic business community, which like many developed countries includes a very strong export sector.¹⁴³

EU: balancing domestic constituencies

Though the EU actively opposed the Resolution when passed, NGO experts have observed increasing engagement in the process by the EU. For example, EU representatives attended the first session of the IGWG, something it had promised not to do after the approval of the resolution. However they spent much time urging inclusion of all businesses, not just TNCs, which an official at an international NGO closely tracking these debates thought was an obstructionist effort, not a constructive one.¹⁴⁴ This apparent shift in the EU approach to the treaty process may reflect differing opinions within EU member states, a scenario not entirely surprising when one considers the variety of national level efforts to place additional human rights obligations on states, some of which are detailed above.

¹⁴² Ladino, "El Camino Hacia Una Convención Sobre Empresas Y Derechos Humanos."

¹⁴³ Naidu-Ghelani, "South Korea's 10 Biggest Companies."

¹⁴⁴ NGO representative, Interview with author.

Unknowns

Several countries, such as Mexico and Ghana, have been more supportive since the formation of the IGWG than initially expected, given their votes and their geopolitical positions,¹⁴⁵ making them potential wild cards in the negotiation. Treaty proponents should keep an eye on these wild cards and their potential to become spoilers or supporters.

Possible area of common interest for many states

Jurisdictional overreach, comity, and financial and administrative burdens on home states

The International Accountability Roundtable (ICAR), a coalition of human rights, environmental, labor, and development organizations that creates, promotes, and defends legal frameworks to ensure corporations respect human rights in their global operations, contends that states, and businesses, have long-standing concerns about “the enhanced use of extraterritoriality, such as jurisdictional overreach, comity, and increased financial and administrative burdens on home state judicial system.”¹⁴⁶ This would seem to be particularly true for developing countries, which tend to have weaker judicial and regulatory institutions, and greater presence of foreign investment.

4.3.2 Human rights NGO community

Pro Treaty

Prevention of human rights abuses through greater accountability of businesses

Human rights NGOs have as a primary interest, due to their underlying mission, the prevention of human rights violations. Of particular interest within this realm is the potential deterrence effect that legally binding obligations could have on potential perpetrators of human rights abuses if businesses are truly held more to account than the current piecemeal system allows.

¹⁴⁵ ICAR, “Fifth Annual Meeting of the International Corporate Accountability Roundtable.”

¹⁴⁶ ICAR, “Second Submission to the Open-Ended Intergovernmental Working Group,” 2.

Increased access to remedy for victims

As described above, one of the biggest failings of the Ruggie Framework identified by NGOs is the continued barriers to remedy for victims of human rights abuses. An important interest of the NGO community, therefore, is removing those barriers and increasing access to remedy.

Parent company liability for subsidiary actions

Central to the prevention and accountability issue is that of parent company liability, or establishing, as it were, command responsibility for subordinates that committed, or planned to commit, human rights violations. Many NGOs argue that the parent company should be held responsible if they do not take all necessary and reasonable measures to prevent the commission of human rights violations within their own entity or any subsidiaries, or, if such crimes have been committed, do not punish the persons responsible. Some also contend that subsidiaries should be held similarly responsible for parent company actions.¹⁴⁷

Global standards, implementation and enforcement

NGOs, particularly those international in nature or with an international focus, have encountered significant difficulties in carrying out their missions of preventing human rights abuses, holding businesses accountable, and assisting victims in accessing remedy, in large part due to the piecemeal nature of the current system. Global standards, implementation and enforcement mechanisms would, if well designed and implemented, drastically increase NGOs' ability to fulfill their missions.

Not pro-treaty

Ruggie: defending the legacy of his Framework

Presumably central for Ruggie, even if he does not acknowledge it openly, is the defense of his 'Protect, Respect, Remedy' Framework and the substantial support it has thus far enjoyed. A treaty, particularly one that rejects the CSR and "consensus-based" model by imposing wide-

¹⁴⁷ See, e.g.: International Commission of Jurists, "Needs and Options for a New International Instrument in the Field of Business and Human Rights"; Treaty Alliance, "Resolution on Binding Human Rights Standards Passes in Human Rights Council."

ranging binding obligations on businesses, could be seen as a rejection of Ruggie’s legacy. As the widely respected developer of the Framework and Guiding Principles, his opinion certainly holds significant weight for some parties, but also would not be sufficient to block agreement on a treaty.

Avoiding the alienation of allies

Given the emphasis in Ruggie’s approach to building “consensus” with stakeholders, including businesses, he likely has an interest in not angering a group of those stakeholders – the business community – with strong support for a model about which they have expressed initial rejection and subsequent serious concerns.

Avoiding the potential for weakening existing standards

Like his NGO colleagues, treaty critic Mark Taylor of the Norwegian NGO Fafo wants to see greater prevention, accountability and remedy for victims. However, he prefers a multi-pronged approach to the “all-encompassing” treaty process, fearing the potential for the process ending in a race to the bottom that waters down of existing standards.¹⁴⁸ In this regard the interest is much the same as that of the treaty-supporting NGO community, but the approach is different.

