

B. Article 3

The Weak Underbelly of Business and Human Rights: Reflections on the 8th U.N. Forum on Business and Human Rights

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1. Introduction

I was pleased to have been able to attend a portion of the 8th Annual UN Forum on Business and Human Rights.¹ The Forum has evolved to become:

the global platform for stock-taking and lesson-sharing on efforts to move the *UN Guiding Principles on Business and Human Rights* from paper to practice. As the world's foremost

¹ The Forum was established in 2011, the organization of which was assigned as one of the principal functions of the then also newly established Working Group on Business and Human Rights. Human Rights Council. Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/17/4 (6 July 2011) available <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>. The mandate was renewed in 2017. See Business and human rights: mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/RES/35/7 (14 July 2017) available <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/191/47/PDF/G1719147.pdf?OpenElement>. Both were to be vehicles for the continued development of the *UN Guiding Principles for Business and Human Rights* (New York and Geneva: United Nations, 2011) [the “UNGP”]. It is “the world's largest annual gathering on business and human rights with more than 2,000 participants from government, business, community groups and civil society, law firms, investor organisations, UN bodies, national human rights institutions, trade unions, academia and the media.” UN Forum on Business and Human Rights Website, About the UN Forum on business and human rights, available <https://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx>.

gathering in this area, it provides a unique space for dialogue between governments, business, civil society, affected groups and international organizations on trends, challenges and good practices in preventing and addressing business-related human rights impacts. The first Forum was held in 2012. It attracts more than 2,000 experts, practitioners and leaders for three days of an action- and solution-oriented dialogue.²

The theme of the 8th Forum (2019) was an important one--*Time to act: Governments as catalysts for business respect for human rights*.³ For me, the theme produced a substantial irony, an irony that serves as the focus of the brief comments offered here on the state of the art in business and human rights and the perversity that it appears to foster as it lumbers along propelled by its own quite incomprehensible internal logic (at worst perhaps comprehensible in the sense that it fails to understand the consequences of the choices it appears to favor).⁴ It reminds us that ideological stances sometimes produce quite absurd results. And absurdity was the order of the day, at least for the positions taken by some of the leading states in this field.

What follows includes my brief reflections on a small part of what had been an immensely rich Forum.⁵ It is divided into two parts. The first part, which follows, *The Obliteration of the State, or, Does Lesotho Exist?*, considers drive toward the legalization of the 2nd Pillar corporate responsibility actually produces a new sort of imperial system with human rights at its center and a confederation of --wait for it--states which formed the family of "civilized nations" as they were constituted in 1900

² Website: United Nations, Office of the High Commissioner, Your Human Rights > Business > Forum on Business and Human Rights > 2019 UN Forum on Business and Human Rights, available <https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2019ForumBHR.aspx>.

³ Ibid. ("The 2019 Forum will focus on the need for all governments to demonstrate progress, commitments and plans in implementing the State duty to protect and strengthening accountability").

⁴ That approach to the state of the art in business and human rights was lovingly critiqued in 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," *Fordham Int'l L.J.* 38:457 (2015) available at: <https://ir.lawnet.fordham.edu/ilj/vol38/iss2/3>.

⁵ The 8th Forum Program can be accessed at <https://2019unforumonbusinessandhumanrig.sched.com/grid/>.

again appear take a leading position. For all other states there is, well, nothing. They disappear in the shadows of the sunshine cast by this Olympian cartel of states.

It is followed by a view of the same event from a different lens. Entitled *Reflections on the 8th U.N. Forum on Business and Human Rights--Part II, "Falling in Love Again: 'Smart Mixes' and the De-Centering of the State Within Private Compliance Governance Orders,"* it considers the contradictions in advancing the international business and human rights project on the basis of its ordering premises. What is exposed is the inversion that consciously or not, the leading actors, both public and private, of this enterprise have backed themselves into a corner. The more they assert the principles in favor of national action, the more effectively they appear to manage the privatization of human rights and economic activity in precisely the ways they actually seek to avoid.

The result is the greater the formal power of states exercised through law, the stronger the constitution of the regulatory authority of the private sphere and the more prominent the role of private actors (enterprises and the non-state sector) in the ordering and management of human rights norms, human rights accountability and human rights enforcement systems. The divide between formal authority and de jure power is both exposed and left without a strong set of conceptual constraints.

2. The Obliteration of the State, or, Does Lesotho Exist?

The Working Group's theme this year was laudable indeed. And it was also very much needed. States have been so busy pushing human rights responsibilities onto enterprises that they have managed to deflect for more than a decade any serious scrutiny of their own duty to protect human rights except in the most abstract and unaccountable ways.⁶ But that was to be expected. The UN, after all, is a member driven organization, and its members tend to center themselves in the process of situating human rights within economic policy and

⁶ The principal expression has found its form in the National Action Plan project of the Working Group. See, UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (Geneva: United Nations, November 2016) available https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

behavior expectations. Both international organizations, and the states whose organizing ideologies them, must necessarily prefer to export responsibility and import successes. Within this system and given the three Pillar framework of the UN Guiding Principles,⁷ it become impolitic for international actors to criticize state failures to embed and enforce their international obligations.

What emerges are behaviors and the development of implementation strategies that are complicit in state avoidance of direct responsibility, while at the same time centering the state as the critical regulatory nexus point for the delegation of both authority and responsibility (through law) to the enterprises whose behavior is the object of these efforts.⁸ And so one has had to tip toe around the issue of state failures to comply with their own human rights related duty in the context of their economic policies, even as we all join in a loud chorus of hosannas every time a large enterprise bends the knee to human rights regimes and recounts its own brave tale of embedding such responsibilities into its operations.

Even within the cynical construct within which some efforts at moving forward a human rights (or perhaps eventually better put, a liberties and protection from harm), the theme was the 8th Forum makes for good reading.

Time to act: Governments as catalysts for business respect for human rights

A key message from the 2018 UN Forum on Business and Human Rights was that governments must step up their action and

⁷ See, e.g., John G. Ruggie, *The Social Construction of the U.N. Guiding Principles for Business and Human Rights*, Corporate Responsibility Initiative Working Paper No. 67 (Cambridge, MA: John F. Kennedy School of Government, Harvard University) available https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cpi/files/workingpaper_67_0.pdf.

⁸ See, e.g., Damiano de Felice, and Andreas Graf, "The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights," *Journal of Human Rights Practice* 7(1):40-71 (2015); Institute for Human Rights and Business, *Notes from the Field: Lessons Learned on Building Better National Action Plans on Business and Human Rights* (April 2016), available <https://www.business-humanrights.org/sites/default/files/documents/IHRB%20NP%20-%20ONAP%20Briefing%20-%20final%20-%202018%20April%202016.pdf>.

leadership. Currently, they are not doing enough to meet their duty to protect against business-related human rights abuse. While important legal developments are evolving in some jurisdictions, and the number of countries developing national action plans on business and human rights continues to grow, the effectiveness of current efforts and the lack of wider action are being called into question.

The lack of government leadership, reflected in governance gaps and a lack of policy coherence at all levels – national, regional and global – remains a fundamental challenge to ensuring that the human rights and dignity of all are upheld in the context of business activities. These gaps have been a recurrent theme at all Forums since the first edition in 2012, and a key reason for the development of the UN Guiding Principles on Business and Human Rights, which provide the main reference for Forum discussions.

At the Forum, civil society organizations, affected stakeholders and business alike have called on States to step up action, through strengthened regulation, improved policy coherence, and through leading by example in the various roles States have as economic actors.

The 2019 Forum will focus on the need for all governments to demonstrate progress, commitments and plans in implementing the State duty to protect and strengthening accountability. As the Guiding Principles clarify, ensuring access to effective remedy is also a part of the State duty to protect against business-related human rights abuse, and discussions on government action need to address the full spectrum of measures from prevention to remediation.

The Forum agenda will look at what governments need to do to foster business respect for human rights, including by getting their own house in order and by setting clear expectations and

creating incentives for responsible business conduct. In doing so, the agenda will consider the Guiding Principles' call for "a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights" and what this can mean in practice.⁹

The challenge starts with a close reading of the text. The focus is government--but the statement never identifies which. Moreover, the statement does not suggest the ways in which governments are to act as catalysts. Instead, governments are understood as pass throughs. Their role is to legislate as well as to provide a dispute resolution mechanism. But the operative role for governance does not reside in the state. It resides in the enterprises which exercise a quasi-administrative regulatory power derived from law. The state's duty to protect human rights is thus reduced to the mere exercise of declaring the legal character of those rights, and the corporate responsibility to respect is converted into a regulatory mandate to be undertaken through quasi-administrative structures of compliance based on prevention-mitigation-remedy of human rights wrongs. *The state, in effect, can disappear while appearing to lead.*

But the 8th Forum provided more than a space for the self-absorbing constructions of abstraction. The Forum's panels actually spun these wisps of abstract straw into regulatory gold.¹⁰ These abstractions were nicely incarnated in one of the

⁹ Website: United Nations, Office of the High Commissioner, Your Human Rights > Business > Forum on Business and Human Rights > 2019 UN Forum on Business and Human Rights, available <https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2019ForumBHR.aspx>.

