

Foreword

The New Draft of the "Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Corporations and Other Business Enterprises"; Responding to the Call for Comments.

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It is always exciting to engage in the production of nostalgia. That is even more the case when the production is for a worthy cause. And there is probably no worthier cause to my mind than the project to robustly embed a strict sensitivity to human rights norms within the operations of economic enterprises, or broadly, within the cultures of economic activity however undertaken.

Even as political, social, and economic power fragment along new and ever more complex lines, many well-intentioned, sophisticated, and thoughtful people remain committed to a view of the world that has not only disappeared--except as to the wisps of its form that still serve as a means organizing factions--but that is being recast in ways we can hardly understand. In a world in which law is being transformed into data with consequences, where enterprises increasingly govern their production chains through regulatory contract, where administrative discretion carries more weight in the public and private sector than the rules with respect to which they are rarely held to account, and where the boundaries between the public and private interventions of state and non-state institutions have become blurred (to put it mildly), *it is hard to generate much more than a pedantic excitement over the efforts to finally (and three quarters of a century late) develop a gloriously antiquarian instrument for a civilization whose ghosts can only haunt us now.*

We speak, of course, of the new Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities Corporations and Other Business Enterprises*,¹ released on 16 July 2019 by the Open-ended Intergovernmental Working Group (OEIGWG)

¹ *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Revised Draft*, 16 July 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf

Chairmanship. The Draft LBI will serve as the basis for negotiation to be held during the fifth Session of the OEIGWG, from 14 to 18 October 2019.²

Still, this is a worthy exercise (as I have suggested before,³ not so much for its stated objectives, but for the principles and perspectives they may generate to contribute to the next generation of structural governance instruments that will have to be developed over the course of the next decade. To that end, a study of this Draft LBI is both worthy and important — not just out of respect for those worthy people whose vision is therein articulated, but also for the value that its insights and failings contribute toward the useful end of embedding principles and expectations grounded in human rights within all economic activities. ***It will be useful, in that respect to compare this Draft to the Zero Draft that circulated last year.***⁴

Lastly, serious study may be helpful to the members of the OEIGWG as they approach their consideration of this draft in October 2019. OEIGWG will *officially and publicly* consider the Draft Legally Binding Instrument at its next meeting in October 2019. It might aid the OEIGWG and their advisors, including those charged with the drafting and defending of the Draft Legally Binding Instrument to receive thoughtful commentary by stakeholders and other interested parties. In its *Note Verbale regarding the release of the revised draft legally binding instrument*, the Chairmanship of the Working Group noted that:

The Chairmanship will convene informal consultations with Governments, regional groups, intergovernmental organizations, United Nations mechanisms, civil society, and other relevant stakeholders, before the fifth session of the OEIGWG, including on an updated program of work, in accordance with additional information to be announced in due course.⁵

The Coalition for Peace and Ethics, as a member of that large group of interested stakeholders is making its views known to the OEIGWG through this Special Issue of *The CPE Bulletin*. The analysis contained herein focusses both on close textual reading, and on

2 On the activities of the OEIGWG see United Nations Human Rights Council, *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, available at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>

3 Larry Catá 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*, 38 *FORDHAM INT'L L.J.* 457 (2015); *Considering a Treaty on Corporations and Human Rights: Mostly Failures But with a Glimmer of Success* (August 28, 2015). Available at SSRN: <https://ssrn.com/abstract=2652804> *Pragmatism Without Principle?: How a Comprehensive Treaty on Business and Human Rights Ought to Be Framed, Why It Can't, and the Dangers of the Pragmatic Turn in Treaty Crafting* (February 18, 2016); *Building a Treaty on Business and Human Rights: Context and Contours* (Surya Deva, David Bilchitz et al., eds), Forthcoming. Available at SSRN: <https://ssrn.com/abstract=2734399>; *Shaping a Global Law for Business Enterprises: Framing Principles and the Promise of a Comprehensive Treaty on Business and Human Rights*, 42 *NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW* 417 (2016).

4 See Appendix.

5 Note 4-7-156/2019, 16 July 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/NV_Ecuador_RevisedDraft_LBI.pdf

drawing out the larger conceptual issues and challenges that the present draft presents. In the process, the CPE-Treaty Project Working Group hopes to provide a basis for further fruitful discussion of this specific project, and more generally, to advance thinking about the role of treaties in the construction of a regulatory universe the object of which is to center human rights and sustainability factors in economic decision making.