4.3.3 International business community

A contradiction arises when examining business’ statements on the GPs and their actions. Although the aforementioned international business associations lauded the GPs and the extensive progress made on them and Ruggie has boasted about the consensus built around his framework, NGOs have found their participation in many of the BHR spaces around the world to be inadequate.¹⁴⁹ Said one participant in the ICAR annual meeting, “businesses are not taking it very seriously, because they think they are better with status quo so are trying to undermine the process.”¹⁵⁰

¹⁴⁸ Taylor, “A Business and Human Rights Treaty?”, n.p.

¹⁴⁹ ICAR, “Fifth Annual Meeting of the International Corporate Accountability Roundtable.”

¹⁵⁰ Personal notes from ICAR 5th annual meeting, 10-11 September 2015, name withheld.

At the same time, when asked by the *Economist* Intelligence Unit how useful a new legally-binding international treaty on human rights would be in helping their businesses respect human rights, 57% of business leaders responded that it would be very or slightly useful, compared to 58% who affirmed that the GPs have been useful to them; in other words, support for a treaty and the GPs is much the same.¹⁵¹

Given these seeming contradictions, what can we deduce about businesses' real underlying interests?

Maintaining and increasing profits

The interests of corporations are fundamentally different from those of governments and victims.¹⁵² In other words, the underlying interest of any business is its bottom line: making a profit for owners and shareholders. Given this fundamental interest in improving and protecting the bottom line, we can conclude that any engagement or involvement of the business community in a treaty process rests on safeguarding that interest, though particular business strategies may vary depending on the possibilities for short-term or long-term gains.

The easiest and quickest route to reducing risks and costs

As the international business community's engagement in the treaty process and the 2015 *Economist* Intelligence Unit survey results would indicate, many businesses have begun to realize that the issue of human rights does imply risk and cost, and that engaging in the process could actually reduce risk and costs. The *Economist* survey concluded that "[the] intellectual argument is largely over: most businesses accept that they have a role in human rights protection."¹⁵³ As one executive interviewed stated, "a human rights approach brings a more interconnected view to the company."¹⁵⁴

¹⁵¹ Economist Intelligence Unit, "The Road From Principles to Practice: Today's Challenges for Business in Respecting Human Rights," 29.

¹⁵² Martens, "Problematic Pragmatism," 29.

¹⁵³ Economist Intelligence Unit, "The Road From Principles to Practice: Today's Challenges for Business in Respecting Human Rights," 10.

¹⁵⁴ *Ibid.*, 12.

Notwithstanding this increased attention to human rights issues, the majority of businesses do not make the direct connection between human rights and a significant reduction in risk or cost, at least in the short term. As explained in the *Economist* survey, “only 21% [of business executives] say that a clear and immediate business case, involving a risk-benefit analysis or a gain in competitive advantage, is driving their human rights policy.” Furthermore, the tendency to focus on short-term profitmaking impedes concerted or significant changes in this area. In the same survey, “15% of respondents said that the potential cost of respecting human rights, or a possible loss of profits related to respecting human rights, are among the five biggest barriers to taking action in this area faced by their company.”¹⁵⁵

Avoiding incurring additional risks and costs

Is the issue, then, getting most businesses to think long term and strategically about these issues? Probably not, given their apparent inability or unwillingness to think long-term and strategically in opposition to previous initiatives to establish binding mechanisms on business and human rights. As a 2014 review of the decades-long efforts at the UN to address business and human rights issues by the Global Policy Forum and others finds, corporate interest groups have fought long and hard to prevent the adoption of legally binding rules, monitoring and accountability measures, and an international remedy system.¹⁵⁶ At issue, then, is less an inability to think long term, but more likely an interest in avoiding the costs involved in the changes to their business models that such rules and measures would require, or the difficulty in quantifying short term costs for adequate current and future cost-benefit analysis.

Protecting their own access to remedy

As discussed above, corporations have sought to establish investor-state dispute mechanisms to allow corporations to sue states when they deem local regulations too restrictive to their activities. Because of the access to remedy that these mechanisms provide to business when they feel their rights under trade treaties, it is clearly in their interest to protect that access.

¹⁵⁵ Ibid.

¹⁵⁶ Martens, “Corporate Influence on the Business and Human Rights Agenda of the United Nations,” 27.

4.4 Best Alternatives to a Negotiated Agreement

If the treaty process falls apart, the pre-existing structures would continue to exist: the GPs, the BHR working group of the HRC, the OHCHR project on access to remedy, Resolution 26/22.

However, significant diplomatic efforts and attention, not to mention civil society time and energy, would have gone into the treaty debate, as warned by treaty skeptics cited above, and would likely suck much wind out of the sails of those pre-existing structures. BATNA analysis helps parties determine whether such efforts are worthwhile.

4.4.1 States

Because the focus of this analysis are the NGO and business communities, only brief mention will be made of states' BATNAs.

Treaty proponents

These states do not have good BATNAs; barring a treaty, their hope for addressing their principal interest of holding TNCs to account for local disasters and requiring their respect of local laws rests largely in attempting to modify international investment agreements, a process no easier than this treaty process, and arguably more difficult.