¹⁰ The reference is to the tale "Rumpelstiltskin," collected for and published in The Brothers Grimm, Fairy Tales (Edgar Taylor and Marion Edwards, trans., Gutenberg Project EBook 52521) available http://www.gutenberg.org/files/2591/2591-h/2591-h.htm#link2H_4_0027. It tells the tale of Rumpelstiltskin, who helps a miller's daughter who, because of the boast of her father, was made to spin straw into gold. To that end she eventually bargained away her first born child. When Rumpelstiltskin came back for the child she bargained that if she could discover his name she could keep her child. She sent servants out to collect names one of whom heard Rumpelstiltskin singing his name in his hut. With that information she was able to reveal his name and keep her child. The story is rich with analogy to the business and human rights project. It is possible to suggest the connection between the bold claims of states and their "daughter" state

most profoundly revealing panels of the 8th Forum: “Scaling up respect for human rights in public investments: learning from government investment funds.”¹¹ Its object was to describe the success of this model around the utility of sovereign wealth funds to discipline the recalcitrant enterprise (and the complicit state).¹² The panel certainly met its objectives. Yet in doing so it revealed far more—it named itself—exposing the real consequences and transformations of its application of theory to the re-construction of a global political order in the name of the business and human rights project applied through its version of the meaning and implications of the principles of the UNGP.

The tale of the experiences of government investment funds served not merely to chronicle their victories in their heroic struggle to press forward their version of the business

intermediaries like SWFs and multinational enterprises, tasked to actually making goods the boast. But does that make a Rumpelstiltskin of the international organizations who spin the straw into the gold of compliance? Perhaps. In our version of the tale, though, it appears that Rumpelstiltskin may manage to take the child. For my purposes here, however, it is enough to suggest that the role of Rumpelstiltskin, turning the “straw” of theory into the “gold” of policy and regulation, that is, of action, makes these panels a critical space for analysis. But to give these panels a name—to name them and by naming them knowing them—that is the ultimate value of the 8th Forum.

¹¹ Panel Monday, November 25 (13:30 - 14:45), “Scaling up respect for human rights in public investments: learning from government investment funds,” description available <https://2019unforumbhr.sched.com/event/U97z/scaling-up-respect-for-human-rights-in-public-investments-learning-from-government-investment-funds#>.

¹² As described in the Forum Program Website:

This panel aims to generate a dialogue around current experiences with avoiding and addressing human rights risks by government funds such as sovereign wealth funds (SWFs) and public pension funds. This session will look at how two Councils on Ethics of government investment funds have addressed human rights risks and engaged with the UNGPs in their work. Key topics of discussion include: screening, information and prioritization challenges; the strategic use of the UNGPs in driving change among companies; leverage in investment relationships: active ownership vs. exclusion; transparency and reporting. Insight into operational challenges and opportunities faced by SWFs and public pension funds will enable a concluding discussion about policy and regulatory tools that can enable public asset owners and managers to scale up respect for human rights.

Ibid.

and human rights agenda. It also exposed the contradictions of the logic of that version of the UNGP principles that, in that name of centering the state, exalted projections of state power through market mechanisms and in the process strengthened some states and extinguished others from any meaningful engagement in the enterprise of business and human rights. These conclusions might best be examined through the lens of a retelling of the stories spun out in the 8th Forum panel. In that re-telling, a tale of the great success of the Norwegian Pension Fund Global¹³ as a great example of the 8th Forum theme, into a story that illustrates the way that the principles propelling that theme might actually impede or distort the 8th Forum theme. In the process, this re-telling nicely exposes the contradictions of the 8th Forum theme and the challenge for states of acting as catalysts.

The story is entitled--

Does Lesotho exist?

And it goes something like this:

The Pension Fund Global (or at least some elements within its organization structure) became concerned for reasons of their own about the state of human rights in the manufacture of textiles in Lesotho. Let us assume they had the best of all motives—the desire proactively to carry out the will of the Norwegian people expressed through law and delegated to the Norges Bank and its Ethics Council facility.¹⁴ The consequences, of course, is the production of law-based compliance overseen by an administrative apparatus within

¹³ The Norwegian Pension Fund Global is one of two principal investment mechanisms developed by the Kingdom of Norway to manage sovereign revenue by privatizing its investment and projecting that investment abroad through private markets managed by the Norges Bank. For a discussion see, e.g., Norges Bank, Government Pension Fund Global: Annual Report 2019 (No. 22, 2020) available https://www.nbim.no/contentassets/3d447c795db84a18b54df8dd87d3b60e/spu_annual_report_2019_en_web.pdf. Discussed in Larry Catá Backer, "Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets," *American University International Law Review* 29(1): 1-122 (2013).

¹⁴ See, e.g., Larry Catá Backer, "Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment," *Georgetown Journal of International Law* 41:425 (2010)

which the laboring oar of government is delegated to enterprises (state or private) now responsible for compliance.¹⁵

But in any case, the Pension Fund Global could proudly be pointed out as a good example of states leading through a “smart mix”. And so they were right to point proudly to this instrument of mixed measure (Norwegian) state leadership. And it could also point out just how well aligned were Norwegian law and the Pension Fund Global’s Ethics Guidelines with the spirit of the UNGPs and international law generally of which the Norwegian state apparatus proudly reminded others, especially in international fora.

For some time, so this story goes, the good fathers and mothers of the Pension Fund Global apparatus experienced a growing concern with the potential bad behavior of Asian participants in production chains. They were particularly concerned that the proper values of human rights relating to gender might not be as carefully observed where the home state of the production chain was centered in China than when operated by others.¹⁶ To the ends of satisfying its curiosity, they commissioned a study about textile manufacturers in Lesotho.

The study was to focus on three garment factories are owned by the Taiwan-based global jeans manufacturer, Nien Hsing Textile Co., Ltd. (“Nien Hsing”) which it was believed collectively employ roughly 10,000 workers. The factories are known as C&Y Garments (“C&Y”), Nien Hsing International, and

¹⁵ Discussed, e.g., Larry Catá Backer, “The Problem of the Enterprise and the Enterprise of Law: Multinational Enterprises as Polycentric Transnational Regulatory Spaces,” in *Oxford Handbook of Transnational Law* (Oxford University Press, forthcoming 2020); Larry Catá Backer, “Regulating Global Markets: What we Might Learn From Sovereign Wealth Funds, in Reshaping Markets: Economic Governance,” *The Global Financial Crisis, and Liberal Utopia* (Bertram Lomfield, Alessandro Somma and Peer Zumbansen, eds., Cambridge University Press, forthcoming 2015)); Larry Catá Backer, “Governance Without Government: An Overview” in *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* 87-123 (Günther Handl, Joachim Zekoll, Peer Zumbansen, editors, Leiden, Netherlands & Boston, MA: Martinus Nijhoff, 2012).

¹⁶ For an observation on this point, see, e.g., Larry Catá Backer Incoherence or Discretion in Corruption and Investment Approaches?--The Norwegian Pension Fund Global Places Petroleo Brasileiro SA (Petrobras) under observation, Law at the End of the Day (2 February 2016) available <https://lcbackerblog.blogspot.com/2016/02/incoherence-in-corruption-and.html>.

Global Garments. Nien Hsing also operates a textile mill in Lesotho, Formosa Textile Company, and has recently opened a fifth facility, called Glory International. All of the facilities are located in the Thetsane Industrial Area in Maseru, the capital of Lesotho¹⁷.

Now, of course, in this age of piece work, of the so-called gig economy,¹⁸ and of an NGO sector increasingly putting its employees adrift, the Pension Fund Global or its instrumentalities could not be bothered doing the work themselves. But Norway is rich, rich especially from profits derived from its substantial contribution to climate warming and environmental degradation, which it appears to celebrate in "some of the highest levels of resource use and CO2 emissions in the world."¹⁹ But why be fussy when here one encounters a state that can lead by example in the imposition of legal and compliance regimes far from its shores?!

