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Essay: Considering a Treaty on Corporations and Human Rights: Mostly Failures But With a Glimmer of Success.

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ABSTRACT:

In June 2014, three years after it endorsed the U. N. Guiding Principles on Business and Human Rights, the UN Human Rights Council moved to establish 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. These actions brought into the open long festering tensions among stakeholders involved in developing governance frameworks to manage the human rights behaviors of enterprises. The substantive positions of most stakeholders are now quite clear. They appear perhaps irreconcilable. 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 UNGPs. What analysis may reveal is that while the move toward the negotiation of a treaty may reveal substantial normative and conceptual failures, it also suggests some not inconsiderable successes. After setting the context of the current debate, Part II considers the normative and structural difficulties of the move toward a comprehensive business and human rights treaty. Part III then considers its benefits, 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 toward a treaty to end in failure, the movement toward more robust governance of the human rights effects of economic activity will emerge stronger.



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I. 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, NGOs, individuals and states? Starting in the 1970s, as the current global economic order was emerging in its current form, the United Nations considered, these questions were at the foundation of a decades long and unsuccessful effort that started with the unsuccessful quest to produce a Code of Conduct for Transnational Corporations 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. By 2011, these questions might have been incomprehensible, as the United Nations Human Rights Council unanimously endorsed what from that time became the U.N. Guiding Principles for Business and Human Rights (UNGP).

But not everyone was thrilled by events that led to the adoption of the UNGP, and less by the UNGP itself. That discontent, at first discrete, became more open and vocal after 2011, and led to substantial mobilization of political power in the years thereafter. It was in the context of disquiet about the UNGP as they began to take definitive form after 2009 and crystalized on the eve of the adoption of the UNGP (Amnesty International 2011) that alternatives or supplements to the UNGP began to be conceived by both civil society actors and small and developing states (Ruggie 2014).

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, centered on a Working Group charged, along other things, to bring states, enterprises NGOs (and a motley crew of others) together to move the UNGP project forward, became a site for growing criticism of and eventually opposition to the UNGP themselves as the way forward. Within that space discontent evolved to mobilization 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 U.N. delegation from Ecuador, and allied eventually with a large collective of NGOs (Ruggie 2014), 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 U. N. Guiding Principles on Business and Human Rights, the UN Human Rights Council moved to establish 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. Simultaneously, the Human Rights Council indicated its continuing support for the UNGP.

These actions brought into the open long festering tensions among stakeholders involved in developing governance frameworks to manage the human rights behaviors of enterprises. But these tensions, lurking from the time of the abandonment of the Norms project was not merely a repetition; it represented the transformation of those perspective, now layered atop changing power dynamics brought on by globalization (Backer 2006). The substantive positions of most stakeholders are now quite clear, well developed, and are quite sharply drawn. To some extent, they appear perhaps irreconcilable and touch on now ancient divisions in global political discourse touching on 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. These are important debates, though ones the essential shape of which was well established by the fourth quarter of the last century.

Rather than add 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 UNGPs. For that purpose I assume that the move toward treaty negotiation is inevitable in some form. I assume further that this move ought to be welcomed, even by those, like me, who view the undertaking as ill conceived, misdirected, and doomed to failure. What such analysis may reveal is that while the move toward the negotiation of a treaty may reveal 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.

The purpose 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. Part II considers the normative and structural difficulties of the move toward a comprehensive business and human rights treaty, the reasons why necessity, advisability, content and implications will produce failure. Part III 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 toward a treaty to end in failure, the movement toward more robust governance of the human rights effects of economic activity will emerge stronger.

II. 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 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. 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. 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. 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. Little has changed on that score since the 1970s. 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.

The contradictions add an important layer of challenge to any treaty making enterprise. In this light, questions—is it 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—acquires more interesting dimension when considered in its process dimensions. Necessity, advisability, content, and implications—these are the stuff of the fundamental failure of the treaty movement in this emerging age of globalization, 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 complex multi-systemic and anarchic global governance systems that mark the current global order.

A. Let us speak first to necessity. The treaty process is necessary not for the sake of its substantive provisions, not for its potential value in creating a legal basis for the governance of multinational or transnational enterprises (however defined). 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. 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 organizations, including international financial institutions, and unofficial collectives of the most powerful states. 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 behaviors on the ground are practiced and disciplined in society and through markets.

That combination of developments has effectively shut small states out of governance. The treaty process is crucial to ensure that small and developing 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 organizations. It is not for nothing that it was Ecuador that spearheaded this effort. It is not for nothing that the vote for the resolution to create the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (A/HRC/RES/26/9 (14 July 2014)) divided developed from small and developing states. 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 agendas of powerful NGO alliances, influential MNEs, rich states, and international organizations that serve them. But even the treaty process may consume the small and less developed states, ground under the agendas and authority of larger states and powerful NGOs. Indeed, the so-called Treaty Alliance appears to have a legitimacy of state action that may be denied 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 OECD states, the G20 or a coalition led by influential BRICS. Yet the very power dynamics that has made the treaty process necessary will also doom it to failure. And failure here is measured both by the inability to produce a treaty or, as likely, the inability of small and less developed states to retain a significant engagement with the treaty making process.