Treaty opponents

These states have strong BATNAs: they (largely) prefer the status quo, and having no negotiated agreement means that they can continue to implement existing mechanisms in whatever way they may – or may not – have already been doing, or continue to try to ignore the issue completely. Arguably, however, ignoring the issue will not make it go away forever, particularly if the treaty process, even one that ultimately fails, brings more attention to the issue and emboldens those pushing for change.

4.4.2 Human rights NGO community

The human rights NGO community has a number of alternatives to a negotiated solution on a treaty; in fact, as noted above, some consider these alternatives better than a potential treaty itself. Such alternatives include continuing current efforts to push NAPs as a method of GP implementation by states, pursuing domestic due diligence and reporting laws like those underway

in France and Switzerland, pursuing stronger standards at the regional level that could eventually harden into customary international law, advocating for stricter government procurement standards at the domestic level, like the US' Federal Accountability and Transparency Act of 2006, which could have significant impacts on business practices given the large purchasing power of states

However, such alternatives, particularly the latter one, may not actually address the principal interests of the NGO community for greater accountability and true access to remedy. As Ford argues, the focus on due diligence, which he refers to as “process-oriented regulations,” can easily end up becoming symbolic, or even “hollow and unproductive ‘ritualism’.”¹⁵⁷

Another alternative option, different from existing efforts, would be an effort to get the Human Rights Council to demand that states report to the UNWG on GP implementation, as recommended by Taylor, which at the very least could help keep some momentum behind those existing structures and mechanisms.

4.4.3 International business community

The international business community has, at the outset, probably the best BATNA of all the principal parties: the continued tailoring of voluntary initiatives to meet its interests. It could also push for domestic-level legislation to reduce regulatory uncertainty, particularly with regard to human rights due diligence.¹⁵⁸

4.5 History of communication and relationship building

In addition to the two previous attempts to impose legal obligations on business enterprises over the last several decades, I make mention here of the various multi-stakeholder initiatives currently underway. Among those are the Voluntary Principles on Security and Human Rights, a set of principles designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights; and the

¹⁵⁷ Ford, “Business and Human Rights,” 18.

¹⁵⁸ *Ibid.*

International Code of Conduct for Private Security Service Providers, a set of principles for private security providers, created through a multi-stakeholder initiative convened by the Swiss government.

These initiatives follow the CSR model, and some NGOs have directly criticized such structures, which they argue purport to place all interested actors – including business, NGOs and, especially, victims – on the same level as equal ‘stakeholders’. Doing so obfuscates existing power imbalances, they say and, as Mortens writes, “promotes a depoliticized model of governance that does not address the different interests and power structures inherent in the global economic system.”¹⁵⁹

5 Opportunities & obstacles for a negotiated agreement

Based on the above analysis, this section and the following provide diagnostic and strategic advice to the human rights NGO community for increasing its power and optimizing its approach to the treaty negotiation. Readers should keep in mind that an underlying assumption of this paper is the influence (though not necessarily equivalent) that the NGO and international business communities can exercise on states, the direct parties to the negotiation.

5.1 Possible criteria of legitimacy

As described above, key to a successful negotiating process is defining early on the criteria of legitimacy to be used so as to avoid constant haggling over topics such as definitions and data sets. Of course, deciding upon such criteria is not necessarily easy, particularly when it comes to a loosely defined area of law. Nonetheless, I propose a small set of criteria that could serve to facilitate negotiation.

5.1.2 Common definition of domestic and transnational businesses

Given the centrality of the debate on whether a treaty would cover just TNCs or all business enterprises, it would be important to be working from a common definition of the terms currently

¹⁵⁹ Martens, “Corporate Influence on the Business and Human Rights Agenda of the United Nations,” 27.

in use: ‘transnational corporations’, ‘business enterprises’, and ‘local businesses’. Though the aforementioned footnote in Resolution 26/9 purports to exclude ‘local businesses’, the soft law of the Guiding Principles refutes this exclusion. The GPs do not distinguish between the types of business enterprises but in fact make clear that they apply to “all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure,”¹⁶⁰ and that “all business enterprises have the same responsibility to respect human rights wherever they operate.”¹⁶¹ This definition, which as part of the GPs enjoys fairly wide consensus among the business community and states, could serve as a logical common definition for the scope of treaty applicability.

5.1.2 Common definition of parent company and subsidiary

Due to the centrality of the parent company-subsidary liability question, establishing early on a common definition for understanding those figures would greatly facilitate negotiation.

The Guiding Principles note that “[business] enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties,” and define those ‘business relationships’ as including “relationships with business partners, entities in its value chain, and any other non-state or state entity directly linked to its business operations, products or services.”¹⁶² As argued above, the GPs enjoy a fairly wide consensus among the business community and states, and this definition would also seem to respond to NGOs’ interest in having a treaty cover a broad understanding of business relationships. Though difficult, if this common definition could be agreed upon early on, negotiators could focus their efforts on deciding the extent and operationalization of the legal liability to be imposed.

¹⁶⁰ Ruggie, *U.N. Guiding Principles on Business and Human Rights*, 1.

¹⁶¹ *Ibid.*, 25.

¹⁶² *Ibid.*, 15.

