PART II

CRITICAL ANALYSES OF A TREATY ON BUSINESS AND HUMAN RIGHTS

CONSIDERING A TREATY ON CORPORATIONS AND HUMAN RIGHTS: MOSTLY FAILURES BUT WITH A GLIMMER OF SUCCESS

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1. INTRODUCTION

Is it necessary or advisable to draft a treaty on corporations and human rights? What ought to be the content of that treaty? What ought to be the objectives and implications of such a treaty for enterprises, non-governmental organisations (NGOs), individuals and states? These questions, emerging simultaneously with and in part propelled by the complex transformations that produced

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economic globalisation, were at the foundation of a decades-long and fruitless effort through the United Nations that started in the 1970s with the unsuccessful quest to produce a Code of Conduct for Transnational Corporations[1] and ended with the failure of the draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights in the first years of the 21st century.[2] By 2011, these questions appeared to have been answered as the United Nations Human Rights Council unanimously endorsed what from that time became the UN Guiding Principles for Business and Human Rights (UNGP).[3]

But the UNGP did not prove to be a sufficiently authoritative or comprehensive answer for all stakeholders, key elements of which were not thrilled by events that led to the adoption of the UNGP, and less by the UNGP itself.[4] That discontent was at first internal to the UNGP discussion and discrete, taking definitive form on the eve of the adoption of the UNGP.[5] It became more open and vocal after 2011,[6] and led to substantial mobilisation of political power in the years thereafter as both civil society actors and small and developing states began considering alternatives or supplements to the UNGP and the means to achieve their adoption.[7]

Ironically, the post-endorsement architecture created by the UN Human Rights Council provided a site for advancing and consolidating discontent. The post-UNGP endorsement mechanism is centred on a Working Group.[8]

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1 T Sagafi-nejad and J H Dunning, *The UN and Transnational Corporations* (Indiana University Press, 2008) pp 89–123.

2 See D Weissbrodt and M Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97(4) *American Journal of International Law* 901.

3 Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (United Nations, New York and Geneva, 2011).

4 'Critiques of Guiding Principles by Amnesty Intl., Human Rights Watch, FIDH, others – debate with Ruggie, Business and Human Rights Resource Centre' (*Business & Human Rights Resource Centre*) <http://business-humanrights.org/en/critiques-of-guiding-principles-by-amnesty-intl-human-rights-watch-fidh-others-debate-with-ruggie> accessed 12.12.2016.

5 Amnesty International and others, 'Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights' (*FIDH*, 14.01.2011) <https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf>accessed 12.12.2016.

6 Human Rights Watch, 'UN Human Rights Council: Weak Stance on Business Standards: Global Rules Needed, Not Just Guidance', Human Rights Watch News (16.06.2011) <https://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> accessed 5.12.2017.

7 J G Ruggie, 'The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty', *Institute for Human Rights and Business* (08.07.2014) <http://www.ihrb.org/commentary/past-as-prologue.html> accessed 12.12.2016.

8 The 'Working Group on the issue of human rights and transnational corporations and other business enterprises' was established by the UN Human Rights Council at its 17th Session, UN Human Rights Council, Resolution, *Human rights and transnational corporations and other business enterprises*, A/HRC/17/4 (06.07.2011) <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement> accessed 05.05.2017.

The Working Group is charged, among other things, with bringing states, enterprises, NGOs (and a motley crew of others) together to meet a number of objectives to move the UNGP project forward. But it also became a site for growing criticism of and eventually opposition to the UNGP themselves as the way forward.[9] Within that space, discontent evolved to mobilisation and eventually to the invocation of institutional mechanisms to challenge the primacy of the UNGP as the central element of managing the human rights impacts of economic activity.

Led initially by the members of the UN delegation from Ecuador, and allied eventually with a large collective of NGOs,[10] and states,[11] a movement grew, the purpose of which was to replace the UNGP with a traditional and conventionally drafted multilateral treaty to bind states to a regime of human rights obligations for business enterprises, and through them, to bind such enterprises themselves. By June 2014, three years after it endorsed the UNGP, the UN Human Rights Council moved to establish an open-ended Intergovernmental Working Group (IGWG) to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.[12] Simultaneously, the Human Rights Council indicated its continuing support for the UNGP.[13]

These actions brought into the open long-festering tensions among stakeholders involved in developing governance frameworks to manage the human rights behaviours of enterprises. Its formal manifestation produced a duelling set of resolutions, the first already mentioned proposed by Ecuador and its allies, the other, a resolution drafted by Norway and its allies, supportive of the UNGP and of the role of the Working Group for its embedding within

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9 The tone was set from the first Business and Human Rights Forum. 'The United Nations Forum on Business and Human Rights is a space for representatives and practitioners from civil society, business, government, international organizations and affected stakeholders to take stock of challenges and discuss ways to move forward on putting into practice the Guiding Principles on Business and Human Rights.' See 'Working Group on the issue of human rights and transnational corporations and other business enterprises', *The 4th Annual United Nations Forum on Business and Human Rights: About the Forum*, <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2015ForumBHR.aspx> accessed 04.05.2017.

10 Ruggie, 'The Past as Prologue?', above n 7.

11 The draft that emerged was developed by Ecuador and South Africa and signed also by Bolivia, Cuba and Venezuela. See, Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, Human Rights Council', A/HRC/26/L.22/Rev.1 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement> accessed 20.05.2017.

12 Ibid.

13 Discussed in L C Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All' (2015) 38(2) *Fordham International Law Journal* 457.

states and business enterprises.[14] But these tensions, lurking from the time of the abandonment of the *Norms* project, were not merely a repetition;[15] they represented the transformation of those perspectives, now layered atop changing power dynamics brought on by globalisation.[16] The substantive positions of most stakeholders are now quite clear and well developed, and are quite sharply drawn.[17] To some extent, they appear perhaps irreconcilable and touch on now ancient divisions in global political discourse about the nature of law, the role of the state, the character of non-state actors, the fundamental nature of human rights, and the possibility of an ordering or hierarchy among them.[18] These are important debates, though the essential shape of these debates were well established by the fourth quarter of the last century.[19] There has been little real movement in the debate since, and even less possibility of consensus.