And so they were able to commission a third party—the US-based organization *Workers Rights Consortium*²⁰—to conduct what ultimately became a two year study.²¹ It doesn't

¹⁷ Worker Rights Consortium, *Worker Rights Consortium Assessment Re: Gender-Based Violence and Harassment at Nien Hsing Textile Co., Ltd (Lesotho); Findings, Recommendations, and Status* (15 August 2019), p. 3; available <https://www.workersrights.org/wp-content/uploads/2019/08/WRC-Factory-Assessment-re-Nien-Hsing-08152019.pdf>.

¹⁸ See, e.g., Noam Scheiber, "Is Gig Work a Job? Uber and Others Are Maneuvering to Shape the Answer," *The New York Times* (26 March 2019) available <https://www.nytimes.com/2019/03/26/business/economy/gig-economy-lobbying.html>.

¹⁹ Jason Hickel, "The Dark Side of the Nordic Model," *Al Jazeera* (6 December 2019) available <https://www.aljazeera.com.cdn.ampproject.org/c/s/www.aljazeera.com/amp/indepth/opinion/dark-side-nordic-model-191205102101208.html>.

²⁰ "The Worker Rights Consortium (WRC) is an independent labor rights monitoring organization. We investigate working conditions in factories around the globe. Our purpose is to document and combat sweatshop conditions; identify and expose the practices of global brands and retailers that perpetuate labor rights abuses; and protect the rights of workers who make apparel and other products." Worker Rights Consortium/ About available <https://www.workersrights.org/about/>.

²¹ Worker Rights Consortium, *Worker Rights Consortium Assessment*, supra note 17. Described in "Female garment workers in Lesotho factories are being forced into sex," *Dazed* (August 2019) ("This week, the US-based organisation Workers Rights Consortium published a report outlining 'gender-based violence and harassment' allegedly taking place in three factories in Lesotho, Southern Africa. All three factories are owned by a

really matter who this group was or whether they were or whether they profited in the profit (consulting) or non-profit (NGO) sector.²² It is enough to know that there is now a healthy enough industry whose economic activity is centered on analysis of the economic activity of others within the construct of the human rights effects of economic activity. More to the point, this industry now represents a substantial, and markets based, privatization of what had traditionally been the enforcement activity of states. And it is an industry that, true to the logic of the markets in which they are embedded, might be understood to need to please their clients in order to survive. Not that there is anything wrong with this, of course. Nor is this to suggest that the report misrepresented the situation in any way. It is merely to suggest that in the context of this story of the grandeur of governments leading by example through a smart mix, it is necessary to situate that smart mix within the context, including the context of delegation, offshoring, and privatization, in which the "new" government as catalyst" framework operates. In any case it adds to the spice in the story of a European sub-national financial entity projecting the domesticated international project of the state that owns it, projecting that project through a US third party contractor into Africa.

And off went this third party provider to its work. After two years, the Workers Rights Consortium produced a set of findings—findings which it delivered to the Pension Fund

Taiwanese company named Nien Hsing Textile Co., whose clientele include American denim brands Levi Strauss, Calvin Klein, and Wrangler. ") available

<https://www.dazeddigital.com/fashion/article/45664/1/report-lesotho-africa-female-garment-workers-sexual-abuse-assault-factories>.

²² This is not to be read as a criticism of this specific protagonist. An assessment or constitution or review of the Worker Rights Consortium is central to this tale. One can assume for purposes of this re-telling that the Worker Rights Consortium operated ethically and in good faith throughout the process. "Founded in 2000 by international labor rights experts, students, and leading universities, the WRC assists universities with enforcement of binding labor standards they have adopted to protect workers producing apparel and other goods bearing university logos. The WRC has 157 university and college affiliates in the United States and Canada. The WRC also works with government entities, including municipal governments and pension funds, seeking to enforce human rights standards." Worker Rights Consortium/ About available <https://www.workersrights.org/about/>.

Global.²³ And probably to one one's surprise, the findings described the most dreadful sort of rampant sex harassment in the textile industry in Lesotho that cried out for response. Indeed, the findings suggested that the conditions were made worse in part because of the way in which the Taiwanese company effectively stripped workers of any sort of institutional apparatus for preserving their liberties against the personal depravities of those individuals who asserted control over their lives as well as their working conditions.²⁴

As described by the storyteller, before the findings were finalized and circulated in August 2019, it went first to the bosses at the institution that had paid for the work. The consensus at the Norwegian Pension Fund Global was to exclude the offending textile companies from its investment universe—the ultimate penalty for human rights bad behavior measured against the Ethics Guidelines. And that, indeed, would certainly have been an appropriate course of action to take.

But, it seems, the Workers Rights Consortium had a better idea. To exclude the companies involved in failing to prevent these activities might make the good folks at the Pension Fund Global sleep better for having acted in a morally (and legally) righteous way. However, righteousness might not contribute to ameliorating the conditions faced by these women in the Lesotho factories. And, indeed, they noted that "C&Y, Global Garments, and Nien Hsing International, supply denim garments to Levi Strauss & Co. ("LS&Co."), The Children's Place ("TCP"), and Kontoor Brands ("Kontoor")."²⁵

Rather than use the Pension Fund Global's market power (exercised through exclusion), or resort to the legal system (hardly on the radar, and in any case whose legal system?), WRC suggested that it might be more effective to rely on the UNGP's

²³ Worker Rights Consortium, *Worker Rights Consortium Assessment*, supra note 17.

²⁴ "As detailed in the report, many of the women working in the factories claim to have been coerced by their male supervisors, bosses, and co-workers into sexual relationships to keep their employment contracts and 'more favourable working conditions'. In the published assessment, one female employee states: 'For the women, this is about survival and nothing else... If you say no, you won't get the job, or your contract will not be renewed.'" "Female garment workers in Lesotho factories are being forced into sex," *Dazed* (August 2019), supra, note 21.

²⁵ Worker Rights Consortium, *Worker Rights Consortium Assessment*, supra note 17, p. 3.

2nd Pillar mechanisms. In the language of the story it might have gone something like this: When the brands find out about the activities, and the likelihood that these conditions will be widely reported, they will go ballistic. Why don't you let the brands do your work for you? After all, they already have in place a full complement of 2nd Pillar private law governance structures that give them substantial leverage (should I dare use that word) over their downstream supply chain associate.

So rather than rely on law, and administrative compliance forms, the Worker Rights Consortium suggested that markets might work better—that is, that the regulatory mechanisms of the societal sphere, governed through the systems of private law that have been constructed around private systems for responsibility to respect compliance might be more effective. And so the Pension Fund Global was persuaded that rather than making a large splash with the distribution of the report within the performance tropes of exclusion, that instead the brands purchasing product from these textile factories ought to be approached first. The objectives were quite transparent—if the brands were informed that garments they sold were manufactured under conditions of severe gender harassment, then they might be induced to better police their own internal law of production (their supplier codes of conduct and the like), to motivate the offending textile factories and their Asian owners, to do the right thing.

Yet at the same time, WRC noted two significant factors that drive the shaping of the use of this tactic. First was the difficulty of ensuring effective 2nd Pillar structural mechanisms for compliance (and implicitly underlining the possibility that human rights due diligence were not working as well as they could be in part because they lack effective incentives to aggressively monitor).

The abuses outlined herein are grievous—and it must be noted that the brands sourcing from Nien Hsing's Lesotho factories did not detect them via their voluntary codes of conduct and monitoring programs, which allowed the abuses to continue. It is relevant to note, in this regard, that workers, in offsite interviews, testified that Nien Hsing managers concealed their actual conditions and treatment from brand auditors, including by

pressuring employees not to speak truthfully to brand representatives who visit the factory.²⁶

Second, they also understood that private law governance regimes that mark 2nd Pillar Human rights governance systems within supply chains were only as effective as they were legally enforceable.

And thus the need to look to workable approaches.

In developing proposals for corrective action to address GBVH at Nien Hsing in Lesotho, the WRC was informed by 1) our recognition of the fact that the management responsible for the existence of a culture of sexual harassment and coercion in a workplace does not suddenly develop the will and capacity to eliminate the problem through its own managerial efforts; 2) our experience with the generally inadequate approach of global brands to improving labor conditions at their contract factories, via their existing auditing systems; and 3) the promising track record, by contrast, of enforceable labor rights agreements between brands and organizations representing workers in their contracted supply chains. These include the Accord on Fire and Building Safety in Bangladesh (which has transformed the physical infrastructure of Bangladesh's enormous garment industry and radically improved safety protection for more than 2.5 million workers) and the Fair Food Program in Florida (which has largely eradicated sexual harassment and coercion, and many other labor rights abuses, in an industry that is among the most poorly regulated in the United States).²⁷

The Pension Fund Global agreed. And, indeed, that was the course of action undertaken. The brands, indeed, it might have been reported, "went ballistic." They immediately undertook to remediate, remedy and put in place agreements and other matters to prevent these sorts of conditions at factories from

²⁶ Ibid., p. 7.