5.2 Opportunities for agreement

First, based on the analysis in the preceding sections, especially of the parties' interests, BATNA, and criteria of legitimacy, I present areas of common, compatible and opposing interests among the parties. I then propose possible "packages" for joint gain, based on trade-offs that could be made given the parties differing perceptions, priorities or preferences. In doing so, I demonstrate that a Zone of Possible Agreement for this negotiation does, in fact, exist.

5.2.1 Common interests

Maintenance of the progress achieved thus far on BHR issues

All parties acknowledge the GPs have done some measure of good, and no party believes they should be totally thrown out. As described above, the GPs can serve as a basis for many definitions of terms, as well as for issues like the rights covered by a treaty.

Reducing governance gaps

NGOs and many states want to increase business accountability globally; businesses have an interest in reducing uncertainty about the risks they may face for their operations. Together, this translates into a common interest of closing gaps in governance. Of course, as the *Economist* survey made clear, not all businesses are conscious of this as an interest, so the corporate interest groups like IOE would have to educate their constituencies.

Cooperation and convergence between OHCHR access to remedy project and IGWG

Both proponents and skeptics of the treaty process have expressed concern about parallel or competing UN BHR initiatives. To address the BHR issues, many proponents have worked on implementation of the GPs and do not want to see that work gone to waste. Though not yet officially announced, movement in the direction of converging those two processes has already

begun, says an NGO expert who participated in the first IGWG meeting and the latest BHR forum in November 2015.¹⁶³

A participatory process

Though definitions of ‘participatory’ surely vary, both NGOs and corporate interest groups have expressed a desire to participate directly in the process. For the international business community, the expression of desire for a participatory process probably translates to a desire to be directly consulted. For NGOs, it is probably more in the line of greater transparency – as demonstrated by the NGO request to have the IGWG meetings broadcast, a request eventually granted – and for inclusion of the perspectives of those directly affected by business activities. Nonetheless, overlap of interests exists, and NGO experts have also argued, privately, that having significant support from the human rights community for initiatives such as the treaty process help, at least indirectly, to safeguard those initiatives from potential deprioritization and lack of funding from the UN.

Increasing the capacity of states to properly fulfill obligation to protect

Both businesses and NGOs identify lack of state capacity to protect as a serious problem. For businesses, the concern centers on states’ fulfilling this obligation so that less, or none, of the burden rests on businesses themselves. For NGOs, the concern focuses more on increasing capacity so that more prevention, accountability and remedy happen. Either way, a shared interest exists, though in pursuing this interest they would have to propose sources for the resources required to build up that capacity, not an easy task particularly in developing countries.

5.2.2 Compatible interests

Increased convergence of legal norms

As described above, Zerk finds that the present remedies system is failing many companies, which operate in an uneven legal environment of considerable uncertainty and risk, including

¹⁶³ NGO representative, Interview with author.

community opposition leading to delays and cost increases, NGO campaigns causing damage to brands, exposure to liability and significant uncertainty about the nature of liability and risk.¹⁶⁴ Reducing differences among national legal standards could reduce risk and increase accountability.¹⁶⁵

A defined set of conduct subject to liability

Business would by no means welcome, nor easily agree to, increased liability. However, if liability were very clearly defined and delimited, it could provide much more regulatory clarity and certainty than they currently enjoy, like by reducing uncertainty in the face of piecemeal national-level initiatives like those in France and Switzerland. Clarifying liability may not be enough to garner full business support for a treaty, but could if dovetailed with another issue that in a way that more fully addresses their interests. For NGOs and many states (especially developing ones), clarifying liability, including that of parent companies, on an international level, would provide increased access to remedy for victims, particularly in host countries with little ability to provide remedy, and thus address an important interest.

Civil, not criminal liability for business

Though many NGOs would like to see businesses held criminally liable, most businesses would vigorously oppose such an obligation, and many states would likely not consent to a treaty including such provisions. Plus, the legal logistics would prove quite controversial – would the CEO get thrown in jail? – not to mention the fact that in many states, political and business leaders are some of the same people, or close relations. However, if business could be held liable for civil claims, it would address the NGO interest of implementing some measure of liability, the state interest of not having to foot the whole bill for damages, and, if it were a clear set of rules, could also address the business interest in regulatory clarity. Furthermore, the *Economist* survey noted that many respondents identified a number of benefits from improvement of human rights records, including facilitating access to resources, including attracting talented employees,

¹⁶⁴ Zerk, “Corporate Liability for Gross Human Rights Abuses.”

¹⁶⁵ International Commission of Jurists, “Needs and Options for a New International Instrument in the Field of Business and Human Rights,” 35.

and making it easier to deal with problems as they arise and to do so with less hostility. This demonstrates that such a change could also respond to the business interests in stability and access to quality resources, both of which, when followed to their logical conclusion, help to respond to the underlying business interest of increasing profit margins.¹⁶⁶

Greater access to remedy provided by states

Though general consensus seems to exist that greater access to remedy is needed, more elusive is consensus on who provides the remedy, and how. As described above, developing countries have an interest in not being left with the full bill when companies cause major damage; thus they would presumably prefer that businesses bear a significant part of the responsibility. NGOs could likely accept a hybrid solution, assuming business provision of remedy was not just left to the good will of individual companies.

