Shaping a Global Law for Business Enterprises: Framing Principles and the Promise of a Comprehensive Treaty on Business and Human Rights

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I. Context 1

II. Principles: From Objectives to Ideologies to Objectives in Search of the Perfect Treaty 12

III. From Objectives Based Principles to the Embedding of Principle in the Necessary Provisions of Principles Based Treaty Drafting. 33

A. Substantive Provisions. 34

B. Structural Provisions 46

C. Process Provisions 52

IV. The Principles in Pragmatic Elaboration of a Coherent Values Based Treaty 59

IV. Conclusion 82

I. Context

This Article considers the ramifications of current efforts to internationalize the legal regulation of corporate social, economic and cultural responsibility. The article represents another iteration in a long ideological battle, the contours of which assumed their contemporary substantive forms in the 1970s,[[2]](#footnote-2) but which evidences contemporary battles over the distribution of regulatory power among state and non-state actors in the early 21st century.[[3]](#footnote-3) That battle revolves around two key questions. The first touches on the appropriate level—local, national, international, or transnational—for the legal regulation of corporations. The second touches on the substance and limits of that regulation. On one extreme end stand those who tend to view the issue of enterprise regulation as inexorably tied to the organization of economic power and thus as essentially national and markets based.[[4]](#footnote-4) Moving toward the other extreme stand those who view the issue as inexorably tied to the larger issue of social and political obligation tied to internationalized standards for human rights and remedially based development obligations.[[5]](#footnote-5) Increasingly, the borders between the two are ill defined.[[6]](#footnote-6)

The current round of internationalizing the legal regulation of corporate social, economic and cultural responsibility was initiated in July, 2014, when the UN Human Rights Council established an open-ended intergovernmental working group (IGWG) on transnational corporations and other business enterprises with respect to human rights, and mandated the working group to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.[[7]](#footnote-7) This action represented the culmination of growing disaffection with the U.N. Guiding Principles for Business and Human Rights (UNGP),[[8]](#footnote-8) which had been endorsed unanimously by the same Human Rights Council only three years before in June 2008.[[9]](#footnote-9) The move from the operationalization of a soft law framework for coordinating the public law based duty of states to protect human rights with the private law, transnational, and social norm based responsibility of enterprises to respect human rights seemed to some incompatible with a move to consider a comprehensive treaty covering the same ground.[[10]](#footnote-10) The Human Rights Council appeared to signal substantial lack of consensus among its members respecting the focus of their efforts to move forward on developing structures for managing the human rights impacts of economic activities. Ironically, the adoption of the resolution to create the IGWG and start a treaty drafting process while continuing to support the earlier adopted soft law framework under the UNGP might have reduced acrimony even as it contributed to anarchy.[[11]](#footnote-11)

At the time of the adoption of the resolution establishing the IGWG, such a trajectory, from UNGP to IGWG, would have been unexpected. John Ruggie, as the Special Representative of the U.N. Secretary General for Business and Human Rights,[[12]](#footnote-12) had “achieved what seemed unthinkable in 2005 at the beginning of his mandate.”[[13]](#footnote-13) Some influential civil society organs were cautiously optimistic about the framework.[[14]](#footnote-14) Indeed, the establishment of the UNGP represented the culmination of a contentious and often failed process that had started in the 1970s as international organizations sought to figure out a way to create a set of quasi-public responsibilities of corporations engaged in economic activity across borders.[[15]](#footnote-15) Yet the endorsement did not silence criticism[[16]](#footnote-16)—it merely sharpened it.[[17]](#footnote-17) Amnesty International set the tone for the post endorsement critique:

The draft guiding principles enjoy broad support from business, precisely because they require little meaningful action by business. Prof Ruggie has acknowledged that governments often fail to regulate companies effectively, and that companies working in many countries evade accountability and proper sanctions when they commit human rights abuses. The fundamental challenge was how to address these problems. His draft guiding principles fail to meet this challenge. Amnesty International believes they must be strengthened. We have offered constructive advice, based on years of investigative experience, to help the process. We will continue to do so.[[18]](#footnote-18)

Civil society became more vocally critical of the UNGP project after 2012,[[19]](#footnote-19) as did some influential legal academics.[[20]](#footnote-20) Some thought that this criticism would be the basis for efforts to guide the operationalization of the UNGP.[[21]](#footnote-21) Instead, this criticism ultimately became a call for a comprehensive treaty on business and human rights shortly after the UNGP endorsement, one built around the core group of civil society that had been most critical of the UNGP process.[[22]](#footnote-22) These civil society elements framed their efforts around a “Global Movement for a Binding Treaty” whose purpose was to enhance the international legal framework to protect human rights from corporate abuse.[[23]](#footnote-23) The object, quite logically, was to extend what Stephen Hopwood, had critically called the Global Human Rights Regime “where law, courts, money, and access to power in New York and Geneva are more familiar terrain.”[[24]](#footnote-24) The business community, on the other hand, reaffirmed their commitment to a governance framework for business and human rights without a treaty.[[25]](#footnote-25)

Simultaneously, a group of developing states led first by Ecuador and thereafter joined by South Africa[[26]](#footnote-26) began efforts to reconsider the UNGP as the framework around which the U.N.’s business related human rights efforts would be focused. In August 2013, at the Regional Forum on Business and Human Rights for Latin America and the Caribbean, and later at UN Human Rights Council 24th session in September 2013, the representative of Ecuador before the UN made a declaration regarding “Transnational Corporations and Human Rights,”[[27]](#footnote-27) seeking a legally binding international instrument on business and human rights to be concluded within the UN system.[[28]](#footnote-28) This declaration was supported by a number of developing states and “welcomed” by a large number of influential civil society actors.[[29]](#footnote-29)

The action to establish an IGWG with its treaty elaboration mandate itself divided the Human Rights Council, with the developed states and their allies firmly opposed to an action that had been brought by a group of developing and mostly non-Western states.[[30]](#footnote-30) At the same time, the Human Rights Council also indicated its adherence to the principles of the UNGP,[[31]](#footnote-31) and adopted by consensus a resolution put forward by Norway and supported by forty-four co-sponsors that expressed support for further operationalization of the UNGP.[[32]](#footnote-32) The Norway resolution included a request that the UN Working Group[[33]](#footnote-33) prepare a report considering, among other things, the benefits and limitations of legally binding instruments.[[34]](#footnote-34) Many of the states that supported the Norway resolution remain hostile to the treaty project.[[35]](#footnote-35) The U.S. is likely to boycott some or all of the deliberations, and the European Union and Norway have reportedly sought to condition participation on a number of parameters that would substantially reshape the IGWG mandate.[[36]](#footnote-36)

Thus, the Human Rights Council appears to have supported two distinct pathways toward the governance of business and human rights that are centered on the activities of transnational corporations (a term that remains ambiguous).[[37]](#footnote-37) On the one hand, the Human Rights Council continues to support the UNGP project[[38]](#footnote-38), a project that itself broke some new ground with its multiple focuses on private law, public law, and societally sourced governance framed within its three pillar structure: a state duty to respect human rights, a corporate responsibility to respect human rights, and a global obligation to provide remedies for breaches of these duties and responsibilities by states and enterprises.[[39]](#footnote-39)

On the other hand, the Human Rights Council has also opened the possibility of shifting focus from the UNGP project to one more traditionally centered on treaty-making and public law.[[40]](#footnote-40) But how does one go about drafting a treaty—and especially one focused on business and human rights? Treaty drafting is a complex project, not merely for its compositional elements but for its legal effects under international and domestic law. What are the principles that ought to frame the drafting of a treaty? How does one evaluate the effect of provisions against these fundamental principles and objectives? Lastly, how does one develop a framework for pragmatic compromise that preserves the integrity of the treaty draft without compromising its core principles? These are not just theoretical questions. The questions suggest the need to focus analysis on the central task of treaty elaboration that the Human Rights Council has taken upon itself in creating the IGWG and that the international human rights community, in its representative capacity, must have clearly in mind as it engages in that treaty elaboration process.

This article considers how to approach these questions and their consequences that face treaty drafters tasked with the project of creating a comprehensive treaty for business and human rights. Its principal insight follows from its focus: no comprehensive treaty for business and human rights will retain any coherence or fidelity to its core objectives unless the treaty drafters first identify and choose among the plausible ideologically distinct principles and frameworks for going forward and then tie the elaboration of specific provisions to these principles. Sounds simple, doesn’t it? Yet in the case of a comprehensive treaty for business and human rights, these simple considerations raise basic issues of the relationship of law to social norm, of the scope, purpose and function of international and corporate law, of the legitimate mechanics for legalization of macro-economic policies, of the scope and methodologies of regulation, and lastly of the ways in which international organizations function between the public and private spheres.

The UN Human Rights Council decided that the first two sessions of the working group should be devoted to “conducting constructive deliberations on the content, scope, nature and form of the future international instrument.”[[41]](#footnote-41) At its first session, civil society refined their expectations for the scope and coverage of a treaty instrument under the mandate.[[42]](#footnote-42) The working group organized its consideration for the scope of a treaty around a number of broad concepts: (1) renewed commitment by states;[[43]](#footnote-43) (2) principles;[[44]](#footnote-44) (3) concepts and legal nature of transnational corporations; [[45]](#footnote-45) (4) extent of human rights to be covered; [[46]](#footnote-46) (5) state obligations to guarantee respect for human rights by entities; [[47]](#footnote-47) (6) enhanced responsibilities for entities; [[48]](#footnote-48) (7) legal liability of entities; [[49]](#footnote-49) and (8) international remediation mechanisms. [[50]](#footnote-50) There was little consensus except at a very general level.[[51]](#footnote-51) Also there may be some fundamental disagreement between the position of the states supporting the treaty project and their civil society allies.[[52]](#footnote-52) At its Second Session,[[53]](#footnote-53) a set of six panels continued the discussion along the same lines, considering in now well understood ways, the social, economic and environmental impacts of TNCs, the utility of extraterritoriality to the project of managing the conduct of TNCs, the societal obligations of TNCs to respect human rights, and the hard issue of remedies in the context of the jurisdictional niceties of the state system.[[54]](#footnote-54)

The work to date, then, suggests two principal challenges for the treaty making project; the first is consensus on underlying principles and objectives; the second is the extent to which the provisions of a treaty must conform strictly to principle, that is to the principles within which pragmatic decisions may be taken that do not imperil the logic of the regulatory project itself. Both touch on issues of coherence and vision. Yet because neither is undertaken in a vacuum, both also suggest the need for pragmatism and a set of principles for pragmatic choices to move from conceptualization to draft treaty in ways that advance the objectives of its champions or preserves the interests of its opponents. Yet the notion of pragmatism—and especially the principled pragmatism[[55]](#footnote-55) that John Ruggie advanced as the basis for the elaboration of the UNGP[[56]](#footnote-56)—has been criticized by those now driving the treaty movement itself.[[57]](#footnote-57) Indeed, as David Kennedy noted almost two decades ago, “it is often tempting (for those within and without the movement) to set pragmatic considerations aside, to treat human rights as an object of devotion rather thancalculaiton.”[[58]](#footnote-58)

The parallels between the elaboration of the UNGP and that of the work of the IGWG, and its associated movement toward the elaboration of an international business and human rights treaty in some form, cannot be ignored. Both present their proponents with the same sort of problem—the problem of pragmatism in the construction of a treaty—from the embrace of a coherent set of animating principles to the objectives in drafting specific provisions that remain true to these principles. Notions of principle and pragmatism, of objective and compromise, will play a role in two critical aspects of treaty making. First it will be fundamentally related objectives that the treaty elaboration project relates with respect to the project of human rights in business activities; second it serves as an essential element in determining the scope and form of the treaty itself.[[59]](#footnote-59) It is to the fundamental issues of framing principle and treaty scope, of the pragmatic choices that will shape its structures, and of the comprises in the service of attainment of the ultimate objectives underlying the push for a comprehensive treaty for business and human rights that this article is directed.

After this short introduction, Section II considers the normative principles that might frame a principles-based treaty-making project to further the ends of its champions. To that end it considers both the charge to the IGWG and the objectives statements of an influential group of NGOs that have been important in driving the process. These suggest the range of *plausible* ideological choices that may serve as a starting point for *treaty drafting that is principled*. For that purpose, evolutive and transformative objectives are distinguished and considered in the context of framework, institutional and systemic objectives. Section III then considers how these principles would find expression in a treaty. Negotiation will tend to focus on three classes of technical provisions, all of which look ideologically adrift, but each of which is embedded with principle and the choices of ideology moving the elaboration project forward: structural provisions, substantive provisions, and process provisions. That consideration then raises the critical contradiction of the treaty-shaping process: each of the fundamental principles that ought to drive treaty drafting themselves challenge the normative order and contemporary principles for the organization of state, enterprise and international law. That leads to a necessary consideration of the likelihood that the application of principle to treaty writing may produce a challenge to conventional norms and the ideologies of domestic and international law systems that may require *pragmatic compromise in treaty drafting*. That challenge is taken up Section IV, which considers the ways that *principled pragmatism* may be useful in helping construct a framework for determining an approach to treaty making in the shadow of the UN Guiding Principles themselves. It ends with a brief consideration of the effects of the 2016 United States Presidential elections and the potential impacts of the foreign and trade policies of President Trump on the pragmatic choices for a treaty going forward.

This article then examines the operational heart of the treaty process itself where the best intentions and deepest substantive principles of its proponents are confronted with both implementation choices (pragmatism of principles) and compromises of those animating principles themselves (principled pragmatism). It thus considers the pragmatic approach to pragmatism itself. Here, actors are not confronted with the issue of operational choices within a set of principles consistent with an underlying ideology. Rather, actors are confronted with the willingness to move away from one or more of the cluster of principles animating any original approach to attain objectives in the face of principled opposition from actors essential to the successful attainment of regulatory goals. The principles of pragmatism may permit the dilution of principle to attain the core objectives to which those principles are directed.

II. Principles: From Objectives to Ideologies to Objectives in the Ideal Treaty

It is useful to start a consideration of the scope and substance of a comprehensive treaty by considering the mandate of the IGWG.[[60]](#footnote-60) At its simplest and most general level, the objective is easy enough to state: the development and adoption of a comprehensive treaty for business and human rights.[[61]](#footnote-61) But while that narrows the subject a little, it opens extraordinarily broad areas of ambiguity that must be confronted at both the initial level and eventually at the level of negotiation with opponents, if the ideal represented by this objective is to be realized in any form. Ideology and objective merge, though, when one considers the document that unleashed the treaty project.[[62]](#footnote-62)

What precisely was the objective? At its narrowest, it was “to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.”[[63]](#footnote-63) That suggests not merely object but ideology. The group formed is limited to states and their representatives.[[64]](#footnote-64) The Resolution stresses “that the obligations and primary responsibility to promote and protect human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations[.]”[[65]](#footnote-65) There is a tension here—the focus on territory and jurisdiction. That appears to underline the great tension within the state system itself—the general principle of territoriality and its exceptions in the context of nationality and effects.[[66]](#footnote-66) But that opens the door to the sort of extraterritoriality that often pits powerful against weak states; one that, in this case, might be ameliorated if all states are required to apply the same “law.”[[67]](#footnote-67)

The treaty effort, then, is to be a state project, and likely for the project of states in the context of this particular issue.[[68]](#footnote-68) And that issue? That is also easy to identify: “[T]o elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”[[69]](#footnote-69) That also specifies substantial constraints on the project. These are also easy to identify. First the mandate is limited to an elaboration.[[70]](#footnote-70) Once the draft is “elaborated” the task is completed.[[71]](#footnote-71) But that elaboration is meant to establish a new regulatory order, one that draws both on ideology and on the normative foundations already established through the Guiding Principles,[[72]](#footnote-72) which itself might suggest the morphing of European natural law into a legalized amalgam of quite specific rights the elements of which might provide remedies to individuals.[[73]](#footnote-73)

Second, the thing to be elaborated is an international legally binding instrument.[[74]](#footnote-74) At first blush this objective is also clear; it speaks to an instrument that may constitute international law but which does not mandate that such an international instrument be embedded in the domestic legal orders of states,[[75]](#footnote-75) though that is implied and under international law may be hoped for. In the long term that hope, when coupled with substantial practice, may morph into customary law. But that is farfetched at this point. But the production of an international legally binding instrument may be interpreted as substantially broader than a treaty—it might suggest the broadness of the Norms[[76]](#footnote-76) to bind enterprises and individuals, as well as states, to embed itself within domestic legal orders despite constitutional barriers to such an action in national law. That certainly might well be a position that could be plausibly taken, and vigorously opposed by traditionalists.[[77]](#footnote-77) The Mandate was careful to take into account “all the work undertaken by the Commission on Human Rights and the Human Rights Council on the question of the responsibilities of transnational corporations and other business enterprises”, the body of which includes the Norms themselves, and the ideologies that supported the Norms.

Yet one can also read the objective of this international legally binding instrument as to regulate, in international human rights law. That suggests a substantial limitation on the jurisdiction of the working group and the scope of the treaty instrument. Those limitations sound in international human rights law, a limitation that may well preclude the extension of international human rights law within the treaty project or the recourse to law other than international human rights law conventionally understood. It is important in this respect to understand that limitation of law—the mandate extends only to human rights law, not human rights norms—including plausibly the U.N. Guiding Principles of Business and Human Rights, which is *not* law.[[78]](#footnote-78) Yet the pragmatics of the principles suggest the importance of the Guiding Principles, whose structure is to be preserved in some form. The mandate resolution stressed the centrality of states to the construction of a regulatory domain, but also emphasized the responsibility of transnational corporations to respect human rights and the important and legitimate role of civil society in promoting corporate social responsibility.[[79]](#footnote-79)

The other constraint on discretion is the object of regulation: the activities of transnational corporations and other business enterprises.[[80]](#footnote-80) There is an ambiguity here as well. A broad reading would suggest this includes TNCs and other business enterprises. A narrow reading would suggest that this includes only enterprises, whether organized as corporations or in other forms, which are transnational in character. Indeed, the drafters of the resolution made their intent clear in a footnote.[[81]](#footnote-81) This appears to be a carryover from a distinction that was an important element of the rejected Norms.[[82]](#footnote-82) And more likely one based on the premise that apex TNCs, those enterprises that can be identified as controlling production chains, should be the sole bearer of international responsibilities for human rights.

This, however, also begs the question: what does it mean to be transnational? There is some writing from the late 20th century produced as a precursor to the Norms Project that might be helpful.[[83]](#footnote-83) These documents, however, may not recognize the substantial changes in the organization of global production chains that have become clear only in the last decade.[[84]](#footnote-84) The easy solution, though one that is not itself without problems, is to define transnational as nondomestic. Yet that distinction produces its own ambiguity. For example, it might be tied to the investment of enterprises abroad, but not extend to enterprises that merely sell their goods internationally. Yet it is not clear that the domestic enterprise that must import components, or which relies on imported labor for domestic operations, might not also fall within the definition. In any case, this distinction may not reflect emerging realities of the organization of economic activity in the 21st century under conditions of globalization. More importantly, it appears to embrace an odd notion for developing states: the idea that all of their domestic enterprises, to the extent that they fall within the orbit of controlling TNC networks, must now be regulated through such networks. The resulting loss of domestic authority over domestic enterprises embedded in global production is thus reduced.

A related objective speaks to the ambiguity-reducing role of the first two sessions of the IGWG, which are to be “ . . . dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument, in this regard.”[[85]](#footnote-85) Indeed, the IGWG was instructed, for its first meeting, “[T]o collect inputs, including written inputs, from States and relevant stakeholders on possible principles, scope and elements of such an international legally binding instrument.”[[86]](#footnote-86) What is clear, then, is that the only objective for which there is an agreement—and it is an important one—is that states elaborate a draft of an international legally binding document and that this document be constrained by existing international human rights *law* touching on *transnational* corporations as well as other business enterprises.[[87]](#footnote-87) But even these terms are subject to substantial interrogation in the course of a three-year progress from *intention* to *realization*.[[88]](#footnote-88)

The objective might be more clearly framed by reference to ideological choices made by the drafters of this resolution. Let us consider those briefly. These complicate rather than clarify the objectives. The Resolution starts with references to (recalling) the U.N. Charter and with the three principal documents that suggest the framework for international human rights (other than with respect to humanitarian law and the laws of war).[[89]](#footnote-89) It also referenced (and recalled) the Declaration on the Right to Development and the Guiding Principles for Business and Human Rights.[[90]](#footnote-90) The first reinforces the ideology of the state as the centering concept in the project of treaty making.[[91]](#footnote-91) It also suggests that an ideology that views enterprises as subjects of international law might not be compatible with the underlying ideology constraining the mandate. The second references two instruments of international law and a mere, though foundational, declaration of international norms, the latter with no effect as law.[[92]](#footnote-92) The third references another declaration.[[93]](#footnote-93) But the global community remains deeply divided, along its own ideological lines among these instruments that constitute the framework totality of human rights “law.”[[94]](#footnote-94) That suggests that while the state is centered in the negotiations, the international community’s aggregate output is centered as the basis for the treaty product to be extracted from the process. That is unlikely to please either side in the ideological debates over the nature and scope of human rights or the hierarchy (temporarily speaking at least) of these rights. More importantly, even among those with a preference for either civil and political rights regimes, on the one hand, or economic, social and cultural regimes, on the other, the meaning of these instruments may be vastly different depending on the political context and constitutional traditions of the state in which the interpretation is to be applied.

None of this makes any difference as ideology. Instead, the collective recollection is meant for something other than a legal purpose. It is to describe the ideological basis on which the elaboration of a treaty is to be undertaken. In this case, that basis becomes clear: centering the state as the nexus point for operationalization[[95]](#footnote-95) and the principles described in the three apex human rights instruments[[96]](#footnote-96) (irrespective of their legal effects) as well as the political ideology of development that seeks to change the natural power dynamic between developed and developing states. In referencing the Guiding Principles, it might also have suggested their reincorporation but this time within an international human rights based legal system centered on the state while staying true to the Guiding Principle’s own objectives.[[97]](#footnote-97) It is within this universe that the enterprises’ responsibilities and civil society’s role, currently embedded within the societal sphere, may be embedded within the state’s duty to protect human rights founded on international law which is then in turn embedded in domestic legal orders.

But there is a tension here as well[[98]](#footnote-98)—the mandate’s veiled reference to the Norms[[99]](#footnote-99) and the ideological foundations for the development in the work of the Human Rights Council and its predecessors since the 1970s, suggests that the UNGPs might well be accepted as a baseline from which changes compatible with the older ideological bases will have to be made.[[100]](#footnote-100) But the hint is not a command.[[101]](#footnote-101) Rather, it is the elaboration of structures of ambiguity within which principles will have to be harmonized and choices made in the service of the pragmatic objective—the elaboration of a comprehensive treaty.

Moreover, even as the mandate seeks to center the state, it also appears to suggest that that the state will serve as a remote center, as its regulatory authority will be operationalized through states and monitored through civil society. The mandate suggests the respective roles of enterprises and civil society both in treaty elaboration and in the human rights protective system furthered by the treaty.[[102]](#footnote-102) “[T]ransnational corporations and other business enterprises have a responsibility to respect human rights . . . [and] the capacity to foster economic well-being, development, technological improvement and wealth, as well as causing adverse impacts on human rights.”[[103]](#footnote-103) Civil society, on the other hand, “[has] an important and legitimate role in promoting corporate social responsibility, and in preventing, mitigating and seeking remedy for the adverse human rights impacts of transnational corporations and other business enterprises.”[[104]](#footnote-104) (Preamble). Together they form two segments of a three part system that can be made better if directed through the normative structures of international law, embedded in and enforced by states. It rejects the idea of private law making and private societal normative systems.[[105]](#footnote-105) In a sense, then, the mandate recognizes the privatization of the state duty to its citizens, and of the international community’s obligation to gap fill in those spaces beyond the state (globalization’s principal challenge). The mandate deputizes civil society as an enforcement agent. It effectively takes the existing system of private governance and re-inserts law and the state: law from the international sphere and the state as international law’s agent.[[106]](#footnote-106)

But this is more than ideology. This is the ideology of the state and its system organized as communities of states developing common standards harmoniously applied to behaviors that affect them.[[107]](#footnote-107) These objective-based principles are an expression of a pragmatism that is focused on implementation rather than on an ideal. The pragmatism emerges from the focus itself. The substantive principles that drive the objectives are themselves obscured behind the pragmatic construction of a structure within which the central element of the project is directed—the construction of an international human rights law of business that itself takes as its grounding principles the existing framework of human rights law and the structural taxonomy of the Guiding Principles for Business and Human Rights.

Thus, for all the clarity of the pragmatic principles through which a comprehensive treaty on business and human rights is to be elaborated, the foundational principles on which this pragmatism is based remain obscure. *And it is that obscurity*—the ambiguity—*that permits stakeholders* (both supporters and opponents of the pragmatic exercise of treaty making) *a wide degree of discretion in staking out normative positions* consistent with the mandate of the IGWG.”[[108]](#footnote-108) It is in this play in the joints of the treaty project itself that the possibilities of principle—and the ideologies that fuel them—can be discerned in their variety. That variety, in turn, suggests the greatest initial difficulty of the treaty project—the choice of ideological focus through which the pragmatic principles of the 2014 mandate may be realized—even before the process of pragmatic negotiation with treaty adversaries necessary for adoption is started.

Indeed, the IGWG Mandate appears more an invitation to choose among ideologies for the elaboration of a treaty than it specifies a choice among them. Let us consider the range of those objectives and their potential effect on the possible principles, scope and elements of such an international legally binding instrument. One might usefully identify five sets of organizing principles that could be plausibly derived from and applied to the fulfillment of the IGWG mandate. These are organized around ideologically organized principles objectives: (1) status quo objectives; (2) evolutionary or ‘evolutive recharacterization’ objectives; (3) transformative objectives; (4) framework treaty objectives; and (5) systemic objectives. Each is briefly discussed in turn.