²⁷ Ibid., p. 5.

which they sourced their product. The consequence was also predictable under the logic of the UNGP's 2nd Pillar—and then began a program of intense monitoring and correction.²⁸

What a story! What a fantastic tale of success! How good all of the stakeholders must feel for the improvement in the condition of the people whose human dignity had been so thoroughly abused! Yes.

Yet from the perspective of the 8th UN Forum, and especially for the advancement of its great theme for the year, the story proved a horrible and utter failure. And not just a horrible and utter failure, but one laced with the sort of North-South arrogance that unmasks the reality of the failure of the fundamental principle on which the post 1945 state system was created--the horizontal parity of states. The story, it turns out is less about the triumph of privatized public projections of authority through financial markets, or of the value of third party private providers as essential mechanisms for vigorous accountability, as it is the story of the disappearance of states that no longer serve the interests of the public and private sectors in apex states. It is the story of a the manifestation of power in a post-globalization world in which sovereignty is determined by one's place in vertically arranged production chains, rather than on the character of the organization as a state or a private (profit or non-profit, state or privately owned) enterprise. What remains of states below the apex of production chains are spaces of convenience in which one can pour responsibility when convenient, and which are continued to provide the veneer of sovereignty designed to give the illusion of engagement in political-economic processes.

From that perspective, it might be useful to read the story a very different way. It is the story of the obliteration of Lesotho, and of its utter irrelevance in a context in which both



public and private international actors who dominate the mechanics of global production can afford to treat the sovereign and independent state of Lesotho as if it did not exist. This is not a unique story, but rather the normalization

²⁸ Ibid., p. 5-8.

of storytelling that is now being normalized as the emerging framework within which new vertically arranged power orders are being established. Just as Bangladesh essentially disappeared in the story of the aftermath of the Rana Plaza



factory building collapse—as powerful states, powerful brands, powerful NGOs, and international organizations took over the project of setting things right.²⁹ The moral of this story is that for the purposes of constructing the structures of a coherent global framework for business and human rights, states like Lesotho may well be reduced to little more than their flags—that is to the reduction of the state to its outward signifiers without internal meaning.

But what does it mean to disappear in this contemporary story of advancing the business and human rights project through states? It means to certain states “count” and are integral stakeholders within emerging governance frameworks, and other states do not. The categorization appears to depend on the place of the state within global production, as well as its governance capacity and power in relation to the owners of inbound investment. To some extent it suggests that the place of states as net importers or exporters of investment as well as the size of that investment may determine the extent to which the state may acquire a place at the business and human rights governance table. But other than that, what role for the state? In the case of Lesotho—almost nothing—the state appears to have been reduced to a space within which global regulatory flows may manifest. In the case of Bangladesh, a set of ministerial functions centered on their use as internal police (the application of their criminal law and administrative regulations).³⁰

It is in this context that the irony of the Forum theme begins to resonate in ways that ought to worry (unless of course one is already nicely embedded within those rarefied corridors

²⁹ Larry Catá Backer, “Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse,” *UC Irvine Journal of International, Transnational, and Comparative Law* 1(1):11-65 (2016).

³⁰ Recounted in *Ibid.*

of power in the most powerful state and their public and private institutional instrumentalities.

What did the government of Lesotho do? How were they involved?

The story as related at the 8th Forum makes it clear that Lesotho was nowhere to be found in this story. Let me suggest all of the questions that perhaps ought to be considered in rethinking the positive values of this story from a state-centered approach:

1. Did the Pension Fund Global seek to advise the government of Lesotho of its concerns before acting?
2. Did the Pension Fund Global seek to work together with the government of Lesotho?
3. Where, if anywhere did the Pension Fund Global (or more to the point given national ambitions and the harvesting of "good state" points harvested by the Kingdom of Norway in this affair) did the Norwegian state offer to provide any capacity building support or funds to support governmental "smart mixes" undertaken by the Lesotho government?
4. How did the national labor unions or the brands involve the host state in its negotiations? To what extent did they play an active role in protecting national interests in the management of this small portion of larger global production chains?
5. To what extent will these binding agreements be litigated or enforced in Lesotho or through its courts?
6. Where was Lesotho involved in the construction of the legal framework within which such issues would be subject to a revised and more effective legal structure within Lesotho itself.
7. And where, if anywhere, were the officials of the Taiwan region in the context of the story?

One gets the point. The story about Lesotho--like that of Bangladesh after Rana Plaza--highlights the great contradiction of the movement to strengthen the 1st Pillar duty of states.

Make no mistake, the story of the triumph of brands and unions overcoming the horrific conditions of sexual harassment in those textile factories is indeed a story of a great success. *But it is not the story of the success of law, or of the state system, or of smart mixes, or of any of the themes outlined in the lofty language around which the 8th Forum was organized.* Indeed, the contrast between the story of Lesotho and the 8th Forum thematic ideals could not be more stark:

The 2019 Forum will focus on the need for all governments to demonstrate progress, commitments and plans in implementing the State duty to protect and strengthening accountability. . . . The Forum agenda will look at what governments need to do to foster business respect for human rights, including by getting their own house in order and by setting clear expectations and creating incentives for responsible business conduct. In doing so, the agenda will consider the Guiding Principles' call for "a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights" and what this can mean in practice.

Instead of movement toward this ideal, what the 8th Forum revealed was the reality of something quite different.

1. States are now dividing along "class" lines. Rich, powerful, and "leading social forces" states--the modern form of the late 19th century "Family of Civilized states" will now play a leading role--directly or through their instrumentalities--in projecting legal and governance mechanisms abroad. I have suggested the plausibility of this trajectory of evolving globalization more than a decade ago.³¹

³¹ Larry Catá Backer, "Economic Globalization Ascendant and the Crisis of the State: Four Perspective on the Emerging Ideology of the State in the New Global Order," *Berkeley La Raza La Journal* 17(1):141-168 (2006) Available <http://lawcat.berkeley.edu/record/1120487/files/fulltext.pdf>.

2. For Norway and large international NGOs this means both bragging rights, and a sort of entitlement to project their authority. There was a sort of context to the choice of a focus on Lesotho. The international community had already targeted Lesotho for what was deemed to be an unacceptable level of sexual violence. More importantly, it produces an entitlement to bypass the sovereign state governmental apparatus in whose territories they are seeking to do good. But by doing good in this way might they also be doing bad? Sovereignty is not a matter of convenience--nor should it be reserved to the largest and most powerful states. At least that is what we have been taught to believe. The story of Lesotho reminds us that these are stories we might relate to our impressionable populations (to give them hope?) but that their connection to reality is at best tenuous.

3. For states like Lesotho and Bangladesh, the choices are substantially unpalatable, especially where they are dependent on others for connection to global production that produces at least some sort of political and economic stability. Either they can bend the knee and perfect the art of invisibility (being called out merely for whatever ceremony is used to assuage any possibility of guilty conscience among those powerful forces actually calling the shots). Or they might (as was also hailed in the 8th Forum) paraded about as one of the class of grateful emerging states that, having received the wisdom of leading state forces have, under their tutelage, produced the sorts of forms and legal structures approved by them. *This strategic capacity building is meant not to provide capacity as much as it is directed toward compliance.*

4. This suggests that, for all intents and purposes, the 1st Pillar State Duty is in danger of being reduced to a state duty to protect human rights under the tutelage and subject to the approval and monitoring of the newly constituted *Family of Civilized Human Rights States* and their international public and private instrumentalities. Barbarian states will either be colonized or co-opted. They will be rewarded for compliance along approved lines. But they will not be invited to the table or taken seriously in the construction of global human rights in economic activity baselines. That is to be expected in a world in which persuasive authority is a function of the control of the mechanics of global administration.

5. It also suggests the extent of the absurdities of the current effort to develop a comprehensive treaty for business and human rights.³² The story of Lesotho and its place in the actual management, though the exercise of 1st Pillar state power, of business conduct in global production chains serves as a harbinger of the allocation of power within any such comprehensive legal instrument. At best, then, the small states that continue to advance its projects, might well understand its power not in the ability to manage, under law, the human rights harms of economic activity within their respective national territories. Rather, they might come to understand its power as a means of acquiring a power to negotiate the delegation of such sovereign authority to the *Family of Civilized Human Rights States* in quid pro quo transactions.