Strengthening national judicial systems

Many states could benefit from the strengthening of national judicial systems – and as they admit – doing so would also allow business greater assurances of certainty and due process for their own grievances. Such strengthening could respond to the NGO interest of increasing prevention, accountability and remedy, and the business interest of regulatory clarity and consistent application. Nonetheless, such a change is undoubtedly difficult and time-consuming to implement, and this particular issue may well not be salient enough to spur the required changes when other such initiatives have not yet done so.

Greater clarity on parent-subsidiary relationship of responsibility

The “corporate veil” makes it very difficult to hold businesses accountable, both for NGOs in their monitoring and advocacy, and states in their various accountability and remedy mechanisms, as demonstrated by the above mention of states’ concern over who pays to “clean up” damages. Though the GPs indicate that all layers of the value chain fall into the business activities that could result in human rights abuses, continued opacity serves the profit margin

¹⁶⁶ Economist Intelligence Unit, “The Road From Principles to Practice: Today’s Challenges for Business in Respecting Human Rights,” 13.

interest of the business community, and often serve as intentional risk mitigating structures, so lifting the corporate veil could prove a tough sell to the international business accountability. Nonetheless, with enough NGO and state support this issue could still advance.

Addressing International Investment Agreements and ISDS ‘overreach’

Concerned about the ways that investment agreements often tie states’ hands, many NGOs and some states would be on board with adjusting IIAs, particularly with regard to ISDS ‘overreach’, though presumably there the business community would mount substantial opposition to such a change. Another obstacle is the fact that operationalization of any kind of limitation on IIAs by way of the BHR treaty would be quite complicated; among other difficulties, it would have to interface with all those existing treaties and would likely require an extensive identity of parties, that is, each state party to existing IIA would have to consent to be bound to this BHR treaty.

5.2.3 Opposing interests

Requiring consultations with affected communities

Business actors have not demonstrated themselves very committed to consultation with those affected, likely due to the added costs and effort of doing so. For example, according to the *Economist* survey, only 37% of businesses with a human rights policy consulted stakeholders on it,¹⁶⁷ and having such a policy means nothing if it is not implemented. On the other hand, this issue is a major priority for NGOs, which support affected communities’ right to participate in decision making about the use of their land and resources. Notably, free, prior and informed consent with indigenous and tribal communities is an obligation of the states that have agreed to be bound by International Labour Organization Convention 169 (1989),¹⁶⁸ however only 22 states have ratified the Convention, not enough to sufficiently harden it into customary international law.

¹⁶⁷ Ibid., 16.

¹⁶⁸ International Labour Organization, *Convention 169*.

Coverage of the treaty: TNCs vs. domestic businesses

As described above, NGOs and the international businesses associations have expressed an interest in leveling the regulatory the playing field by applying any future treaty to all business enterprises. Many states do not, however, even if they support a treaty that is strong in other ways. This difference in interests, even among treaty proponents, could prove very divisive.

5.2.4 Zones of Possible Agreement

Based upon the above opportunities, I propose a number of ZOPAs; any one of these, or a combination thereof, could serve as a mutually beneficial agreement for the parties.

Strengthen the GPs

Given the uptake of the GPs by many in the business community and many states, a treaty could build upon the GPs with additional new obligations on states to implement the GPs.¹⁶⁹ To address the interests of NGOs and some states for increased access to remedy and accountability, the treaty could expand obligations and responsibilities in those areas and include mechanisms for the strengthening of state judicial systems.

Mandate NAPs and their implementation

In a similar vein, a treaty could build upon the NAP process by mandating that all states create NAPs and implement them. Such a treaty would be most effective if it provided a clear roadmap for implementing and integrating NAPs into concrete action, since to date much of the interpretation of NAP guidance has been left to states, resulting in a wide variety of implementation, if any has been done at all.

Application to companies over a certain size

One way to avoid the divisive issue of whether a treaty would apply to TNCs or domestic business would be to have it apply to large companies over a certain size, whether TNC or

¹⁶⁹ Ford, “Business and Human Rights,” 23.

domestic. This compromise could satisfy most, with the possible exception of states with large and influential domestic business sectors.

Mandate domestic legislation and policies

Rather than creating a set of specific international legal obligations, a treaty could oblige states to approve and implement specific domestic legislation, for example laws creating human rights standards for government procurement or laws mandating extensive free, prior and informed consent processes. If the obligations were specific enough, this could address many of the concerns about piecemeal and divergent domestic regulatory and legal environments. Recognizing that even states that consent to be bound by such a treaty may not readily implement such domestic legislation, the treaty could create incentives to do so by tying the passage of such legislation to access to benefits, like capacity-building support.¹⁷⁰

Regional multi-stakeholder monitoring and accountability mechanisms

In a 2014 letter to the UN Secretary General, a wide array of states argued for multi-stakeholder monitoring and accountability mechanisms, including peer review, for the Post-2015 development agenda.¹⁷¹ A similar set of instruments could be developed within the BHR treaty. In fact, the pre-existing multi-stakeholder spaces already in existence could serve as starting points, though with greater accountability and enforcement mechanisms, and new adjustments made to take into account power imbalances among the different parties, something addressed barely, if at all, in current mechanisms.