*Status quo objectives* might be understood as the most conservative objective-ideology that may be extracted from the mandate. This approach would emphasize both the traditional limitations of international law, and the primacy of states. It would produce a treaty approach that is focused on principles broadly enough framed that individual states might embrace and embed them in quite distinctive ways. It is an approach that would not resolve the great contradiction between the international human rights approach that seeks to treat production chains as a single enterprise, and corporate law principals that would distinguish among legal persons and would make a further distinction between chains of ownership and chains of contract. At best, perhaps, one would see in this approach an effort to convert the second pillar of the UNGP into a treaty, subject to the limitations of international law and the autonomy of states within an international system.[[109]](#footnote-109) It would serve as an aspirational beacon with little practical effect. But it would provide a centering element in the agendas of civil society seeking congruence in a global project of national legal reform.

*Evolutive recharacterization objectives* might be understood as a less conservative objective-ideology framework from which principle and pragmatism in the treaty project can be understood. At bottom, this seeks to embrace the UNGP but to improve them within the conventional ideologies of state system based on public law edifices well-constructed by the last third of the 20th century.[[110]](#footnote-110) But this conservative project can be understood in one of three distinct forms. First, evolutive recharacterization projects might seek to focus on the legalization of the UNGP’s 2nd pillar, the corporate responsibility to respect human rights, especially its obligation to engage in human rights due diligence. [[111]](#footnote-111) But it might take legalization a step further—by reframing the 2nd pillar as a set of international norms through which both national and international law must be read. This reflects an ideology that views the societal sphere as either inferior to and less legitimate than the sphere of public law based on the elaboration of domestic legal orders enforced through court-established states or that as a sphere that just does not work.[[112]](#footnote-112) Yet it is also an approach that would extend the internationalization project of globalization to the societal sphere. It is, in this respect, a creature of the larger project of legalization to which many traditionalists, including influential NGOs, continue to subscribe.[[113]](#footnote-113) For some, this is a backward looking approach that does not reflect current realities. And it will be in the clash between these two positions, one that was already previewed in the run up to the endorsement of the UNGP themselves, that pragmatism—in terms of the objectives, principles, and methodologies—will be necessary.

Second, evolutive or recharacterization objectives might seek to harmonize the state duty under the first pillar. Certainly this is unstated though a plain goal of the UN Working Group’s patient project of UNGP national action plans.[[114]](#footnote-114) And, indeed, at the center of any project for the elaboration of a treaty producing international law is the notion of harmonization of state duty, which is itself a necessary precondition for the harmonization of behavior norms among transnational actors, like TNCs. Harmonization is likely best accomplished through the internationalization of law. That, in a sense, was the object of the 2nd pillar in the societal sphere. But here a treaty would have the benefit of creating a singular international law that might be applied by states embedded within their own domestic legal orders. To some extent this is a well-known and well-worn process, at least as applied to less developed states through bilateral and multilateral investment treaties.[[115]](#footnote-115) That logic might now be applied to the arena of human rights behaviors of TNCs and states. Yet here there is no indication that the now half century division among states between those who would privilege civil and political rights and those who would privilege economic, social and cultural rights, is any closer to resolution. Equally contentious is the rift among states that reserve to themselves the right to contextualize the international within their own distinctive cultural, social and religious context, and between them and internationalists.

Third, and closely related to the legalization ideologies at the heart of objectives targeting the second pillar public law making and first pillar harmonization, are evolutive or recharacterization objectives that focus on the internationalization of the third pillar remedial rights of victims of human rights abuses by TNCs and states. Internationalization objectives have the benefit of aligning remedies with the thrust of the web of bilateral investment treaties that have effectively shaped the transnational law of production chains and the business behavior of TNCs. But internationalization also poses challenges for any underlying ideology of state sovereignty on which the treaty project itself is founded. Chief among these, traditionally, are issues touching on jurisdiction and on the enforcement of judgments. But these can be sorted out through the treaty process itself as it has in the past with respect to a host of litigation oriented issues.[[116]](#footnote-116) More problematic would be moves to constrain the discretion of jurists in the interpretation and application of international law, even international law embedded within domestic legal orders. Yet some discipline will be necessary to avoid substantial deviation from common interpretation, especially of remedial mechanisms, if the objective of the treaty in this respect is to be realized.

Taken together, evolutive and recharacterization objectives suggest a fidelity both to the project of internationalization and of legalization of the substantive norms around which a law of business and human rights may be constructed. But it also touches on the internationalization of the mechanisms through which this internationalized legalization might be realized within the judicial orders of states. The objectives suggest fidelity to the classical ideology of the state but also challenge that ideology as well. It is in that space between ideology and objective that normative pragmatism will be required—something will have to give—either sovereignty or the project of *harmonized* internationalization of rights and remedies under the auspices and within the logic of the UNGP as the framework foundational template for action.

*Transformative objectives*, in contrast, reflect an ideology in which those pragmatic choices have been made in favor of the project of internationalization through law beyond the state but imposed through the state.[[117]](#footnote-117) These speak to four distinct approaches to the construction of an internationalized legal order. The first touches on the ideology-objective of global law administered through states. This suggests a bifurcation that is quite traditional, at least over the last century or so. It posits that the community of nations may come together, elaborate common positions to which all agree to be bound, with the expectation that each will embed these common positions within their domestic legal orders authoritatively through the legislative process and with the sovereign consent of their respective citizens. This is not just a project of normative harmonization but rather one of moving toward a new set of structures and expectations. More importantly, to the extent that this process is meant to be mandatory—to produce something like customary international law to *jus cogens*, then the transformative value of the exercise becomes more readily apparent. And also the possibility of resistance especially among states (and their citizens) who might feel bullied into common positions with respect to which they share little in common.[[118]](#footnote-118)

The second touches on its alternative, a global law administered through a global mechanism. This is, of course, the emerging structure of international investment law. It moves both norm-making and the mechanisms for remedies out of the state and into transnational organs. With respect to remedies, those organs are arbitral in character. That poses some challenges for those who would adhere to it in elaborating a comprehensive treaty on business and human rights. These include issues of due process and accessibility; both, ironically, are human rights issues themselves. But it also touches on the organs for norm creation. Recent history has suggested that while the most powerful states have little reluctance in advancing internationalized norms on less developed states, they tend to have far less taste for its structures within their own domestic legal orders.[[119]](#footnote-119) On the other hand, certain developed states have already begun the process of extracting and applying an internationalized legality to some of their market based activities.[[120]](#footnote-120)

Third, the same challenges face transformative objectives that focus on the creation of centralized prosecutorial and remedial mechanisms. I have suggested one version.[[121]](#footnote-121) There are others. The transformative objective here moves from a mere reliance on uniform national court structures, or even of a centralized or transnational remedial mechanism, like ICSID, to structures that might more closely mimic the structures of the International Criminal Court. A comprehensive treaty that means to legalize business behavior on the basis of international law might also consider vesting both the authority to develop normative rules and the power to administer these normative frameworks within a transnational organ. The transformative objective might include mechanisms for deferral to national courts, like those embodied in the complementarity principles of the Rome Statute.[[122]](#footnote-122) And like the deference principle in the Rome statute, it would have to be grounded in the premise of the superiority of international law and the authority of its tribunals, that is that complementarity is itself conditioned on the transposition of international law into the domestic legal systems to which the international tribunal would defer. This might require a mechanism to effectively supersede national authorities, national constitutional principles and national sovereignty in the service of a superior legalized transnational regime the protection of the operation of which must also be entrusted to a transnational actor.

Fourth, transformative objectives must eventually confront the issue of regulatory object itself and the transformation of the global economic system within which international human rights legalization is embedded. Some of this represents old ideological challenges to the established order in new frameworks.[[123]](#footnote-123) Though the focus of the last generation has been on the regulation of entities and of enterprises, however defined,[[124]](#footnote-124) it may be necessary to change the focus of regulatory objective from these entities to the production process itself.[[125]](#footnote-125) This is perhaps the most radically transformative of the objectives that may be embedded within the treaty elaboration process. It is grounded in the notion that what must be centered are the *effects* *of production chains on individuals* (the objects for which remedies are made available) rather than on the actors that might or might not produce those effects. An effects-based normative project more comprehensively responds to the fundamental objectives of the UNGPs than one that focuses on a subset of those actors whose behaviors produce human rights wrongs. But such an approach radically redirects a conceptualization framework now several generations old. Since at least the 1970s the focus has been not just on the corporation/enterprise, but also on the corporation/enterprise projecting power across borders and that traditional framework is itself closely tied to deeply held ideological views that remain highly contested.[[126]](#footnote-126) These ideologies conflate state with enterprise and politics with economics. They reject notions of private sector actors serving their own interests within global markets. And it is grounded on the notion of a fundamental divergence of interests between developing and developed states. Shifting the focus to production chains transforms the basis of regulation from the entity to the process which would change, expand, and internationalize the scope and content of regulation, taking as its starting point the individual, rather than the economic actor, which would transform both treaty and UNGP.

*Framework or treaty format objectives* move the discourse from principle in the elaboration of a treaty to the principled pragmatics of the treaty’s construction. The first touches on principles of transparency. The recent elaboration of multilateral instruments like the Trans Pacific partnership reminds us that international law making is not necessarily a transparent process. What marked the process leading to the UNGP was its transparency, even where some NGOs complained of the lack of a sufficient quantum of transparency. It is not clear what principles of transparency are to be applied in the treaty elaboration process. One way to look at it is to assume that traditional state centered rules apply, in which the extent of transparency will be determined by the states themselves. The other might suggest a broader role for enterprises and NGOs in the process precisely because that has been the habit of the Working Group for the UNGP and because the Treaty mandate intimates some role for both.[[127]](#footnote-127) More importantly, the UN itself has suggested the centrality of civil society, including enterprises, in the processes of the UN system,[[128]](#footnote-128) though that relationship remains subject to some controversy.[[129]](#footnote-129)

The second touches on principles of participation. The Treaty makes clear that the states, though its IGWG will bear the responsibility for elaborating the treaty, determine the extent to which civil society, including enterprises, will be able to participate. This issue is closely tied, but not identical to the issue of transparency. States may promote a transparent process but one with no effective participation by non-state actors. That, effectively, was a model that appeared to be followed in the elaboration of the Trans Pacific Partnership.[[130]](#footnote-130) Here one encounters a substantial potential divide among those who were instrumental in the adoption of the Mandate Resolution. On the one hand *from the perspective of states*, states might view it as central to collective national sovereignties and to the state system itself, that participation be limited to states with consultation from time to time with others. On the other hand, *from the perspective of international actors*, public and private international actors, including some states, might view it as central to the integrity of the international system itself and collective international sovereignty, that participation must be centered among the critical stakeholders in the international system such as states, transnational public and private actors, and international public organizations themselves.

The third focuses on the operationalization through states. Here one confronts the unresolved tensions among state actors in international law. More specifically, one comes face to face with the tension between the *legal obligations of states under international law*—that is to other states—and the *constitutional obligations of states* under national constitutional traditions to their own polities. Issues of democratic deficits,[[131]](#footnote-131)—already troublesome where powerful states and multilateral actors impose their sense of internationalized norms on developing states—will only be exacerbated through the process of elaboration of a treaty. What makes these objectives different is that they touch on principles of institutional organization and relational order, rather than on normative principles in the first instance.[[132]](#footnote-132)

First, a treaty of the sort contemplated by the mandate will likely require an international apparatus of some sort.[[133]](#footnote-133) That apparatus can be quite narrowly constituted—a secretariat providing support, research and limited monitoring[[134]](#footnote-134)—or it can demand a complex governance organization that, in addition to monitoring, could provide technical assistance and serve as the site for interpretation.[[135]](#footnote-135) In either case, the institution of a secretariat would tend to affect the centering of norm creation.[[136]](#footnote-136) The larger and more active the international apparatus is, the more likely that it will assert a more influential and harmonizing role.[[137]](#footnote-137)

Alternatively, the treaty might seek to leverage existing international public institutional organs with legitimacy and authority in human rights. This might serve to enhance the authority of international organs and leverage that authority to enhance the legitimacy of treaty based interpretative efforts. For example, it might be possible to vest regional human rights judicial organs—the European Court of Human Rights, the Inter-American Court and the African Court—with substantial authority to hear cases. The authority of these organs can be limited either to the substance of disputes among parties, or it may be limited to making determinations of interpretation of the language of the treaty itself.[[138]](#footnote-138)

Still another institutional alternative would transpose the OECD National Contact Point model[[139]](#footnote-139) into the institutional apparatus of the treaty. Here, the institutional architecture of the treaty framework would be folded into states, now serving as administrative units of a transnational (global) actor. The difference among alternatives touches on objectives of institutional advancement. Alternatives that enhance the international architecture will tend to reinforce the internationalization project through treaty elaboration. Alternatives that tend to emphasize institutionalization of treaty implementation in states privilege state organs and national context. A unifying secretariat tends to aid harmonization and centralized accountability.[[140]](#footnote-140) A diffuse system of state-based implementation privileges local context. The choice among them represents the articulation of objectives that either furthers a principle of internationalization or a principle of localization in the construction of legal structures for business and human rights. In turn, these principles depend in part on the choice of principles for evolutive or transformative objectives. None of these are predetermined by the treaty mandate. Indeed, the opposite is true. NGOs, developing states, and international organizations will favor principles of internationalism in the elaboration of the treaty for reasons of their own. States may favor national approaches and the devolution of power[[141]](#footnote-141) so that they might gain advantage in their relationship with enterprises and manage international actors more effectively. Enterprises may also favor a national approach so that they can engage in strategic behavior among states and leverage their power.[[142]](#footnote-142) Yet each of these approaches would have to grapple with the more foundational issues of technocracy, bureaucracy and juridicialization of the societal sphere. Extensions of regulatory and juridical control might not always be the answer, and each bears a cost. They each cede power to specialists—lawyers, judges, and bureaucratic administrators, creating apparatus organisms that can be more remote from the object of their service, and that require substantial resources to ensure accountability and access.[[143]](#footnote-143)

*Systemic objectives*, last, bring the focus back to core principles. The treaty represents, at its foundation, an operationalization and elaboration of the principle of law over governance, of the state over the enterprise, and of public rather than private governance structures. The treaty can be understood as an exercise in preserving the privilege of law as the form of legitimate regulatory governance and the centrality of the state as the source of law. It seeks to establish the state as lawmaker while increasingly embracing the principle that international law is the source of political decision and mandates the lawmaking duty of the state. The treaty, in its entirety, represents the articulation of an emerging system one sees clearly for the first time here: one in which states retain the only legitimate authority to create law binding on individuals while ceding the authority for leadership in determining the policy objectives which law serves to international organizations. In this way, states cede authority to the community of nations assembled as a sort of vanguard party whose leadership is binding (in the sense that international law is binding) by creating duties in states to legislate and administer the policy objectives of the international community. The treaty also seeks to develop a space for NGOs within these constructs.[[144]](#footnote-144) It emphasizes the principle that the law manages entities and enterprises, but does not manage systems, including production chains. What appears so simple and direct—a mandate creating an IGWG for the purpose of elaborating a treaty for business and human rights—veils a complex set of principles and objectives in which core principles and direction, even among treaty proponents, remains highly ambiguous and contestable.

The conflict of principle hidden by a set of common objectives, which themselves reflect normative choices, requires the exercise of pragmatic decision making in structural and process provisions, which are in turn grounded by principles of their own. That is, having exposed the aggregation of principle and objective that form the foundation of the treaty elaboration project, it becomes necessary to develop principles for the exercise of choices among them. The choice-making principles constitute the exercise of pragmatism from principle essential for the elaboration stage of the treaty process. But it is one that has been substantially ignored in the rush to develop any number of variations in the consideration of the details of implementing ideals whose logic is assumed but not examined. The next section considers the nature of the pragmatic choices that treaty elaboration will require in light of the objectives-principles described in this section. It then extracts the principles that may guide the choices that face treaty proponents in the elaboration process—and in that process provide a principled basis for the challenges that will invariably be made by those who oppose the treaty.

III. From Objectives Based Principles to the Embedding of Principle in the Necessary Provisions of Principles Based Treaty Drafting.

An examination of the mandate for the elaboration of a comprehensive business and human rights treaty has revealed a set of objectives, which produces certain normative ambiguity. That ambiguity invites choice which advances the objectives of the mandate (its pragmatic principle) among a number of principles that themselves are each compatible with the mandate objectives, but which are incompatible with each other. Yet all of them share in common a push toward legalization under principles of classical international law, now redrawn, at its limit, as a transformational device.

The mandate itself leaves the choices among principles to the process of elaboration. But all choices must be compatible with the primary objective. “An international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”[[145]](#footnote-145) This base objective must be achieved in fidelity to a small number of ordering principles: the principles and purposes of the U.N. Charter, the Universal Declaration of Human Rights and the two partially embraced Covenants; the Declaration on the Right to Development, the UNGP, the Norms, the primary role of the state, the responsibility of the enterprise to respect human rights and their utility as an instrument for development, and the “important and legitimate” role of civil society in promoting corporate social responsibility.[[146]](#footnote-146) These competing principles are coherently bound together by the articulation of the treaty elaboration objective.

But the elaboration of any one of these structuring principles also produces substantial choices among legal principles that might be subsumed into and advanced through the treaty drafting process. The available range of broad structuring principles and the more specific legal principles that advance these broad principles, produces the possibility of many potential variants in the treaty product. These variants in principle choices will reflect the policy preferences of the treaty’s drafters. These choices, at both the structuring and implementation levels, will likely be contested by those who reject the structure, principles, and expression specified within the treaty language itself. These likely challenges leave treaty drafters with a choice. Either the drafters can embrace principle throughout the treaty negation process, or they can reject these principles in favor of pragmatic politics. To choose the latter opens the process to the sort of unprincipled pragmatism that suggests the advancement of personal (and institutional objectives) rather than substantive objectives that the treaty was first meant to achieve.

This section focuses on framing principles, expressed in specific treaty principles that follow from the application of structuring principle to the drafting process. I then discuss the potential consequences of these principles. In Section, IV, which follows, the contradictions of principles in drafting a treaty are identified and the dynamics of pragmatism are introduced. This will contextualize the process of moving from principles-objectives to provisions within the broader context in which this exercise must be undertaken.

The structure of this sort of elaboration-pragmatism has been well discerned.[[147]](#footnote-147) Negotiation will tend to focus on three classes of technical provisions, all of which look ideologically adrift, but each of which is embedded with principle and the choices of ideology moving the elaboration project forward.[[148]](#footnote-148) These classes of provisions include substantive structural provisions, and process provisions.[[149]](#footnote-149) Each is briefly examined in turn.

A. Substantive Provisions.

*Substantive provisions* touch on the normative heart of the treaty. At their greatest level of generality, these substantive provisions have already been elaborated in the Treaty mandate.[[150]](#footnote-150) But that generalized mandate hides a number of important decisions that will have to be made, each itself a choice of principle and ideology in the construction of the normative structures for the regulation of the human rights conduct of enterprises.[[151]](#footnote-151) Each substantive provision represents a concrete expression of ideology and a choice of principle. Together they still leave accountability gaps whose closure will provide ample room for contention.[[152]](#footnote-152) As an initial matter, the Mandate poses a problem. The trajectory of discussions about the human rights responsibilities of enterprises, like states, has been generally focused on negative obligations; roughly, to do no harm.[[153]](#footnote-153) Yet it appears that the Mandate opens the door to the imposition of positive obligations on TNCs.[[154]](#footnote-154) This is especially strong in connection with the reference to the right to development.[[155]](#footnote-155) It is made stronger by the acknowledgement that “transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth, as well as causing adverse impacts on human rights.”[[156]](#footnote-156)

One approach to substantive rights is to consider using the treaty to produce a *catalogue of rights as legal rights* cognizable under the Treaty and eventually under the domestic legal orders of states. There is a tradition of seeking such a catalogue of rights specified in a legal instrument, and a suspicion either of an organic elaboration of such rights in courts or of leaving this to the societal sphere.[[157]](#footnote-157) The treaty might usefully develop a catalogue of rights as legal rights. The difficulty would consist in garnering agreement for the contents of that catalogue. It might include the “Universal Declaration of Human Rights,”[[158]](#footnote-158) but most states have failed to ratify all and one of the instruments has no official status as international law (just norm).[[159]](#footnote-159)

Perhaps environmental sustainability ought to be included as well,[[160]](#footnote-160) and the mandate speaks to the human right to development.[[161]](#footnote-161) It might include all norms and international instruments that touch on human rights, but it is not clear that such a catalogue currently exists[[162]](#footnote-162) or that there is agreement about its contents.[[163]](#footnote-163)

Alternatively, the Treaty might itself create a secretariat or other body with the authority to elaborate those catalogues of rights that constitute human rights. Or it may follow the form of the Rome Statute[[164]](#footnote-164) and vest an intergovernmental organization the authority to further elaborate human rights from one or several sources.[[165]](#footnote-165)

Either way, each of these choices is values heavy. They touch on principles of state versus international power, on the extent of the regulatory authority of international bodies, and on the basis for determining what rules might be characterized as human rights related. This is a determination that might have significant impacts within a state’s own domestic legal order.[[166]](#footnote-166)

Nonetheless, a last alternative might embrace the idea that within the general context of international human rights, the Treaty affords an opportunity for the elaboration of human rights from a blank slate. The treaty could, consistent with its mandate, be viewed as a structure within which it would be possible to rework a legal framework into which it will pour the totality of human rights as legal obligations.

Whatever the choice of normative rights, this catalogue then opens the issue of the legal effect of the catalogue itself. At one extreme, it is possible to conceive of the normative obligations of international human rights regimes with supra constitutional effect. That would follow form the fundamental character of the rights protected in the treaty. But such a position would require a confrontation of the tension between the principle that state constitutional orders are superior to international norms and emerging ideologies that hold that international law and norms may sometimes be superior to the constitutional traditions of any state.[[167]](#footnote-167) Leaving space for constitutional interpretation of treaty requirements runs the risk of eviscerating or fracturing the substantive protections of the treaty. But embracing the notion of the superior application of internationalized law then leads to the problem of the role of national judiciaries in treaty interpretation and enforcement. That, in turn, would require further elaboration in provisions that might constrain the power of national courts from interpretations that might be consistent with their own domestic constitutional orders but which might be inconsistent with a transnational application of the right. It might then follow that the treaty might have to establish an international mechanism either for the provisions of remedies for individual claims or at least for rendering consistent interpretations binding on national courts under the treaty.[[168]](#footnote-168) Alternatively, the treaty will be confronted by issues of discretionary spaces for national courts to contextualize the universal rights of the treaty within the constraints of national cultural practices, religion, and political orders. Of course, the more deference to national context the more important will be provisions for the exercise of choice of law principles on the determinations of rights and obligations under the treaty.[[169]](#footnote-169) TNCs will likely choose the law of the state of their principal operations, developing states will seek to extend their jurisdiction. Jurisdictional fights will weaken the value of the treaty as it diverts resources from the protection of human rights victims.

But it is also possible to reject the catalogue of legal rights approach in favor of a more limited approach to substance. This approach would share with the UNGP the idea that the treaty is meant to structure rights, not create them, and that the rights cognizable under the treaty are finite. To that end a number of consequential choices would have to be made. It would be consistent with a harmonizing approach for the catalogue of rights to extend to those identified in the second Pillar of the UNGP. This model would take as its principle the objective of legalizing the 2nd pillar of the UNGP. But another approach would focus on the legalization of the 1st Pillar duties of states under international law and their transposition into the legalization of the corporate responsibility to respect human rights.[[170]](#footnote-170) Under this approach, the treaty would extend corporate or enterprise obligations only to be consistent with those aspects of international human rights that have been accepted and embedded within the domestic legal order of the regulating state. Consequently, the substantive basis of the Treaty would fracture and reflect the uneven state of human rights law transposition within the community of states. The first approach would be true to the principle of legal internationalism; the second more compatible with the principle of state sovereignty and autonomy within the international order. Both would comply with the objectives of the mandate.

Lastly, the substantive provisions issue might also serve to revive the old objectives of the New International Economic Order of the 1970s with respect to TNCs.

To prevent interference in the internal affairs of the countries where they operate and their collaboration with racist regimes and colonial administrations;

To regulate their activities in host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context facilitate, as necessary, the review and revision of previously concluded arrangements;

To bring about assistance, transfer of technology and management skills to developing countries on equitable and favourable terms;

To regulate the repatriation of the profits accruing from their operations, taking into account the legitimate interests of all parties concerned;

To promote reinvestment of their profits in developing countries.[[171]](#footnote-171)

These objectives represent a quite distinct ideological base line but one already noted as privileged within the mandate itself; the focus on the use of TNCs as a vehicle for development[[172]](#footnote-172) by reframing international regulation of TNCs to that effect.