6. It is important to note, however, the extent of the great triumph that the story of the confrontation of gross sexual harassment cultures in Lesotho represents. But it is not a great triumph of law or legal systems. It is not even the triumph of regulatory extraterritoriality. It is rather the great triumph of the private sector, of markets, and of the rising power of privatized law making within global enterprises, within global NGOs, and within globally involved state instrumentalities (SWFs and SOEs). It is, in other words the great triumph of the 2nd Pillar and not the 1st.

7. What is left to the 1st Pillar under what is emerging as its structural order? There are a number of "morals" to the story of Lesotho.

First, the power of the force of the 1st Pillar will lie in the willingness of the great powers to project 1st Pillar legalities through the production chains it controls. One already saw this

³² For our own views of the effort in its current draft form, see Larry Catá Backer and Flora Sapio (eds.), *Emancipating the Mind: Bulletin of the Coalition for Peace & Ethics* 14(2):149-351 (2019; Special Issue): Commentary on the U.N. Inter-Governmental Working Group (Geneva) 2019 Draft "Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Corporations and Other Business Enterprises" (Textual and Conceptual Analysis) available <https://www.thecpe.org/little-sir-press-a-self-publishing-collective/emancipating-the-mind-bulletin-of-the-coalition-for-peace-and-ethics/issues-emancipating-the-mind-bulletin-of-the-coalition-for-peace-ethics/volume-14-no-2-october-from-globalization-to-empire-essays-from-the-cpe-working-group-on-empire/>.

emerging into the structures of global financial regulation emerging after the economic crisis of 2006-8.³³

Second, emerging multilateral orderings of production--China's Belt and Road Initiative, the US America First Project (if it ever gets off the ground conceptually), and the European moral-regulatory project (of which the Pension Fund Global is an example)--are far more likely than a treaty to discipline and advance the state of the art in controlling human rights affecting behavior in economic activities. Whether, in fact, this is undertaken is likely the principal task facing the hopefully not oblivious UN apparatus.

Third, the old debates about extraterritoriality begin to assume an increasingly anachronistic character as international actors move from rogue elephant regulatory regimes projected abroad to coordinated efforts among more and more tightly banded groups of states. This suggests, as well, the ultimate problem with the 8th Forum theme. Hundreds of states legislating to their hearts content and with different content and effect (the movement toward all sorts of Modern Slavery Acts as an example) will not produce an efficient or useful regulatory environment (even if one were inclined to see in regulation the solution to the problem of business and human rights). Rather it will create the sport of regulatory forest that will invite strategic behaviors and conflict.

Fourth, the future appears to belong to private law. What the story of Lesotho really signals is that law is at its most useful when it is undertaken by the key stakeholders in global production. In that context the state provides stability but not specific regulatory rules.

Fifth, as a consequence, the emerging partnership between business (global production) and international organizations (as the sources of substantive rules against which business conduct is measured) will be far more critical to the development of a robust human rights centered culture of economic activity than the encouragement of law making in all of its glorious variation by states embedded in parts of global

³³ Larry Catá Backer, "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order", 18 *Ind. J. Int'l L.* 751-802 (2011)

production. The exceptions, of course, are the emerging multilateral production regimes identified above.

Sixth, none of this may matter in the face of the transformation of law from a set of written normative commands to a deeply embedded system of data based compliance. In a word in which ratings based on measured activity, produced by an analytics grounded in an approved or privileged set of data may make all of this structuring (and the theory underlying its controversies) little more than a historical artifact.

3. Falling in Love Again: 'Smart Mixes' and the De-Centering of the State Within Private Compliance Governance Orders'

I often stop and wonder; Why I appeal to men
 How many times I blunder; In love and out again
 They offer me devotion; I like it, I confess
 When I reflect emotion; There's no need to guess
 Falling in love again; Never wanted to
 What am I to do; I can't help it
 Love's always been my game; Play it how I may
 I was made that way; I can't help it
 Men cluster to me; Like moths around the flame
 And if their wings burn; I know I'm not to blame
 Falling in love again; Never wanted to
 What am I to do; I can't help it
 (Orchestral Interlude)

Falling in love again; Never wanted to
 What am I to do; I can't help it
 Love's always been my game; Play it how I may
 I was made that way; I can't help it
 Men cluster to me; Like moths around the flame
 And if their wings burn; I know I'm not to blame
 Falling in love again; Never wanted to
 What am I to do; I can't help it³⁴

³⁴ Transcribed by Mel Priddle (13 November 2013) available <https://lyricsplayground.com/alpha/songs/f/fallinginloveagain.html>. This song was submitted on November 22nd, 2012 and last modified on July 30th, 2017. Copyright with Lyrics © Universal Music Publishing Group. Written by F. Hollander, Reg Connelly.

In the 1930 German film *Der Blaue Engel* (The Blue Angel), based on Heinrich Mann's 1905 novel *Professor Unrat* (Professor Garbage),³⁵ a conventional high school teacher (Professor Rath (in the book Professor Raat), played by Emile Jennings) descends from the heights of conventional respectability to the role of cabaret clown and madness in the orbit of the cabaret's dancer Lola Lola (played by Marlene Dietrich) with whom he has an affair that ruins him³⁶. The signature song that captures the film's zeitgeist, *Ich bin von Kopf bis Fuß auf Liebe eingestellt* (Falling in Love Again),³⁷ nicely captures the relationship between the state (as Professor Rath)—conventional and bound by the rules that gives his essence meaning—and the markets based UNGP 2nd Pillar as the foundation of regulatory governance (Lola Lola) whose by being herself proves both irresistible to and the undoing of the good professor.

But of course, the UN Forum is not the cabaret to which those standard bearers of respectability--the state--are drawn and seduced by the freedom it offers from the convention that binds states tighter than a sealed drum. Nor is the 2nd Pillar if the UNGP our Lola Lola, against which our good professor (states) have been warning their students (global enterprises), and the protection of whose respectability has drawn states to the cabaret in which Lola Lola is encountered. States have not become the cabaret clowns of the UN Forum; nor has the UNGP 2nd Pillar and its portal opening to regulatory governance³⁸

<https://www.letsingit.com/marlene-dietrich-feat.-marlene-lyrics-falling-in-love-again-1zvsnbq>. LetsSingIt - The Internet Lyrics Database.

³⁵ Heinrich Mann, *Professor Unrat* (Rowohlt, 1951 (1905)). The book serves as a critique and caricature of 2nd Empire German life, customs, and manners. It focuses on the perversion of passion as obsession (for a rigid morals, structure of authority, application of principle, etc.), and the way that passion can be inverted to become the instrument of the very thing it was meant to control or in the extreme to suppress. These are the notions nicely expressed in the lyrics with which this section begins.

³⁶ This is a variation from the book where once financially ruined, the professor becomes the instrument through which his now wife can continue to seduce and entertain gentlemen friends. Ultimately efforts to help are unsuccessful and, reported to the police, they both are arrested and led off to jail.

³⁷ See note 34, *supra*.

³⁸ For a discussion, see, Larry Catá Backer, "Theorizing Regulatory Governance Within its Ecology: The Structure of Management in an Age

made the state pathetic and an object of ridicule by its students and the society that expected better.

But there are some resonances made clearer when one steps back for a second from the sometimes turgid and interest-laden discursive tropes that mark these sorts of conversations for the clarity of a song lyrics written well before the idea of globalization of the sort encountered today could even have risen to the level of science fiction. What that clarity provides is an insight. It is not that the state has humiliated itself by abandoning law in succumbing to the allure of the UN GP 2nd Pillar and the framework of regulatory governance. Rather it is that the embrace by states of compliance-accountability-monitoring-reporting structures has turned law into a form of cabaret clown, whose own performance now makes it impossible for the state to remain respectable through law. It is in "Falling in Love Again" with law, that the societal sphere is again able to transform what had once been its master into little more than the accounting house, the auditors--through which it can retain its legitimacy with its global constituency. In the process, of course, law becomes constitutive rather than normative, and the state, again, loses its centering (at least conventionally understood) position in the cosmology of power relations in global production. Of course our Lola, the markets at the core of the global production chain, would just laugh and say, "Falling in love again; Never wanted to; What am I to do; I can't help it."