Rather than adding to that discourse, this chapter will consider what the *process* of negotiating the contemplated treaty may reveal about the state of structuring governance frameworks for business and human rights either within the anticipated treaty framework or under the UNGP. For that purpose, I assume that the move towards treaty negotiation is inevitable in some form. I assume further that this move ought to be welcomed, even by those who, like me, view the undertaking as ill conceived, misdirected and doomed to

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14 Human Rights Council, Resolution 26/22, ¶¶ 10–11, 27.06.2014 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/062/40/PDF/G1406240.pdf?OpenElement> accessed 30.05.2017.

15 Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at http://www.unhchr.ch/html/menu2/2/55sub/55sub.htm; D Weissbrodt and M Kruger, above note 2. For a sense of the evolution of the critique, see essays in S Deva and D Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge University Press, 2013.

16 L C Backer, 'Economic Globalization Ascendant and the Crisis of the State: Four Perspective on the Emerging Ideology of the State in the New Global Order' (2006) 17 *La Raza Law Journal* 141 <http://scholarship.law.berkeley.edu/blrlj/vol17/iss1/8> accessed 12.12.2016.

17 J Chaplier, 'EU engagement critical for adoption of strong business & human rights treaty, says NGO', *Business and Human Rights Resource Centre*, 03.09.2015 <http://business-humanrights.org/en/eu-engagement-critical-for-adoption-of-strong-business-human-rights-treaty-says-ngo> accessed 12.12.2016; Joint Civil Society, 'Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights' (*FIDH*, 2011) <https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf> accessed 11.09.2015.

18 J P Doh and T R Guay, 'Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective' (2006) 43(1) *Journal of Management Studies* 47.

19 Discussed in L C 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' (2006) 37 *Columbia Human Rights Law Review* 287.

fail, at least in relation to the purpose for which it was created.[20] What such analysis may reveal is that while the move towards the negotiation of a treaty may show substantial normative and conceptual failures, it also suggests some not inconsiderable successes. The process of treaty negotiation is necessary and advisable, not because it will succeed but precisely because, in its failure, it will move the project of creating a coherent structure for business and human rights governance one step closer to reality. This pattern is becoming visible through the very work of the IGWG. Its first two sessions were 'dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument'.[21]

The object of this chapter, then, is to consider what the process of treaty negotiation reveals about the state of structuring governance frameworks for business and human rights. It undertakes this examination within the context of the questions posed since the 1970s and described at the beginning of this introduction – is a treaty necessary, is it advisable, what ought to be included in such a treaty, and what are the implications of that effort? Section 2 considers the normative and structural difficulties of the move towards a comprehensive business and human rights treaty, the reasons why necessity, advisability, content and implications will produce failure. Section 3 then considers the reasons why the process of getting to failure is so necessary and advisable, both for the process of developing structures of governance for business and human rights, and its substance. Taken together, what may become clear is that even were the move towards a treaty to end in failure, the movement towards more robust governance of the human rights effects of economic activity will emerge stronger.

2. THE FAILURES THAT THE TREATY PROCESS REVEALS

One starts an analysis of this kind in the shadow of the fundamental contradictions on which the treaty negotiation project is built. The first touches

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20 See Backer, 'Moving Forward the U.N. Guiding Principles For Business And Human Rights' above n 13.

21 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', above n 11. The first session was described in '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, 05.02.2016. The second session was reported in 'Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights', A/HRC/34/47, 04.01.2017.

on the unresolved conceptual issue of the relation between state, law and enterprise. The second touches on the unresolved conceptual issue of the nature and hierarchy of human rights embedded in the domestic legal orders of states.

I have spoken to the *conceptual* substantive failures of this return to a treaty model for managing the human rights effects of enterprises.[22] I have also spoken to the roots of these conceptual weaknesses *embedded in historical context* – the still unresolved controversy about the scope of human rights, and precedence of certain human rights over others.[23] With respect to the first, one enters the nebulous realm of controversy over the consequences of the legal personality of non-state actors in public law.[24] With respect to the second, one relives the schismatic battles that tore asunder the Universal Declaration of Human Rights, splitting it irrevocably into a civil and political rights camp and an economic, social and cultural rights camp.[25] Little has changed on that score since the 1970s.[26] The treaty process will not heal this rupture. These two foundational realities will doom the treaty process precisely because they define the gulf that exists not merely between critical stakeholders in the treaty debate, but more importantly because they divide, as strongly as they did after 1945, those states on whose goodwill and good faith the success of the treaty process depends.[27]

The contradictions add an important layer of challenge to any treaty-making enterprise. In this light, questions – whether it is necessary or advisable to draft a treaty on corporations and human rights; what the content of that treaty and its implications could or should be; and related aspects – acquire a more interesting dimension when considered in the process dimensions of the treaty making enterprise. Necessity, advisability, content and implications – these are the stuff of the fundamental failure of the treaty movement in this emerging age of globalisation, of global governance, and of the creation of world power systems in which the grand principles of state primacy and the horizontal equivalence of states has become largely a formal construct belied by the functional realities of

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22 See Backer, 'Moving Forward the U.N. Guiding Principles For Business And Human Rights' above n 13.

23 L C Backer, 'On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context' (2011) 9 *Santa Clara Journal of International Law* 37.

24 On the issue of the legal personality of non-state actors, see, e.g., A Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006.

25 For a discussion of the history of the evolution of the two international covenants, see, e.g., D Okeowo, 'Economic, Social and Cultural Rights: Rights or Privileges?' (2008) <http://dx.doi.org/10.2139/ssrn.1320204> accessed 11.09.2015; M J Perry, 'The Morality of Human Rights: A Nonreligious Ground?' (2005) 54 *Emory Law Journal* 97.