B. 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. That is to say, the treaty is advisable to create a system, grounded in law, where none exists. One has a sense of this context of advisability from the 2nd statement of the so-called Treaty Alliance. This statement nicely made the case for 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 centered 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. The treaty, then, might be understood to undermine the rationale for its creation—preservation of robust democratic orders based in states. The treaty structure might be understood to undermine principles of democratic governance and the integrity of states through ordering premises grounded in the compulsion of international law. Alternatively 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 advisability also makes the case for the failure of the treaty process itself. For the Treaty Alliance, an

international legal framework is necessary as a means of using the power of international organizations to compel states to “adopt legislation;” to determine for all states the scope of company conduct that will result in civil or criminal liability; to determine the interlinkages sufficient to convert production chains into liability chains within one or more states; to produce remedial structures that defy borders; 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. Beyond the *plausibility* of these objectives, there is no doubt that they are *advisable* for any 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.

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 national borders—and is enforced. 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 objectives of the Treaty process is itself undermined by the scope of the charge of the Human Rights Council.

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. 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.

C. 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. 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 principle structural contributors to content based failure.

First, whatever the content, it 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, indeed contemptuous, of the cultures, traditions, law, and strongly embedded values that underlie business practice across the globe. This orientation, meant perhaps to counter what was perceived as the unbalanced deference to the business sector, derided in John Ruggie's principled pragmatism for the development of the UNGP, may create two structural consequences.

One touches on the inevitability of challenging the fundamental approach in law, economics and social organization, 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. And yet, the fundamental objectives of the treaty will require not merely 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. That is a project that contributed to the failure of the Norms project. Recognition of the power of corporate culture in law and practice underlay John Ruggie's principled pragmatism. Efforts to transform it indirectly through an international instrument focused on human rights behaviors is likely to doom the contemporary treaty project as well. treaty

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 UNGPs derives from a sense of imbalance in favor 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 nearly a decade ago that the tragedy of the business of managing the human rights responsibilities of business was the utter inability of internationalists, human rights and corporate and business sectors to break out of the normative silos in which each has constructed a comfortable ideological and practical home. The treaty continues that tragedy on a new stage.

Second, the regulatory objects of the treaty are already both obsolete and largely irrelevant. The treaty is directed to build a legal regulatory framework for "transnational corporations and other business enterprises." 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 that increasingly is at variance with the way in which global business is now undertaken. 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*. 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, 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 characterized by hybridity in organization—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. 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 U.N. then leading to the Norms is now largely irrelevant. Unless, of course, the object of the treaty exercise is merely to produce optics. 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 international instrument will ultimately failure 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 legalization 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 internationalize and legalize what the UNGP organized as the 2nd Pillar responsibility of enterprises to respect human rights. 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 2nd 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 has the agendas of many human rights NGOs invested in this enterprise. Yet the strength of the corporate responsibility to respect human rights, its autonomy from state based law systems and its coherence within the context of the International Bill of Human Rights, is precisely the reason why, when incorporated within a treaty structure, such a structure will fail. States have come no closer to closing the human rights standards gap since the 1970s. States, given their constitutional traditions, and their national agendas, have adopted a wide variety of approaches to what constitutes human rights enforceable within its 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 harmonized system of human rights standards for business behaviors when states have stubbornly (though for the best of human rights reasons—giving effect to national sovereign will) refused to align their 1st Pillar duty to protect human rights in any coherent fashion. 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 legalization of enterprise conduct may be disclosure.

D. Let us speak to implications. The process of treaty making may bring down the INGP precisely because the success of the treaty process must be based, at least in part,

on proof of the failure of the UNGP process. 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 signaling. In this case the signaling 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. Still that sort of talk does signal both a rejection of the long term value of the UNGP (indeed it served its purpose the moment it 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 objects fail. We will be left with neither treaty nor UNGP.

And, indeed, the great tragedy of the treaty process is likely the willingness of its proponents to use the UNGP as a rationale for the treaty process itself. And in the process to substantially question the legitimacy of the UNGP and its value as it is juxtaposed against a “better version” treaty. This strategic use of the UNGP might also tempt stakeholders to ensure that reality meets rhetorical tropes. At its limits it might well produce a temptation to help the UNGP fail.

III. 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 will, 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 toward 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.

A. For States: Moving Toward Coherence in the State Duty to Protect Human Rights. Even if the treaty process fails, the process of getting to failure prove valuable in the elaboration of a legal framework within which states will come to 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 have stymied the advancement of coherent governance norms in this field except in very narrow areas.

B. 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 legalization of the UNGP’s 2nd 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 2nd Pillar, from the specification of human rights instruments binding on corporate activity, to the legal effects of human rights due diligence. 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 UNGPs, 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 1st 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 2nd Pillar. Even failed treaty negotiations will expose those governance gaps within transnational space and make clearer the scope of governance that might require filling by MNEs and transnational civil society within the 2nd Pillar context.

C. 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 mobilization that might produce effects on the ground. Beyond its ability to engage in governance at the highest international levels, such failures 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 behaviors 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 toward

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 2nd 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 specialized legal centers—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 2nd Pillar governance. Indeed, NGOs might well determine that they play the most important role in the social norm sphere of the 2nd Pillar, rather than as “civil society” elements within traditional public law structures.

D. For Small and Less Developed States: Solidarity Among Small and Less Developed States. 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 organizations, and the peculiarities of agreements with specific large firms, has 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, to determine how states might reacquire a greater measure of control or coherence of law and policy within their territories. It might also produce a better approach to regionalism with teeth, rather than the present regionalism as convenience and as gesture that marks much regionalism currently.

E. 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 2nd 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 it evaluates and approaches business decisions. This is particularly useful because of the narrowness of the 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 intimately embedded.

IV: Conclusion.

The chapter ends where it started—in a state of expectation. The movement to a treaty has polarized 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 hopes 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 as a step toward 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).