For those who find this too esoteric (precisely because the analogies are meant to rip the reader from the insides of the leaden discursive tropes inside of which the respectable tend to argue these things, within the bounds of propriety), perhaps seeing the emerging role of the state through the lens of the Swedish Trade Minister, Anna Halberg, will drive the point home.³⁹

of Globalization," *Contemporary Politics* 24(5):607-630 (Special Issue 2018).

³⁹ Anna Halberg, "Stepping up government leadership: from commitments to action". Minister for Trade Anna Hallberg's speech in the opening plenary of the 2019 UN Forum on Business and Human Rights. November 25th, 2019 available <https://www.swedenabroad.se/es/embajada/un-geneva/current/statements/un-forum-on-business-and-human-rights-minister-for-trade-anna-hallbergs-speech/>.

Excellencies, distinguished guests, ladies and gentlemen, I am very pleased to be with you today at this important meeting. The United Nations Forum on Business and Human Rights concerns matters close to my heart: the respect and promotion of human rights in the business sector.
* * *

I am here today because Sweden's government has a strong commitment to protect and fulfil human rights and fully support this theme for the forum. Let me share with you seven key areas for the Swedish government's work.

I will start with social dialogue. In 2016, the Swedish Prime Minister initiated the Global Deal partnership. The Global Deal is a multi-stakeholder partnership hosted by the OECD in collaboration with ILO, promoting an enhanced social dialogue. We believe this is crucial to foster decent work and quality jobs globally. By extension, we believe it contributes to greater equality and inclusive growth.

In Sweden we can see that almost everyone benefits from increased trade and open global markets. We have a social security system that is engineered for coping with change. For example, if a company decides to close its operations at a factory, our answer is not mainly to try to stop it, but to handle the consequences in a way that protects the workers and the society.

Change is not a threat – it's an absolute necessity! But status quo and locking in old production methods is a threat to any company and any state. We have a social safety net that steps in. We offer retraining so that workers can find new jobs in more profitable and modern sectors.

Thanks to this system, Swedish trade unions are pro-change and pro free trade. We have strong unions and our Swedish businesses want strong unions. They appreciate unions as partners of the social dialogue. This partnership between

employers and employee organizations has also been a key factor behind many successful Swedish companies.

Workers win by gaining influence, improved working conditions and better opportunities for education and social welfare.

Companies win from a constructive working atmosphere, an openness to change, increased productivity and stronger consumers.

Society wins from inclusive growth and social stability.

It's a win-win-win situation. I call upon other states, organizations and companies to join the Global Deal initiative.

The second area is feminism. The Swedish government is a feminist government. We emphasize the human rights of all women and girls as absolutely essential for sustainable economic development. This is not just the right thing to do. It also makes sense economically. Gender inequality is always wasteful.

The third area is corruption. For the Swedish government the fight against corruption and bribery is key to sustainable development and the fulfillment of the Agenda 2030. Corruption is devastating for the business sector and for societies. Companies are less interested in investing in countries or regions with widespread corruption. This blocks economic development and undermines democracy.

Governments have a responsibility to build strong institutions, support the rule of law, and implement legislation on anti-corruption. In the Swedish Government's Drive for Democracy, an initiative aimed at responding to recent threats and challenges to democracy, fighting corruption is an important component.

The fourth area is Global Value Chains. Global value chains are a key component of the globalized economy, and they must be sustainable in all their parts. A chain is only as strong as its weakest link. In global trade, a chain of production can only be considered responsible and sustainable if it is so every step of the way.

We believe the Agenda 2030 presents a golden opportunity to gather the private sector to further develop ways to ensure that these global value chains respect human rights.

The fifth area is National Action Plans. It is essential for every country to implement and follow up National Action Plans for Business and Human Rights, in order to implement the United Nations Guiding Principles on Business and Human Rights. Sweden supports countries in Asia and the Pacific in this regard. I am pleased to see that Thailand has developed a National Action Plan and I would like to congratulate Thailand on being the first country in Asia to adopt a Plan.

The Swedish National Action Plan, launched in 2015, was followed-up in 2018 with a report on recommendations. Now, we are taking the National Action Plan one step further by launching a Swedish Platform for International Sustainable Business. We want to further improve our work in this field by developing one unified platform for Government initiatives.

The sixth area is about Sustainability Reporting. The EU demands sustainability reporting for all companies having more than 500 employees. We have strengthened this requirement in our national legislation. In Sweden, we require all companies having 250 employees or more to provide a sustainable development report.

This was important to spark change and awareness in an initial phase. But today many Swedish businesses are proactive and have

placed sustainability in their core business model. They now have extensive sustainability reporting – beyond legislation requirements – to boost the companies' business and shareholder value.

Consumers demand socially responsible production and companies take own initiatives to improve sustainability. Government action was necessary as a catalyst of change, but when the demand comes from consumers and markets it gets so much stronger.

The seventh area is state-owned companies, which must be role models in terms of sustainable business. The Swedish government has therefore made human rights an integral part of the corporate governance of Swedish state-owned enterprises by strengthening the follow-up of the UN's guiding principles. We have introduced crystal clear requirements in the state ownership policy, skill-enhancing measures and improved tracking of the companies' work in this field.

Lastly, our government will soon launch our new Export- and Investment Strategy. When we devised this strategy, it was clear to us that Sustainable Business would have to be at its absolute core. Sweden wants to show that trade is compatible with sustainability and respect for human rights. Sustainability is not an obstacle for trade, it will enhance trade. A sustainable business sector, with human rights as a corner stone, is absolutely necessary for any country's future welfare.

Thank you!

Here, the emerging role of the state sector in the governance of the human rights consequences of business activities emerges clearly.

First, the state embraces, as it should, a 1st Pillar UNGP "commitment to protect and fulfil human rights." Yet that commitment to protect and fulfill is undertaken through a leadership role. Consider what that means in terms of both the

mechanics of leadership (politics) and its characteristics (politics and structural baselines). Political parties, and vanguard elements of social forces undertake leadership roles. Leninist parties are tasked with guiding the state and administrative apparatus. But in this area, states are viewed primarily as the nexus of the highest expression of sovereign (and thus legitimate--a point NGOs in favor of the Comprehensive treaty never tire of reminding the rest of us) authority--law. That was the point of the 1st Pillar in large respect--to remind states of their duty to undertake through their own domestic legal orders the substantive duties they had embraced (to the extent they felt like it) of their international obligations along with or as a supplement to the human rights structures already framed within their constitutional orders.

That, however, is not what the Swedish Trade Minister has in mind. In place of law, she centers (as she must) the techniques of regulatory governance, of markets, and in the process de-centers the state (and law) as a normative foundation. In its place, a "smart mix" shifts normative and operational authority to the enterprise (along with the international community as the generator of norms, not binding on the state but rather on the operations of its enterprises) leaving the state in the role of the celestial clockmaker⁴⁰ charged with the great but remote task of defending the integrity of the system it oversees. She does this in seven steps.

Second, social dialogue is an odd basis on which to build the State duty. It acquires an even odder position as the first of the principles of state leadership in a context in which communities seeking to defend rights holders have been clamoring for law--substantive law and law permitting a more realistic access to justice. It is that clamoring that has produced the rights holder protective demand for a Comprehensive business and human rights treaty.⁴¹ But the Treaty efforts, like

⁴⁰ Isaac Newton, *Philosophiae Naturalis Principia Mathematica* (S. PEPYS, Reg. Soc. PRÆSES, Julii 5. 1686) available <http://www.gutenberg.org/files/28233/28233-h/28233-h.htm>. Translated as Isaac Newton, *The Mathematical Principles of Natural Philosophy* (www.WealthOfNation.com, February 21, 2013)

⁴¹ Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, OEIGWG Chairmanship Revised Draft 16-7-2019 available https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransC/oeigwg/oeigwg_RevisedDraft_LBI.pdf. Discussed in Carlos Lopez, "The Revised Draft of a Treaty on Business and Human Rights: A Big Leap

Professor Rath in the Blue Angel, has itself become the instrument of its own inversion, turning a project furthering the business and human rights enterprise into one centered on the glorification of key stakeholders within the constellation of global regulatory power.⁴² And this approach appears to disappoint. Indeed, this is the sort of thing one would expect to be at the heart of the 2nd Pillar--and ridiculed there. But here it appears to acquire a loftier standing. Perhaps that is because dialogue with the state is best; but that would be an odd conclusion for a human population for whom the state is a novel concept and hardly ever in accord with societal realities.