Another important area of technical substantive choice revolves around the development of the substantive provisions relating to rights holders. The treaty will have to identify rights holders. It is easy enough to identify individuals as rights holders. Yet some systems view human rights, not as a matter of assignment of rights, as in the allocation of burdens of responsibility for the protection of what might otherwise be understood as rights.[[173]](#footnote-173) Beyond that is a set of harder questions. Rights might not be solely allocable to individuals. In many constitutional traditions juridical persons are also entitled to the protections of fundamental law, including corporations.[[174]](#footnote-174) More interesting, there is no logical reason why the constraints of human rights in institutional activities ought not to extend to civil society actors, religious institutions, and to international organizations themselves.[[175]](#footnote-175) Though one can argue that the political or religious nature of some of these institutions merit waivers, that is legitimate only by implicitly accepting that human rights is limited only to economic enterprises and has no reach to the activities of public organs, of religious institutions or of civil society in their own operations, no matter how egregious from a human rights point of view. [[176]](#footnote-176) Lastly, it may be necessary to extend the protections to peoples as well as to individuals. Certainly, the emerging traditions of African States suggest the necessity of this.[[177]](#footnote-177)

Conversely, it will be necessary to determine whether all rights holders are also burdened with a responsibility. The treaty speaks to TNCs, but there is no reason, in thinking through the dynamics of global transactions, why the obligations of human rights should not apply with equal measure on everyone who has human rights. Certainly, a strong case can be made that it ought to apply to international financial institutions (IFIs)[[178]](#footnote-178) with the understanding that their macro-economic policy must incorporate provisions. It might also apply to banks and other financial investors like sovereign wealth funds.[[179]](#footnote-179) It would be odd, indeed, if human rights responsibilities turn merely on the form of organization chosen through which to conduct economic activity. Likewise, it is difficult to determine how the treaty will give effect to that first footnote of the mandate, which inexplicably makes a distinction between national and transnational business.[[180]](#footnote-180) That reference makes sense only as a marker of historical significance rather than as a structural limit on the scope and application of treaty design.

Substantive provisions will also have to confront a number of important technical issues with important substantive consequences, treaty triggers, sovereign immunity, complicity, and the scope of the duty.

Treaty triggers set out the basic scope and coverage of the duties and obligations in the treaty; they touch on those occurrences or conditions that would be sufficient to invoke the protections of the treaty or the treaty as transposed to national law.[[181]](#footnote-181) The mandate focuses on one critical treaty trigger: the extent of the application of the treaty’s substantive provisions to enterprises. The mandate suggests that the treaty’s obligations applies only to transnational enterprises and explicitly would avoid application to domestic enterprises.[[182]](#footnote-182) Yet, there are two quite distinct ways that treaty application could be framed.

The first is grounded in status. Every enterprise designated as a TNC for treaty purposes would bear the responsibilities imposed through the treaty with respect to all of its operations all of the time. But that would require a sufficiently precise and fair definition of TNC. The difficulties of that task have already been noted, even within a status quo or evolutive ideological approach.[[183]](#footnote-183) Transformational approaches would have to confront the fundamental challenge of the application of human rights standards on enterprises—the quite distinct approach to the protection of the separate legal personality of enterprises, of the character of contractual relations and of the apportioning of assets that these imply that are embedded in national corporate law and international human rights law. Alternatively a pragmatic choice will have to be made—one that requires bending to the realities that enterprises do not exist as a legal construct and thus would have to find a legal definition in the absence of such within national law.[[184]](#footnote-184)

The second approach to determining the extent of any human rights obligations would focus not on the enterprise, but transactions. This would itself mark an extraordinary transformational step, but one in line with adjustments in the character of economic regulation. [[185]](#footnote-185) It would effectively require a change of focus from assigning responsibility along a supply chain, to investing activity within a supply chain with liability that is to be apportioned within the chain itself. Under this method, only those transactions with a transnational character would subject all participating actors participating to the treaty’s obligations. The approach would address the trigger on economic transactions of any kind that cross borders, rather than on the character of the enterprise engaged in such activity. Although it would theoretically extend the coverage of the obligations to a much larger class of actors, this approach would impose tremendous monitoring problems, as well as issues of definition and application. More importantly, it is hardly on the regulatory horizon of any of the players involved in treaty making (or in resisting and offering alternatives to the treaty process). [[186]](#footnote-186)

Sovereign immunity touches on issues of protection against state liability or amenability to suit, with respect to its obligations under the treaty.[[187]](#footnote-187) Sovereigns operating commercial enterprises have a much narrower scope of protection against liability.[[188]](#footnote-188) In the human rights context, perhaps they should have none. Yet, less developed states might find this works to the advantage of developed ones that can afford to bear the risk and which have governmental organisms in place that are better able to mitigate risks. The same principles to compel enterprise liability ought to suggest state liability as well. But for some states, these notions trigger fundamental ideological constraints, grounded in the premises that sovereign immunity constitutes a defense against the encroachments of powerful states.[[189]](#footnote-189)

Complicity touches on the legal efforts of involvement of states in acts that might bear on liability under the Treaty. Companies that are involved in the wrongful acts of states and vice versa should both share equal liability with the principal actor. But the concept of complicity can be applied narrowly—for example requiring substantial acts or proof of intent.[[190]](#footnote-190) It can be defined broadly as well—touching on any acts that facilitate wrongdoing by others.[[191]](#footnote-191) The substantive provisions of the treaty could mark the borders of the legal touchstone for gauging complicity, or complicity might be discerned by acts. It is possible to see the notion of complicity elaborated elsewhere within international law and law enforcement systems.[[192]](#footnote-192)

Among the major substantive provisions to be confronted is the issue of the enterprise and enterprise law principles.[[193]](#footnote-193) This was an issue as difficult for the process leading to the UNGP as it will be for the Treaty elaboration effort.[[194]](#footnote-194) The law of most states recognizes a variety of organizations of business and preserves the autonomy and separate existence of each.[[195]](#footnote-195) States zealously guard their authority over this power to license (and regulate the internal affairs) of enterprises.[[196]](#footnote-196) States have also zealously guarded their authority to protect the integrity and assets of those legal persons it has licensed and regulates.[[197]](#footnote-197) Academic literature has sought to modify these principles, though they have remained respectful of the conceptual framework within which corporate law is framed. [[198]](#footnote-198)

Adoption of broad enterprise liability principles on the treaty, especially liability tied to concepts of TNCs, will invariably challenge, and upset, these otherwise quite stable principles of law.[[199]](#footnote-199) It would change the basis of corporate personality from one grounded in the aggregation of capital to one founded on the partition of liability for breaches of human rights in economic transactions. And it will substantiate another principle of law—that the law of international human rights supersedes any national law of corporations or enterprises that impedes or restricts the liability of enterprises by protecting the autonomy of any part thereof. It is true enough that there have been substantial efforts made to undertake this change through the natural process of litigation aimed at changing corporate law—with particular emphasis on the law of veil piercing.[[200]](#footnote-200) But the treaty would take this internal and embedded law reform process and substantially transform its substance.

Yet, this is precisely at the core of the transformational objectives of a TNC treaty.[[201]](#footnote-201) At its broadest construction, this is a project that might cause legal distinctions among legal and natural persons to become irrelevant and disregard asset-partitioning rules. These principles would be vigorously opposed by developed states and may not be in the interests of developing states seeking to protect their own enterprises against the otherwise formidable competitive advantages of foreign enterprises. The model adopted might have the further controversial effect of reshaping the ancient principles of duty in economic enterprises, especially the fiduciary duty of the directors of enterprises to their shareholders.[[202]](#footnote-202) In determining whether corporations, enterprises, individuals, or states have a duty to minimize the social cost of economic activity and whether their boards of directors must act to advance corporate interests under either a stakeholder, public values or sustainability model, will require substantial transformation of the corporate laws of virtually every state on earth.[[203]](#footnote-203) To impose any such model through the treaty will transform it into a treaty that creates international standards of corporate governance with impacts far beyond the narrow scope of the mandate. Significant among these would be the principle of corporate autonomy.[[204]](#footnote-204) Nonetheless, that may be necessary to ensure coherence in the elaboration of a business and human rights treaty.

B. Structural Provisions

The structural provisions of the treaty project would pose no less significant a set of principled problems. *Structural Provisions* touch on issues of the operation of the substantive provisions of the treaty itself.[[205]](#footnote-205) They define the place and power of the treaty and the extent of its legality within the international law framework.[[206]](#footnote-206)

The issue of the treaty’s character—whether it is self-executing or not—will have an impact on its legal effect in many jurisdictions.[[207]](#footnote-207) If the object is uniform, comprehensive and coherent legalization, the treaty must be understood as self-executing.[[208]](#footnote-208) Otherwise the possibilities of fracture, as states add reservations and legislatures amend to suit national needs, would produce incoherence that may substantially weaken this project of internationalized norm making.[[209]](#footnote-209) A related issue might be the consideration to make the treaty provisions directly applicable in the manner of certain directives in the European Union system. This has the benefit of avoiding the issues of national transposition, but it would come at the expense of sacrificing principles of state sovereignty.[[210]](#footnote-210)

Refusing reservations might also reduce fracture.[[211]](#footnote-211) It is not clear that this would be possible under international law—and thus a conundrum: a treaty meant to bring business and human rights under law might be undone by the ability of states to use law to avoid its strictures as law. A way around this would be to draft substantive provisions as *jus cogens*.[[212]](#footnote-212) However, that is itself a difficult undertaking and may not be possible under current interpretations of international law.[[213]](#footnote-213) Many states would view an exercise of that sort with suspicion and as an indirect attack on their sovereign autonomy.[[214]](#footnote-214) Yet, a more feasible alternative, as it applies to international law, is to set the treaty provisions as superior law within domestic legal orders.[[215]](#footnote-215) In this scenario, a treaty’s provisions would constitute legislation that is superior to ordinary legislation, but perhaps inferior to constitutional law and amenable only under special circumstances to be defined by the treaty itself.[[216]](#footnote-216) Some states already provide for super statutory effects for international law within their constitutional orders.[[217]](#footnote-217) Other states reject the concept and strongly embrace the notion that they retain full authority to interpret international law embedded within domestic legal orders.[[218]](#footnote-218) Taken together, these structural issues apply to the treaty’s authority and character in national legal orders.[[219]](#footnote-219) These are fundamental questions that will determine whether the treaty can either be operationalized in a rational and comprehensive way or will remain more of a gesture in international law than a robust working structure for a normative discipline. The structural challenges, along with the tensions and challenges to principles they represent, will present a set of substantial obstacles to enable *effective* elaboration.

However, the harmonization within a domestic legal order leaves unresolved the distinct, but growing, issue of conflicts among treaties.[[220]](#footnote-220) Some have suggested that while treaty conflicts may never be entirely resolved, strategies towards avoiding potential conflicts include “the use of interpretive techniques to analyze texts that have already been written” and the incorporation of inter-state disciplinary cultures.[[221]](#footnote-221) This raises an issue not just about the internalization of international law within states, but also the potentially more difficult problem of harmonizing the human rights law that is then incorporated into a comprehensive treaty. To that end, a number of international utterances, including those that states noted with approval in the Mandate resolution establishing the IGWG,[[222]](#footnote-222) would have no *legal* effect. Consequently, the comprehensive treaty may, to some extent, have to create substantive legal norms from international declarations and the like, even as it seeks to impose this substantive legal structure on both states and enterprises. Therefore, the treaty project would have a two-fold effect: it would establish legal norms and the legal structures through which they are embedded in domestic law,[[223]](#footnote-223) and uniformly apply them across all states entangled within a production chain that produces human rights abuses.[[224]](#footnote-224) However, the application of these substantive norms to sub-national groups––especially indigenous groups operating in autonomous regions––is an issue that remains incompletely addressed.[[225]](#footnote-225)

The second set of structural issues goes to the institutional structures that may be built around the treaty.[[226]](#footnote-226) One approach would be to craft the treaty as a direct agreement among states.[[227]](#footnote-227) This traditional model imposes no administrative architecture and relies heavily on inter-governmental processes for ensuring state compliance with treaty obligations.[[228]](#footnote-228) Thus, it would avoid the necessity of building an international institutional architecture around the treaty. However, it would also mean that beyond the U.N.’s oversight, the treaty’s oversight would have no institutional international center. This outcome would likely benefit those who privilege state power within the international system.[[229]](#footnote-229) For internationalists, this represents a potentially substantial weakening of the treaty’s value as a regulatory system.[[230]](#footnote-230) Instead, they need an alternative that includes the construction of an institutional international architecture.

In one scenario, a monitoring and technical support mechanism ––perhaps operated by a secretariat with a small staff––could be developed to function as a treaty oversight agency. Another institutional mechanism might provide the international organization with broader governance power, such as the power to refine and substantiate the catalogue of rights as new situations arise, with or without limits, and subject to some sort of voting approval by the member states. Or, perhaps, such legislative authority might be limited to a gap filling facility subject to veto by the collective membership. At its broadest, this institutional mechanism may also serve as the highest authority to interpret the application of the treaty in cases before the national courts of its collective membership, an option discussed below.

The third set of structural issues goes to the challenge of international legalization through states in weak governance and conflict zones – a fundamental weakness of the state system itself at its margins.[[231]](#footnote-231) International actors have developed a number of models in response to these issues in recent years.[[232]](#footnote-232) The UNGP address the issue in part, focusing on the problems for enterprises in conflict zones.[[233]](#footnote-233) However, the issue speaks to a systemic weakness in the structures through which the treaty is to be implemented, which affects areas with a greater likelihood of grave human rights violations.[[234]](#footnote-234) Therefore, the treaty would need to not only consider the mere structuring of an institutional legal framework in the ordinary case, but also consider providing structures for the case in which the ordinary system breaks down into additional institutions for support.[[235]](#footnote-235) Such constructions will call into play issues of privatizing legalization through enterprises that act as state proxies in weak governance or conflict zones, as well as determine––as a matter of treaty law – the characteristics that mark a state as so deviant that its right to autonomy and self-governance is suspended or superseded in part.[[236]](#footnote-236)

Issues of assessment and transparency[[237]](#footnote-237) are closely related to those of structure. The disciplinary effectiveness of assessment and monitoring are at the heart of the corporate responsibility to respect’s human rights due diligence.[[238]](#footnote-238) The Treaty will have to incorporate both transparency––as a means of building capacity and strengthening participation––and accountability––as a means of disciplining both state and enterprise actors with obligations under the treaty.[[239]](#footnote-239) Achieving these goals may either require focus on a strengthened international administrative mechanism,[[240]](#footnote-240) or on the construction of national contact points administered through the states who would then convene in international forums.

C. Process Provisions

*Process provisions* provide the foundation for treaty effectiveness either as an international law instrument, or as the template for transposition into the domestic legal orders of adopting states.[[241]](#footnote-241) However, the technical provisions themselves will each reflect the choices made among treaty animating principles and make clear the extent of the contradictions inherent in a legalization project that is both state-centered and internationalist. Even though procedural issues are highly technical in most respects, they are also crucial mechanisms for determining the scope of *access to remedy*, especially for victims.[[242]](#footnote-242) The shaping of process rules effectively controls the extent to which remedies remain formally available but beyond the reach of more vulnerable groups for whom they were designed to protect and serve.[[243]](#footnote-243)

The principle issues may well revolve around the scope and nature of judicial remedies as they relate to the “global trend toward juristocracy.”[[244]](#footnote-244) The “sociopolitical revolution” that this trend has created[[245]](#footnote-245) touches on issues of judicialization of social relations, the distribution of power among political actors and the judiciary,[[246]](#footnote-246) and accountability for a remedial mechanism that at once must be responsive to law as a political instrument and protected from political influence in specific instances.[[247]](#footnote-247) The judicial remedies also speak to issues of the remoteness of the law in the hands of an elite, which may serve itself through obligations to its constituencies.[[248]](#footnote-248) These judicial remedies will involve choices with regards to a set of fundamental process issues. Among these issues are whether the judicial remedies will be national or supra national.[[249]](#footnote-249) Reconciling this particular issue determines either the law applicable by tribunals hearing claims or the choice of tribunals in which claims can be made.[[250]](#footnote-250) A state would likely prefer a system in which national courts apply a version of transposed international (treaty-based) norms in local domestic legal orders to claims brought before their own courts. However, because the usual choice of law and choice of forum rules might also apply, it may be necessary to make choices about the rules for choosing the appropriate forum and the appropriate law to be applied in a particular case.[[251]](#footnote-251)

A more interesting point, and one reflecting a transformative ideal, involves rules that would require all courts to apply a uniform internationalized set of rules and make them independent of the peculiarities and variations among the different national legal orders in which claims might be made.[[252]](#footnote-252) This would constitute developing an international common law scheme of interpretation or commentaries of the substantive rights accorded by the treaty.[[253]](#footnote-253) It may be possible to discern, in the constitutional traditions of some states, a template for internationalization and harmonization within domestic constitutional order.[[254]](#footnote-254) Still, the exercise discloses the potential conflict between human rights nationalists and internationalists, one that would need to be resolved before the treaty elaboration program could move forward to a conclusion.

Furthermore, the treaty might usefully adopt something like a European Union approach to remedies. In doing so, it might vest a single global tribunal with the authority to interpret the provisions of the treaty and their applicability within national legal orders, but to leave to the courts of the national legal orders the authority to hear and resolve specific claims, subject to their superior and binding interpretive authority.[[255]](#footnote-255) One alternative might be to adopt an approach similar to that used in the enforcement of regional human rights regimes, though this latter model suffers some substantial constraints within legalized systems of international law.[[256]](#footnote-256) Another option would be to develop a coherent mechanism that would receive appeals from all jurisdictions but only to resolve issues related to the interpretation of the law applied to the claim and relevant to the Treaty’s provisions.[[257]](#footnote-257) Each of these alternatives would erode state sovereignty and control over national courts.[[258]](#footnote-258) They would also substantially transfer legal authority from domestic to transnational tribunals, and, in doing so, may create conflict among states adhering to principles of state sovereignty and subsuming sovereignty within the superior web of international law and interpretation.[[259]](#footnote-259)

Process also intersects with the substantive provisions of the treaty. It may be necessary to develop substantive rules, not just with respect to the hierarchy of law within the national legal orders, but also to determine the relationship of the substantive rules of the treaty with the body of international law and norms otherwise binding on states.[[260]](#footnote-260) Thus, the treaty elaboration project touches not only on the centering of international human rights law within domestic legal orders, but also – and perhaps more importantly – on the centering of human rights within the constellation of international law. For process purposes, it will require the construction of rules for determining construction of human rights obligations as against obligations in bilateral and multilateral investment treaties and in other treaties among states. It will also require some consideration of the hierarchy of international law when it comes into contact with other international law and regulation—from that of the other international organs to the contractual work of international financial institutions.[[261]](#footnote-261) Even though these issues of hierarchy of law within international law have scarcely been addressed, they will remain at the center of any instruction to national courts seeking to determine what law applies to whom and under what circumstances, and for determining the manner for resolving conflicts among multiple laws that may apply to a given dispute.[[262]](#footnote-262)

Another set of issues relates more directly to issues of *access to remedies*.[[263]](#footnote-263) The nature of those provisions will depend heavily on the principles to be advanced by the treaty. Evaluative principles may produce treaty provision approaches quite distinct from those that advance transformative objectives.[[264]](#footnote-264) Among the core issues are those concerning rights to access courts.[[265]](#footnote-265) Should treaty rights be deemed universal and the objective of coherence and access to remedies privileged, it might be useful to insist on universal jurisdiction.[[266]](#footnote-266) That might make it substantially easier for the victims to more readily vindicate rights. It would also contribute toward uniformity and would likely have to be tied to the legalization of human rights at the supra national level. Otherwise, such rules would enhance the current global patterns of using differences in national rules strategically to the advantage of the litigant seeking to avoid liability. However, the move toward universal jurisdiction has been met with substantial resistance in related areas.[[267]](#footnote-267) A similar problem and effect would be realized by relaxing venue and standing rules. These highly technical rules serve as gatekeepers for access to courts and tend to work to the detriment of the poorest and least sophisticated claimants. Non-judicial remedial mechanisms – i.e., those under the OECD Guidelines for Multinational Enterprises – have at times substantially broadened standing and even venue rules.[[268]](#footnote-268) However, national legal orders may find such broadening incompatible with their own constitutional regimes. Similar issues also arise with respect to rules of joint and several liability. In cases of joint and several liability, modern corporate law and corporate governance principles are transformed by permitting liability across autonomous juridical personality without the need to change the form or national principles through which they are created and regulated.

One might leave issues regarding the rules of evidence to the national systems in which cases are heard. However, this creates large disparities in treatment at times. Furthermore, these disparities will likely have adverse effects on the poorest of victims to vindicate otherwise plausible claims.[[269]](#footnote-269) The treaty elaboration project that fails to deal with these issues will produce a project worthy of admiration in theory. Yet, it would be one whose promise will not be realized for the largest group of persons for whom the effort is ostensibly undertaken. Even in developed states, the idea of a trial before judicial officers is becoming more ideological than pragmatic, since alternatives to trial are more often invoked as the normal course of remedial resolutions.[[270]](#footnote-270)

Lastly, a number of important subsidiary rules might require some consideration. These rules may include the requirement that all states make available legal representation and access to courts for those without the means to afford either lawyers or court fees.[[271]](#footnote-271) Perhaps the losing party may pay the lawyers’ fees, though that would also excessively burden those with few assets and plausible claims who cannot afford to pay them.[[272]](#footnote-272) The European Union has provided some relief from fees and costs, but even this amount of relief may be insufficient.[[273]](#footnote-273) States might instead be required to develop processes where lawyers are not necessary. On the other hand, they might need to re-think the role of the judge in cases touching on the treaty.[[274]](#footnote-274) Or, perhaps, they might develop processes that give qualified NGOs the authority to represent victims.[[275]](#footnote-275) Another potential rule includes limiting the ability of firms to discharge their human rights related obligations in bankruptcy, or to move assets in anticipation of litigation.[[276]](#footnote-276) Perhaps states would be required to undertake a duty to fund remedial mechanisms free of charge through taxation or other schemes. All of these alternative scenarios touch on making remedies more tangible. They will not only determine the degree to which access to remedy becomes effective, but will also challenge core principles of state governance and autonomy in ways that might inhibit these approaches.

IV. The Principles in Pragmatic Elaboration of a Coherent Values Based Treaty

The problems for pragmatism now emerge, even within communities of actors committed to the elaboration of a comprehensive treaty for business and human rights.[[277]](#footnote-277) The greatest contradiction is the basic ordering premise of the treaty itself.[[278]](#footnote-278) It posits the state as the apex organ and its domestic law as the most legitimate expression of popular power.[[279]](#footnote-279) Yet in order for the Treaty itself to be effective, it must undermine, or at its most extreme, subvert the state and national popular power as the fundamental building block of business and human rights. The Mandate itself suggests contradiction and tension. It’s legitimating function—by reinserting the process of norm making within the state—is also anti-democratic at the international level by shutting out direct representation by civil society and other groups.[[280]](#footnote-280) As such, the Mandate’s framework speaks to confederation and indirect representation through states, rather than direct representation of civil society and business among states in the elaboration process.[[281]](#footnote-281) That elaboration of a treaty is itself bound up in the constraints of contemporary international law, if it is to be binding, and yet speaks to the construction of a regulatory architecture in which the substantial discretion of states under international law would undo the project itself.[[282]](#footnote-282) The Mandate speaks to transnational corporations but does not apply to enterprises without a transnational character.[[283]](#footnote-283) Yet, since economic transactions typically occur within production chains made up substantially of domestic firms, such a restriction serves either a political purpose or substantially narrows the applicability of the treaty to a handful of enterprises. These restrictions produce a number of ideologically based frameworks for meeting the fundamental (though contested) objective—an evolutive, transformative, treaty format, institutional and systemic objective.[[284]](#footnote-284) Each produces a principled means of making choices for elaborating a treaty.[[285]](#footnote-285) Yet, each restriction provides a distinct set of choices for that implementation. They suggest a minimum of five quite distinct treaties, but each has the potential of developing a unified, singular and consistent vision, which may create incompatibility with the others. Choosing among these treaty options requires the application of a principle that is itself grounded in the need to make a pragmatic choice. This choice must at least be rational, consistent, and guided by a purpose other than expediency and the advancement of personal stakeholder agendas.

That pragmatic choice is made increasingly complicated by the contradictions following from the application of principle in the design and drafting of the substantive treaty provisions themselves.[[286]](#footnote-286) The drafting of the substantive provisions exposes the tension between international law principles and the substantive principles that would mandate application of international law and norms, irrespective of the sovereign consent of states.[[287]](#footnote-287) It would either effectively override national power to consent to treaties, or it would embrace that traditional notion at the expense of the principle of uniform treatment of individuals under globally applicable human rights. That is the critical contradiction where the treaty builds in principles of self-execution,[[288]](#footnote-288) *jus cogens*,[[289]](#footnote-289) sovereign immunity, and giving effect to international principles that do not have the effect of law. Compromise here either requires the application of expediency, or a framework of principle (depending on which structural framework is the basis for elaboration of the treaty).[[290]](#footnote-290) The price of compromise is the expansion of the possibility of introducing a race to the bottom as states may be tempted to compete for business investment. Most importantly, however, the substantive element requires a confrontation with the core principle of enterprise organization. This proposition constitutes the autonomy of the enterprise grounded in principles of legal personality and asset partitioning.[[291]](#footnote-291) A treaty that is more transformative in nature is likely to produce the greatest resistance. And yet, compromise without principle would either obliterate the coherence of the treaty or reduce it to the aggregation of personal interest among those powerful enough to gain admittance to the negotiation table.[[292]](#footnote-292)

Structural provisions highlight the contradictions between the autonomy of national legal systems and the need for uniformity inherent in any treaty model.[[293]](#footnote-293) They also expose the difficulties of conflicts, not just among distinct legal traditions, but also among treaties that might be the objects of rights within the Treaty on business and human rights.[[294]](#footnote-294) The principle of state autonomy is also tested by the extent to which international institutional governance apparatuses are built around the treaty.[[295]](#footnote-295) A more extensive international governing apparatus creates a “centralized administration in an international organization” and coherent set of global norms, but does so at the expense of “reduc[ing] state autonomy.”[[296]](#footnote-296) Since the field of international governance lacks “any defined sovereign or formal structure comparable to that present within national jurisdictions,” such an apparatus might include a technical, legislative, and judicial body.[[297]](#footnote-297) However, there is also substantial contestation, especially among newly independent states now bound up again in a subordinate relationship to a greater power.[[298]](#footnote-298)

Process provisions enable principles of access to remedies, constitutional provisions of the rule of law, and due process to collide within the national context of adhering states.[[299]](#footnote-299) They include judicial versus non-judicial remedies; the constitutional protections of process rights; the extent of damages; and the process and expense of dispute resolution.[[300]](#footnote-300) While they are all the technical issues of courts and lawyers, each is also a critical juncture point for effectiveness of both substantive and structural rights and institutions.[[301]](#footnote-301) Furthermore, even these are merely gateways to contestations around additional technical, but ideologically sensitive, provisions: universal jurisdiction, representation, rules of evidence, protection from reprisal, the calculation of damage, the scope of remedial authority beyond compensation, and the provision of interim relief. Transformative treaty format, and institutional and systemic objective frameworks approach these issues in distinct ways. In each case, the Treaty may require some substantial contestation of significant and ancient political-legal-constitutional principles of state organization and rights.[[302]](#footnote-302) To mix and match among frameworks sacrifices coherence for something that look like the amalgam of compromise.[[303]](#footnote-303) In other words, an incoherent framework will create inconsistencies[[304]](#footnote-304) when negotiated with those who reject the ideological bases of choices among key principles affecting the nature of the state, the nature of the enterprise, and the nature of the remedial power within and beyond states.