26 Discussed in L C Backer, 'Realizing Socio-Economic Rights Under Emerging Global Regulatory Frameworks: The Potential Impact of Privatization and the Role of Companies in China and India' (2013) 45(4) *The George Washington International Law Review* 615.

27 Backer, 'Moving Forward The UN Guiding Principles for Business and Human Rights' above n 13.

complex multi-systemic and anarchic global governance systems that mark the current global order.

2.1. LET US SPEAK FIRST TO NECESSITY

Much of the discussion about the necessity of the treaty (and certainly its process) focuses on the need to create a legal basis for whatever substantive provisions are eventually adopted and more generally as a necessary step in creating a legal basis for the governance of multinational or transnational enterprises (however defined). Yet necessity is better understood in a different way. The treaty process is necessary as a crucial means by which small and developing states may have their voices heard, may preserve even a semblance of their sovereignty. Small and less developed states have had their sovereignty eroded over the last half century.[28] They find themselves less able to engage in the most basic decisions that affect their internal macro-economic, social, political and cultural policies. These are increasingly in the hands of international organisations, including international financial institutions and unofficial collectives of the most powerful states. International financial institutions have come to manage developing states through the increasingly controversial conditions attached to loans.[29] The larger states have managed similar effects through trade and related agreements.[30] The largest multinational non-governmental actors have also become increasingly important stakeholders in the development of social norms that constitute the foundations of customs and traditions on which behaviours on the ground are practised and disciplined in society and through markets.[31]

That combination of developments has effectively shut small states out of governance.[32] The treaty process is crucial to ensure that small and developing

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28 Backer, 'Economic Globalization Ascendant and the Crisis of the State' above n 16; N Villaroman, 'The Loss of Sovereignty: How International Debt Relief Mechanisms Undermine Economic Self-Determination' (2009) 2(4) *Journal of Law and Politics* 3; W E Murray and J Overton, 'The Inverse Sovereignty Effect: Aid, Scale and Neostructuralism in Oceania' (2011) 52(3) *Asia Pacific Viewpoint* 272.

29 G Bird and D Rowlands, 'The Catalytic Effect of Lending by the International Financial Institutions' (2002) 20(7) *The World Economy* 967.

30 D W Drezner, 'The Power and Peril of International Regime Complexity' (2009) 7(1) *Perspectives on Politics* 65.

31 G Teubner, 'Self-Constitutionalizing TNCs?: On the Linkage of "Private" and "Public" Corporate Codes of Conduct' (2011) 18 *Indiana Journal of Global Legal Studies* 617; N-L Sum, 'Wal-Martization and CSR-ization in Developing Countries' in J C Marques and P Utting (eds), *Corporate Social Responsibility and Regulatory Governance*, Palgrave Macmillan, 2010 pp 50–76; cf. S Bottomly, *The Constitutional Corporation: Rethinking Corporate Governance*, Ashgate, 2007.

32 On the effects of unequal power in the development of international norms, see, e.g., N Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16(3) *European Journal of International Law* 369.

states are not swallowed up by powerful enterprises, developed states and even the largest NGOs, all of which dwarf many of the smaller and less developed states in power and influence in the public sector and within the halls of international organisations. That is what appears from the realities of the treaty process thus far. It is not for nothing that it was a group of developed states, led in part by Ecuador and South Africa, that spearheaded this effort.[33] It is not for nothing that the vote for the resolution to create the open-ended IGWG on transnational corporations and other business enterprises with respect to human rights[34] divided developed from small and developing states.[35] It is not for nothing that a coalition of influential NGOs was necessary to put the finishing touches on the effort to secure an international imprimatur on a treaty-making process.

The treaty process, then, serves as an important means of bringing small and less developed states back into global norm-making processes. But those very processes will end in failure – crushed under the weight of the *substantive agendas* of powerful NGO alliances,[36] influential multinational enterprises (MNEs),[37] rich states,[38] and the international organisations that serve them.[39] But even the treaty *process* itself may consume the small and less developed states that are unable individually to devote the resources necessary to engage in the sort of sustained politics essential to the successful negotiation of the treaty. They are unlikely to sustain a unified front, which may be ground under the agendas and authority of larger states and powerful NGOs. That influence was much in evidence during the first session of the IGWG.[40] Indeed, the so-called

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33 See Business and Human Rights Resource Centre, 'Binding Treaty' <https://business-humanrights.org/en/binding-treaty> accessed 01.06.2017.

34 See above n 11.

35 The Ecuador resolution was supported by developing states and Norway's by developed states. See above n 11 and n 14.

36 For the NGO Alliances supporting the treaty see, e.g., Treaty Alliance, 'Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse' <http://www.treatymovement.com/statement/> accessed 05.09.2015.

37 BIAC and others, 'UN Treaty Process on Business and Human Rights. Initial Observations by the International Business Community on a Way Forward', *United States Council for International Business*, 29.06.2015) <http://www.uscib.org/uscib-content/uploads/2015/07/2015-06-29-Business-observations-on-UN-Treaty-on-Bus-and-Human-Rights.pdf> accessed 11.09.2015.

38 K Lappin, H Pedersen and T Khan, 'Influence of Corporations in Treaty Process Would Undermine Affected Communities' Interests', *Business & Human Rights Resource Centre* <http://business-humanrights.org/en/influence-of-corporations-in-treaty-process-would-undermine-affected-communities%E2%80%99-interests> accessed 09.09.2015.

39 For an example, see, L C Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order' (2011) 18 *Indiana Journal of Global Legal Studies* 751.