A Conference of states parties or committee of experts

Rather than multiple regional monitoring instruments, a treaty could establish a Conference of states parties, a relatively common practice with human rights treaties, in which representatives of states parties to the treaty would provide international monitoring and supervision, as well as, potentially, commentary and even legal opinions to support consistent implementation of the

¹⁷⁰ See: Moomaw and Papa, “Creating a Mutual Gains Climate Regime Through Universal Clean Energy Services,” 16.

¹⁷¹ Johnson Sirleaf et al., “One Year On: An Open Letter from Former Members of the UN Secretary-General’s High-Level Panel of Eminent Persons on the Post-2015 Agenda.”

treaty across states and support for states in implementation.¹⁷² Business would likely support the focus on states and the potential for convergence of regulation and norms, and NGOs would also likely back such an international supervisory body, particularly if it were a body to which grievances could be relayed.

Similarly, a treaty could establish a committee of experts to review implementation, require periodic reports from states, receive complaints, and/or conduct inquiries, like the committee of experts established by the Convention on the Elimination of all Forms of Discrimination Against Women.

A system of rules to distribute responsibility among states

Given the regulatory and jurisdictional conflicts of the current system, a treaty could create a system of rules to help distribute responsibility among states; host state responsibility might be the first line, but if that state does not act, responsibility could pass to the home state. Such a system could provide for consultations between the home and host states in order to manage this handover of responsibility or even for a host state to formally request that the home state take legal action against the TNC in question.¹⁷³

A supranational grievance mechanism

A treaty could establish a supranational grievance mechanism, which could be housed in a secretariat and include an investigatory body and enforcement mechanisms to which victims could take grievances against business enterprises, at which they would have a more robust and uniform system for accessing remedy, and at which businesses and states could also defend themselves.¹⁷⁴ The OECD's National Contact Point could serve as a model for such a

¹⁷² International Commission of Jurists, "Needs and Options for a New International Instrument in the Field of Business and Human Rights," 36–37.

¹⁷³ De Schutter, "Sovereignty-plus in the Era of Interdependence: Toward an International Convention on Combating Human Rights Violations by Transnational Corporations," 245–284.

¹⁷⁴ Moomaw and Blankenship, "Charting a New Course for the Oceans."

mechanism,¹⁷⁵ though some NGOs have deplored serious problems with that system.¹⁷⁶ Such an instrument could be particularly effective if the enforcement had some teeth, perhaps fees, taxes, or sanctions for those found to be in violation.

Tort liability for companies

One solution to the concern of NGOs and many states regarding the enormous power that businesses wield, particularly vis-à-vis ISDS mechanisms in IIAs that allow corporations to sue states, would be to establish mechanisms allowing victims to sue companies directly.¹⁷⁷ This option would likely run counter to business interests, and also to states with close and/or direct ties to domiciled businesses, but, as indicated above, if the scope of liability were closely defined it could prove amenable.

Separate protocols for different rights or sectors

Breaking up the negotiation into sectors or bodies of rights could facilitate agreement and also allow for tailoring of responsibilities and obligations to specific contexts. A treaty could include separate protocols for different business sectors in order to take into account the diverse factors affecting sectors as varied as the extractive and the financial. Alternatively, separate protocols could address different bodies of rights, with gross abuses receiving a higher priority.¹⁷⁸

However, the pollution of a local water source by major oil contamination – like the Texaco case that has Ecuador so indignant – would likely not be considered a gross violation, and thus would not satisfy the desire of states like Ecuador for greater accountability and remedy for such incidents. This could lead to a politicized fight over definitions, potentially derailed the treaty process.

¹⁷⁵ Kromjong, “Intergovernmental Working Group on Proposed Treaty Needs to Have an Inclusive & Consultative Process”. The OECD requires participating countries to establish NCPs, to “further the effectiveness” of its Guidelines for Multinational Enterprises. See: mneguidelines.oecd.org/ncps.

¹⁷⁶ Amnesty International UK, “Obstacle Course.”

¹⁷⁷ International Commission of Jurists, “Needs and Options for a New International Instrument in the Field of Business and Human Rights,” 36.

¹⁷⁸ Cassel and Ramasastry, “White Paper: Options for a Treaty on Business and Human Rights”; Espinosa Garcés, “Draft Report of the Chairperson-Rapporteur of the IGWG,” 18–19.

An international tribunal

If the treaty created international legal obligations for businesses, a tribunal could be established to adjudicate allegations of violations. A tribunal could resolve many of the problems associated with the existing piecemeal regulatory and legal environment, and existing tribunals have helped to align domestic legislation and jurisprudence in the areas of law in which they operate.¹⁷⁹

However, the implementation of such a tribunal would be quite complicated. Existing bodies, both regional and international, only have jurisdiction over states; this tribunal would have to address a whole new area of law with little existing precedent. Furthermore, some NGOs have expressed concern about the accessibility of a tribunal to most victims, given that the costs of operation are often born by parties to the dispute, and victims may have few resources, not to mention the probable imbalance of resources available to victims compared to businesses.¹⁸⁰ In addition, if many states would not ratify a treaty, or a protocol, establishing a tribunal, its effectiveness would be limited. And finally, such a body would require funding. Alternatively, the ICJ has suggested extending the jurisdiction of the ICC to include business violations, were the treaty to create criminal liability for businesses.¹⁸¹

Mandating the internalization of negative externalities

Economists like Stiglitz and Porter have argued that internalizing the associated costs of business activity that have traditionally been placed on third parties – like the cost of polluting a local river – would not only benefit the competitiveness of the business and the long-term health of the economy but could also lead to a reduction in the costs of such activity as businesses innovate to reduce them.¹⁸² A treaty, therefore, could mandate the internalization of negative human-rights-related externalities, arguably most easily achieved by requiring states create those obligations in domestic legislation.