“Principled pragmatism”[[305]](#footnote-305) may thus be necessary in order to choose among frameworks, preserve the integrity of the framework chosen, and use the frameworks to decide among principles that concern the drafting of the treaty’s substantive, structural, and procedural provisions. More significantly, it provides an alternative that preserves the essential coherence of an ideologically integrated approach to regulation (through treaty in this instance) that may survive the politics of negotiation and adoption, in ways that more extreme alternatives could not. Those alternatives, for example, a “no compromise” alternative, or a “compromise everything” in order to get a treaty approach do have a purpose. The former would be an essential technique for a transformational position that views treaty elaboration as an important space for developing an influential aspirational position. The later would serve those who view the world in terms of politics and power and for whom any treaty would represent an increase of both to those who engaged in the process.[[306]](#footnote-306) The matrix of choice combinations becomes quite complex.[[307]](#footnote-307) Treaty drafters will need to figure out how to elaborate a treaty that enhances states’ sovereignty even as it constrains it by binding provisions with respect to international obligations (now transposed into domestic law) that may severely limit such sovereignty to deviate from its strictures.[[308]](#footnote-308) Treaty drafters will also need to figure out how to preserve the autonomy of the enterprise by modifying legal principles.[[309]](#footnote-309) In doing so, they must consider how to exclude domestic enterprises from the Treaty’s application, even as the Treaty seeks to vigorously regulate production chains that make no distinction between transnational and national enterprises.[[310]](#footnote-310) However, there will likely be unintended consequences that result from compromising some principles in order to preserve others.[[311]](#footnote-311) For example, the internationalization of dispute resolution and the legal relationships between workers and their employer-enterprises through a harmonizing treaty could sharpen and re-invigorate an ancient conflict between principles of judicial independence and the primacy of national law, on the one hand, and the internationalization of legal rules and the mechanics of their vindication, on the other hand.[[312]](#footnote-312) It is here where the necessity of principle meets irony.

Former Special Representative of the Secretary General on Business and Human Rights, John Ruggie, is both famous and notorious for advancing the notion of principled pragmatism as a basis for framing the three-pillar “Protect-Respect-Remedy” framework, and for completing the UNGP’s development in 2011.[[313]](#footnote-313) The notion of “principled pragmatism” was highlighted in the unveiling of the three-pillar framework in 2008.[[314]](#footnote-314) “Protect-Respect-Remedy” served as the principled basis for the pragmatic provisions of what the UNGP eventually endorsed.[[315]](#footnote-315) Principled pragmatism was also one of the ongoing projects of operationalizing its second pillar in the societal sphere.[[316]](#footnote-316) Its purpose is to provide *principle practical effect*, or, in the words of John Ruggie, to “take a rigorous evidence-based approach and search for practical solutions, not be driven by doctrinal preferences.”[[317]](#footnote-317) Adhering to the tenets of principled pragmatism requires “getting everyone around the negotiating table”[[318]](#footnote-318) and “painstaking hard work for a real political settlement.”[[319]](#footnote-319) Shaping international discourse by offering “real solutions, not band-aids” will adequately address complicated issues “in their full economic, social and political dimension.”[[320]](#footnote-320) The Framework’s establishment of foundational principles “also lays down markers for an array of complex and relatively new issues for the human rights field that would require further development and consideration.”[[321]](#footnote-321)

Principled pragmatism stems from a fundamental need to “better manag[e] business and human rights challenges.”[[322]](#footnote-322) A failure to adequately do so will likely produce unintended consequences.”[[323]](#footnote-323) The essence of pragmatism is a choice of principle – to act pragmatically is “to deliver results, not mere promises.”[[324]](#footnote-324) Furthermore, principled decision-making “recognizes that developments in society . . . and in the idea of justice itself will mean that even precepts that transcend the individual case may from time to time need to change.”[[325]](#footnote-325) In other words, pragmatism affects not only the choice of principle, but also the interpretation and application of that principle; it can, thus, either serve as a necessary element of principle, or stand contrary to it. A pragmatist is one who will attend to the methodologies that underlie the ultimate goals, “instead of offering more high-minded words about what ought to be done.”[[326]](#footnote-326) At the same time, however, pragmatism is its own independent ideology that can bend principle and the normative elements towards its objectives, that is pragmatism may be understood as a principle for applying principle, for naturalizing it when it must be applied to a concrete task.[[327]](#footnote-327)

Institutional objectives also add a layer of interpretive and normative complexity to the project of principled pragmatism. Objectives within a business enterprise, for example, add an essential managerial element that “should lay out what performance the . . . managerial unit is supposed to produce.”[[328]](#footnote-328) More generally, institutions should also implement a process of elaborating a treaty by converting principles to objectives, and objectives to policy choices that are critical to attaining the identified objectives.[[329]](#footnote-329) For example, the principle of protection of state authority against the incursion of societal or private governance can distort both the underlying normative principles of business and human rights as well as constrain the conceptions and methodologies of pragmatism now bent to both normative and institutional objectives.[[330]](#footnote-330) The choice, for example, of privileging state and business agendas over “polycentric governance” affects both principle and pragmatism by emphasizing the role of states and by limiting the alternatives available to that end.[[331]](#footnote-331)

Additionally, while no principle is neutral, the idea of neutrality remains embedded in discourse. Although Herbert Wechsler might speak to the principle of constitutional-neutrality, he in fact references the application of that principle.[[332]](#footnote-332) Yet, even equal protection can be skewed by ideology and history.[[333]](#footnote-333) All principles are indeed the opposite of neutral—the embrace of a particular set of normative choices. Normative choices on which principles are elaborated are themselves grounded in choices that are meant to give form to principle.[[334]](#footnote-334) Principles, then, are second order premises that are built on the choices made in their construction, elaboration and privileging. Next, it follows that pragmatism is not neutral, at least in the sense of the choice of objectives and of the methodologies chosen to attain those objectives.[[335]](#footnote-335) Both principle and pragmatism reflect principled choices and are colored by the principles and pragmatism of the institutions through which they are elaborated and applied.[[336]](#footnote-336) Pragmatism is colored by the principle for which it serves as an instrument toward an objective in context. Principle, on the other hand, is colored by the pragmatism through which it is expressed in operation. Taken together, we are “in a position to argue that any intelligible concept has a content that can be traced to experience and has application in the determination of action.” [[337]](#footnote-337)

To speak, then, of principle and pragmatism, is to acknowledge that both normative and operational constructs are infused with an ideology that guides choices and constrains principle and pragmatism individually. However, this approach remains highly contested as principle and as pragmatics.[[338]](#footnote-338) This is not so much tautological, but rather an acknowledgement that both principle and pragmatism are two sides of the same coin. To understand this concept better, assume one starts with the objective of creating a global legal framework for managing the conduct of multinational corporations. This objective would then speak to principles such as the primacy of the state, the authoritativeness of law, and the universalism of behavior standards. It would also speak to pragmatism – i.e., the desirability to negotiate a treaty, the need to development mechanisms for treaty enforcement, and the structures of uniform interpretation. Principles speak to normative choices, while pragmatism speaks to the practical application of that principle’s truth, value, or beliefs in terms of their successes.[[339]](#footnote-339)

This is where the political-normative value of pragmatism is meant to be most useful. It is possible for multiple sets of values and principles-based communities, to agree to a set of objectives in context, and each to see in that pragmatic choice a fidelity to its own principles.[[340]](#footnote-340) This reads as the essence of Professor Ruggie’s principled pragmatism, but in the inverse: to begin with practical objectives which key political actors (i.e., states, MNEs and NGOs) might share in common—in this case, the need to establish a structure on which to begin identifying and enforcing certain conduct norms for business behavior—and then to work backwards toward principle. Principled pragmatism is a process of aggregating the principled pragmatism of all necessary actors in the service of objectives which are privileged over the principles and pragmatic choices of any single actor, as a process of ambivalence in the service of common objectives among communities whose principles and the pragmatism that drives them, are fundamentally incompatible.[[341]](#footnote-341)

Within the context of the UNGP, the objective was the establishment of a structure for disciplining business behavior within a normative conduct defining structure.[[342]](#footnote-342) For all key actors, the resulting structure would move toward a pragmatic embedding of their principles, but could not produce an identity between principle-pragmatism and objective. Furthermore, to the extent that each continued to participate—a key element of the principles underlying each actor—the more important it is for each actor to stay true to the principles represented by the shared objective in making pragmatic choices about treaty content. It is in this sense that one makes meaning through the aggregation of the practical consequences of the experiences of participants. [[343]](#footnote-343) The objective, then, becomes the principle, and the pragmatism becomes the interpretive latitude in contextualizing norms within the structures of the objectives.[[344]](#footnote-344) For states, that meant abandoning the principle of state monopoly on governance and the singularity of law (the second pillar).[[345]](#footnote-345) For enterprises, it meant the acceptance of regulatory governance structures rather than markets as a means of constraining behavior (the first pillar).[[346]](#footnote-346) Finally, for NGOs, it meant the acceptance of governance techniques as an authentic alternative to law and of the internal constitution of enterprises as societally-constituted governance organs (three pillars).[[347]](#footnote-347)

It is in this more nuanced sense that one can understand the value of principled pragmatism as a *lubricant*. This construct was initially exemplified through the UN Guiding Principles, but has since centered on the shift from the establishment of those principles to the UNGP’s extended operationalization in June 2014.[[348]](#footnote-348) In the latter case, principled pragmatism has been achieved through an “open-ended intergovernmental working group . . . to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises . . . “[[349]](#footnote-349) The object of this effort was to cure the deficiencies of the UNGP, and apply principle unencumbered by pragmatism, in order to produce law to manage enterprises through state action.

The process of choosing and organizing principles will be a function of the pragmatic choices made in elaborating the treaty.[[350]](#footnote-350) The principles of pragmatism, thus, will likely invert the process of treaty elaboration. By focusing on smaller areas, governing bodies should instead have a narrower focus when creating treaties that relate to business and human rights.[[351]](#footnote-351) The discussion of implementation and drafting of these treaties will both hide and advance positions of principle that will not be discussed. Thus, it is unlikely that the elaboration of the treaty will be preceded by an agreement on principle. Instead, those involved in the treaty process will likely use the elaboration of the treaty’s implementation provisions to embed their principles and ideology. Negotiation will revolve around the text of particular provisions, but the stakes will be the ability of each of the negotiating parties to embed to a greater degree the ideology or principles within the text of technical provisions.[[352]](#footnote-352) Indeed, one can already discern in the position of important and potentially influential stakeholders, the move toward structuring arguments on the basis of “most favored” implementation provisions rather than on the construction of a coherent normative basis around which a treaty can be structured.[[353]](#footnote-353)

The value of this sort of inversion will be substantial. It prevents deadlock and permits the pragmatics of compromise without appearing to compromise principle. One can hide compromise on principle within technical provisions.[[354]](#footnote-354) However, one also avoids accountability in making these decisions through negotiation. It permits the appearance of coherence and unity in broad themes even where there is none among the variation in approach possible within broad consensus.[[355]](#footnote-355) And indeed, the mechanics of the process toward an elaboration of a treaty—convening in Geneva and involving global networking, and requiring a sophisticated understanding of the use of the language of law, of international relations and of human rights in the context of complex public governance now emerging—also increases the transaction costs of participation, helping to limit effective participation to experts proficient in the art of using technical provisions to advance principles.[[356]](#footnote-356) Ironically, the move toward legalization, ostensibly made for the benefit of human rights victims, tends to exclude these very people from effective participation and relegates them to objects of consultation by institutional actors.[[357]](#footnote-357) Additionally, it produces an elaborated treaty in which multiple and inconsistent ideologies will likely be represented simultaneously in different parts of the document. This inversion is not unique to the Mandate, and is central to the art of negotiating treaties in the same way that one tends to make the sausage of international instruments.[[358]](#footnote-358) However, it will substantially inhibit ideological clarity, confuse principle, and ultimately complicate the treaty’s interpretation.

Yet, the treaty’s formation may well sink on the very shoals of the pragmatism that is needed in order for it to move from conception to actualization.[[359]](#footnote-359) This contribution considers the consequences of principles and pragmatism within the constraints developed for the elaboration of such “an international legally binding instrument.”[[360]](#footnote-360) My aim is to apply *pragmatism* to treaty-making approaches; in the face of the likelihood of a necessary deviation between the ideal and the attainable (and even among various versions of the ideal within the treaty favoring community) in a treaty *what principles and normative premises ought to be developed and applied* to determine the scope and application of pragmatism toward the production of a treaty.

That pragmatism ought to be built on two critical elements. The first is grounded in the recognition of fundamental ideologies underlying the move toward a treaty.[[361]](#footnote-361) The second element is certainty about the core framework that preserves or advances those ideologies whose expression as law is the treaty’s core objective.

Both of these critical features are required to develop a distinct sort of principled pragmatism that can ensure the integrity of the treaty project—that is that it remains true to its core vision and aims—even in the face of two likely alternatives.[[362]](#footnote-362) The first guarantees substantial necessary compromise if the treaty effort is to produce something that resembles success. The second is grounded in the certainty of failure—and the strength to craft the treaty itself as the embodiment of ideology, theories and values around which future efforts might be based.

Fundamentally conceptual pragmatism is a necessary first step toward a rigorously rational approach for treaty proponents. It is built on a process of self-knowledge that reveals the ideological basis that supports treaty proponents, the provisions that are required to give effect to those ideologies, and the likely nature, grounded in counter-ideology, of opposition to the treaty, whatever its initial form. And it will form the only principled basis within which the process of treaty negotiation can proceed in ways that preserve the ideological core embraced by treaty proponents. Indeed, in the face of the already announced intent of opponents to undermine the treaty and the treaty process itself, [[363]](#footnote-363) coherence is likely an important element toward the successful elaboration of an instrument that may survive its own birth.[[364]](#footnote-364) In the absence of this pragmatism, fracture and incoherence—a treaty process inverted—centered on treaty provision negotiation without a centering ideology or visions for the project as a whole.

This leads to the larger point of pragmatics, especially as practiced within these technical but highly significant rules. The elaboration of the treaty will not be an elaboration of principle but the relation of structures of rights and the remedial mechanisms to vindicate them.[[365]](#footnote-365) It will neither serve as a manifesto of ideological purity, nor of the consensus ideology of human rights in the international sphere, but rather the roadmap for the legalization of obligation and in states and enterprises.[[366]](#footnote-366) That roadmap, those structures, and that framework, will be built through the construction of a coherent, deep and complex system of obligation, rights and remedies—of directions to states, to the international community, to enterprises and individuals. It is code building at its more complex and the extension of judicial authority beyond its current limits. The elaboration of the treaty is an exercise in pragmatism in the service of a specific set of general objectives, all of which can be conceptualized in quite distinct ways depending on the choice in the application of ideological framework.[[367]](#footnote-367) Yet it should be clear by now that the dozens of choices that are critical to that construction are deeply embedded in choices among principles, and the result will be driven, in some important respects by ideological premises that can each serve these overall objectives, though in different ways. Privileged ideology, however, of apex principle to guide the elaboration of the treaty remains elusive at best and is fraught with the contradictions of adverse principles and dueling ideologies—of the state, of the role of civil society, of the character and obligation of the enterprise, and of the nature of the duty to legalize human rights regimes within and among states.[[368]](#footnote-368)

Any move toward the ideal elaboration of the treaty challenges foundational ideologies that underlie both the state system and substantive notions of aggregations of capital in (usually) corporate form.[[369]](#footnote-369) Meeting the mandate objectives requires a choice among state system based sovereignty, non-state institutional autonomy (public-private divide), religious sovereignty, and sovereignty constrained by international organizations. This choice colors the way in which substantive norms are developed, structural issues are addressed, and procedural issues are decided.[[370]](#footnote-370) The relation of national to international law forms an important subtext in many of the choices facing those elaborating the treaty.[[371]](#footnote-371) These may be colored by deference to religious liberty as other than an object of protection.[[372]](#footnote-372) The hierarchy of national and international law also touches on fundamental ideologies of democratic organization and the legitimacy of the domestic legal orders of states exercised through a law making authority.[[373]](#footnote-373) They also touch on ideological stances relating to sustainability. The principles of autonomy of the judicial systems – from the state, through law, in relation to their interpretive authority, and in respect of the power of other judicial organs to make binding interpretive decisions – also impact the shape of the treaty and the effectiveness and character of access to justice.[[374]](#footnote-374)

Two critical structural ideologies will also have to be confronted, even if only indirectly through the negotiation of the treaty’s provisions. The first touches on the contested fundamental nature of human rights.[[375]](#footnote-375) Human rights is embraced by some as a relational subject (Marxist Leninist states; interpreted within context of progress toward communism),[[376]](#footnote-376) or it can be understood as universal autonomous capstones, or it can be understood as the expression of the customs and constitutional traditions of a demos organized as a state, or as the expression of the relationship of a divine source with the community of believers and in that sense a hegemonic exercise.[[377]](#footnote-377) These basic conceptual differences will substantially color the approaches to the normative project of the treaty as well as its structural and procedural character. Neither the states that put forward the proposal for the IGWG nor the group of civil society actors have come to any sort of consensus. Perhaps this is not necessary. But fracture within the camp proposing the treaty does not bode well when the product of that effort meets the sustained and unified opposition of the developed states. The second touches on the equally contested conception of the corporation and corporate regulation.[[378]](#footnote-378) In opposition to the strongly held and deeply ingrained principles of corporate governance, institutional welfare maximization and localism in corporate governance, some are calling for international legalization that to some extent would transform the contemporary understanding of corporate enterprises as legal organisms into a quite distinct and internationalized legal instrument, one serving a distinctly different set of masters,[[379]](#footnote-379) or at least stretch settled conceptions of corporate law and legal autonomy well beyond its current form.[[380]](#footnote-380)

At bottom, then, the treaty objectives cannot avoid, even among those most devoted to the treaty objective, the conflicts of interest driven by the principles of the state system and of the supremacy of internationalism within a public politics/law system.[[381]](#footnote-381) Among those conflicts are those that are fundamental to the structure and operation of the international system as it is currently organized: for states especially the treaty negotiations will necessarily point to perhaps great change in the character of states as objects and subjects of this international law system and ramification for its own interventions as law-maker and enforcer. These the treaty will necessarily decide—preserve the status quo or point to potentially fundamental change in the ordering of the state system—even if the discussion never deals with these issues directly.[[382]](#footnote-382) And those choices will likely bleed into other areas of international norm-making well beyond the business and human rights project.

What form does pragmatism take within this swirl of ideology, principle and technique? How does principle manifest within the necessary pragmatic choices that the treaty mandate objectives demand? There are a number of distinct principles that may significantly affect the way in which choices among substantive principles are made. These will have a profound effect on the elaboration of the treaty. The chapter has suggested the effects of the application of those principles of pragmatism. But each is worth identifying as a principle in its own right: a nod to a power principle, a principle that privileges the preservation of state autonomy, or deep democratic principles, or traditional practices and practice consensus, or the autonomy of national judiciary, or normative coherence. Pragmatism principles might favor remedial coherence and normative coherence over other principles, application of which would privilege internationalism over state autonomy in the development of the structural and procedural provisions of the treaty. Conversely pragmatism might accept fracture, and therefore principles of state autonomy and reject any idea of the supremacy international norms.

And beyond these approaches, there are *political strategic choices that must be considered as well*. It is also possible to start from a position of *utopianism*; the object is to frame a future distinct vision of the world that will serve as a touchstone for the future (like the Universal Declaration of Human Rights). Yet pragmatism, from the perspective of other actors, might be the way in which one uses the cover of internationalism to advance the agenda of state empowerment. Provisions that fracture authority, vest discretion in state actors, limit the reach of transnational norms—substantive (structural or procedural), might provide a cover of internationalism (the treaty) that masks a system that instead protects national autonomy in matters of human rights.

On a less abstract level, principles of pragmatism might produce a willingness to accept an *anarchic incrementalism*.[[383]](#footnote-383) Incrementalism may produce a tolerance of fracture—the piecemeal negotiation of the provisions of the treaty that does not produce coherence or the elaboration of a singular vision, but instead produces a framework that permits further negotiation and refinement as a work in progress and through application.[[384]](#footnote-384) Incrementalism has no center—at some level it becomes an exercise in collecting as large a set of wish lists as the community of actors can muster—and to seek to maximize the inclusion of as many as possible within an instrument that might well receive formal approval—if not effective implementation.[[385]](#footnote-385) Beyond these considerations are the strategic considerations of incrementalism that focus on maximizing some sort of agreement on some key elements of a long term agenda,[[386]](#footnote-386) underlying evaluative principles of treaty drafting,[[387]](#footnote-387) or of utopianism, that focuses on developing the near perfect form of a treaty for the ages against which states and civil society might judge and perhaps ultimately conform their own regulatory conduct going forward,[[388]](#footnote-388) and that underlie transformative objectives.

And indeed, communal laundry list projects facture approaches to treaty making along ideological and pragmatic lines. It moves the project from anarchic incrementalism to agenda based power politics. Each of the participating stakeholders is likely to embrace both a distinct set of normative principles, grounded in a distinct ideology and producing a distinct approach to the technical terms negotiations from which the terms of the treaty will emerge. As a result, what is likely to be elaborated are an amalgam of principles and pragmatism that, in its entirety will lack coherence, will appear to satisfy the formal objectives of the Treaty mandate, and may well disappoint in its aggregate effectiveness to provide real remedial rights to the people who are ostensibly the objects of all of this effort.[[389]](#footnote-389) *Elaborating a comprehensive treaty by aggregating the wish lists of its principal proponents is hardly the best way to build a coherent system for the management of human rights risks of economic activities undertaken in global production*. Such an elaboration methodology can be reduced to incoherent concept grounded in serendipity—our previous reference to sausage making. And that may indeed be enough for the incrementalist, and a shot of reality for evolutive principles. Yet it is not clear how pragmatism can be invoked in this respect and can still preserve a substantial fidelity to the core objectives of the treaty process.

On a wholly practical level, principles of pragmatism might move away from principle entirely and instead embrace *template*.[[390]](#footnote-390) This technique is very useful and often used. It posits a small set of basic objectives, identifies a core group of foundational writings, and then offers templates for drafting grounded in prior often successfully adopted efforts.[[391]](#footnote-391) Professor Douglas Cassel and Anita Ramasastry provide an excellent example of this approach.[[392]](#footnote-392) Pragmatics are built into the structures of treaty option construction, built around an examination of treaty options, templates, and “cross cutting issues”.[[393]](#footnote-393) Cassel and Ramasatry offer two templates that reflect conventional practice—a treaty grounded in state responsibility and a treaty grounded in enforcement and elaboration through international organs.[[394]](#footnote-394) The pragmatics are then built into the discussion: “[w]ithin each category, the listing proceeds, roughly speaking, from relatively “weak” to relatively “hard” options.”[[395]](#footnote-395) Yet these templates may themselves represent ideological choices among distinct principles, one in which the pragmatics was built into the choice of template and the rejection of others, in light of the experiences and expectations of those on whose behalf the templates are presented.

But both incrementalism and the substitute approach of templates increase the risk of a turn to unprincipled pragmatism, or pragmatism by rote. In order to avoid unprincipled pragmatism, and to elaborate principle from template in a context in which the ideal treaty is impossible as a matter of theory, it may be necessary to articulate principles through which pragmatism may be structured. That process, in turn, may require the application of an objectives-based pragmatic approach to the embedding of principle which was at the heart of the UNGP process itself. This produces an irony that is briefly explored in the conclusion, an attempt at developing a coherent set of principles in the style of John Ruggie’s principled pragmatism but this time bent to the service of the treaty project.[[396]](#footnote-396)

To that end *the mandate has suggested the way forward*. The mandate provides a constrained set of ideological choices for the elaboration of a treaty and a guide to its (pragmatic) application. The mandate effectively points to four distinct *concepts* of treaties and the practical consequences of which can be identified by the distinct collections of provisions (substantive, procedural, and structural) that then mark each concept of a treaty as unique. “It is in this sense that one can speak about principled pragmatism--that is the application of standards of value to the choices that must be made among competing choices whose aggregations produce effects that change dramatically the conception of the object that they affect.” [[397]](#footnote-397)

Is it possible to apply principle to pragmatism? While somewhat irrelevant, the simple answer is “yes.” The more complete answer acknowledges that pragmatism can be exercised only after a principled conceptual base is developed, and that pragmatic choices will preserve coherence only as long as they are made in line with that principled conceptual base. That may be harder than it sounds as multiple pragmatic principles will be simultaneously projected into the negotiations by stakeholders with quite distinct agendas. The critical question posed to the IGWG, then, does not so much touch on the elaboration of a comprehensive treaty, but rather directs itself to the fundamental question of what sort of principle-objectives are to be embraced around which a treaty may be elaborated. Systemic and institutional objectives may substantially affect the approach to the core principles that guide treaty provision drafting. Beyond these lie the issues of transposition. Principles may be transposed into systems of treaty law in a variety of ways that may produce equivalent results. Here, the delicate balancing of context and legal tradition come into play, but now mediated by the principle against which technical drafting may be judged and beyond that lay the technical issues of application.