40 See, 'Report on the first session of the open-ended intergovernmental working group', above n 21.

Treaty Alliance[41] appears to have a legitimacy of state action that may be denied to small and less developed states. There is irony there. Indeed, consider that the imprimatur might not have been necessary had the initiative come from the Organisation for Economic Co-operation and Development states, the G20 or a coalition led by the influential BRICS countries (Brazil, Russia, India, China and South Africa). Yet the very power dynamics that have made the treaty process necessary will also doom it to failure. And failure here is measured both by the inability to produce a treaty and, as likely, the inability of small and less developed states to retain a significant engagement with the treaty-making process.

2.2. LET US THEN SPEAK TO ADVISABILITY

The treaty-making process is advisable not for the sake of the development of governance architectures within the traditional systems of legal standards generated by international public bodies and transposed into the law of adhering states, but because in the absence of such an effort there will be no architecture and no law to speak of.[42] That is to say, the treaty is advisable to create a system, grounded in law, where none (system or law) exists. One has a sense of this context of advisability from the second statement of the so-called Treaty Alliance.[43] This statement nicely made the case for the advisability of an international legal framework to protect human rights against abuse by transnational enterprises. It reflects the strongly held traditional view that posits legitimacy centred on states adhering to democratic values, collaborating through the production of international law, which binds them all.

Yet the legal architecture posited through the treaty itself poses a challenge to the legitimacy of law and the integrity of the state system on which it relies. Indeed, the more the treaty is structured as a set of compulsory obligations (on states and enterprises), the more the treaty will serve as an instrument for the substitution of the legal order inherent in its terms for that of the domestic legal orders of states. Like other comprehensive treaties, the effect is anti-democratic, but for a good cause. In any case in states with working democratically elected governments, the democratic deficit is only indirect; in other states the legal orders constructed by the community of states fills a democratic gap. Still it should trouble that the treaty might be understood to undermine the rationale for its creation – preservation of robust democratic orders based in states. Indeed, the treaty structure might be understood to undermine principles of democratic governance and the integrity of states through ordering premises

41 See above n 36.

42 This is the essence of the critique of the UNGP. See discussion above n 4.

43 See n 36.

grounded in the compulsion of international law especially where, as here, it is unlikely that any but the most powerful states, or powerful alignments of states, will have a substantial influence on the shape and scope of the treaty's provisions. The advisability of the treaty, then, is a marker for the advisability of the use of the state system to ensure that the substantive objectives of powerful coalitions of states are imposed globally.

That understanding of advisability suggests the alternative justification. A structure grounded in anything but compulsion leaves only an international patchwork that is as easily achieved without the bother of a formal treaty process. Indeed, the case for the advisability of a treaty embodying a specific set of norms that legalises a specific set of ideologies also makes the case for the failure of the treaty process itself. Consider the Treaty Alliance, that has advanced the suggestion that an international legal framework is advisable as a function of its objectives. These include methodological objectives (e.g., to use the power of international organisations to compel states to 'adopt legislation'); substantive objectives (e.g., to determine for all states the scope of company conduct that will result in civil or criminal liability); and process-remedial objectives (e.g., to determine the interlinkages sufficient to convert production chains into liability chains within one or more states; to produce remedial structures that defy borders; and to carve out a special place in law for a class of persons in the performance of their roles as defenders of human rights against enterprises.[44] Beyond the *plausibility* of these objectives, there is no doubt that they are *advisable* (as opposed to alternatives) for anyone seeking to develop a vigorous legally binding instrument that is meant to function as global law, leaving to states only the ministerial function of transposing its provisions into the indigenous forms of national law.[45] But their advisability also undermines the integrity of states and the sovereign capacity of their peoples.

Again, the logic that makes a treaty of this sort advisable, given its objectives, will also doom the project to failure. The Treaty Alliance, much more than the states that supported the Human Rights Council Resolution, understand that the treaty is advisable only if it becomes embedded in a disciplined way across

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44 Ibid; M Ibrahim, 'Summary of discussions of the Forum on Business and Human Rights, prepared by the Chair, Mo Ibrahim' (2015) *Human Rights Council Forum on Human Rights* <http://www.ohchr.org/Documents/Issues/Business/A-HRC-FBHR-2014-3_en.doc>; B Leather, 'Human Rights Defenders Must Be at Core of Treaty Process and Outcomes', *Business & Human Rights Resource Centre* (2015) <http://business-humanrights.org/en/human-rights-defenders-must-be-at-core-of-treaty-process-and-outcomes> accessed 11.09.2015.

45 D Bilchitz, 'The Moral and Legal Necessity for a Business and Human Rights Treaty', *Business & Human Rights Resource Centre* (2015) <http://business-humanrights.org/sites/default/files/documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20Business%20and%20Human%20Rights%20Treaty%20February%202015%20FINAL%20FINAL.pdf> accessed 11.09.2015.

national borders – and is enforced.[46] But A/HRC/RES/26/9 (14 July 2014) itself is far less ambitious, calling only for 'an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'. And thus the failure; the objective of the treaty process is itself undermined by the scope of the charge of the Human Rights Council.[47]

What is *possible* is the creation of an internationally legally binding instrument – that is to say, one binding on states through the normal modalities of international relations – but only relating directly to international human rights law, the international human rights law currently in force and to the extent enforced. That would require the acceptance of principled pragmatism into the construction of a treaty framework.[48] What is *advisable* is a comprehensive global legal order in which international legal standards must apply to states the way that regulations apply within the European Union to its Member States. But that itself creates not just failure but contradiction – in order to preserve the traditional international state order, it is necessary to undo it by creating an elaborate framework that essentially tramples state sovereignty, especially that of small and less developed states, now subject to the will of a larger polity. The protection of core human rights principles of democratic government as a core value of human rights in the face of its extinction through this advisable approach to treaty making creates a contradiction that has yet to be discussed to any great extent. The answer – variations of the ends justifying the means is either empty or suggests the very creation of hierarchies of human rights that the treaty is itself supposed to avoid.