But dialogue here is meant to substitute or supersede the democratic process. That ought to give the populations of liberal democratic states pause. Does Pillar 1 permit the blatant (it has of course been inherent for a century or so) aristocratic tendency in the actualities of liberal democratic governance. Again, and again, one sees the reflex toward treating the objects of good intentions as without capacity (like children). They have no power. And this part of the speech makes that clear enough. Now transpose this pattern to the one that dominates discourse among states. . . . What one has is an invitation to dialogue based on power. And an embrace of the principle that within the mechanisms of states, the object (lawmaking) is a product of the sort of deal making in the shadow of substantive norms that is, in fact, the essence of the derided (as unaccountable) 2nd Pillar.

Third, the tendency to identify with the "causes of the month" produces the sort of sloganeering that, when produced by Marxist Leninist regimes, induces substantial criticism among the liberal democratic states whose representatives now appear unable (in turn) to resist. Sweden is a feminist state. . . Really? That is what is offered. It might have been more useful to suggest both what feminism means--hopefully as an inclusive rather than an invertive power/culture principle. Sweden has

Forward," *Opinio Juris* (15 August 2019) available <http://opiniojuris.org/2019/08/15/the-revised-draft-of-a-treaty-on-business-and-human-rights-a-big-leap-forward/>. See also Carlos Lopez, "Toward an International Convention on Business and Human Rights," *Investment Treaty News* (17 October 2018) available <https://www.iisd.org/itn/2018/10/17/toward-an-international-convention-on-business-and-human-rights-carlos-lopez/>.

⁴² Discussed in the essays in Larry Catá Backer and Flora Sapio (eds.), *Emancipating the Mind: Bulletin of the Coalition for Peace & Ethics* 14(2):149-351 (2019); Special Issue, *supra* note 32.

something to offer here, though none of it was in evidence. That, in part, is because much of the advances have come from the governmentalization of the private sector which has been given the laboring oar in developing the regulatory structures to make a robust feminism a reality--one with national characteristics (a discussion that this speech avoids).

Fourth, corruption is an area where the state has much to offer. That started, of course, with the Americans in the 1970s, with the world slowly catching up as this, too, became popularized through the normative developments (backed by loan terms) of the International Financial Institutions and their public lending policies. But still. And yet here, the centrality of the state and of law is deceptive. Anti-corruption efforts have indeed been profoundly transformative. But the transformation is essentially a consequence of compliance not directly of law. It is to compliance systems--and thus to the governmentalization of the global administration of the enterprise within the jurisdictional boundaries of its activities, that one looks to the development both of the systems of rules to combat corruption, and its implementation. That state stands aside. . . it judges, it evaluates, it holds accountable--like an electorate in a liberal democratic state. It protects the system within which such private governmentalized systems can operate, but it does not govern directly.

Fifth, the reference to global value chains makes the point. This is the operationalization of public (state driven) cultures that would make small states like Lesotho as irrelevant, and indeed as obstacles, to the proper running of global production--one grounded in the sensibilities that are better developed and transmitted from European, Western and Asian capitals, than from the sweat shop states of the world.⁴³

Sixth, the National Action Plans. I have had little good to say about National Action Plans; and that has put me on the wrong side of the herd.⁴⁴ I hope someday to be proven wrong; I expect that will be a task fraught with the likelihood of failure. What National Action Plans have wrought has been the usual tendency to export norms and compliance outward, with a sometimes substantial wall between domestic human rights regimes and those reserved for work undertaken "abroad." But worse, in this case, and I thank the Swedish Minister for being

⁴³ See *infra* discussion at §2.

⁴⁴ Backer, *Moving Forward*, *supra* note 4.

so open, is the inherent issues of hegemony that the National Action Plan project has been engendering. Just as it went without notice that the Norwegian Pension Fund Global and its US NGO Consultant could effectively treat Lesotho as nonexistent with respect to human rights harms occurring within its territory, so Sweden can speak to the way that it helps capacity poor states develop appropriate NAPS to suit the times and their direction. For those who started off life in the global South, the spectacle of parading the Thai's around as an example of a success might not have brought Sweden the reaction it thought it was entitled to obtain for this "good work." But worse, these NAPS also center their work on compliance--that is they delegate responsibility to the private sector to actually do the work. And in the process accelerate the movement of regulatory power (and control) from the state to the 2nd Pillar enterprises.

Seventh, sustainability reporting is to be welcomed. And indeed, the entire project of fusing the human rights, climate change, and sustainability projects is long overdue. But a combination of turf protection and inertia (regulatory and administrative drag as well) plagues this project. Still it was warming to see it mentioned. But less warming to see it fractured along national lines. Sustainability is not a state project; climate change does not change its character at the borders of states. And yet a program that creates incentives toward national programs might have perversely bad effects. But that is not what they are after. Putting this point together with the previous, what one sees here is an effort to use what Professor Ruggie references as "leverage" (see below in this essay), by seeking to legislate the framework within which enterprises will develop global governance regimes the baseline of which will be determined by the regulatory framework of the regulating (usually home) state. Here again one sees a 1st Pillar power assertion bounded by its ability to activate 2nd Pillar power.

Eighth, SOEs remain an important element of 1st Pillar power. But in essence, given the ideology of OECD states, more a 2nd Pillar issue. Here one deals with the state as shareholder--another aspect of privatization. And one deals with the public role of state projections of power in private markets--again bounded by OECD ideologies. And yet, what the state applies to its own enterprises as a shareholder could as easily be applied to all of its enterprises as legal expectations. The gap is more an

affectation than a reality--and yet a useful one for states reluctant to legislate.

Ninth, investment strategies. Here Sweden can do a lot of good. But that good is as a bank with a public conscience. Again, the Minister speaks the language of compliance, and it undertakes implementation through the markets driven world of lending. One is back in the world of the 2nd Pillar with the state as a powerful partner. But it is the world of the 2nd Pillar none the less.

And, indeed, the eight points of the Swedish minister points to the fundamental problem of the 8th Forum theme: a truly robust 1st Pillar would effectively require the abandonment of markets in favor of central planning regimes. Ironically, the only states in the global now capable of a profoundly robust engagement with the 1st Pillar are Cuba and North Korea. To embrace the market—as global actors have robustly embraced it over the last generation to build the current trade order--is to have to acknowledge that it has produced a great transformation in the role of the state, and the role of law in the management of economic activity now organized along global production chains. "Smart mix" in that context inevitably leads away from the effective deployment of the ideology of the state around which the mythologies of the 1st Pillar are built.

As John Ruggie recently, perhaps inadvertently, underlined in his much read and important Keynote Address Conference on Business and Human Rights:⁴⁵

The conference agenda asks the question: How do we most effectively advance action on the EU level? My job this morning is to sketch out the backstory to our discussions and suggest some strategic directions.

Let me begin with the most basic question: what is business and human rights all about? The

⁴⁵ John G. Ruggie, "Keynote Address, Conference on Business and Human Rights: Towards a Common Agenda for Action", organized by Finland's Presidency of the EU Council, Brussels, Belgium 2 December 2019 available

https://www.shiftproject.org/media/JohnRuggie_FinlandConferenceBHR_2Dec2019_vFinal.pdf.

answer varies depending on vantage point. In big-picture terms, it is about the social sustainability of globalization. . . .

When seen from the perspective of enterprises, business and human rights is about ways they can recover trust and manage the risk of harmful impacts. . . . For governments, business and human rights is at the core of new social contracts they need to construct for and with their populations. . . .

For the individual person whose rights are impacted by enterprises, business and human rights is about nothing more – but also nothing less – than being treated with respect, no matter who they are and whatever their station in life may be, and to obtain remedy where harm is done.

My second point is to remind us that formal international recognition of business and human rights as a distinct policy domain is relatively recent. At the UN level, the first and thus far only formal recognition dates to 2011, when the Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights. . . .

That brings me to the key issue of strategy – how to reinforce and add to this transformative dynamic. The Guiding Principles embody two core strategic concepts: advocating a “smart mix of measures,” and using “leverage.” I’ll take them up in turn.

We often hear the term “smart mix of measures” being employed to mean voluntary measures alone. But that gets it wrong. Guiding Principle 1 says that states must have effective legislation and regulation in place to protect against human rights harm by businesses. Guiding Principle 3 adds that states should periodically review the adequacy of such measures and update them if necessary. They should also ensure that related areas of law, for example corporate law and

securities regulation, do not constrain but enable business respect for human rights. So, a smart mix means exactly what it says: a combination of voluntary and mandatory, as well as national and international measures.

