The Treaty Route for Business and Human Rights

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Background: I teach a seminar on business and human rights that meets once a week. I developed the attached exercise as part of my unit covering Pillar I of the United Nations Guiding Principles on Business and Human Rights.

Objective: To have the students think through the various issues related to the proposal of drafting a binding international treaty concerning business and human rights.

Reading: In anticipation of the in-class exercise I assigned:


I ask students to read these materials with an eye towards considering the pros and cons of the treaty route. *(I would welcome suggestions for other articles and essays discussing the pros/cons of a binding treaty as well as any feedback on any part of the exercise: llaplante@nesl.edu).*

Instructions for the in class exercise: Begin the class with a brief introduction of the topic of a binding treaty for business and human rights. Hand out the attached instruction sheet. Provide each student a country. Depending on the class size, you may need to create teams of students to represent the same country. Give the students initial time to read their role and prepare their debate. Ask Norway to facilitate the debate. If a student or group of students does not volunteer to give an answer, select one to start. Wait for another student to respond. If that student directs the response to you, remind him or her that they should speak to each other. Step aside and try to avoid commenting on the conversation. Afterwards reflect on what it felt for the students to represent their country and what were the points in the debate that struck them as most persuasive and important.
Exercise: In Class Debate on the Treaty Process

Names: 
Date: 

In 2014, Ecuador presented a resolution before the U.N. Human Rights Council that established

“an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, the mandate of which shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporation and other business enterprises.”

The resolution also directed that the first two sessions of this working group would be dedicated to “constructive deliberation on the content, nature and form of the future international instrument.”

The resolution was co-sponsored by Bolivia, Cuba, South Africa, and Venezuela. The vote in the Council was twenty in favor, fourteen against, with thirteen abstentions. A majority of African members voted for it, as did China, India, and Russia. Apart from the sponsors, all other Latin American countries, notably Brazil, abstained. The European Union and the United States voted against the resolution. Japan and South Korea also voted no.

Directions: The in-class role-play will simulate a U.N. session in which this working group begins the deliberations as instructed by the U.N. Human Rights Council resolution. You will be assigned a country role for the debate.

Part I: Preparing for the debate (10 minutes)

Read your role carefully. Then in groups in favor or against the treaty process, discuss your various arguments with relation to the creation of a legally binding international treaty on business and human rights. Note any issues or questions that need to be clarified/discussed before the official working group meeting in Geneva.

Part I: Preparing for the debate (20 minutes)

The debate will be facilitated by the country Norway.
Country Roles:

**Instructions:** I made a separate page for each of these roles that I handed out to the students on the day of the exercise.

*Please note:* I do not claim that these roles contain an accurate or exact depiction of the political positions of the named countries. I view this as a fictional exercise although I did speculate as to some of the possible reasons for the positions of each country. Importantly, each country represents at least one of the many arguments on this issue whether in favor or against a treaty.

**Country Roles**

**PRO**
- Ecuador
- Bolivia
- Cuba
- South Africa
- Venezuela
- China, India, and Russia

**Con**
- UK
- United States
- Australia
- Japan
- Korea

**Middle**
- Norway
- Brazil

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Names:

**United States  (Against the Treaty)**

Although the U.S. has been generally supportive of the United Nations Guiding Principles on Business and Human Rights, it wants to kill this treaty process. Although originally threatening to boycott the working group, it decided it made more sense to participate in order to delay, slow down and even paralyze the process. The U.S.’s position is that the idea of establishing an overarching international legal framework through a single treaty instrument governing all aspects of transnational corporations in relation to human rights may seem like a reasonable aspiration and simple task. But neither the international political or legal order is capable of achieving it in practice. The crux of the challenge is that business and human rights is not so discrete an issue-area as to lend itself to a single set of detailed treaty obligations. Politically, it exhibits extensive problem diversity, institutional variation, and conflicting interests across states. This challenge only increases as the number of TNC home countries grows. The treaty would be at such a high level of abstraction that it would be devoid of substance, of little practical use to real people in real places, and with high potential for generating serious backlash against any form of further international legalization in this domain—as we already began to witness in the recent Council debate.

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**Australia (Against the Treaty)**

The Australian government has generally been supportive of the United Nations Guiding Principles on Business and Human Rights, but due to its desire to maintain good relations with the United States it has decided to take a hard stand against the treaty process. Although Australia is participating in the working group process, your aim is to discourage advancements while appearing very neutral and disinterested. In particular, you emphasize that the existing human rights treaties provides enough legal framework in conjunction with the UNGPs. Moreover, even if a treaty were drafted and adopted, it would be hard to get many countries to ratify it and so it may not enter into force (won’t be binding on any country). If too few countries ratify the treaty it might weaken the existing framework evolving through the UNGP framework (which may eventually become International Customary Law and more binding). Moreover, the resulting treaty might even be watered down. Bottom up development is more likely to be more effective at holding companies accountable.

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Japan (Against the Treaty)

Japan is currently suffering one of its worst economic crises and cannot afford to alienate any multinational company that would like to do business in its country. Thus, its stance against the treaty is largely based on its strong pro-business stance back home and the need to stay consistent. Japan wants to emphasize that each sovereign nation is responsible for regulating companies and that an international treaty will slow things down. It rejects any suggestion that an international treaty could hold corporations directly accountable for violations of human rights which it considers an outlandish proposal given that human rights law only applies to governments vis a vis the people in its territory. In fact, the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” failed because they claimed Corporations were directly accountable. Japan's position is that we have not given states adequate time and space to implement the Guiding Principles. This Intergovernmental Working Group will create a competing initiative, which will undermine efforts to implement the Guiding Principles. The focus will turn to the new instrument, and companies, states and others are unlikely to invest significant time and money in implementing the Guiding Principles if they see divisive discussions here in Geneva.