2.3. LET US SPEAK TO CONTENT

We have focused on at least one influential approach to the content of the treaty suggested by the Treaty Alliance.[49] There is little point to speaking to context other than to suggest the way that content itself inevitably contributes to failure. These failures are the consequence of the structural framework that will likely inform treaty negotiations. There are three principal structural contributors to content-based failure worth noting.

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46 See above n 36.

47 Discussed further in L C Backer, 'The Perils and Promise of Drafting a Comprehensive Treaty on Business and Human Rights: Principles, Pragmatism and Principled Pragmatism in Shaping a Global Law for Business Enterprises' (2016) 42(1) *North Carolina Journal of International Law* 417.

48 Consider its deployment in D Renfrey, '"Narrative power" and the UN business and human rights treaty', *Social Watch: poverty eradication and gender justice*, 01.09.2015, <http://www.socialwatch.org/node/17024> accessed 20.05.2017.

49 See above n 36.

First, whatever the content, the treaty elaborated will tend to reflect the ethos of the international lawyer and policy maker; it will reflect the macro-economic predilections of states. But it will be oblivious to, indeed contemptuous of, the cultures, traditions, law and strongly embedded values that underlie business practice across the globe; it will marginalise the ethos of the corporate and securities lawyer. The draft report of the Second Session of the IGWG might be said to reflect these perspectives.[50] This is not a special consequence of a business and human rights treaty effort; globalisation itself has adopted this stance as it has moved towards harmonisation of practices, customs and expectations.[51] This orientation, meant perhaps to counter what was perceived as the unbalanced deference to the business sector, derided by NGOs[52] in John Ruggie's important concept of principled pragmatism for the development of the UNGP,[53] may create two structural consequences.

One touches on the inevitability of challenging the fundamental approach in law, economics and social organisation, of the primacy and characteristics of aggregations of capital now dominant in most states. Whatever one thinks of the development of corporate law, and the practices of business, however one thinks that several generations of large groups of people 'got it wrong' when they developed corporate law, accounting, financial disclosure, and finance markets, one cannot defeat them by ignoring them and seeking to supplant them through international instrument making.[54] And yet, the fundamental objectives of the treaty will not merely require the adoption of human rights standards applicable to transnational enterprises, but will also require many states to substantially alter their approaches to the legal regulation of enterprises themselves – to a fundamental transformation of corporate law.[55] That transformation is an

50 See, 'Report on the second session of the Open-ended intergovernmental working group', above n 21.

51 On the harmonising effects of globalisation see, e.g., J Wiener, *Globalization and the Harmonization of Law*, Cassell, 1999.

52 On the NGO critique of principled pragmatism, see, e.g., 'NGOs Should Expose the Limitations of Pragmatism', *Conectas*, 02.12.2013) <http://www.conectas.org/en/actions/business-and-human-rights/news/8495-ngos-should-expose-the-limitations-of-pragmatism> accessed 13.09.2015.

53 On John Ruggie and principled pragmatism see, e.g., J G Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) *American Journal of International Law* 819; J G Ruggie, 'Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization' in C Rodriguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* Cambridge University Press, 2017.

54 Discussed in Backer, 'Multinational Corporations, Transnational Law' (n 19).

55 On academic and political calls for adoption of a stakeholder welfare maximisation model to replace the shareholder welfare maximisation model at the core of most corporate law, see, e.g., M J P Magill, M Quinzii and J-C Rochet, 'A Critique of Shareholder Value Maximization (2013) *Swiss Finance Institute Research Paper* No. 13-16.

undertaking that contributed to the failure of the Norms project,[56] and one which academics continue to seek to overcome within the current legal framework.[57] Recognition of the power of corporate culture in law and practice underlay John Ruggie's principled pragmatism.[58] Efforts to transform it indirectly through an international instrument focused on human rights behaviours is likely to doom the contemporary treaty project as well.

The other touches on the consequences of developing a legal framework that threatens the operation of modern business, and its practices. To the extent that dissatisfaction with the UNGP derives from a sense of imbalance in favour of business, the solution is not a system that produces imbalance against business. Indeed, that blindness to the realities of a well-established legal and business culture (and its practice), and an unwillingness to engage, will itself produce content, whatever its form, that will encounter substantial and perhaps fatal opposition. I noted over a decade ago that the tragedy of the *business* of managing the human rights responsibilities of economic enterprises was the utter inability of those with a conventional internationalist and human rights law and policy orientation, and those with a domestic corporate and business law and policy orientation, to break out of the normative silos within which each has constructed a comfortable ideological and practical home.[59] The treaty continues that tragedy on a new stage. The problem with a business and human rights treaty will likely centre on the rigidity of efforts to force the logics and practices of economic organisation globally to conform to the expectations of human rights ideology whose characteristics and applications have yet to produce consensus.

Second, the regulatory objects of the treaty are already both obsolete and increasingly less relevant. The treaty exercise is directed towards building a legal regulatory framework for 'transnational corporations and other business enterprises'.[60] That reflects a conception of the way that business operates that might have been plausible up to the later part of the last century, but which increasingly is at variance with the way in which global business is now undertaken. It is no longer clear that the management of global economics

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56 Backer, 'Multinational Corporations, Transnational Law' above n 19; J G Ruggie and T Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) *Corporate Social Responsibility Initiative Working Paper No. 66* <https://www.hks.harvard.edu/index.php/content/download/76202/1711396/version/1/file/workingpaper66.pdf> accessed 11.09.2015; Ruggie, 'Business and Human Rights' above n 53.