A number of EU member states and the EU as a whole have begun to put in place mandatory measures that reinforce what previously was voluntary guidance to firms on corporate responsibility. These include reporting requirements regarding modern slavery, conflict minerals, and non-financial performance more broadly, as well as human rights and environmental due diligence. Such initiatives are aligned with the spirit of the UNGPs, and they are important steps in adding “mandatory measures” into the mix. Still, many leave a lot to the imagination – of company staff, consulting firms, and civil society actors among others. More should be done to specify what meaningful implementation looks like, in order to avoid contributing to the proliferation of self-defined standards and storytelling by firms. Also, with limited exceptions currently no direct consequences follow from non-compliance. Nevertheless, the ascent of Pillar I is underway.

Professor Ruggie’s elegant analysis partially points in the right direction. And perhaps that is necessarily an inevitable consequence of an approach that has, to a necessary extent, continued to seek to center the state—understood as the community of states as horizontally equal partners--but in reality nudging toward the use of the 1st Pillar as the cover under which the home states of the great global production chains can (as he suggests) use their leverage to develop regulatory chains extending down into and obliterating any sense of partnership among states.⁴⁶

What all of these movements toward “smart mixes” and legal pluralism signify;

⁴⁶ See *infra* discussion at §2.

What the trajectory toward the governmentalization of the private sphere and the legalization of its governance;

What the centering of the state as the administrative unit overseeing structures of accountability beyond its ability to directly regulate by traditional means;

What the mix that is at the heart of the re-branded 1st Pillar strategy appears to be is this?:

The focus on the state (with exceptional variations for the "great states" the U.S. and China, and with a "moral exception for the incarnation of internationalization that the EU continues to hope to represent) is not meant to amount so much to the centering of the state within the 1st Pillar of the UNGP. Instead it heralds the triumph of the 2nd Pillar and its capture of the state in ways that are palatable to the ideologies of conventional state supremacy (at least among those states already subject to the "leverage" of the "big 3"--US-China-EU). The object, again, is to keep those at the bottom happy with, and to offer a hopeful rationalization, of their (inevitable) position in global power chains. For that, at the end, is all there is.

And here again we come to the great insight that can be derived from *The Blue Angel*: at the end, neither Professor Rath nor Lola Lola can be anything but what they are. And that is what they will be. But the students, the cabaret goers, the orchestra, that is all those who shift between gymnasium and cabaret, those who work in and for the cabaret and the gymnasium, those who function in the society around which professor, dancer, and students can rationalize their lives, those who make use of Rath and Lola Lola, play a role. It is to those actors that the emerging social order belongs. And to be somewhat tiresome about the meaning:

In a world in which one accepts the primacy of international law and the compulsion of international norms (however manifested to the extent they have societal weight), but which also is profoundly tied to the state as the apex source of political legitimacy, and yet recognizes the realities of governance through enterprises that may be constituted to mirror the state and which may be called up on to develop binding regulatory structures, and compliance mechanisms extending down their chain of control and up to the states to

which they might be held accountability for the quality of their legal structures and the efficacy of their implementation, there is an inevitable consequence. That consequence suggests that the application of these principles produces a governance orthodoxy the operation of which requires the state (not all states but dependent states) to cede both their regulatory primacy and its role as the center of the institutional framework for the management of global business.

That is the vision that our Swedish Trade Minister and John Ruggie would appear to have us embrace. That is also a vision profoundly at odds with the traditional reading of the 8th Forum's theme. But perhaps, the view of Lola Lola, "can't help it." The alternative, of course, is not Lola Lola, but that very European avatar of itself—Lulu.⁴⁷ It is to that which I will turn to in discussing the next generation state based mandatory due diligence laws.

4. Conclusion

U was delighted to have been able to attend a portion of the 8th UN Forum for Business and Human Rights. I have been reflecting on the lessons learned and the directions toward which that great assembly of states, enterprises, NGOs and academics would have us all journey.

That journey, of course, was wrapped up nicely in the 2019 Forum theme—*Time to act: Governments as catalysts for business respect for human rights*. For me, the theme produced a substantial irony, an irony that serves as the focus of the brief comments offered here on the state of the art in business and human rights and the perversity that it appears to foster as it lumbers along propelled by its own quite incomprehensible internal logic (at worst perhaps comprehensible in the sense that it fails to understand the consequences of the choices it

⁴⁷ Alban Berg, *Lulu* (1929-35) Opera in 3 Acts, libretto adapted from Frank Wedekind, *Erdegeist* (Earth Spirit, 1895) and *Die Büchse der Pandora* (Pandora's Box, 1904). See generally, Theodor W. Adorno, *Alban Berg, Master of the Smallest Link* (Juliane Brand, and Christopher Haley (trans.) Cambridge, England: Cambridge University Press, 1991), pp. 120-136. This is a story of the unconscious but quite deliberate contradiction of abstraction and principle in the face of a hostile world in which the only possible outcome is sometimes violent engagement, misunderstanding, inversion, and (self) destruction.

appears to favor). It reminds us that ideological stances produce some time quite absurd results. And absurdity was the order of the day, at least for the positions taken by some of the leading states in this field.

These observations were divided into two parts. The first part, *Reflections on the 8th U.N. Forum on Business and Human Rights—Part I, "Does Lesotho Exist?"*, considered the reactionary character of progressive approaches to the enterprise of business and human rights. The 8th Forum nicely encapsulated the way that the drive toward the legalization of the 2nd Pillar corporate responsibility actually produces a new sort of imperial system with human rights at its center and a confederation of --wait for it--states which formed the family of "civilized nations" as they were constituted in 1900 again appear take a leading position. For all other states there is, well, nothing. They disappear in the shadows of the sunshine cast by this Olympian cartel of states. The irony that appears to emerge out of the 8th Forum in this respect that the drive to center the state actually divides states into those that count and those that are slated, effectively, for oblivion--resurrected only when necessary to hide the reality that the system of horizontal parity among states created after 1945 is being substantially transformed. Make no mistake, is not about Western privilege (though that trope is always useful in the corridors of Geneva, and New York or wherever it is deemed useful to manufacture a strategic reality for the voting masses); rather it is about power—the divide is between rich states from which global production is controlled or centered, and those states (the rest) whose people and resources serve them. And in the process, those serving states lose effectively their coherence as states (resurrected only for the photo-op sessions that the UN system can ably arrange.

The second part was built around and as an homage to that marvelous inter-war German movie, "The Blue Angel."⁴⁸ The movie is about the way that a society at its apex inverts itself on the contradictions of its own good intentions, is again at the heart of the business and human rights enterprise illustrated within the Forum framework. Entitled '*Falling in Love Again: Smart Mixes and the De-Centering of the State Within Private Compliance Governance Orders*', explores the way the

⁴⁸ "The Blue Angel," *supra*.

framework for this *emerging imperium* actually has a far more interesting effect. The effect becomes more interesting when measured against the objectives expressed in the 8th Forum's theme. One would think, on the basis of the expected consequences of the building of vertically arranged power structures in which principal states oversee the economic activities (through their instrumentalities) of activities undertaken by them throughout their production chains, that the Forum theme would thereby be furthered. Here, at last, one might expect to see fulfilled the objectives that these states (and dominant society intelligentsia) had sought for a long time. That would be a regulatory structure driven by the law of the most powerful states and enforced through their judicial structures, now serving the higher cause of (still badly defined) international human rights.

Yet, rather than returning power to the states who play a leading role in the manifestation of a human-rights controlling imperial cartel, it has the effect of dissipating that authority. States, effectively incapable of actually managing human rights through law, transform the role of law as a constituting element of legal orders that are actually delegated to enterprises (or better put delegated to the global production chains). As a consequence, the state itself disappears within the logic of the structures of its own approach to law into the vast data driven compliance machinery that the vanguard states have been furiously constructing (with the complicity of the largest enterprises) over the last generation.

Together, both perspectives on the 8th UN Forum for Business and Human Rights sketch out one of the great absurdities of the current approach to the regulation of business and human rights--the great campaign of national regulation the results of which accelerate the process of privatizing law by governmentalizing the largest enterprises--delegating to them the functional role of the state in the management of the human rights effects of economic activities within global production. Perhaps that is as it should be. I have certainly been arguing this position since before many of the current crop of elite influence leaders learned to connect state-enterprise-human rights.⁴⁹ But in the process, and in an effort--essentially

⁴⁹ Explored in Larry Catá Backer, (e.g., *From Moral Obligation to International Law*, Geo. J. Int'l L. 39(4):591-653 (2008) available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1112882.

reactionary--to revitalize the state as the source of control, and law as the language and structure through which such obligations are implemented, these "leading forces" of human rights change have essentially produced a mechanism through which the core power of the state will be obliterated, all the while preserving an increasingly fragile facade of state power.