The importance of principled pragmatism for shaping a coherent elaboration of a comprehensive business and human rights treaty may have become more important in the wake of the results of the U.S. Presidential election of 2016. President Trump, in his first few weeks in office repudiated the Trans Pacific Partnership[[398]](#footnote-398) and in both his inaugural address[[399]](#footnote-399) and draft executive order on multilateral agreements[[400]](#footnote-400) signaled a change in U.S. policy that appears to seek to affirmatively reject multilateral projects like a comprehensive business and human rights treaty. In the face of the change in U.S. policy from indifferent opposition to potentially active hostility to the legitimacy of the entire project, the need for greater fidelity to a set of organizing principles may be even more necessary to justify the project and to make a case for its value within regimes of international trade. The U.S. position on bilateralism and rejection of a broad approach to multilateral agreements might present a substantial challenge to the project itself. The potential for a shift of leadership in the framing of the rules of international trade and investment to other states that may be less committed to the multilateral human rights process might also create challenges. In those circumstances pragmatism may create a tension that will have to be resolved among treaty proponents. On the one hand the challenges may make it unlikely that any treaty will be approved or adopted. If that is the case, the best use of the process might be to produce the model ideal treaty that might prove influential either in the societal sphere or in some future time when a treaty process might be revived. Alternatively, the stronger challenge to the treaty project might militate in favor of some form of incrementalism. The possibility of even a modest forward movement in form acceptable to the United States may represent a significant victory that might, over time (perhaps a long time) provide the foundation for more ambitious changes. In either case a coherent vision will contribute to a treaty design that by its coherence may do some good for those it is intended to benefit.

IV. Conclusion

Where does this discussion leave the treaty movement? In a sense, it suggests the fundamental difficulties of coherence in the project of human rights legalization. Such difficulties arise precisely when stakeholders’ objectives are meant to veil the sometimes-substantial ideological and principles-based contradictions of their respective positions. A shared objective might get all stakeholders to the point where an IGWG may be charged with elaboration of a treaty. However, objectives may produce an amalgam of provisions that each reflect distinct ideologies and policies held together by reference to the objectives. They may also produce a framework that lacks coherence or substantial power to compel states to enforce a relatively uniformly enforced system of human rights responsibilities against TNCs. Yet, perhaps the treaty project itself can evolve into an exercise on the construction of transformative international legalization, or a coherent variation of products of expressions of power-ideologies.

Or perhaps the highest value of the treaty project is to serve as a fetish within a performance space which champions of conflicting ideologies use as a battleground for the advancement of their projects. Yet, if one learns anything from the way that John Ruggie managed the process of negotiation from the UNGP’s three-pillar framework, it is that the treaty process itself must embrace principled pragmatism in the elaboration of its provisions.[[401]](#footnote-401) This turn to principled pragmatism itself will require the reconciliation of a number of important driving ideologies that may otherwise prove incompatible and drive the treaty process itself to cross purposes. That places the treaty project in the same position with respect to pragmatic choices made from principle as that which confronted the move toward the UNGP in 2011: the dilemmas of the law-state system in a global context, the law-policy conundrum of the state duty to protect, the management of legal privatization through legal mandates for MNE enforcement of internationalized law, the character of the law and its relation to local context, the character of corporate law making, the difficulty of dual character enterprises--SOEs, SWFs, IFIs, the obligations of states and others in weak governance or conflict zones, the structure of remedies and their focus on formal or functional objectives, and the issues of polycentric governance in a global order that is fundamentally disordered.[[402]](#footnote-402)

International human rights, as the treaty is meant to convey, currently sits at the crossroads of ideology, objectives, and substance. Pragmatism will shape the structures of compromise, and will be driven by principle. The article has suggested the form of these principles in game theory,[[403]](#footnote-403) of sausage making in reality, as an embedded exercise (law making woven into the structures of law at state, regional levels), exercise in autonomous law making, and metaphor that is both utopian and aspirational in nature. And yet, the drive toward treaty elaboration is also deeply ironic. In thinking about the very project of human rights legalization, of which this treaty elaboration process sis merely a part, Frédéric Mégret noted that

whereas international human rights law is often presented as a way of transcending the value-agnosticism of the classical liberal international order, it is in fact fundamentally prone to becoming a part of that very order. Rather than a resolution of liberal contradictions by reaching for a horizon of common values, international human rights law in its dominant form represents their very apotheosis, uniquely combining the indeterminacy of the domestic and international variants of liberal concepts of law. The human rightsization of international law typically ends up benefitting international law more than human rights, and is much more in continuity with international law than typically seen.[[404]](#footnote-404)

This article suggests that the insight is perhaps even more valuable when considering the elaboration of a business and human rights treaty. If developing the treaty will avoid the possibility that it will amount to no more than a fetish object, the pragmatism that marked the UNGP project may as well have to be invoked to shape a coherent form for the swirling mass of alternatives that now present themselves to the IGWG. And even that may not be enough to save the ideal of that project from its reality expressed as the sum of its consequences. But more importantly still, if the elaboration of the treaty is to robustly serve those in whose name and for whose benefit it is written, it must do more than serve as a vehicle for the reification of the state and of the civil society elements that would serve it.

1. † W. Richard and Mary Eshelman Faculty Scholar, Professor of Law and International Affairs, Pennsylvania State University; Executive Director Coalition for Peace & Ethics. My thanks to Angelo Mancini (Penn State Law J.D. expected 2017) for his usual excellent research assistance. These materials were first presented as “Pragmatism Without Principle?: How a Comprehensive Treaty on Business and Human Rights Ought to be Framed, Why It Can’t, and the Dangers of the Pragmatic Turn in Treaty Crafting.” Roundtable on the Proposed Comprehensive Treaty on Business and Human Rights, International Commission of Jurists, Geneva, Switzerland, November 19, 2015. A revised version was presented as “Drafting a Treaty on Business and Human Rights” for the Business and Human Rights Roundtable on International Human Rights and Business: Evaluating the Impact of the UNGP’s, organized by the Human Rights Interest Group, American Society of International Law and held at the George Washington University Law School on March 29, 2016. My thanks to the organizers of both and to the participants for their valuable comments. The article builds on insights of a short essay, Larry Catá Backer, *Pragmatism without Principle?: How a Comprehensive Treaty on Business and Human Rights Ought to be Framed, and the Dangers of the Pragmatic Turn in Treaty Crafting, in* Building a Treaty on Business and Human Rights (Surya Deva and David Bilchitz, ed., Cambridge U. Press, forthcoming 2017). [↑](#footnote-ref-1)
2. *See* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 Colum. Hum. Rts. L. Rev. 287, 308–327 (2006). [↑](#footnote-ref-2)
3. *See* *generally* Radu Mares, *A Rejoinder to G. Skinner’s Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law*, 73 Wash. & Lee L. Rev. Online 117 (2016), http://scholarlycommons.law.wlu.edu/wlulr-online/vol73/iss1/2 (describing three baselines of legalizations that shape contemporary thinking). [↑](#footnote-ref-3)
4. *See e.g.*, Kent Greenfield, *There’s a Forest in Those Trees: Teaching About the Role of Corporations in Society*, 34 Ga. L. Rev. 1011 (2000); *see* *also* Mark J. Roe, *Can Culture Constrain the Economic Model of Corporate Law?,* U. Chi. L. Rev. 1251 (2002). [↑](#footnote-ref-4)
5. See Surya Deva, Regulating Corporate Human Rights Violations: Humanizing Business 200–231 (Routledge 2012). [↑](#footnote-ref-5)
6. *See e.g.*, Penelope Simons and Audrey Macklin, The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage 79–177 (Routledge 2014); Daniel Augenstein and David Kinley, *When Human Rights ‘Responsibilities’ Become ‘Duties:’ The Extraterritorial Obligations of States that Bind Corporations*, in Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? 271–294 (2013). [↑](#footnote-ref-6)
7. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/26/L.22/Rev. 1, para. 1 (June 26, 2014). [↑](#footnote-ref-7)
8. U.N. Human Rights Office of the High Comm’r, Guiding Principles On Business And Human Rights: Implementing The United Nations “Protect, Respect And Remedy” Framework (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\_EN.pdf [https://perma.cc/4LFV-UB6Y] [hereinafter UNGP]. [↑](#footnote-ref-8)
9. *See* John Ruggie (Special Representative of the Security General), *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, para. 5, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011). [↑](#footnote-ref-9)
10. *See generally* Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation’s “Protect, Respect and Remedy” and the Construction of Inter-Systemic Global Governance*, 25 Pac. McGeorge Global Bus. & Dev. L.J. 69 (2012) (discussing the move from soft law to a principles-based approach.). [↑](#footnote-ref-10)
11. *See* Shane Darcy, *Guest Post: Josh Curtis Reflects On the United Nations Business And Human Rights Forum 2014,* Bus. & Hum. Rts. In Ir. para. 2 (Dec. 17, 2014), https://businesshumanrightsireland.wordpress.com/2014/12/17/guest-post-josh-curtis-reflects-on-the-united-nations-business-and-human-rights-forum-2014/ [https://perma.cc/2GJY-2CUM] (“To the relief of many, the second aspect was a distinct turn towards a constructive rapport in the relationship between the more established process of implementing the UNGPs and the new initiative on a binding treaty. As Amol Mehra, the Director of the International Corporate Accountability Roundtable puts it, ‘treaty’ is no longer a bad word.”). [↑](#footnote-ref-11)
12. Ruggie, *supra* note 8. [↑](#footnote-ref-12)
13. Faris Natour, *The UN Guiding Principles: What’s Next for Business and Human Rights,* Bus. For Soc. Resp. (June 21, 2011), http://www.bsr.org/en/our-insights/blog-view/the-un-guiding-principles-whats-next-for-business-and-human-rights [https://perma.cc/SN96-MJY4]. [↑](#footnote-ref-13)
14. *See* Rachel Wilshaw et al., Oxfam Int’l, Business And Human Rights: An Oxfam Perspective on the UN Guiding Principles (2013), https://www.oxfam.org/sites/www.oxfam.org/files/tb-business-human-rights-oxfam-perspective-un-guiding-principles-130613-en.pdf [https://perma.cc/6CEC-U5ME] (“The UNGPs have set the stage for meaningful development in business and human rights policies by clearly defining, for the first time, the roles and responsibilities of the state and businesses, and means of redress open to people who are victims of human rights violations. In doing so, they have placed rights firmly back onto the corporate social responsibility (CSR) agenda.”). [↑](#footnote-ref-14)
15. *See* Karl P. Sauvant, *Looking Back, Looking Ahead: What Lessons Should We Learn From Past UN Efforts to Adopt a Code of Conduct for Business?,* Inst. for Hum. Rts. & Bus. paras. 2, 3 (Apr. 16, 2015), http://www.ihrb.org/commentary/looking-back-looking-ahead.html [https://perma.cc/B9WY-NV7C]. [↑](#footnote-ref-15)
16. *See* Hugh Williamson, *Rights Groups Slam UN Plan For Multinationals’* Fin. Times para.5 (Jan. 17, 2011), https://www.ft.com/content/36f72370-2226-11e0-b91a-00144feab49a [https://perma.cc/XDE5-KPK3] (showing “controversial new standards governing the operation of multiational companies in developing countries and conflict zones could undermine rather than reinforce efforts to protect human rights”). [↑](#footnote-ref-16)
17. *See generally Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights,* Worldwide Movement for Hum. Rts. (Jan. 2011) [hereinafter *Joint Civil Society Statement*], https://www.fidh.org/IMG/pdf/Joint\_CSO\_Statement\_on\_GPs.pdf [https://perma.cc/5WBW-YX9H] (discussing criticisms of the Guiding Principles). [↑](#footnote-ref-17)
18. *See* Widney Brown, *Stronger UN Draft On Human Rights Abuses Needed*, Fin. Times (Jan. 19, 2011), https://www.ft.com/content/a3101700-2439-11e0-a89a-00144feab49a [https://perma.cc/MC5W-5R76]. [↑](#footnote-ref-18)
19. *See* Chris Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability,* Hum. Rts. Watch 2–4, https://www.hrw.org/sites/default/files/related\_material/business.pdf [https://perma.cc/VF4Q-AHUM]**.** [↑](#footnote-ref-19)
20. *See* Robert C. Blitt, *Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, 48 Tex. Int’l L. J. 33, 52–56 (2012); David Bilchitz & Surya Deva, *A Chasm Between “is” and “ought”? A Critique of the normative foundations of the SRSG’s Framework and the Guiding Principles*, Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? 107–37 (2013). [↑](#footnote-ref-20)
21. *See* Natour, *supra* note 12, para. 5 (“Granted, some advocacy groups, including Human Rights Watch and Amnesty International, have voiced important criticism, suggesting that the principles’ standards for government and business are too low. But even these organizations likely will invoke the Guiding Principles in their efforts with business, while advocating at the UN level for more stringent standards.”). [↑](#footnote-ref-21)
22. *See generally* Global Movement for a Binding Treaty, *available at* http://www.treatymovement.com/ (“An alliance of committed networks and campaign groups around the world are joining to collectively help organi[z]e advocacy activities in support of developing a binding international instrument to address human rights abuses committed by transnational corporations and other business enterprises.”). *Id*. [↑](#footnote-ref-22)
23. *See Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse*, Treaty All. para. 1, http://www.treatymovement.com/statement/ [https://perma.cc/C4VZ-Z7WP]. [↑](#footnote-ref-23)
24. Stephen Hopwood, *The Endtimes of Human Rights,* in Debating The Endtimes of Human Rights: Activism and Institutions in a Neo-Westphalian World 11, 13 (Doutje Lettinga & Lars van Troost, eds. Amnesty International Netherlands, 2014). See generally Stephen Hopwood, The Endtimes of Human Rights (New York: Cornell University Press, 2013) (critique of the international human rights movement and organizations, but also of the International Criminal Court and the Responsibility to Protect). [↑](#footnote-ref-24)
25. *See* *Employers Reaffirm Commitment to UN Principles on Business and Human Rights*, U.S. Council For Int’l Bus. para. 5 (June 30, 2014), http://www.uscib.org/employers-reaffirm-commitment-to-un-principles-on-business-and-human-rights-ud-4771/ [https://perma.cc/W5HW-FB9F]. [↑](#footnote-ref-25)
26. *UN Human Rights Council Sessions*, Bus. & Hum. Rts. Res. Centre para. 3, http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions [https://perma.cc/G3RC-46GF] [hereinafter *UN Human Rights Council sessions*]. [↑](#footnote-ref-26)
27. *See Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council*, Bus. & Hum. Rts. Res. Centre para. 3 (Sept. 2013), http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf [https://perma.cc/N3KZ-WPRL]. [↑](#footnote-ref-27)
28. *UN Human Rights Council sessions, supra* note 24, para.1. [↑](#footnote-ref-28)
29. Press Release, Dismantle Corporate Power, Statement to the Human Rights Council in Support of the Initiative of a Group of States for a Legally Binding Instrument on Transnational Corporations (Sept. 13, 2013), http://www.stopcorporateimpunity.org/statement-to-the-human-rights-council-in-support-of-the-initiative-of-a-group-of-states-for-a-legally-binding-instrument-on-transnational-corporations/ [https://perma.cc/GE75-7C7V]. [↑](#footnote-ref-29)
30. *UN Human Rights Council Sessions*, *supra* note 24, para. 4 (“The votes were: **20 in favo[]r** (Algeria, Benin, Burkina Faso, China, Congo, Côte d’Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam), **14 against** (Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, UK, USA) and **13 abstentions** (Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, UAE). On 27 June, the Council adopted by consensus Norway’s resolution.”) (emphasis added). [↑](#footnote-ref-30)
31. *See UN Human Rights Council sessions*, *supra* note 24, para. 4. [↑](#footnote-ref-31)
32. Human Rights Council Res. 26/22, U.N. Doc. A/HRC/26/L.1 (June 23, 2014). [↑](#footnote-ref-32)
33. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, paras. 14(a)–(j) (July 6, 2011) (containing the goals of the UN Working Group). [↑](#footnote-ref-33)
34. Human Rights Council Res. 26/22, *supra* note30,para. 23. [↑](#footnote-ref-34)
35. *See* John G. Ruggie, *The Past as Prologue?: A Moment of Truth for UN Business and Human Rights Treaty*, Harv. John F. Kennedy Sch. Gov’t para. 5 (June 2014), https://www.hks.harvard.edu/m-rcbg/CSRI/Treaty\_Final.pdf [https://perma.cc/W869-VKWH]. [↑](#footnote-ref-35)
36. Chip Pitts, “*Ready, Steady, Debate!”: Treaty Talks Begin at U.N.,* Bus. & Hum. Rts. Res. Centre para. 14, https://business-humanrights.org/en/ready-steady-debate-treaty-talks-begin-at-unhttp://business-humanrights.org/en/ready-steady-debate-treaty-talks-begin-at-un [https://perma.cc/29NX-A7S2] (“(i) a third-party chair to facilitate the process, (ii) broadening the focus beyond transnationals, (iii) commitment by all to continued implementation of the GPs, and (iv) consultation with relevant experts, civil society, and business.”). [↑](#footnote-ref-36)
37. *See generally* John Ruggie, Just Business: Multinational Corporations and Human Rights (2013) (discussing the relationship between business and human rights). [↑](#footnote-ref-37)
38. *Id.* at3. [↑](#footnote-ref-38)
39. *Id.* at 4. [↑](#footnote-ref-39)
40. *See id.* at 3–5. [↑](#footnote-ref-40)
41. Human Rights Council, Rep. on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument, U.N. Doc. A/HRC/31/50, at para. 1 (Feb. 5, 2016) (The quotation is found on page two, paragraph 1, in the introduction.)[hereinafter *Rep. On The First Session*]*.* [↑](#footnote-ref-41)
42. *See id.* paras. 21–105. [↑](#footnote-ref-42)
43. *Id.* paras. 37–39. [↑](#footnote-ref-43)
44. *Id.* paras. 40–54. [↑](#footnote-ref-44)
45. *Id.* paras. 55–61. [↑](#footnote-ref-45)
46. *Id.* paras. 62–66. [↑](#footnote-ref-46)
47. *Rep. On The First Session*, *supra* note 39, at paras. 67–77. [↑](#footnote-ref-47)
48. *Id.* paras. 78–87. [↑](#footnote-ref-48)
49. *Id.* paras. 88–97. [↑](#footnote-ref-49)
50. *Id.* paras. 98–105. [↑](#footnote-ref-50)
51. *See generally Intergovernmental Working Group Sessions*, Bus. & Hum. Rts. Res. Centre, http://business-humanrights.org/en/binding-treaty/intergovernmental-working-group-sessions [https://perma.cc/4MG9-CY9U] (providing the various statements proffered to the working group by civil society organization around its first session). [↑](#footnote-ref-51)
52. *See* Int’l Network for Econ., Soc. & Cultural Rights (ESCR-Net) Corp. Accountability Grp., *Statement of the ESCR-Net Corporate Accountability Working Group (CAWG)*, Bus. & Hum. Rts. Res. Centre, http://business-humanrights.org/sites/default/files/media/documents/cawg\_statement\_re\_un\_hrc\_resolution\_text.pdf [https://perma.cc/4R9L-UX2C] (“[S]ome States involved in the negotiation are attempting to qualify this text with the following definition: ‘Other business enterprises’ denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law. The inclusion of this restrictive definition in the resolution text is a damaging development, which would result in a missed opportunity to ensure a level playing field for all corporations worldwide, while also ensuring that all corporate human rights violations are addressed by future international normative developments.”). [↑](#footnote-ref-52)
53. Human Rights Council, Rep. on the Second Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument, U.N. Doc. A/HRC/34/47, at para. 1 (4 Jan. 2017) [hereinafter Rep. On The Second Session]. [↑](#footnote-ref-53)
54. Id., 6-22. [↑](#footnote-ref-54)
55. Principled pragmatism in the context of the developing a framework for the governance of the relationship between business conduct and emerging global human rights norms was defined as “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most—in the daily lives of people.” John G. Ruggie, *Business and human rights: further steps toward the operationalization of the “protect, respect and remedy” framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Human Rights Council A/HRC/14/27, para. 4. (Apr. 9, 2010), http://www2.ohchr.org/english/issues/trans\_corporations/docs/A-HRC-14-27.pdf [↑](#footnote-ref-55)
56. *See Principled Pragmatism – The Way Forward for Business and Human Rights*, U.N. Hum Rts. Off. High Comm’r para. 8 (June 7, 2010), http://www.ohchr.org/EN/NewsEvents/Pages/PrincipledpragmatismBusinessHR.aspx [https://perma.cc/JA4B-VLBD] [hereinafter *Principled Pragmatism*] (“Operating from a position of ‘principled pragmatism,’ Ruggie said he had set out to close the governance gaps which ‘provide the permissive environment for wrongful acts by companies of all kinds without adequate sanction or reparation.’ In this latest phase of his work, he has combined research, consultations and practical experimentation to give practical effect to the ‘protect, respect, remedy’ framework.”). [↑](#footnote-ref-56)
57. For example, EarthRights International faulted the UNGPs failure to confront the fundamental question of the direct obligation of enterprises under public international law because of Mr. Ruggie’s embrace of principled pragmatism as the framework through which the UNGP’s were elaborated. *See* Jonathan Kaufman*, Ruggie’s Guiding Principles Fail to Address Major Questions of Obligations and Accountability*, EarthRights Int’l (Apr. 5, 2011), https://www.earthrights.org/blog/ruggies-guiding-principles-fail-address-major-questions-obligations-and-accountability [https://perma.cc/U2F4-8E2X] (“[T]he ‘pragmatic approach’ counsels against tackling such issues – why chase after ephemeral and controversial points of international law when there are concrete gains to be made now through win-win, collaborative efforts?”). [↑](#footnote-ref-57)
58. David W. Kennedy, *The International Human Rights Regime: Still Part of the Problem?*, 14 Harv. Hum. Rts. J. 101, 102 (2002). [↑](#footnote-ref-58)
59. This later point was recognized by at least on the participants in the 2nd Session of the IGWG who

    focused on the potential form of the treaty, suggesting several possibilities: a detailed treaty setting out substantive and procedural matters, similar to the Rome Statute; a framework treaty setting out key principles and approaches, such as the United Nations Framework Convention on Climate Change; a core treaty ith a series of annexes to deal with supervisory mechanisms and developments, such as the Vienna Convention for the Protection of the Ozone Layer; or an optional Protocol to existing human rights treaties. The treaty should expressly cover enterprises owned or controlled by the State; it should also define the responsibilities of international organizations.