57 S R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111(3) *Yale Law Journal* 443.

58 Ruggie, 'Regulating Multinationals' above n 53.

59 Discussed in Backer, 'Multinational Corporations, Transnational Law' above n 19.

60 A/HRC/RES/26/9 (14.07.2014), see above.

is grounded in state-based legal frameworks or even in state-based macro-economic policy. Indeed, the expression of that economics in multinational enterprises might be better conceived as system rather than as entity, and *an effectively targeted treaty might seek to regulate production chains rather than the enterprises that may serve as convenient vessels for its realization*.[61] The thrust of contemporary regulatory efforts appears focused on the supply chain as the basis of governance, rather than the enterprise, or the state.[62] The difference is important for developing a legal framework; yet this difference appears to elude those focused on the treaty making. There are a large number of production chains,[63] to be sure, that continue to operate as vertically integrated simple command structures grounded in corporate chains. But it is as likely that production chains are now characterised by hybridity in organisation – with some corporate chains, some contract chains, some understandings, and increasing amounts of segmentation at all levels of production from raw materials to consumer sales.[64] A treaty limited to corporations misses entirely that enterprises may not operate in corporate form and more importantly, that the object of regulations is increasingly a system (supply or production chains) rather than an enterprise. The model that is the basis of the treaty, building on the conceptual framework of the 1970s and the work of the UN then leading to the Norms is now largely irrelevant. This is a problem unless, of course, the object of the treaty exercise is merely to produce optics – the appearance of action without much effort at creating an identity between problem and solution. Yet so much effort for optics itself suggests failure of the treaty enterprise, and perhaps on a monumental scale – so much effort for so little effect – the definition of bathos.

Third, whatever its content, the efforts towards a viable international instrument will ultimately fail precisely because it focuses on the wrong rule set as its regulatory target. It is not just that the treaty is misdirected by focusing on entities rather than production systems as the object to be regulated. It is that the legalisation project fails to develop a coherent set of global baseline human rights standards on which any project of enterprise regulation building must be built. It is an easy matter to seek to internationalise and legalise what the UNGP organised as the Second Pillar responsibility of enterprises to respect

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61 Discussed in L C Backer, 'Regulating Multinational Corporations – Trends, Challenges and Opportunities' (2015) 22(1) *Brown Journal of World Affairs* 153–73.

62 For example, Organization for Economic Cooperation and Development, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD, Paris, 2016, pp 12–16.

63 On production chains, see E Andriesse and others, 'Business Systems, Value Chains and Inclusive Regional Developments in Southeast Asia' in A H J Helmsing and S Vellema (eds), *Value Chains, Social Inclusion, and Economic Development: Contrasting Theories and Development*, Routledge, 2011, pp 151–77.

64 Ibid.

human rights.[65] Indeed, the object of much of the work of the UNGP Working Group, and the stakeholders active in its field of operations, have focused on methods for 'taming' the Second Pillar by bringing it back within systems of law and resisting efforts to expand the notion of autonomous extra-legal governance regimes. National Action Plans have been particularly well focused on this effort, as have the agendas of many human rights NGOs invested in this enterprise.[66] Yet the strength of the corporate responsibility to respect human rights–derived from the Second Pillar's autonomy from state-based law systems and its coherence within the context of the International Bill of Human Rights–is precisely the reason that, where incorporated within a treaty structure, the effectiveness of such a structure will collapse. To incorporate the Second Pillar within the conventional structures of state obligation under international law is to fracture the governance integrity of the Second Pillar's normative order.

In this light, consider that few states have actually embedded the entirety of the International Bill of Human Rights within their domestic legal orders.[67] And even among those that have there are considerable potential variations in domestic application.[68] States have come no closer to closing the human rights standards gap since the 1970s. Given their constitutional traditions and their national agendas, states have adopted a wide variety of approaches to what constitute human rights enforceable within their borders. The meaning and practice of human rights among states varies even between states whose legal systems and constitutional traditions are quite similar. It is not clear how one can develop a harmonised system of human rights standards for business behaviours when states have stubbornly (though for the best of human rights reasons – that is, for the purpose of giving effect to national sovereign will) refused to align their First Pillar duty to protect human rights in any coherent fashion.[69]

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65 UNGP, above note 3, at ¶¶ 11-24. Moreover the Second Pillar standardises applicable baseline substantive provisions; ¶ 12 provides that 'The responsibility of business enterprises to respect human rights refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on fundamental Principles and Rights at Work.'

66 UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (United Nations, 2014). Available at http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.

67 United Nations, 'Multilateral Treaties Deposited with the Secretary-General, Status as of December 31, 2006' U.N. Doc. ST/LEG/SER.E/25, U.N. Sales No. E.07.V.3, United Nations, 2007, pp 160–242 <https://treaties.un.org/doc/source/publications/MTDSG/2006-vol.1-english.pdf> accessed 12.12.2016.

68 Ibid.

69 The UNGP recognise wide variation in the extent of a state's duty to protect human rights. See UNGP, above, n 3, at General Principles ('Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.').

Again, the result of any treaty will be formal coherence and functional failure in the face of wide variations in state recognition of human rights. Absent coherence in the legal obligations of states to protect human rights, the best one can hope for in the legalisation of enterprise conduct may be disclosure.

2.4. LET US SPEAK TO IMPLICATIONS

The process of treaty making may bring down the UNGP precisely because the success of the treaty process must be based, at least in part, on proof of the failure of the UNGP process itself.[70] The consequence is a perverse effect – the creation of incentives to actively contribute to UNGP failure to prove the necessity of a treaty. Here, the implications of the treaty process again point to failure, but on a more comprehensive level. That failure involves, to some extent, the consequences of signalling. In this case the signalling of A/HRC/RES/26/9 (14 July 2014) suggests a willingness to eviscerate all of the work leading to the UNGP as a failure. That is a conclusion that would be rejected even by treaty defenders who politely suggest that the UNGP were a necessary 'step in the right direction' but fundamentally insufficient.[71] Still that sort of talk does signal both a rejection of the long-term value of the UNGP (indeed that sort of talk implies that the UNGP served its purpose the moment the UNGP was endorsed) and of its substantive elements. And thus the greatest failure of the treaty process will be to produce a failure of development of the UNGP even as its own direct objectives fail for want of coherence and relevance. We could be left with neither treaty nor UNGP.