¹⁷⁹ See: Cronstedt and Thompson, “A Proposal for an International Arbitration Tribunal on Business and Human Rights”; Cronstedt et al., “An International Arbitration Tribunal On Business & Human Rights – Reshaping The Judiciary.”

¹⁸⁰ International Commission of Jurists, “Needs and Options for a New International Instrument in the Field of Business and Human Rights,” 38.

¹⁸¹ *Ibid.*, 39.

¹⁸² Porter and van der Linde, “Toward a New Conception of the Environment-Competitiveness Relationship”; Stiglitz, “Whither Reform? Towards a New Agenda for Latin America.”

New optional protocols to existing human rights covenants

Another option for a treaty involves the adoption of additional protocols to existing covenants related to human rights, specifically the ICCPR and ICESCR, which would bind current states parties to those conventions to additional obligations in the new protocol, perhaps including legal responsibility for businesses involved in abuses of the rights outlined in those covenants.¹⁸³ This option would have the benefit of building upon existing instruments to which many states have already consented to be bound to protect a broad set of already-defined rights. These covenants also already include monitoring bodies.

International cooperation on investigation and adjudication

One of the identified barriers to accountability and remedy is the difficulty of cross-border investigation and adjudication. Such cooperation already occurs with regard to existing international legal regimes, like those to fight corruption or organized crime.¹⁸⁴ A successful treaty could help remove some of those barriers by encouraging international cooperation in this area.

5.3 Barriers to agreement

Participation and power imbalances

Both NGOs and business have expressed a strong desire to participate in the negotiation and will seek to provide input and exert influence even if not at the table. But the nature of UN negotiations allows for little direct participation of non-state actors, and even if it did, the power imbalances between human rights NGOs and businesses would tip the scales heavily in business's favor. The likelihood of this scenario can be surmised from NGO critiques of existing multi-stakeholder initiatives, which, as Martens argues, create "the illusion that 'win-win' solutions can be found if only all stakeholders are sitting at the table," and "[promote] a depoliticized model of governance that does not address the different interests and power

¹⁸³ International Commission of Jurists, "Needs and Options for a New International Instrument in the Field of Business and Human Rights," 41.

¹⁸⁴ *Ibid.*, 34, 37.

structures inherent in the global economic system.”¹⁸⁵ Power imbalances also exist between states, as referenced above with regard to the pressure exerted by some states on others during the Resolution debate.

So many externalities

As described above, the internalization of negative externalities could serve as a treaty solution. However, the fact that so many negative costs are currently external creates an extremely high hurdle for businesses, and perhaps many states, to see beyond the initial costs of incorporating human rights concerns.

Perceived lack of, and/or difference of, available information

As documented in the *Economist* survey, many businesses cite lack of understanding of issues and context as principal barrier to change: “It takes time. It takes training. Things have to be translated into operations-speak if they are going to be effectively internalised by people on the ground.”¹⁸⁶ Many of those surveyed also highlighted the need for data and examples of good practice.¹⁸⁷ Of course, human rights NGOs regularly produce mountains of data and examples of good practice, as do many regional and international human rights bodies. This lack of information, then, may just be a perception.

Complexity of the issue

Business and human rights as an issue encompasses many kinds of international law, including human rights, labor, environment, anti-corruption and trade law, among many others.¹⁸⁸ Hammering out agreements that address all this complexity will undoubtedly prove very difficult.

¹⁸⁵ Martens, “Corporate Influence on the Business and Human Rights Agenda of the United Nations,” 27.

¹⁸⁶ Economist Intelligence Unit, “The Road From Principles to Practice: Today’s Challenges for Business in Respecting Human Rights,” 18–19.

¹⁸⁷ *Ibid.*, 21.

¹⁸⁸ Fernández Sixto, “Business and Human Rights: A Study on the Implications of the Proposed Binding Treaty,” 12.

The US as a potential spoiler

The US has most actively opposed the treaty process and also is home to many TNCs, many of which have been implicated in human rights abuses. If the US were, from the outset, to refuse to be bound by any treaty that emerges from this process, it could seriously damage the potential for agreement. Particularly if the treaty were to provide for criminal liability for US nationals or US-based businesses, the US would be very unlikely to consent. However, John Cerone's analysis of US politics and international criminal tribunal negotiations indicates at least a small possibility that the US could consent, depending on the nature of the administration in office. He writes, "[to] the extent an administration's ideological strain in favor of criminal accountability is stronger than its ideological strain opposed to the creation of international authority, the prospect of U.S. support of a given international criminal court seems to increase."¹⁸⁹ However, even if the administration agreed to sign the treaty, it would require Senate approval for ratification, another significant hurdle. And even if the US does not ratify, the US has not ratified a number of human-rights-related covenants, like the Rome Statute or the Convention on the Rights of the Child, many of which have continued to function and even progress.¹⁹⁰

6 Conclusion & initial strategy advice for NGOs

The negotiation analysis conducted here has demonstrated that the international business and the human rights NGO communities do have some overlapping interests, opening the possibility for a mutually beneficial negotiated solution to the current treaty debate. The most clear-cut example of these overlapping interests is the application of the treaty to all business enterprises, not just TNCs, an issue on which the two communities could join forces to advance.