    Rep. On The Second Session,supra, ¶ 98, 17. [↑](#footnote-ref-59)
60. *See* Human Rights Council Res. 26/9, *supra* note 6. [↑](#footnote-ref-60)
61. *See* *id.* [↑](#footnote-ref-61)
62. *See* Larry Catá Backer, *Revealing Ideologies for a Comprehensive Treaty for Business and Human Rights*, Law at the End of the Day (Sept. 6, 2016), *available at* http://lcbackerblog.blogspot.com/2016/09/revealing-ideologies-for-comprehensive.html [https://perma.cc/UQX4-X6P3]. [↑](#footnote-ref-62)
63. See Human Rights Council Res. 26/9, *supra* note 6*,* para. 13. [↑](#footnote-ref-63)
64. *See* *id.* para. 8. [↑](#footnote-ref-64)
65. *Id*. [↑](#footnote-ref-65)
66. *See generally* Louis Henkin, International Law: Politics and Values (1995) (discussing the ideas of state sovereignty and international law). [↑](#footnote-ref-66)
67. *See* Sigrun Skogly, *Regulatory Obligations in a Complex World: States’ Extraterritorial Obligations Related to Business and Human Rights* (forthcoming 2016); ETO Consortium, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights 3 (2013), http://www.etoconsortium.org/nc/en/main-navigation/library/maastrichtprinciples/?tx\_drblob\_pi1%5BdownloadUid%5D=23 [https://perma.cc/NXV5-B4N9] (“Despite the universality of human rights, many States still interpret their human rights obligations as being applicable only within their own borders. This attempt to limit obligations territorially has led to gaps in human rights protection in various international political processes and a lack of adequate regulation for the protection of human rights.”). [↑](#footnote-ref-67)
68. *See* Human Rights Council Res. 26/9, *supra*note 6, para. 8. [↑](#footnote-ref-68)
69. *Id.* para. 13. [↑](#footnote-ref-69)
70. *Id*. [↑](#footnote-ref-70)
71. *See id*. [↑](#footnote-ref-71)
72. *Id*. [↑](#footnote-ref-72)
73. Cf. Costas Douzinas, The End Of Human Rights: Critical Legal Thought At The Turn Of The Century (Hart 2000). [↑](#footnote-ref-73)
74. Human Rights Council Res. 26/9, *supra*note 6, para. 13. [↑](#footnote-ref-74)
75. *See generally* Human Rights Council Res. 26/9, *supra*note 6 (containing nothing stating that it would need to be included in the domestic law of states). [↑](#footnote-ref-75)
76. U.N., Econ. & Soc. Council, Comm’n on Human Rights, Sub-Comm’n on the Promotion & Prot. of Human Rights, Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational  Corporations  and  Other  Business  Enterprises  with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, at 4 (Aug. 26, 2003) [hereinafter ECOSOC Norms]. [↑](#footnote-ref-76)
77. Int’l Org. of Emp’rs & Int’l Chamber of Commerce, *Joint Views of the IOE and ICC on the Draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,”* Bus. & Hum. Rts. Centre (Mar. 1, 2004), https://business-humanrights.org/en/joint-views-of-the-ioe-icc-on-the-un-human-rights-norms-for-business#c25602 [https://perma.cc/CHJ5-L5CZ]. [↑](#footnote-ref-77)
78. *See* Human Rights Council Res. 26/9, *supra* note 6, para. 2. [↑](#footnote-ref-78)
79. *See* *id.* paras. 4–5. [↑](#footnote-ref-79)
80. *See* *id.* para. 15. [↑](#footnote-ref-80)
81. *See* *id.* para. 6 n.1 (“‘Other business enterprises’ denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.”). [↑](#footnote-ref-81)
82. *See* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 Colum. Hum. Rts. L. Rev. 287, 337–338 (2005). [↑](#footnote-ref-82)
83. *See id at* 287–389; Karl P. Sauvant, *Looking Back, Looking Ahead: What Lessons Should we Learn from Past UN Efforts to Adopt a Code of Conduct for Business?,* Inst. For Bus. & Hum. Rts. (Apr. 16, 2015), http://www.ihrb.org/commentary/looking-back-looking-ahead [https://perma.cc/N3AK-XMSD]. [↑](#footnote-ref-83)
84. *See generally* Reuven Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 Colum. J. Transnat’l L. 5, 5–34 (2003) (discussing the changes in the organization of global production); Larry Catá Backer, *Regulating Multinational Corporations–Trends, Challenges and Opportunities*, 22 Brown J. of World Aff. 153, 154 (2015). [↑](#footnote-ref-84)
85. Human Rights Council Res. 26/9, *supra*note 6, para. 12. [↑](#footnote-ref-85)
86. *See* *id.* at para. 14. [↑](#footnote-ref-86)
87. *See* *id*. [↑](#footnote-ref-87)
88. *See* *id*.at para. 1. [↑](#footnote-ref-88)
89. *Id.* at paras. 1–4. [↑](#footnote-ref-89)
90. *Id.* atpara. 1. [↑](#footnote-ref-90)
91. *See*Human Rights Council Res. 26/9, *supra*note 6, para. 1 (“Recallingthe principles and purposes of the Charter of the United Nations . . .”); (“Recalling also the Universal Declaration of Human Rights . . .”) *Id*. [↑](#footnote-ref-91)
92. *Id.* at para. 2 (“*Recalling also* . . . International Covenant of Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights  . . .”). [↑](#footnote-ref-92)
93. *See id.* at para. 3 (“Recalling furtherthe Declaration of the Right to Development . . .”). [↑](#footnote-ref-93)
94. *See In Controversial Landmark Resolution, Human Rights Council Takes First Step Toward Treaty On Transnational Corporations’ Human Rights Obligations,* Int’l Just. Resource Ctr. para. 4 (July 15, 2014), http://www.ijrcenter.org/2014/07/15/in-controversial-landmark-resolution-human-rights-council-takes-first-step-toward-treaty-on-transnational-corporations-human-rights-obligations/ [https://perma.cc/3WGU-GN7X]. [↑](#footnote-ref-94)
95. *See* Human Rights Council Res. 26/9, *supra* note 6, para. 8. [↑](#footnote-ref-95)
96. *See id.* paras. 3–6. [↑](#footnote-ref-96)
97. *Id.* para. 5 (“Bearing in mind the approval of the Guiding Principles on Business and Human Rights by the Human Rights Council in its Resolution 17/4.”). [↑](#footnote-ref-97)
98. *See generally* Bilchitz, *supra* note 14 (discussing the tension of the enterprises’ responsibilities and civil society’s role). [↑](#footnote-ref-98)
99. *See generally* ECOSOC Norms, *supra* note 69 (discussing the responsibilities of transnational responsibilities). [↑](#footnote-ref-99)
100. *See* Backer,*supra* note 9, at 317 n.119 (discussing David Weissbrodt & Muria Kruger’s, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 Am. J. Int’l L. 901, 904–07 (2003)). [↑](#footnote-ref-100)
101. Human Rights Council Res. 26/9, *supra* note 6, paras. 1–6 (“*Recalling*” the UN Guiding Principles and “*taking into account*” the work leading to the elaboration of the Norms). [↑](#footnote-ref-101)
102. *See* Larry Catá Backer, *Revealing Ideologies*, *supra* note 56. [↑](#footnote-ref-102)
103. See Human Rights Council Res. 26/9, *supra* note 6, para. 8 [↑](#footnote-ref-103)
104. *Id*. [↑](#footnote-ref-104)
105. *See* Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39(4) Conn. L. Rev. 1739–1784 (2007). [↑](#footnote-ref-105)
106. *See* Final Statement, National Contact Point, Friends of the Earth Europe and Friends of the Earth Netherlands/Milieudefensie–Rabobank (Jan. 15, 2016), *available at* http://www.oecdguidelines.nl/binaries/oecd-guidelines/documents/publication/2016/1/15/fs-foe-milieudefensie-rabobank/160115-fs-rabo-foe.pdf (discussed in Larry Catá Backer, *Should Financial Institutions Have Obligations to Manage the Human Rights Impacts of their Clients?*, Law at the End of the Day (Jan. 21, 2016), *available at* http://lcbackerblog.blogspot.com/2016/01/should-financial-institutions-have.html [https://perma.cc/9UHM-GUXL]) . [↑](#footnote-ref-106)
107. *See generally* Surya Deva, *Scope of the Proposed Business and Human Rights Treaty: Navigating through Normativity, Law and Politics*, Building a Treaty on Business and Human Rights: Context and Contours (Surya Deva & David Bilchitz eds., forthcoming Cambridge 2017) (on file with author). [↑](#footnote-ref-107)
108. *See* Human Rights Council Res. 26/9, *supra* note 6, para. 15. [↑](#footnote-ref-108)
109. Consider the arguments in John G. Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights*, (Jan. 23, 2015), *available at* [*https://papers.ssrn.com/sol3/papers2.cfm?abstract\_id=2554726*](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2554726)[https://perma.cc/AD79-U4XH]. The status quo would continue to recognize the division between the public and societal sphere built into the UNGP, one in which the responsibility of business “exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.” *See* UNGP, *supra* note 7, para. 11. [↑](#footnote-ref-109)
110. *See generally Joint Civil Society Statement*, *supra* note 16 (discussing criticisms of the Guiding Principles). [↑](#footnote-ref-110)
111. *See* Radu Mares, *Legalizing human rights due diligence and the legal separation of entities* in Surya Deva and David Bilchitz (eds.), Business and Human rights: Exploring the Contours of a Treaty (forthcoming 2016). [↑](#footnote-ref-111)
112. *See* Marcia Narine, *Disclosing Disclosure’s Defects: Addressing Corporate Responsibility for Human Rights Impacts*, 47 Colum. Hum. Rts. L. Rev. 84, 84 (2015). [↑](#footnote-ref-112)
113. *See generally* Anna Beckers, Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law (2015) (discussing the social protection of regulatory intervention); *but see* Larry Catá Backer, *A Lex Mercatoria for Corporate Social Responsibility Codes Without the State?: On the Regulatory Character of Private Corporate Codes*, 23 Ind. J. Global Legal Stud. 23, 23 (2016). [↑](#footnote-ref-113)
114. See UN Working Group on Business and Human Rights, *Guidance on National Actions Plans on Business and Human Rights*, U.N Hum. Rts. Off. High Comm’r, at ii (Dec. 2014), http://www.ohchr.org/Documents/Issues/Business/UNWG\_%20NAPGuidance.pdf [https://perma.cc/3CLF-JAXQ]. [↑](#footnote-ref-114)
115. *See* Florian Grisel, *Sources of Foreign Investment Law* in The Foundations of International Investment Law: Bringing Theory Into Practice 213, 217–21 (Zachary Douglas et al. eds., 2014). [↑](#footnote-ref-115)
116. *See generally* Matthew B. Berlin, *The Hague Convention on Choice of Court Agreements: Creating an International Framework for Recognizing Foreign Judgements*, 3 BYU Int’l L. & Mgmt. R. 43 (2006) (discussing Hague convention treaty process in part). [↑](#footnote-ref-116)
117. *Cf.* Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law (2010) (discussing international orders as the new constitutional center beyond the nation state). [↑](#footnote-ref-117)
118. *See* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am Ct. H.R. (Sept. 17, 2003), http://www.corteidh.or.cr/docs/opiniones/seriea\_18\_ing.pdf [https://perma.cc/93LL-8AXR]. [↑](#footnote-ref-118)
119. *See* Sara Seck, *Chevron at the Supreme Court of Canada: The Saga Continues*, Law End Day para. 1 (Sept. 11, 2015), http://lcbackerblog.blogspot.com/2015/09/sara-seck-on-chevron-at-supreme-court.html [https://perma.cc/25E2-6S8B]. [↑](#footnote-ref-119)
120. *See* Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets*, 29 Am. U. Int’l L. Rev. 1, 4 (2013). [↑](#footnote-ref-120)
121. *See* Larry Catá Backer, *From Guiding Principles to Interpretive Organizations: Developing a Framework for Applying the UNGPs to Disputes that Institutionalizes the Advocacy Role of Civil Society* inBusiness and Human Rights: Beyond the End of the Beginning 1 (César Rodríguez-Garavito ed., forthcoming 2017). [↑](#footnote-ref-121)
122. *See* Rome Statute of the International Criminal Court July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002). The 10th paragraph of the Preamble emphasizes the principle of complementarity, that the ICC and its legal structures are meant to complement “national criminal jurisdictions.” Section 1 of the ICC then establishes this as the core jurisdictional principle of the international framework. Most usefully, Section 17 of the ICC limits complementarity where the international tribunal itself determines that the national organs are unable or unwilling to prosecute the crimes that are themselves defined (in Section 5 of the ICC) by international law. [↑](#footnote-ref-122)
123. Among these are the old calls for the establishment of a new international economic order and its eventual evolution into a focus on development as a global political issue. Each of these incorporated calls for the management or regulation of TNCs within the ambit of a new ideological ordering of global economic activity that was, in the last instance, overtaken by economic globalization in the decades that followed. *See* United Nations General Assembly, Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), at 3 (May 1, 1974), http://www.un-documents.net/s6r3201.htm [https://perma.cc/Q3AP-QY2S]; *see also* United Nations General Assembly, Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (S-VI), at 5 (May 1, 1974), http://www.un-documents.net/s6r3202.htm [https://perma.cc/MRG8-U7Y2]; U.N. General Assembly, Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 2 (Dec. 12, 1974), http://www.un-documents.net/a29r3281.htm [https://perma.cc/XTD6-T9FK]. However, the approaches developed in these declarations remain very much in circulation especially among developing states. [↑](#footnote-ref-123)
124. On definitional issues touching on TNCs, see Christos N. Pitelis and Roger Sugden, *The (Theory of the) transnational firm: The 1990s and Beyond* in The Nature of the Transnational Firm 1–9 (2nd ed., Christos N. Pitelis and Roger Sugden, eds., Routledge, 2000). [↑](#footnote-ref-124)
125. *See generally* Larry Catá Backer, *Are Supply Chains Transnational Legal Orders?: What We Can Learn From the Rana Plaza Factory Building Collapse*, 1 U.C. Irvine J. Int’l, Transnat’l & Comp. L. 1 (June 6, 2016) (discussing change from regulation to production). [↑](#footnote-ref-125)
126. *See* Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law-Making: Wal-Mart as a Global Legislator*, 39 Conn. L. Rev. 1739, 1739–84 (2007). [↑](#footnote-ref-126)
127. [↑](#footnote-ref-127)
128. For a discussion, see U.N. Office of the High Commissioner for Human Rights, Civil Society Space and the United Nations Human Rights Systems: A Practical Guide for Civil Society (2014), http://www.ohchr.org/Documents/AboutUs/CivilSociety/CS\_space\_UNHRSystem\_Guide.pdf [https://perma.cc/4L4C-3B2A]. [↑](#footnote-ref-128)
129. For example, a group of quite influential global civil society actors produced a report calling for substantial expansion of the role of civil society within the U-N- human rights framework. *See* Joint Civil Society Paper, Strengthening the Human Rights Council, at 10 (April 2016), http://www.ishr.ch/sites/default/files/article/files/hrc10\_joint\_paper\_final.pdf [https://perma.cc/SRB6-ZLA5]. Within the U.N. itself, the process of expanding the role of civil society has not been without controversy. *See* Report of the Secretary-General on the implementation of the Report of the Panel of Eminent Persons on United Nations–Civil Society Relations A/58, *available at* https://www.globalpolicy.org/images/pdfs/0904sgreport.pdf [https://perma.cc/5X5N-AZNN] (responding to criticism of the earlier Report of the Panel of Eminent Persons on United Nations–Civil Society Relations A/58/817 (June 11, 2004), *available at* https://www.globalpolicy.org/images/pdfs/0611report.pdf [https://perma.cc/5NWK-S4LP]. [↑](#footnote-ref-129)
130. *See*William F. Jasper, *Regional Scheme for the Pacific Rim*, New Am. para. 2 (Aug. 23, 2013), http://www.thenewamerican.com/world-news/item/16347-regional-scheme-for-the-pacific-rim [https://perma.cc/7QXJ-APEV]. [↑](#footnote-ref-130)
131. *See generally* Alfred C. Aman, Jr., The Democracy Deficit: Taming Globalization Through Law Reform(2004) (discussing how democratic values are furthered though administrative engagement on a global level in lieu of market driven harmonization). [↑](#footnote-ref-131)
132. Larry Catá Backer, *The Ideological Basis of a Comprehensive Treaty on Business and Human Rights: Choosing Among Status Quo, Evolutive and Transformative Visions*, Law End Day, para. 11 (Sept. 20, 2016), http://lcbackerblog.blogspot.com/2016/09/the-ideological-basis-of-comprehensive.html [https://perma.cc/ZT7P-A28Y] [hereinafter *Ideological Basis*]. [↑](#footnote-ref-132)
133. *Id.* para. 7. [↑](#footnote-ref-133)
134. *See* Rosemary Sandford, *International Environmental Treaty Secretariats: Stage Hands or Actors* inGreen Globe Yearbook of International Co-operation on Environment and Deviation. 17, 19–20 (Georg Parmann ed., 1994) (describing the role of secretariats). [↑](#footnote-ref-134)
135. *See id*. [↑](#footnote-ref-135)
136. *See id.* at 28. [↑](#footnote-ref-136)
137. *See, e.g.*, Pallavi Kishore, *A Comparative Analysis of Secretariats Created under Select Treaty Regimes*, 45 Int’l Law 1051, 1053–55 (2011). [↑](#footnote-ref-137)
138. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 32–33, Apr. 11, 1950, E.T.S. No. 005. [↑](#footnote-ref-138)
139. *See, e.g.*,Jernej Letnar Cernic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 3 Hanse L. Rev. 71 (2008) (discussing the institutional framework of the OECD’s Guidelines for Multinational Enterprises). [↑](#footnote-ref-139)
140. *See* Kishore, *supra* note 129, at 1053. [↑](#footnote-ref-140)
141. *See, e.g*., Secretary of State for Foreign and Commonwealth Affairs, Good Business: Implementing the UN Guiding Principles on Business and Human Rights, 2013, Cm. 8695 (UK). [↑](#footnote-ref-141)
142. *See, e.g.*, Int’l Chamber of Com. et al., Joint Input to the United Nations Secretary-General’s Report on Business and Human Rights and the UN System (2012). [↑](#footnote-ref-142)
143. *See infra* Part III; *cf*. Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 Eur J. Int’l L. 1, 9 (2006). [↑](#footnote-ref-143)
144. *See generally* Martin A. Oz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 Colum. Hum. Rts L. Rev.307 (1997) (discussing the relationships of NGOs in regional human rights systems in the model). [↑](#footnote-ref-144)
145. Human Rights Council Res. 26/9, *supra*note 6, para. 11. [↑](#footnote-ref-145)
146. *Id*. [↑](#footnote-ref-146)
147. *See generally* Doug Cassel and Anita Ramasastry, *Anatomy of a business and human rights treaty?*, Inst. for Hum. Rts. & Tech. (June 25, 2015) http://www.ihrb.org/commentary/anatomy-business-and-human-rights-treaty.html [https://perma.cc/NPF2-S5VZ] (discussing the structure of the treaty). [↑](#footnote-ref-147)
148. *See id.* para. 3. [↑](#footnote-ref-148)
149. *Id*. para. 4. [↑](#footnote-ref-149)
150. Human Rights Council Res. 26/9, *supra*note 6, para. 13. [↑](#footnote-ref-150)
151. *See generally* Human Rights Council Res. 26/9, *supra*note 6 (lacking important ideological decisons in the construction of normative structures). [↑](#footnote-ref-151)
152. *See, e.g.*, John Morrison, *A Business and Human Rights Treaty? Smart Strategies are Needed to Close Accountability Gaps*, Inst. for Hum. Rts. & Bus. para. 4 (June 3, 2014), http://www.ihrb.org/commentary/business-and-human-rights-treaty-smart-strategies.html [https://perma.cc/5H2T-UAB5]. [↑](#footnote-ref-152)
153. *See, e.g.*, *UNGP*, *supra* note 7, at 16. [↑](#footnote-ref-153)
154. *See* Human Rights Council Res. 26/9, *supra* note 6, para. 2. [↑](#footnote-ref-154)
155. *See* *id.* para 4. [↑](#footnote-ref-155)
156. *See* *id*. [↑](#footnote-ref-156)
157. *Fact Sheets on the European Union: The Charter of Fundamental Rights*, Eur. Parliament: At Your Serv. para. 7 (June 2016), http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\_1.1.6.html [https://perma.cc/5FUU-FN6K] (Considering the context of the European Union in the elaboration of its Charter of Fundamental Rights of the European Union: “For a long time, the protection of fundamental rights against action by the Communities was therefore left to the Court of Justice, which elaborated a catalogue of rights drawn from the general principles of Community law and from the common constitutional traditions of the Member States. However, the absence of an explicit, written catalogue of fundamental rights, binding on the European Community and easily accessible to citizens, remained an issue of concern. Two main proposals were made on repeated occasions with the aim of filling this legislative gap.”). [↑](#footnote-ref-157)
158. *See* G.A. Res. 217 (III) A,The Universal Declaration of Human Rights (Dec. 10, 1948). [↑](#footnote-ref-158)
159. *See* *id*.; *see also* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int’l & Comp. L. 287, 289–90 (1996). [↑](#footnote-ref-159)
160. *See* Human Rights Council, Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/HRC/31/53, at 2 (Dec. 28, 2015). [↑](#footnote-ref-160)
161. See Human Rights Council Res. 26/9, *supra* note 6, para. 4. [↑](#footnote-ref-161)
162. National catalogues of rights exist memorialized in national constitutions, certainly, and the UNGP took the position that the International Bill of Human Rights plus certain ILO conventions constituted a basic catalogue of international human rights. *Se*e *UNGP*, *supra* note 7, at 13–14. The Treaty Mandate itself includes references to instruments beyond the basic ones, and it is not clear that these are meant to be either definitive or preclusive of the inclusion of others now or in the future. *Id.* at 14. [↑](#footnote-ref-162)
163. *See* Thomas C. Buerganthal. *The Human Rights Revolution*, 23 St. Mary’s L.J. 3, 9 (1991). [↑](#footnote-ref-163)
164. Rome Statute of the International Criminal Court at 1, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002). [↑](#footnote-ref-164)
165. *See, e.g.*, Elements of Crimes, ICC-ASP/1/3 (part II-B) (2002) (establishing elements of international human rights crimes for consideration by the court); *see generally* Hon. Akua Kuenyehia, *The International Criminal Court: Challenges And Prospects, Annual Lecture On Human Rights And Global Justice, Center For International Law And Justice (CILJ)*, 6 Fla. A&M U. L. Rev. 89 (2010) (analyzing the development of the International Criminal Court and the unique facets incorporated within the tribunal). [↑](#footnote-ref-165)
166. *See*, *e.g.*, Bruce Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law 25 (2003); Mark Lattimer & Philippe Sands, Justice for Crimes Against Humanity (2003); Phillippe Sands, From Nuremberg to the Hague: The Future of International Criminal Justice (2003); Ian Ward, Justice, Humanity, and the New World Order (2003). [↑](#footnote-ref-166)
167. *Cf*., Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 Mich. J. Int’l L. 445 (2000). [↑](#footnote-ref-167)
168. *See* Backer, *supra* note 113, at 9. [↑](#footnote-ref-168)
169. *Cf*. Merritt B. Fox, *“Comment: What’s So Special About Multinational Enterprises?: A Comment on Avi-Yonah”*, 42 Colum. J. Transnat’l L. 551 (2004); William F. Baxter, *Choice of Law and the Federal System*, 16 Stan L. Rev. 1 (1963); Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev*.* 277 (1990). [↑](#footnote-ref-169)
170. *Cf*. Justine Nolan, *Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights*, 30 Utrecht J. Int’l Eur. L. 7 (2014). [↑](#footnote-ref-170)
171. United Nations General Assembly, Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (S-VI), at 5 (May 1, 1974), http://www.un-documents.net/s6r3202.htm [https://perma.cc/Z7U9-H8FB]. [↑](#footnote-ref-171)
172. U.N. General Assembly, Declaraiton on the Right to Development A/RES/41/128 (Dec. 4, 1986) http://www.un.org/documents/ga/res/41/a41r128.htm [https://perma.cc/98JH-RMRF] (“States should realign their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and realization of human rights.” *Id*., art. 3(3)). [↑](#footnote-ref-172)
173. *See, e.g.*, G.A. Res. 63/308 (Sept. 14, 2009) (expressing overwhelming support for the Responsibility to Protect “R2P” norm). [↑](#footnote-ref-173)
174. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 342 (2010). [↑](#footnote-ref-174)
175. 148 *Cf.* José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints*, 13 Ham L. Rev. 623, 660 (1990) (discussing the responsibility of governments to fulfill human rights obligations). [↑](#footnote-ref-175)
176. *Id.* [↑](#footnote-ref-176)
177. *See* African Charter on Human and Peoples’ Rights arts. 19–24, June 27, 1981, 1520 U.N.T.S. 217; *see generally* Richard N. Kiwanuka, *The Meaning of “People” in the African Charter on Human and Peoples’ Rights*,82 Am. J. Int’l L. 80 (1988). [↑](#footnote-ref-177)
178. *Cf*. Günther Handl, *The Legal Mandate Of Multilateral Development Banks As Agents For Change Toward Sustainable Development*, 92 Am. J. Int’l L. 642, 649–51 (1998). [↑](#footnote-ref-178)
179. *See, e.g.*, The Norwegian Nat’l Contact Point for the OECD Guidelines for Multinat’l Enters., Final Statement: Complaint From Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green And Global Alliance And Forum For Environment And Development v. Posco (South Korea*),* Abp/Apg (Netherlands) And NBIM (Norway) (2013), http://www.responsiblebusiness.no/files/2013/12/nbim\_final.pdf [https://perma.cc/LG4Z-DAJ7]. [↑](#footnote-ref-179)
180. *See* Human Rights Council Res. 26/9, *supra* note 6, at 1 n.1. [↑](#footnote-ref-180)
181. A treaty trigger is a condition or action or occurrence that would itself give rise to the provisions of the treaty itself. In the context of the UNGP, for example, the obligations apply to all states and to all business enterprises, “both transnational and others, regardless of their size, sector, location, ownership and structure.” UNGP, *supra* note 7. [↑](#footnote-ref-181)
182. *Id*. [↑](#footnote-ref-182)
183. *Id.; see also Joint Civil Society Statement*, *supra* note 16 (discussing criticisms of the Guiding Principles). [↑](#footnote-ref-183)
184. There are exceptions. The German Enterprise law might provide a framework that could be internationalized. *See generally* Thomas Raiser, *The Theory of Enterprise Law in the Federal Republic of Germany*, 36 Am. J. Comp. L. 111 (1988) (discussing the definitional issues of the term “enterprise”). But any attempt to create a new juridical person out of the parts of a multi entity system—the autonomy of the individual parts of which are a central concept in the Enterprise law of virtually every state—may prove to be a difficult problem indeed. [↑](#footnote-ref-184)
185. Consider the move toward supply chain regulation. OECD Due Diligence Guidance for Responsible Supply Chains of Minerals form Conflict-Affected and High Risk Areas (2nd ed., 2013), https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf [https://perma.cc/6SUD-FHWA]. [↑](#footnote-ref-185)
186. The state of thinking is nicely evidenced in Cody Sisco, Blythe Chorn, Peder Michael Pruzan-Jorgensen, Jeremy Prepscius, and Veronica Booth, “*Supply Chains And The OECD Guidelines For Multinational Enterprises,” Bsr Discussion Paper On Responsible Supply Chain Management* OECD (June 30, 2010), https://www.oecd.org/corporate/mne/45534720.pdf [https://perma.cc/MH2B-Q2AR]. [↑](#footnote-ref-186)
187. Tom McNamara, A Primer on Foreign Sovereign Immunity 2 (2006); *cf*. Ismael Diaz, *A Critique of Proposals to Amend the Foreign Sovereign Immunities Act to Allow Suits Against Foreign Sovereigns for Human Rights Violations*, 32 U. Miami Inter-Am. L. Rev. 137, 139–41 (2001) (discussing human rights advocate’s attempts to punish “offending governments” through suits for damages). [↑](#footnote-ref-187)
188. *See* McNamara, *supra* note 179, at 141. [↑](#footnote-ref-188)
189. *See* Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 Penn St. Int’l. L. Rev. 497, 502 (2006). [↑](#footnote-ref-189)