Therein lies the great tragedy of the treaty process: in the willingness of its proponents to construct from out of the failure of the UNGP the foundation of the rationale for the inevitability of the treaty process itself. The process of business and human rights treaty elaboration itself, then, is usefully understood as a means of using the UNGP as the means of its own undoing. The process is based on framing something that appears to be an internal conversation between the UNGP and what is proposed as its better or idealised version (in the form of the treaty). The object of the dialogue is to substantially question the legitimacy of the UNGP as its structures and premises are juxtaposed against what is put forward as the 'better version of the UNGP' in the form of a proper (and well-constructed) treaty. This strategic use of the UNGP is clever, but perhaps too

70 On arguments that the UNGP process has failed or has not progressed fast enough, see, e.g., C Albin-Lackey, 'Without Rules: A Failed Approach to Corporate Accountability' (2013) *Human Rights Watch World Report*.

71 See, e.g., FIDH, 'Business and Human Rights: Enhancing Standards and Ensuring Redress' (2014) *FIDH*, <https://www.fidh.org/IMG/pdf/201403_briefing_paper_enhance_standards_ensure_redress_web_version.pdf> accessed 09.09.2015.

much so. It carries with it the temptation to apply or resist the UNGP project in a way that helps prove that the UNGP fail to meet their objectives. At its limits, this strategic approach may well signal to stakeholders that in order to move forward a treaty project it may be necessary to actively contribute to the failure of the UNGP![72]

3. FROM OUT OF FAILURE … SMALL SUCCESS; WHY THE TREATY PROCESS OUGHT TO EMBRACE ITS DESTINY

Though it is easy enough to describe the weaknesses of the treaty project, as to its substance and its process, it would be misleading to suggest that the process of treaty making is itself something that ought to be abandoned merely because it is likely to fail, and fail quite spectacularly. Indeed, from my perspective, the exercise of treaty making in the context of the human rights obligations of enterprises (and of states) constitutes an important exercise necessary for the development of a vigorous and more coherent set of standards that might produce a common system of custom and expectation that can drive governance and law. Indeed, even were the treaty enterprise to fail, it would, to some extent be a success.

I do not speak to the well-developed argument, raised elsewhere, that suggests that treaty negotiations are welcome to the extent they seek to focus on quite narrow topics on which there is already a move towards consensus. That, though a worthy goal, proffers an alternative to the current treaty project envisioned in A/HRC/RES/26/9 (14 July 2014). Rather I consider the benefits of engaging vigorously in what the Human Rights Council Resolution describes as 'conducting constructive deliberations on the content, scope, nature and form of the future international instrument', even if, as I have suggested, the exercise is doomed to failure. This section suggests briefly why even a project doomed to failure may well succeed in advancing the project of embedding human rights elements in business operations.

3.1. FOR STATES: MOVING TOWARDS COHERENCE IN THE STATE DUTY TO PROTECT HUMAN RIGHTS

Even if the treaty process fails, the process of getting to failure proves valuable in the elaboration of a legal framework within which states will come to

[72] Discussed in more detail in Backer, 'The Perils and Promise of Drafting a Comprehensive Treaty on Business and Human Rights', above n 47.

understand the nature of their duty to protect human rights. In particular, treaty negotiation itself may be a useful exercise to the extent that it exposes the limits and regulatory gaps within states. The treaty negotiation process itself may actually serve to produce a series of action plans relating to core consensus issues required to move forward on a treaty – the definition of human rights that must be transposed to national law, the establishment of remedial mechanisms that produce coherence in such mechanisms and the like. The effect of the treaty negotiation process, then, may produce the sort of national action plans for human rights embedding within national law that has proven elusive under the UNGP framework – producing close and critical discussion of the scope of a state's human rights obligation and the extent of remedies available for redress of human rights violations. Indeed, it may be possible that the treaty negotiations may serve as a means of bridging the near half-century divide in approaches to human rights that has stymied the advancement of coherent governance norms in this field except in very narrow areas.

3.2. FOR MARKETS AND CONSUMERS: THE CLOSING OF GOVERNANCE GAPS

But, of course, A/HRC/RES/26/9 (14 July 2014) is supposed to focus on the legalisation of the UNGP's Second Pillar. That focus, even if likely to end in failure relating to a treaty, may produce important successes through the process of treaty negotiation. Principal among them would be advances in the elaboration of coherent glosses on the Second Pillar, from the specification of human rights instruments binding on corporate activity, to the legal effects of human rights due diligence.[73] A move to incorporate human rights due diligence as part of the financial reporting requirements necessary for the public trading of securities would provide a great step forward for the UNGP, even in the face of the failure to successfully negotiate a treaty. Thus, if an important value of comprehensive treaty negotiations is to spotlight the deficiencies of international law in the development of a coherent space within which the state duty to protect human rights must be articulated and applied (the UNGP's First Pillar), then an equally important element of success turns on the ability of negotiating parties to focus on the elaboration of a legal framework for the UNGP's Second Pillar. Even failed treaty negotiations will expose those governance gaps within transnational space

[73] This effort is currently aided through efforts undertaken by the UN Working Group on Business and Human Rights through its National Action Plan project. See Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights', UN Geneva, 2016 <http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf> accessed 01.06.2017, pp 1, 12–13.

and make clearer the scope of governance that might require filling by MNEs and transnational civil society within the Second Pillar context.