However, for the most part the mere existence of such overlap does not a negotiated solution make. When we consider another overlapping interest, that of reducing regulatory uncertainty and governance gaps, we have seen that a good many businesses do not appear to be conscious

¹⁸⁹ Cerone, "The Politics of International Justice," 8.

¹⁹⁰ Fernández Sixto, "Business and Human Rights: A Study on the Implications of the Proposed Binding Treaty," 15.

of the full nature of their risk with regard to piecemeal legal and regulatory environments. Treaty proponents, then, must remind the business community of the benefits it stands to gain in removing the uncertainty and risk of the current patchwork legal landscape. Helpful to this strategy would be to frame these arguments in terms of the incentives for businesses. As noted in the course of this analysis, businesses are motivated by profit, and therefore will only make changes in practices or policies when compelled to do so by disincentives or incentives; NGOs do not tend to think in those terms. Also crucial to this overall strategy, then, is for NGOs to think more strategically about how to leverage these incentives in order to further develop options for mutual gain that compel businesses but also serve NGOs' interests of strengthening accountability and access to remedy for human rights violations.

One such example of this kind of incentive leveraging would be a proposal for internalizing human rights externalities, as elaborated above. Also strategic would be the framing of pro-treaty arguments on the savings for companies by streamlining policies and practices throughout their operations and avoiding social conflicts with affected communities, especially in countries with weak regulatory environments, and to demonstrate the way that a human rights approach provides companies a holistic view of their operating environments, and the likely 'competitive disadvantage' of not doing so.

Apart from employing negotiation strategies with the business community, the NGO community could also work to break down the EU block by lobbying more friendly states. It already seems, as described above, that the EU is moving from its initial full rejection of the treaty process, and NGOs could help it along.

Even with the successful implementation of these and other efforts, the resulting treaty text may not respond to the core interests of the human rights NGO community. I therefore recommend that the community conducts regular reassessments as the treaty process advances of the negotiation analysis begun here in order to evaluate whether continuing to engage in the process is worth the cost of the additional time and resources required.

In particular, regular BATNA analysis, updated with new information gleaned as the process advances, can help NGOs assess whether the potential outcome of a negotiated solution continues to have the potential to serve their interests, or when their alternatives to a negotiated solution would be preferable to the negotiated outcome. As a starting point, I note that many

NGOs have already identified the TNC-only focus of current treaty negotiations as a potentially unacceptable final outcome of the treaty process,¹⁹¹ and if efforts fail to expand the scope of the treaty to include all business enterprises (or at least those above a certain size), NGOs will have to decide if their BATNA is, in fact, preferable to treaty and their interests are better served by walking away from the negotiation.

Of course, even if some version of a treaty is successfully negotiated that addresses the interests of human rights NGOs, states will have to agree to consent to be bound by it. In most cases this involves legislative approval, which adds numerous additional obstacles, many of which will likely be quite difficult to overcome.

Furthermore, NGOs must consider the implications of the likely heterogeneous ratification of any resulting treaty. Would such an outcome result in capital flight to non-ratifying countries? If so, would this result in an improvement in human rights prevention, protection and remedy?

The road to an effective business and human rights treaty is by no means an easy one, but thorough and regular negotiation analysis will help assure the best possible outcome, and the murder of activists like Berta Cáceres demonstrate the necessity of making every possible effort.

¹⁹¹ ICAR, “Fifth Annual Meeting of the International Corporate Accountability Roundtable.”

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Appendix: Abbreviations Guide

BATNA - Best alternative to a negotiated agreement

BIAC - Business and Industry Advisory Committee to the OECD

BHR – Business and human rights

CAI – Corporate Accountability International

CSR - Corporate Social Responsibility

EITI - Extractive Industries Transparency Initiative

EU - European Union

FCTC - Framework Convention on Tobacco Control

GPs - Guiding Principles on Business and Human Rights

Guiding Principles - Guiding Principles on Business and Human Rights

HRC – United Nations Human Rights Council

ICAR – International Corporate Accountability Roundtable

ICC – International Chamber of Commerce

ICCPR - International Covenant on Civil and Political Rights

ICESC - International Covenant on Economic, Social and Cultural Rights

IGWG – Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

IIA- International investment agreements

ISDS - Investor-state dispute settlement

NAP - National Action Plan on Business and Human Rights

NGOs – Nongovernmental organizations

OECD – Organization for Economic Co-operation and Development

OHCHR – UN Officer of the High Commissioner for Human Rights

TNCs – Transnational corporations

WBCSD - World Business Council for Sustainable Development

ZOPA – Zone of possible agreement