190. *See* Off. High Comm’r on Hum. Rts., The Corporate Responsibility to Respect Human Rights: An Interpretive Guide 5 (2012). [↑](#footnote-ref-190)
191. *See id*. [↑](#footnote-ref-191)
192. *See* Robert C. Thompson et al., *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 Geo. Wash. Int’l L. Rev. 841, 841–42 (2009); *see also* Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 Santa Clara L. Rev. 79, 151–52 (2011); Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 Vand. J. Transnat’l L. 325 (1998). [↑](#footnote-ref-192)
193. Reinier Kraakman et al., The Anatomy of Corporate Law: A Comparative and Functional Approach (2d ed. 2009). [↑](#footnote-ref-193)
194. *See* Special Rep. of the Sec’y Gen., *Summary Report, Expert Meeting on Corporate Law and Human Rights: Opportunities and Challenges of Using Corporate Law to Encourage Corporations to Respect Human Rights* (Nov. 5–6, 2009); *see also* Larry Catá Backer, *Using Corporate Law to Encourage Respect for Human Rights in Economic Transactions: Considering the November 2009 Summary Report on Corporate Law and Human Rights Under the UN SRSG Mandate*, Law End Day (Jan. 14, 2010), http://lcbackerblog.blogspot.com/2010/01/using-corporate-law-to-encourage.html [https://perma.cc/9X6M-RZDW]. [↑](#footnote-ref-194)
195. *See, e.g*., Canada Corporations Act, R.S.C. 1970, c. C-32 (Can.). [↑](#footnote-ref-195)
196. *See*, *e.g.*, Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 L. & Contemp. Probs. 161 (1985). [↑](#footnote-ref-196)
197. See, e.g., Henry Hansmanna, Reinier Kraakman, *Organizational law as asset partitioning*, 44 Eur. Econ. Rev. 807-817 (2000); Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality,* 41 Tulsa L. Rev. 541 (2006); Giacomo Rojas Elgueta, *Divergences and Convergences of Common Law and Civil Law Traditions on Asset Partitioning: A Functional Analysis*, 12 U. Penn. J. Bus. L. 517 (2010) [↑](#footnote-ref-197)
198. *See*, *e.g.*, Anna Beckers, Taking Corporate Codes Seriously: Towards Private Law Enforcement of Voluntary Corporate Social Responsibility Codes (2014); Jennifer Zerk, Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies, Report Prepared for the Office of the UN High Commissioner for Human Rights (Oct. 2013), http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf [https://perma.cc/HY3V-7L9T]. [↑](#footnote-ref-198)
199. Discussed in Larry Catá Backer, *A Lex Mercatoria for Corporate Social Responsibility Codes without the State?: A Critique of Legalization Within the State Under the Premises of Globalization*, 23 Ind. J. Of Global Legal Stud. (forthcoming 2017). [↑](#footnote-ref-199)
200. *See* *generally* Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law,* 72 Wash. & Lee L. Rev. 1769 (2015) (discussing possible legislation that disregards parent company’s limited liability for claims of “customary international human rights violations and serious environmental torts,” ). [↑](#footnote-ref-200)
201. *See*, *e.g.*, Surya Deva, Parent Company Liability, Briefing Paper for Consultation for ESCR-Net and FIDH Joint Treaty Initiative Project at 3–4 (Sept. 2015), https://www.escr-net.org/sites/default/files/parent\_company\_liability\_briefing\_paper\_first\_draft\_sept\_2015\_-\_eng.pdf [https://perma.cc/GM4H-NLNG] [↑](#footnote-ref-201)
202. *See*, *e.g.*, *Dodge v. Ford Motor Company*, 170 NW 668 (Mich. 1919). It should be noted that there have been some movement in that direction under very limited circumstances in the United Kingdom. *See*, *e.g.*, *Chandler v Cape plc* [2012] EWCA Civ. 525; *Connelly v Rio Tino Zinc Corporation* [1999] CLC 533; *CSR v. Wren* [1997] 44 NSWLR 463. [↑](#footnote-ref-202)
203. As a subsidiary issue, the treaty might have to speak to the issue of the legalization of human rights due diligence. *See* UNGP, *supra* note 7, at 16–17. That can be understood as necessary in shaping the forms of governance required for the substantive provisions of the treaty or it may be understood as procedural necessity. A host of subsidiary issues would then be raised—from where implementation of such authority ought to reside (for example the securities regulators) to the standardization of the forms of human rights due diligence for coherence and comparison in reporting. This is a project laced with considerable ambiguity. *See* Robert McCorquodale & Marcos Orellena, *Briefing Paper for Consultation: Human Rights Due Diligence* paper for ESCR-Net & FIDH Joint Treaty Initiative Project (Sept. 2015), https://www.escr-net.org/sites/default/files/975269176/human\_rights\_due\_diligence\_briefing\_paper\_first\_draft\_sept\_2015\_-\_eng.doc. [↑](#footnote-ref-203)
204. *See* Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy*, 117–18 (London: Amnesty International 2014). [↑](#footnote-ref-204)
205. *See* *Medellín v. Texas*, 552 U.S. 491, 507 (2008). [↑](#footnote-ref-205)
206. *Se*e *id*. at 505. [↑](#footnote-ref-206)
207. *See* *id.* at 504. [↑](#footnote-ref-207)
208. *See id.* at 505, 518. [↑](#footnote-ref-208)
209. *See* *generally* Jean Koh Peters, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 Harv. Int’l. L.J. 71(1983) (discussing states making reservations to treaties and explores how treaty law can “provide[] a battleground for the clash between two basic opposing visions of the world: a world composed of autonomous states versus an integrated world order.”). [↑](#footnote-ref-209)
210. *See* Case 26/62, *Van Gen den Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 26 (1963). [↑](#footnote-ref-210)
211. *See* Peters, *supra* note 200. [↑](#footnote-ref-211)
212. *See* Vienna Convention on the Law of Treaties arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331*; see* Rafael Nieto-Navia, *International Peremptory Norms (*Jus Cogens*) And International Humanitarian Law*, *in* Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese (2003) [↑](#footnote-ref-212)
213. *See* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 Am. J. Int’l L. 4, 6 (1986) (noting that “the application [of *jus cogens*] in particular cases is made difficult . . . by the lack of consensus about the identity of most peremptory norms” and concluding that states’ differing economic, social, cultural, and political values create an “improbability of reaching a meaningful consensus”). [↑](#footnote-ref-213)
214. *See generally* Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened the Pandora’s Box, Did You Ever Think About the Consequences?,* 18(5) Eur. J. Int’l L. 853 (2008). [↑](#footnote-ref-214)
215. *See* Mario Mendez, The Legal Effects of EU Arguments 2 (2013) (explaining that “international law leaves it to the domestic legal order to determine how it gives effect to its treaty obligations in the domestic legal arena”). [↑](#footnote-ref-215)
216. *See* Michael John Garcia, Cong. Research Serv., RL32528, International Law and Agreements: Their Effect upon U.S. Law 1 (2015) (describing self-executing executive agreements as those that “have a status that is superior to U.S. state law and inferior to the Constitution”). [↑](#footnote-ref-216)
217. *See generally* Deutscher Bundestag [BT] [Basic Law] art. 25 (Ger.) (stating in the English translation that “The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”). [↑](#footnote-ref-217)
218. *See* Ligia M. De Jesus, *The Inter-American Court on Human Rights’ Judgment in Artavia Murillo v. Costa Rica and Its Implications for the Creation of Abortion Rights in the Inter-American System of Human Rights*, 16 Or. Rev. Int’l L. 225, 243 (2014) (explaining that the Federal Court *Artavia* “decision was not binding on the state of Argentina . . . because it was not a party to the dispute”). [↑](#footnote-ref-218)
219. *See id*. para. 1 (noting that the “exclusive power” to modify the lawmaking function and character of a treaty belongs to the States). [↑](#footnote-ref-219)
220. *See generally* Maja Smrkolj, Commentary, *Jan Klabbers. Treaty Conflict and the European Union*, 20 Eur. J. Int’l. L. 1316, 1317 (2009) (introducing the argument that “the law of treaties is not very well equipped when it comes to solving difficult treaty conflicts”). [↑](#footnote-ref-220)
221. Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 Geo. Wash. Int’l L. Rev. 573, 576 (2005). [↑](#footnote-ref-221)
222. *See* Human Rights Council Res. 26/9, *supra* note 6, at 3 (listing all 20 states that stood in favor of the IGWG’s Mandate resolution). [↑](#footnote-ref-222)
223. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599, 2603 (1997) (reviewing Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1995) and Thomas M. Franck, Fairness in International Law and Institutions (1995)) (noting that the “internalization of international norms into domestic legal systems is pivotal to understanding why nations ‘obey’ international law”). [↑](#footnote-ref-223)
224. *See id.* at 2639–40 (explaining that in international human rights law, the nation-states who are parties to the treaty do not have the authority to determine if a legal norm has been violated, thus inferring that such norms are uniformly applied across all states). [↑](#footnote-ref-224)
225. *See* S. James Anaya, Indigenous Peoples in International Law 132 (1996) (emphasizing that “the juridical character of historical and contemporary agreements with indigenous peoples is unclear” within international law, and that “treaties have not actively been regarded by states and international institutions as having the same character as treaties between recognized independent states”). [↑](#footnote-ref-225)
226. *See generally* Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, Vand. L. Rev. 649, 657–70 (2006) (discussing theories and mechanisms of institutional change in international organizations). [↑](#footnote-ref-226)
227. *See* Borgen, *supra* note 212, at 579 (citing the Vienna Convention on the Law of Treaty’s definition of a treaty as “an international agreement concluded between States in a written form and governed by international law”). [↑](#footnote-ref-227)
228. *See* Koh, *supra* note 214, at 2601 (quoting Abram and Antonia Chayes who state that “[T]he fundamental instrument for maintaining compliance with treaties at an acceptable level . . . is an iterative process of discourse among the parties, the treaty organization, and the wider public”). [↑](#footnote-ref-228)
229. *See* Helfer, *supra* note 217, at 670 (distinguishing a “rational choice” theory of institutional change from historical institutionalism and neo-functionalism by explaining that in the former, international organizations are “faithful agents and respond to controls by States principals”). [↑](#footnote-ref-229)
230. *See id.* (stating that in a “rational choice” theory, States “abandon” international organizations and, instead, “establish a rival institution”). [↑](#footnote-ref-230)
231. *See* Organisation for Econ. Co-Operation & Dev., OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones 9 (2006), http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf [https://perma.cc/FS9M-R5QE] (emphasizing that in the international business sector, “weak governance zones represent some of the most challenging investment environments in the world”). [↑](#footnote-ref-231)
232. *See id.* (functioning as a chief example of one such model that has been developed by international actors in recent years). [↑](#footnote-ref-232)
233. *See* John Ruggie (Special Representative of the Secretary-General), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, para. 7, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (discussing how to support “business respect for human rights in conflict-affected areas”). [↑](#footnote-ref-233)
234. *See id.* at 11 (explaining that “[s]ome of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself – where the human rights regime cannot be expected to function as intended”). [↑](#footnote-ref-234)
235. *See id.* (discussing that “greater policy coherence” in such situations can be achieved by enabling States to “foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies”). [↑](#footnote-ref-235)
236. *See* Larry Catá Backer, *Corporate Social Responsibility in Weak Governance Zones*, 14 Santa Clara J. Int’l. L. 297, 302–08 (2016) [hereinafter *Fact 1*] (discussing the public responsibility of enterprises and the concerns of extreme autonomy of states). [↑](#footnote-ref-236)
237. *See* Damiano de Felice, *Challenges and opportunities in the production of business and human rights indicators to measure the corporate responsibility to respect*, 37 Hum. Rts. Q. 1, 4 (2015) (discussing the importance of developing methodologies to examine “*whether* and *how much* corporations are meeting their responsibility to respect human rights”) (emphasis added). [↑](#footnote-ref-237)
238. *See id.* at 2–3 (stating that “business enterprises are expected to act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved”). [↑](#footnote-ref-238)
239. *See* Tara J. Melish, *Putting ‘Human Rights’ Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights* 7 (SUNY Buffalo L. Sch., Working Paper No. 2014-032, 2014), http://ssrn.com/abstract=2475629 [https://perma.cc/3M6Z-MAR6] (underscoring that human rights groups “insist that genuine social transformation occurs only when affected communities *themselves* have the power and voice to engage decision making processes that affect their lives, as active subjects of law, not mere objects”). [↑](#footnote-ref-239)
240. *See id.* at 9–10 (suggesting a human rights approach to social change that incorporates both public and private units that work towards “pursuing the goals in locally appropriate ways” as well as a “system for revising goals, metrics and decision making procedures” through a wide use of institutional actors and stakeholders). [↑](#footnote-ref-240)
241. *See* Larry Catá Backer, *Pragmatism Without Principle?: How a Comprehensive Treaty on Business and Human Rights Ought to Be Framed, Why it Can’t, and the Dangers of the Pragmatic Turn in Treaty Crafting*, Soc. Sci. Res. Network 19 (Feb. 18, 2016) http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2734399 [https://perma.cc/3AEK-R9ZE]) [hereinafter *Fact 2*] (citing Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004)) (discussing that process provisions “touch on issues of judicalization of social relations, of the distribution of power among political actors and the judiciary, [and] on accountability for a remedial mechanism that at once must be responsive to law as a political instrument”). [↑](#footnote-ref-241)
242. *See generally* Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Non-Legal Institutions of Remedy*, 42 Loy. L.A. L. Rev. 949, 957–64 (2009) (discussing remedy institutions for civil justice problems). [↑](#footnote-ref-242)
243. *See id.* at 962–64 (discussing how formal remedy institutions result in an inequality in access to justice to those who experience them). [↑](#footnote-ref-243)
244. Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism 222 (2004). [↑](#footnote-ref-244)
245. *Id.* [↑](#footnote-ref-245)
246. *See id.* (discussing the “transformative impact on political discourse” that has been established by the “existence of a political environment conducive to judicial empowerment” in judiciaries across nation-states). [↑](#footnote-ref-246)
247. *See id.* at 221 (emphasizing the impact that a growing deference to the judiciary has created and the “growing reliance on adjudicative means for clarifying and settling fundamental moral controversies and highly contentious political questions”); *see also* Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 Eur. J. Int’l L. 187, 194 (2006) (stating that “accountability and transparency more probably derive . . . from the good governance agenda”). [↑](#footnote-ref-247)
248. *See* Yves Dezalay & Bryant G. Garth, The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States 163–71 (2010) (explaining that as the legal field became increasingly business-oriented, there resulted various hierarchies and emerging power dynamics); *see also* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 Hastings L.J. 805, 808 (1987) (discussing that the competition for judicial control leads to “a structure of differential professional prestige and power attaching to legal subspecialties” and a form of hierarchy). [↑](#footnote-ref-248)
249. *See* Hirschl, *supra* note 235, at 221–22 (distinguishing between national high courts and supranational tribunals as they emerge as “key factors in international politics”). [↑](#footnote-ref-249)
250. *Id.* at 221 (describing the kinds of “constitutional controversies” that have been assigned to the national high courts of certain nations). [↑](#footnote-ref-250)
251. *Id.* at 222 (emphasizing that the choice of determining the kind of forum and law to adjudicate a political controversy has “expanded to become a multifaceted phenomenon, extending well beyond the now-standard concept of judge-made policy-making through constitutional rights jurisprudence and judicial redrawing of legislative boundaries”). [↑](#footnote-ref-251)
252. *See* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. Pa. L. Rev. 687, 693–95 (1998) (discussing the need for developing an international uniformity within international law that includes the participation of courts of various sovereign member nations); *see also* Sara Seck, *Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations*, 3 Trade L. & Dev. 164, 165–70 (2011) (reconsidering the character of states’ extraterritoriality in the context of public international law). [↑](#footnote-ref-252)
253. *See* Van Alstine, *supra* note 243, at 693 (arguing that “the delegation of lawmaking authority amounts to an instruction to the federal judiciary to participate with courts of other member nations in fashioning an international common law around the frame of an international convention”). [↑](#footnote-ref-253)
254. *See* David Bilchitz, *Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law*, 23 Ind. J. Comp. Legal Stud. 143, 166–70 (2016) (discussing that examining fundamental rights within a constitutional order requires a focus on “ensuring that individuals’ fundamental interests are realized” and a consideration of the public and private natures of agents and institutions”). [↑](#footnote-ref-254)
255. *See* Rafael Leal-Arcas, *The EU Institutions and Their Modus Operandi in the World Trading System*, 12 Colum. J. Eur. L. 125, 145 (2006) (highlighting trade policy within the European Union to illustrate how “the inter-relationship between national and supra-national levels is of high importance” and emphasize the need for member states to support EU trade institutions); *see also* Steven Bibas, *The European Court of Justice and the U.S. Supreme Court: Parallels in Fundamental Rights Jurisprudence*, 15 Hastings Int’l & Comp. L. Rev. 253, 255 (1992) (explaining how the “Treaties formed a new legal order” in establishing a common market, stating that “the system is both proto-federal and supranational, not purely international”). [↑](#footnote-ref-255)
256. *See* Mike Burstein, *The Will to Enforce: An Examination of the Political Constraints Upon a Regional Court of Human Rights*, 24 Berkeley J. Int’l L. 423, 423–35 (2006) (emphasizing that in spite of the purpose of supranational human rights courts, there are political constraints that limit their operations and judgments). [↑](#footnote-ref-256)
257. *See Fact 2*, *supra* note 232, at 12–13 (explaining how an internationalizing focus “enhances coherence and harmonization but reduces state autonomy,” while a state-centered focus “enhances state autonomy but reduces the coherence of the norms”). [↑](#footnote-ref-257)
258. *Id.* (“An internationalizing focus would result in a move toward establishment of centralized administration in an international organization . . . . [which] enhances coherence and harmonization but reduces state autonomy.”); *see also* Burstein, *supra* note 247, at 425 (explaining that “there is reason to believe that the interests of the court and those of the member states are effectively in opposition in many instances”). [↑](#footnote-ref-258)
259. *See* Smrkolj, *supra* note 211, at 1317 (quoting Jan Klabbers in concluding that “legal order can accommodate diverging values and create methods for conciliation, discussion and debate, but it ‘cannot place one value systematically over another one without becoming incoherent’”). [↑](#footnote-ref-259)
260. *See* Kristin N. Wuerffel, *Discriminating Among Rights?: A Nation’s Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law*, 33 Val. U. L. Rev. 369, 370–72 (1998) (explaining that states must act autonomously or on a regional basis in order to protect and enforce human rights on an international scale, though such actions “may inhibit real protection”). [↑](#footnote-ref-260)
261. *See* Meron, *supra* note 204, at 3–4 (discussing the hierarchy of well-established norms in international law). [↑](#footnote-ref-261)
262. *See* Hirschl, *supra* note 235, at 221–22 (discussing how national high courts have evolved into “major political decision-making bodies, and there has been an emerging presence of “numerous quasi-judicial tribunals, panels, and commissions”). [↑](#footnote-ref-262)
263. *See* Sandefur, *supra* note 233, at 957–62 (discussing formal institutions of remedies). [↑](#footnote-ref-263)
264. *See infra* pp. 43–46. [↑](#footnote-ref-264)
265. *See* Sandefur, *supra* note 233, at 950 (explaining the importance of access to civil justice, which includes the creation of a “more comprehensive legal aid system” and the expansion of “support for people utilizing the court system without the assistance of attorneys”). [↑](#footnote-ref-265)
266. *See* Jordan J. Paust, *Kiobel, Corporate Liability, and the Extraterritorial Reach of the ATS*, 53 Va. J. Int’l L. Dig. 18, 20–29 (2012) (arguing that universal jurisdiction over violations of international law already exists within the U.S. jurisprudence); *see also* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Va. J. Int’l L. 81, 96–104 (2002) (discussing the theoretical foundation of universal jurisdiction). [↑](#footnote-ref-266)
267. *See generally* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 Harv. Int’l L.J. 183, 184 (2004) (“Universal jurisdiction can have dangerous consequences, especially in the absence of generally accepted limitations on its scope.”); *see also* Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, Foreign Affairs para. 19 (July/Aug. 2001), https://www.globalpolicy.org/component/content/article/163/28174.html [https://perma.cc/3UTQ-P9AC] (explaining that because many issues are “much more vague and depend on an understanding of the historical and political context,” the universal jurisdiction doctrine is difficult to apply). [↑](#footnote-ref-267)
268. *See* Organisation for Econ. Co-operation & Dev., The OECD Guidelines for Multinational Enterprises 2–3 (2001), http://www.oecd.org/investment/mne/1903291.pdf [https://perma.cc/2V94-ZEVK] (listing the various principles and non-judicial remedial measures underlying the OECD Guidelines). [↑](#footnote-ref-268)
269. *See* Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice*, 40 Fam. Ct. Rev. 36, 38 (2002) (quoting Professor Luban, that “Equality before the law, like universal suffrage, holds a privileged place in our political system, and to deny equality before the law delegitimizes that system”). [↑](#footnote-ref-269)
270. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 460 (2004) (“Plausible causes for this decline include a shift in ideology and practice among litigants, lawyers, and judges . . . . trials are declining not only in relation to cases in the courts but to the size of the population and the size of the economy.”). [↑](#footnote-ref-270)
271. *See* Goldschmidt, *supra* note 260, at 38; *see also* The World Bank, Justice for the Poor 1 (2016), http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/JusticeforthePoor-TwoPager.pdf [https://perma.cc/4Y88-R3E3] (describing the J4P program as one that “supports the emergence of equitable justice systems”). [↑](#footnote-ref-271)
272. *But see* Lorraine Wright Feuerstein, *Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*, 23 Pepp. L. Rev. 125, 130–31 (1995) (discussing that “some form of fee shifting” might prove to be an effective rationale for ensuring “simple justice,” which is a concept that would have “‘intuitive’ public appeal”). [↑](#footnote-ref-272)
273. *See* Council Directive 2002/8, art. 7, 2003 O.J. (L 26) 41, 41 (EC) (regarding legal aid costs that relate to the dispute’s cross-border nature). [↑](#footnote-ref-273)
274. *See generally* Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 Fordham L. Rev. 969 (2004) (addressing the various inequalities that exist in the market for justice). [↑](#footnote-ref-274)
275. *See generally* Larry Catá Backer, *From Guiding Principles to Interpretive Organizations: Developing a Framework for Applying the UNGPs to Disputes that Institutionalizes the Advocacy Role of Civil Society* (Pa. St. L., Working Paper No. 40-2014, 2014), http://ssrn.com/abstract=2501167 [https://perma.cc/3D7F-987N] (discussing the significant role of international human rights NGOs in present day institutional governance). [↑](#footnote-ref-275)
276. *See generally* Robin F. Hansen, *Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill*, 26 Berkeley J. Int’l L. 410 (2008) (discussing how multi-jurisdictional enterprises may strategically allocate resources among states to take advantage of the state system’s ideology of minimizing their collective liability for harms incurred). [↑](#footnote-ref-276)
277. *See generally Fact 2*, *supra* note 232 (discussing the risks of framing a pragmatic, comprehensive treaty on business and human rights). [↑](#footnote-ref-277)
278. *Id.* [↑](#footnote-ref-278)
279. *Id.* [↑](#footnote-ref-279)
280. *Id.* at 6–10 (stating the objectives of the IGWG Mandate and claiming that “[c]ivil society groups, including business, no longer have even the appearance of privileged participating in this process that is meant to be . . . state driven”). [↑](#footnote-ref-280)
281. *But see* Human Rights Council Res. 26/9, *supra* note 6, para. 7 (“*Stressing* that the obligations and primary responsibility to promote and protect human rights and fundamental freedoms lie with the State . . . .”). [↑](#footnote-ref-281)
282. *See* Human Rights Council Res. 26/9, *supra* note 6 (emphasizing the responsibilities of States to “promote and protect human rights and fundamental freedoms” as well as the responsibilities of business enterprises). [↑](#footnote-ref-282)
283. *See id*.para. 10 (explaining that “transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth, as well as causing adverse impacts on human rights”). [↑](#footnote-ref-283)
284. *See supra* Section II. [↑](#footnote-ref-284)
285. *See generally* Human Rights Council Res. 26/9, *supra* note 6 (outlining the framework of an “international legally binding instrument on transnational corporations and other business enterprises”). [↑](#footnote-ref-285)
286. *See supra* Section III. [↑](#footnote-ref-286)
287. *See supra* Section III.A. [↑](#footnote-ref-287)