3.3. FOR NGOs: SOLIDARITY AND GLOBAL MASS DEMOCRACY

Treaty negotiation, and indeed *the failure of treaty negotiation*, will create greater solidarity among human rights NGOs. The process of getting to A/HRC/RES/26/9 (14 July 2014) suggests the power of failure to generate solidarity and to produce the sort of mass democratic mobilisation that might produce effects on the ground. Beyond the positive possibilities of greater solidarity inherent in treaty negotiations (successful or not), negotiation permits such actors to learn to better engage in governance at the highest international levels. Even treaty negotiation failure (and perhaps especially treaty negotiation failures) also may produce the sort of solidarity that would aid local and national NGOs in their efforts to shape the governance of the human rights affecting behaviours of enterprises within states, in the negotiation of bilateral and multilateral trade agreements, and in the shaping of corporate practice. In the process of moving towards failure, the process itself might contribute to making NGOs better advocates within states.

But more importantly, as treaty negotiations progress, the role of NGOs within the architecture of any international instrument will necessarily be far more diminished than under the UNGP's Second Pillar. International instruments, addressed to states and focused on the regulation of economic enterprises, will relegate NGOs to the margin of systems of monitoring and enforcement. NGOs will likely have only the smallest role within remedial frameworks. As a consequence, NGOs will either have to become specialised legal centres – representing individuals and groups with standing to bring action against enterprises within one of the states adhering to any international instrument (and to the extent such an instrument has been transposed into national law), or they will be relegated to the usual peripheral, though important, roles of outside monitoring and accountability functions. Yet a treaty negotiation failure might well provide the impetus necessary for NGOs to begin more aggressively to serve as an important site for Second Pillar governance. Indeed, NGOs might well determine that they play the most important role in the social norm sphere of the Second Pillar, rather than as 'civil society' elements within traditional public law structures.

3.4. FOR SMALL AND LESS DEVELOPED STATES: SOLIDARITY GAINS

Treaty negotiation may produce a similar effect on small and developing states in terms of producing a solidarity that has been absent since the end of the Third World Movement. It might serve as a basis for more effective regionalism

grounded in the shared interests of these states against both the largest enterprises and the more developed states. It may provide a nexus point for producing a better engagement of these states with the logic and evolution of global economic activity and provide a basis for engaging an area that A/HRC/RES/26/9 (14 July 2014) avoids – the way that emerging systems of law and governance, sourced in international norms, bilateral and multilateral treaties, the rules of international organisations, and the peculiarities of agreements with specific large firms, have effectively transformed most small and less developed states from a territory marked by a single and coherent set of laws to a nexus point for multiple legal systems that apply to specific segments within the national territory. The treaty negotiation process, in other words, may help states confront the reality of the myth of the legally integrated state and, through that confrontation, determine how states might reacquire a greater measure of control or coherence of law and policy within their territories.[74] For small and developing states there might be an additional gain, an opening to a better approach to regionalism, one with teeth, to replace the tired and ritualised forms of regionalism that currently appear long on rhetoric and ideology and quite short on effective development implementation strategies.

3.5. FOR ENTERPRISES: AFFECTING BUSINESS CULTURE AND STRENGTHENING THE AUTONOMY OF BUSINESS GOVERNANCE

Treaty negotiation, whether or not it succeeds, may finally create a space in which *enterprises begin to understand the language and referents of public law-based human rights structures* and NGOs may begin to understand the singular power of the state-based notions of legal personality of corporations and similar enterprises. The policy discussions that may be produced in the course of treaty negotiations may serve as an important source for the development of social norm standards and governance frameworks that might be elaborated through the Second Pillar. In this respect, the treaty negotiations may be the most important impetus for business and enterprise embrace of the notions of human rights due diligence and of the incorporation of human rights elements in the way in which all enterprises (private and state owned) evaluate and approach business decisions.[75] This is particularly useful because of the narrowness of the

74 Discussed in L C Backer, 'Fractured Territories and Abstracted Terrains: The Problem of Representation and Human Rights Governance Regimes Within and Beyond the State' (2016) 23(1) *Indiana Journal of Global Legal Studies* 61–94.

75 These are efforts that have already acquired a substantial footing within the soft law frameworks of transnational governance, even those overseen by large transnational public actors. See, e.g., D Abrahams and Y Wyss, 'Guide to Human Rights Impact Assessment and

treaty-making focus. While states may focus on transnational enterprises operating in corporate form, business may elaborate governance structures more compatible with the management of production chains within which issues of human rights may be more effectively embedded with targeted and specific effect.

4. CONCLUSION

The chapter ends where it started – in a state of expectation. In her opening statement to the second session of the open-ended IGWG on transnational corporations and other business enterprises with respect to human rights, the Chair-Rapporteur María Fernanda Espinosa noted that:

> The initiative of a binding instrument was based on respect for the principles of fairness, legality and justice, which should prevail for the benefit of all in the international context, and the objective of the process was to fill gaps in the international system of human rights and to provide better elements for access to justice and remedy for victims of human rights abuses related to transnational corporations. That objective was in no way aimed at undermining host States or the business sector, but was intended to level the playing field with respect to human rights.[76]

Yet, the very movement to a treaty has polarised the business and human rights community. It has brought out into the open a number of tensions that were submerged during the development of what became the UNGP as stakeholders held their fire in the hope of making some progress on advancing the business and human rights agenda. But those tensions – the irrelevance of small and developing states in international discourse and standards development, the frustration of human rights NGOs in the face of the need to compromise, the instrumentalism of business whose commitment to substantial changes in business cultures might be hard to gauge – should not produce reaction but advancement. A treaty is necessary and advisable. But its greatest utility may be only as a step towards the development of a better grounding for the governance of the human rights impacts of business activity – whether by private or public enterprises. That better grounding may well be advanced even in the face of the failure of the treaty process initiated through A/HRC/RES/26/9 (14 July 2014). To that extent, the process of elaborating a treaty might well provide a glimmer of success.

Management (HRIAM)' (2010) *International Business Leaders Forum and the International Finance Corp*, <http://www.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES> accessed 12.12.2016.

76 'Report on the second session of the open-ended intergovernmental working group', above n 21, ¶ 7.