288. *See* Garcia, *supra* note 207, at 12 (describing self-executing treaty provisions as those that “require implementing legislation to provide U.S. agencies with legal authority to carry out the [agreement’s] functions and obligations”). [↑](#footnote-ref-288)
289. *See generally* Meron, *supra* note 204 (discussing the pitfalls of the jus cogens principle). [↑](#footnote-ref-289)
290. *See supra* Section III.B. [↑](#footnote-ref-290)
291. *See generally* Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 Tulsa L.J. 541 (2006) (examining asset partitioning as it relates to the multinational enterprise and discussing institutional autonomy as it relates to economic entities). [↑](#footnote-ref-291)
292. *See* Bourdieu, *supra* note 239, at 808 (discussing the “differential professional prestige and power attaching to legal subspecialities,” and thus inferring that a compromise without principle might result in more elite groups taking control of negotiations). [↑](#footnote-ref-292)
293. *See supra* Section III.B. [↑](#footnote-ref-293)
294. *See* Smrkolj, *supra* note 211, at 1317 (“For treaty conflicts that are an expression of value conflict, such as in the case of a clash between a human rights and a trade conflict, the provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT) cannot offer any helpful guidance.”). [↑](#footnote-ref-294)
295. *See Fact 2*, *supra* note 232, at 12–13 (explaining how an internationalizing focus “enhances coherence and harmonization but reduces state autonomy”). [↑](#footnote-ref-295)
296. *Id*. [↑](#footnote-ref-296)
297. Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, *in* Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese 595, 597 (Lal Chand Vohrah et al. eds., 2003). [↑](#footnote-ref-297)
298. *See e.g.*,Paola Gaeta, *Inherent Powers of International Courts and Tribunals*, *in* Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese 353, 368–69 (Lal Chand Vohrah et al. eds., 2003) (noting that the inherent powers of international judicial organs may result in an “‘outside impact’ . . . [by limiting] the freedom of States or other international entities”). [↑](#footnote-ref-298)
299. *See supra* Section III.C. [↑](#footnote-ref-299)
300. *See id*. [↑](#footnote-ref-300)
301. *See id*. [↑](#footnote-ref-301)
302. *See* Koh, *supra* note 214, at 2638 (theorizing that “the treaty regime has assumed a managerial role with regard to the compliance of its member states,” and “invoked, interpreted, and elaborated [norms] in a way that generates pressure for compliance”); *see also* Borgen, *supra* note 212, at 574 (“The very success of treaties as a policy tool has caused a new dilemma: a surfeit of treaties that often overlap and, with increasing frequency, conflict with one another.”). [↑](#footnote-ref-302)
303. *See* Ruggie, *supra* note 224, para. 14 (explaining how the purpose behind the Guiding Principles is to integrate “them within a single, logically coherent and comprehensive template . . . and identifying where the current regime falls short and how it should be improved”). [↑](#footnote-ref-303)
304. *See e.g.* Borgen, *supra* note 212, at 646 (emphasizing that treaty conflicts stem from “the lack of consistent and effective means of resolving such conflicts” and proposing that international law may become more coherent by the establishment of “better rules to interpret and resolve conflicts between norms”). [↑](#footnote-ref-304)
305. *E.g. The Spirit of Principled Pragmatism*, Economist para. 2 (Nov. 15, 2007) , http://www.economist.com/node/10120161 [https://perma.cc/JRG3-5VB3] [hereinafter *The spirit of principled pragmatism*] (emphasizing that the “spirit of principled pragmatism” encompasses dealing with complex problems “comprehensively, in their full economic, social and political dimension”) (citing Ban Ki-moon). [↑](#footnote-ref-305)
306. Cf. Robert Pear, *If only Laws Were Like Sausages* New York Times Week in Review (Dec. 10, 2010), http://www.nytimes.com/2010/12/05/weekinreview/05pear.html [https://perma.cc/U23X-FPWM] (discussing the politics behind unwieldy and lengthy bills and the generally “messy” legislative process). [↑](#footnote-ref-306)
307. *See* Helfer, *supra* note 217, at 670 (presenting the various theories of change in international organizations as they constitute different types of frameworks). [↑](#footnote-ref-307)
308. *See* Nieto-Navia, *supra* note 288, at 594 (explaining that principles of international law declare that “no State may derogate by way of treaty”). [↑](#footnote-ref-308)
309. *See e.g.*,Ruggie, *supra* note 224, annex Section I.B.3 (noting that laws and policies “should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards”). [↑](#footnote-ref-309)
310. *But see*,Sara McBrearty, *The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity*, 57 Harv. Int’l L.J. 11, 13–14 (2016) (“The exclusion of domestic corporations would create an uneven playing field, giving domestic and state-owned corporations significant advantages over foreign competitors, who would be held to a different and higher standard.”). [↑](#footnote-ref-310)
311. *Id.* at 14 (explaining that “an exclusive approach would ultimately limit support for the treaty and reverse the collaborative and cumulative progress of the [guiding principles]”). [↑](#footnote-ref-311)
312. Consider in this light the difficulty of subordinating national courts to the rulings of regional human rights courts. *See generally* Alexandra Hunees, *Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights in* Cultures of Legality: Judicialization and Political Activism in Latin America 112 (Javier A. Couso, Alexandra Huneeus and Rachel Sieder, eds., Cambridge, 2010). [↑](#footnote-ref-312)
313. Ruggie, *supra* note 224. [↑](#footnote-ref-313)
314. John Ruggie (Special Representative of the Secretary-General), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, para. 17–26, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Protect, Respect*] (outlining the “protect, respect and remedy” framework). [↑](#footnote-ref-314)
315. *See id.*; *see also Principled pragmatism*, *supra* note 52, para. 8(“Operating from a position of ‘principled pragmatism,’ Ruggie said he had set out to close the governance gaps which ‘provide the permissive environment for wrongful acts by companies of all kinds without adequate sanction or reparation.’”). [↑](#footnote-ref-315)
316. *See generally Human Rights Reporting and Assurance Frameworks Initiative*, Shift (Nov. 2012), http://www.shiftproject.org/resources/collaborations/human-rights-reporting-assurance-frameworks-initiative/ [https://perma.cc/69TL-BVQV] (providing an example of an NGO – SHIFT – that has been working toward a framework for operationalization). [↑](#footnote-ref-316)
317. John G. Ruggie, Just Business: Multinational Corporations and Human Rights 55 (2013). [↑](#footnote-ref-317)
318. *The spirit of principled pragmatism*, *supra* note 296, para. 8. [↑](#footnote-ref-318)
319. *Id.* para. 4. [↑](#footnote-ref-319)
320. *Id.* para. 2. [↑](#footnote-ref-320)
321. *Protect, Respect*, *supra* note 305, at 83. [↑](#footnote-ref-321)
322. *Principled pragmatism*, *supra* note 52, para. 3. [↑](#footnote-ref-322)
323. *See e.g.*, *Principled pragmatism*, *supra* note 52, para. 8 (quoting John Ruggie in acknowledging that gaps in governance structures “‘provide the permissive environment for wrongful acts by companies of all kinds without adequate sanction or reparation’”). [↑](#footnote-ref-323)
324. *The spirit of principled pragmatism*, *supra* note 296, para. 1. [↑](#footnote-ref-324)
325. Christopher H. Schroeder, *Some Notes on a Principled Pragmatism*, 95 Calif. L. Rev. 1703, 1709 (2007). [↑](#footnote-ref-325)
326. *The spirit of principled pragmatism*, *supra* note 296, para. 5. [↑](#footnote-ref-326)
327. *Protect, Respect*, *supra* note 305, at 78–80. [↑](#footnote-ref-327)
328. Peter F. Drucker, The Practice of Management 126 (1954). [↑](#footnote-ref-328)
329. *See e.g.*, *id.* at 136(discussing how the “management by objectives” theory “motivates the manager to action not because somebody tells him to do something or talks him into doing it, but because the objective needs of his task demand it”). [↑](#footnote-ref-329)
330. *Protect, Respect*,, *supra* note 305, at 78–80. [↑](#footnote-ref-330)
331. *See id.* (noting that state and business agendas reflect “the different social roles of the actors who are expected to meet those responsibilities,” and suggesting that the reason why “polycentric governance” is not a “more coherent system capable of truly moving markets is the lack of an authoritative focal point around which the expectations and behavior of the relevant actors can converge”). [↑](#footnote-ref-331)
332. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19 (1959). [↑](#footnote-ref-332)
333. That, after all, is the essence of the “affirmative action” debates not just in the United States but in other States as well. *See* Laura Dudley Jenkins, *Race, Caste and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States*, 36 Conn. L. Rev. 747, 747 (2004) (“Historically, social scientists have participated in constructing and reinforcing racism through colonial anthropology and ‘scientific racism.’”). *See generally* M. Varn Chandola, *Affirmative action in India and the United States: The untouchable and black experience*, 3 Ind. Int’l & Comp. L. Rev. 101 (1992) (discussing affirmative action and how different countries deal with equal protection;Barry Sautman, *Scaling Back Minority Rights? The Debate About China’s Ethnic Policies*, 46 Stan. J. Int’l L. 51 (2010) (discussing the how China’s historical trajectory has influenced its government’s policy responses to ethnic minorities’ rights). [↑](#footnote-ref-333)
334. The notion is essentially semiotic, in the sense that meaning and interpretation are themselves the product of the organization of object and its signification among a community that together must choose an interpretation for both object and sign. “Take expressions such as ‘freedom’ or ‘liberal’, diversity’ or ‘tolerance.’ They can mean totally different social practices, some of them clearly hidden in the deep structures of explorative social practices embedded in capitalism and its liberal ideology.” Jan M. Broekman and Larry Cata Backer, Lawyers Making Meaning: The Semiotics of Law in Legal Education II 80 (Springer, 2013). [↑](#footnote-ref-334)
335. The readings of *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) serves as an example. *See* Lawyers Making Meaning, *supra* note 325, 155–180. [↑](#footnote-ref-335)
336. *See* Christopher Hookway, The Pragmatic Maxim: Essays on Peirce and pragmatism 165-181 (Oxford, 2012) (noting Pierce’s expression of pragmatism as “the possible practical consequences of a concept constitute the sum total of the concept”) *Id. at* 167. [↑](#footnote-ref-336)
337. *Id.* at 181. [↑](#footnote-ref-337)
338. Penelope Simons, A Framework treaty to regulate transnational corporations (forthcoming 2016). [↑](#footnote-ref-338)
339. *See* Albert Atkin, *Charles Sanders Peirce*, Internet Encyclopedia Phil. para. 30, http://www.iep.utm.edu/peircebi/ [https://perma.cc/TPH8-9YWD] (“Pragmatism . . . takes the meaning of a concept to depend upon its practical bearings.”). *See generally* Charles S. Peirce, *How To Make Our Ideas Clear*,12 Popular Sci. Monthly 286 (1878) (discussing, in part, the concept of truth and clarity of principles). [↑](#footnote-ref-339)
340. *See generally,* Aharon Barak, Purposive Interpretation in Law 286–90 (2005) (discussing how pragmatism is a dynamic concept that considers “the totality of components – text, authorial intent, and the intent of the reasonable author and of the system . . .”). [↑](#footnote-ref-340)
341. *See generally,* Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. Pa. L. Rev. 907 (1983) (discussing the ambivalence of the principle of race-consciousness and its effect on initiating race-conscious action). [↑](#footnote-ref-341)
342. Ruggie, *supra* note 224, para. 14 (“The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses . . . ”). [↑](#footnote-ref-342)
343. *See* discussion, text and *supra* notes 326–29. [↑](#footnote-ref-343)
344. *See* Barak, *supra* note 331, at 288–89 (discussing pragmatic systems of purposive interpretation). [↑](#footnote-ref-344)
345. *See e.g.*, *Protect, Respect,*,*supra* note 305, at 82 (“The second [pillar] is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.”). [↑](#footnote-ref-345)
346. *See id.* (describing the first pillar as the state’s “duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication”). [↑](#footnote-ref-346)
347. *See id.* (explaining that each of the three pillars “is an essential component in an interrelated and dynamic system of preventative and remedial measures . . . ”). [↑](#footnote-ref-347)
348. *See Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Hum. Rts. Off. High Comm’r, http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx [https://perma.cc/B5VT-EJG7] (noting that in “June 2014 at its twenty-sixth session (in resolution 26/22), the Human Rights Council decided to extend the Working Group’s mandate for a period of three years”). [↑](#footnote-ref-348)
349. Human Rights Council Res. 26/9, *supra*note 6, para. 11. [↑](#footnote-ref-349)
350. *See* *id.* (noting that the principles that underlie the newly-established “intergovernmental working group” will require a mandate that “shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”). [↑](#footnote-ref-350)
351. John Ruggie, *A Business and Human Rights Treaty? International legalisation as precision tools*, Inst. Hum. Rts. & Bus. para. 4 (June 13, 2014), https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-international-legalisation-as-precision [https://perma.cc/7RGN-QGLN] [hereinafter “A Business”]. [↑](#footnote-ref-351)
352. *Cf.* Avishai Margalit, On Compromise and Rotten Compromises (2009). [↑](#footnote-ref-352)
353. *See e.g*., *Global Movement for a Binding Treaty*, Treaty Alliance, http://www.treatymovement.com/statement/ [https://perma.cc/6NWC-YPB7] (presenting the signatories and stakeholder groups who are willing to support the international legal framework of protecting human rights through business operations). [↑](#footnote-ref-353)
354. *See generally* Amy Gutmann & Dennis Thompson, *The Mindsets of Political Compromise*, 8 Persp. Pol. 1125 (2010) (discussing how political compromises require the adaptation of one’s principles while respecting the principles of opponents). [↑](#footnote-ref-354)
355. Cf., Robert A. Dahl, A Preface to Democratic Theory (U. Chi. Press, 1956) (“Prior to politics, beneath it, enveloping it, restricting it, conditioning it, is the underlying consensus on policy that usually exists in the society among a predominant portion of the politically active members.”) *Id.* at 132. That underlying consensus may be represented by the Treaty Alliance, supra, for example, among civil society. But that appearance may extend only to the broadest generalized consensus, and it assumes a process by which that group assumes an authority for representation, and the assertion of rights of those represented simply by operation of their existence and their purpose, their raison d’etre. *See* *also* Larry Catá Backer, *Fractured Territories and Abstracted Terrains: The Problem of Representation and Human Rights Governance Regimes Within and Beyond the State*, 23(1) Ind. J. Glob. L. Stud. 61–94 (2016). [↑](#footnote-ref-355)
356. *See*, *e.g.*, Jan Aart Scholte, Civil Society and Democracy in Global Governance, CSGR Working Paper No. 65/01 (Jan. 2011), *available at* http://wrap.warwick.ac.uk/2060/1/WRAP\_Scholte\_wp6501.pdf. [↑](#footnote-ref-356)
357. See, e.g., Larry Catá Backer, Keren Wang, Nabih Haddad and Tomonori Teraoka, *Democratizing the Global Business and Human Rights Project by Catalyzing Strategic Litigation From the Bottom Up, in* Human Rights and Business: Moving Forward, Looking Back 254-287 (Jena Martin and Karen Erica Bravo, eds., Cambridge University Press, 2015). [↑](#footnote-ref-357)
358. *Cf.* Roy S. Lee, *Introduction,* The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results 1, 13–38 (Roy S.K. Lee, ed., Kluwer, 1999). [↑](#footnote-ref-358)
359. *See e.g.*,John G. Ruggie, *Third United Nations Forum on Business & Human Rights Closing Plenary Remarks*, Harv. Kennedy Sch. Gov’t. (2014), http://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie\_SR\_SG\_BHR.pdf [https://perma.cc/3WPW-TA2C]. [↑](#footnote-ref-359)
360. Human Rights Council Res. 26/9, *supra*note 6, para. 11. [↑](#footnote-ref-360)
361. *See supra* Section IV. [↑](#footnote-ref-361)
362. *See supra* Section IV. [↑](#footnote-ref-362)
363. *See* Thalif Deen, *After Losing Vote, U.S.-EU Threaten to Undermine Treaty*, Inter Press Serv. para. 4 (June 28, 2014), http://www.ipsnews.net/2014/06/after-losing-vote-u-s-eu-threaten-to-undermine-treaty/ [https://perma.cc/5FFB-B8V6] (discussing how the U.S. and EU “have warned they would not cooperate with an intergovernmental working group (IGWG) which is to be established to lay down ground rules for negotiating the proposed treaty”). [↑](#footnote-ref-363)
364. *See e.g*., Sheldon Leader*, Coherence, Mutual Assurance, and the Rationale for the Treaty* in Building a Treaty on Business and Human Rights (Surya Deva and David Bilchitz, eds., Cambridge U. Press, forthcoming 2017) (draft on file with author). [↑](#footnote-ref-364)
365. See discussion text and notes 55–101. [↑](#footnote-ref-365)
366. See discussion text and notes 137–141. [↑](#footnote-ref-366)
367. See discussion text and notes 102–140. [↑](#footnote-ref-367)
368. See discussion at text and notes 141–269. [↑](#footnote-ref-368)
369. *See* Keren G. Raz, *Toward an Improved Legal Form for Social Enterprise*, 36 N.Y.U. Rev. L. & Soc. Change 283 (2012) (discussing the discourse surrounding legal structures and social enterprises); *see generally* Amnesty Int’l, Injustice Incorporated: Corporate Abuses and the Human Right to Remedy (2014) [hereinafter Amnesty Int’l] (noting that corporations have a responsibility to respect and protect all human rights). [↑](#footnote-ref-369)
370. *See* Amnesty Int’l, *supra* note 359, at 187 (2014). [↑](#footnote-ref-370)
371. *See* Amnesty Int’l, *supra* note 359, at 187 (2014). [↑](#footnote-ref-371)
372. *See generally* Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, 16 Ind. J. Global Stud. 85 (2009) (discussing that religious groups have “accepted the legitimacy of transnational constitutionalism as a disciplining force but have rejected the notion that such [normative constraints on constitution making] can be the product of a secular global political consensus”). [↑](#footnote-ref-372)
373. *See* Jean L. Cohen, *Constitutionalism Beyond the State*, Human. J. (2014), http://humanityjournal.org/wp-content/uploads/2014/06/2.1-Constitutionalism-beyond-the-State.pdf [https://perma.cc/2LYD-CZK4]. [↑](#footnote-ref-373)
374. *See* Hirschl, *supra* note 235, at 100–48 (discussing the judicial interpretation of rights and access to justice). [↑](#footnote-ref-374)
375. Larry Catá Backer, *Realizing Socio-Economic Rights Under Emerging Global Regulatory Frameworks: The Potential Impact of Privatization and the Role of Companies in China and India*,45 Geo. Wash. Int’l L. Rev. 615 (2013). [↑](#footnote-ref-375)
376. That is, human rights relates to the overall process of moving society toward socialist modernization which imposes the obligation to ensure regimes of rights as obligations of the state in the attainment of its political objectives. Effectively that translates into an obligation of the state to ensure the economic, social and cultural rights of individuals as a prelude to the construction of civil and political rights which thereafter develop. *See* Larry Catá Backer*, The Role of Socio-Economic Rights in India and China Under Emerging Global Regulatory Framework* in Socio-Economic Rights In Emerging Free Markets: Comparative Insights From India And China 44–70 (Surya Deva, ed., London: Routledge, 2015). [↑](#footnote-ref-376)
377. [↑](#footnote-ref-377)
378. *See* *generally* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law*, 37 Colum. Hum. Rts. L. Rev. 101 (2006) (discussing the regulation of corporations). [↑](#footnote-ref-378)
379. *Cf.* Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 Denv. U. L. Rev. 183 (2010). [↑](#footnote-ref-379)
380. This is particularly important in the context of a parent corporation’s obligations for the liabilities of its subsidiaries or of enterprises with which it has a substantial economic relationship. c*See* Gwynne Skinner et al., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, Int’l Corp. Accountability Roundtable 83 (Dec. 2013), http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf. [https://perma.cc/8LZT-Q5UY]; *cf.* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. (1991) (evaluating the common scenarios and factors relating to veil piercing). [↑](#footnote-ref-380)
381. *See generally* Anita Ramasastry, *supra* note 184 (“Article explores the relationship of Swiss banks and their tradition of bank secrecy to the activities of a particular group of depositors: war criminals and other human rights violators.”). . [↑](#footnote-ref-381)
382. John Ruggie alluded to these issues in his warnings about the challenge that a treaty project presents. *See* John G. Ruggie, “A U.N. Business and Human Rights Treaty?: An Issues Brief (Jan. 28, 2014), *available at* https://www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf. [↑](#footnote-ref-382)
383. *Cf.* Susan Block-Lieb & Terence C. Halliday, *Incrementalisms in Global Lawmaking*, 32 Brook. J. Int’l L. 1, 52 (2007) (“Consensus building--for that is what produces global law–takes time and political skill. Once we conceptualize incrementalism in these terms, a theoretical and empirical agenda opens up that includes but far exceeds insolvency lawmaking.”). [↑](#footnote-ref-383)
384. *But see* Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles (Surya Deva & David Bilchitz eds., 2013). [↑](#footnote-ref-384)
385. Consider, for example, the laudable recent efforts to produce lists substantive provisions for a treaty elaboration. *See* ESCR-Net FIDH, What Would You Put in a Treaty on Human Rights and Business (May 1, 2016), *available at* https://www.escr-net.org/news/2016/you-design-the-treaty [https://perma.cc/F4HF-Y526]. [↑](#footnote-ref-385)
386. *Id.* (“The briefs are the first in a two-step process to develop ‘Building Blocks’ that discuss options for how key issues for the treaty could be addressed in various ways, in line with the priorities of CSOs.”). *Id*. [↑](#footnote-ref-386)
387. Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument, A/HRC/31/50 (Feb. 5, 2016), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/018/22/PDF/G1601822.pdf Open Element, at pp. 20–22. [↑](#footnote-ref-387)
388. For example, consider David A. Koplow, *Nuclear Kellogg-Briand Pact: Proposing a Treaty for the Renunciation of Nuclear Wars as an Instrument of National Policy*, 42 Syracuse J. Int'l L. & Com. 123 (2014-2015); and generally Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 513-557 (Cambridge U. Press edition, 2006) (examining analytical tropes that seek to demonstrate that international law is either an irrelevant moralist Utopia or a manipulable façade for State interests) [↑](#footnote-ref-388)
389. And indeed there is little by way of thinking of the forms through which the objects of all this effort might be better engaged in the process as the ultimate source of the rights. See, Philip Allott, Eunomia: A New Order for a New World (Oxford, 1993) (an international consitution to which not the countries but the people of this world commit). [↑](#footnote-ref-389)
390. Anita Ramasastry & Douglass Cassel, *White Paper: Options for a Treaty on Business and Human Rights*, 6 Notre Dame J. Int’l & Comp. L. i, iv. (2015). [↑](#footnote-ref-390)
391. *See id.* [↑](#footnote-ref-391)
392. *See id.* [↑](#footnote-ref-392)
393. *Id.* at vi (explaining that the paper “does not attempt to catalogue all treaty options; there are simply too many. It outlines illustrative options, each modeled partly on existing international law binding States in regard to human rights, anti-corruption or environmental law. Each potential template is already either widely ratified or recently adopted. Thus there is reason to believe that its form, at least, may be generally acceptable to States”). [↑](#footnote-ref-393)
394. *See id.* [↑](#footnote-ref-394)
395. *Id.* at ES-3. [↑](#footnote-ref-395)
396. *See text, discussion, and notes* 51–53 [↑](#footnote-ref-396)
397. *See* Larry Catá Backer, *Ruminations 64: Can Pragmatism Be Principled? With Application to the Elaboration to Comprehensive Treaty for Business and Human Rights,* Law at the End of the Day (Sept. 3, 2016), *available at* http://lcbackerblog.blogspot.com/2016/09/ruminations-64-can-pragmatism-be.html [https://perma.cc/JZA8-Q6XW] (especially Tables 1–3: Principles Matrix, Provisions Matrix, and Effects Matrix). [↑](#footnote-ref-397)
398. Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, Jan. 23, 2017, available <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>. [↑](#footnote-ref-398)
399. Remarks of President Donald J. Trump – As Prepared for Delivery, Inaugural Address, Friday, January 20, 2017, Washington, D.C., available <https://www.whitehouse.gov/inaugural-address>; analyzed in Larry Catá Backer, Ruminations 69/Democracy Part 38: "Behold, how good and how pleasant it is for brethren to dwell together in unity!": On President Trump's Inaugural Speech, Law at the End of the Day (Jan 21, 2017) available <http://lcbackerblog.blogspot.com/2017/01/ruminations-69democracy-part-38-behold.html>. [↑](#footnote-ref-399)
400. Larry Catá Backer, The 45th Presidency and Multilateral Treaties--Fear, Loathing and a Repudiation of 20th Century Americanism, Law at the End of the Day (Feb. 2, 2017) available <http://lcbackerblog.blogspot.com/2017/02/the-45th-presidency-and-multilateral.html>. [↑](#footnote-ref-400)
401. *Protect, Respect*,, *supra* note 305, at 81–83 (explaining that the three-pillar framework addresses what should be done as well as how to do it). [↑](#footnote-ref-401)
402. *Id.* at 78–80 (noting that state and business agendas reflect “the different social roles of the actors who are expected to meet those responsibilities,” and suggesting that the reason why “polycentric governance” is not a “more coherent system capable of truly moving markets is the lack of an authoritative focal point around which the expectations and behavior of the relevant actors can converge”); *see also supra* Section III.C. [↑](#footnote-ref-402)
403. *See generally* Avanash Dixit et al., *A Theory of Political Compromise*, Princeton U. (May 1998), https://www.princeton.edu/~fgul/dgg.pdf [https://perma.cc/M27X-MREQ] (discussing the dynamic game of two political parties and the power of the two parties). [↑](#footnote-ref-403)
404. Frédéric Mégret, *The Apology of Utopia: Some Thoughts on Koskenniemian Themes, With Particular Emphasis on Massively Institutionalized International Human Rights Law,* 27 Temple Int’l & Comp. L.J. 455,458 (2013). [↑](#footnote-ref-404)