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**Ecuador (In favor of treaty/sponsored resolution)**

Since Ecuador sponsored the Resolution that created the working group, it has a lot invested in making this consultation process work. You are determined to keep the dialogue focused on the mandate that the Resolution set out to discuss ideas for the content, nature and form of the future international instrument. You will do your best to put to rest any doubt about whether a treaty even makes sense, and instead you want to encourage the states that are offering concrete suggestions for the actual substance of the treaty.

You will start off the meeting and be responsible for facilitating the dialogue.

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Venezuela (In favor of the treaty)

Venezuela has had an ongoing tension with the U.S. (along with its allies Cuba and Russia who are also supportive of the Treaty. Venezuela views the Western countries as are trying to bully NGOs and other countries in order to weaken support for the Ecuador resolution. Venezuela believes that there is public support for the treaty given that more than 610 organizations from 95 organizations have formed a coalition in support of the Ecuador resolution. All of these supporters are fed up with transnational corporations’ cowboy style of production where and how they want to without accountability. Victims need a voice in this process and Venezuela feels it is the voice of the pueblo, Simon Bolivar style.

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South Africa  (In favor of the treaty)

Having experienced the dramatic impact of multinationals on sustaining apartheid (and then the dissolution of apartheid due to company embargos), South Africa is very keen to support the treaty making process. In particular it is skeptical that national laws and domestic courts suffice to hold companies accountable. If this were true, then why do Transnational Corporations (TNC) not rely on these domestic mechanisms to resolve investment disputes with States? Why is binding international arbitration necessary, enabled by 3,000 bilateral investment treaties and investment chapters in free trade agreements? The justification for this has always been that national laws and domestic courts are not adequate and need to be supplemented by international instruments. For this reason, South Africa would like the treaty to contain a provision that creates an international body, perhaps even a tribunal that would hear cases against corporations.

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Bolivia

Having lived through the crisis brought about by the privatization of water, Bolivia has first hand knowledge of the type of violence that can arise when companies ignore the basic human rights of communities. Although Bolivia supports the UNGPs, it believes that a treaty is necessary because the Guiding Principles do not create new international law obligations. Bolivia believes that the treaty should codify the principle recognized in the Universal Declaration of Human Rights that “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.” Thus Bolivia wants the treaty to be directly binding on companies, as opposed to binding only on the states that regulate these companies. This model is not too far from what was proposed by the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.” One of the weaknesses of the UNGPs is that they are voluntary and so this international treaty would help to create more teeth to the framework.

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India (In favor of the treaty)

In recent years, India has enjoyed a booming economy but recognizes the importance of the treaty as a way of assuring the sustainability of its economic success. It has a very practical approach to viewing the treaty and possible international legal regime. First, such a regime would enhance legal predictability and stability and help to manage risk so companies will have long term success. With a clear floor of minimum standards, there will also be a more level playing field for business. A more predictable, binding human rights regime would also help to lower conflicts between individuals and communities with companies, thus lowering costs. Overall, this system would induce an environment of greater trust and enhanced reputation so business can thrive. The treaty would be a “political spur” (not legal chill) to the growing support of the UNGPs, while bringing hard law status to the framework and giving it teeth. India realizes, however, that the working group must agree on what core rights it will include in the treaty and whether these will be new law; or alternatively if the treaty will just make reference to existing human rights treaties.

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Brazil (In favor of treaty but wants to find a middle ground to address polarization))

Brazil takes that stand that the U.N. Guiding Principles are a critical first step but must be complemented by effective regulatory measures to address the continuing human rights protection gaps relating to the adverse impacts of business. The two processes can now proceed alongside one another — implementing the voluntary Guiding Principles while simultaneously pursuing a binding treaty, which would likely take a decade or more to complete. One concern of Brazil is the need to create the legal basis for extra-territorial effect. That is, the home country of companies should have the ability to regulate the foreign activities of companies incorporated in their country. Brazil also is mindful of the Human Rights Council resolution paragraph 2 which states: “…the first two sessions of the open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises shall be dedicated to conducting constructive deliberation on the content, scope, nature and form of the future international instrument…”

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Norway (In favor of the treaty but wants to find a middle ground to address polarization)

Norway recognizes the need to bring more consensus to the treaty making process. If a treaty is to be effective, it needs to be developed in close consultation with all relevant States, including those that headquarter many transnational corporations such as the US and EU States, together with other stakeholders such as human rights defenders and affected communities. While the business community continues to be fully engaged to effectively implement voluntary commitments for respecting human rights, no initiative or standard with regard to business and human rights can replace the primary role of the state and national laws in this area. For that reason, Norway objects to the idea that companies must be directly bound by a treaty, but rather the treaty would call upon States to enhance their domestic legal affairs to afford greater protection to individuals and communities. The development of any international legal instrument requires a certain degree of consensus among states. Norway agreed with China’s delegate who stated that the vote was based on the following “understanding”: that the issue of a business and human rights treaty is complex; that differences exist among countries in terms of their economic, judicial, and enterprise systems, as well as their historical and cultural backgrounds; and that it will be necessary, therefore, to carry out “detailed and in-depth” studies, and for the treaty process itself to be “gradual, inclusive, and open.” Thus, before launching a treaty process its aims should be clear, there ought to be reasonable expectations that it can and will be enforced by the relevant parties, and that it will turn out to be effective in addressing the particular problem(s) at hand. This suggests narrowly crafted international legal instruments for business and human rights—“precision tools” I called them—focused on specific governance gaps that other means are not reaching. Norway also wants to assure the continued development of the UNGPs. In fact, the day after the deeply divided vote on the Ecuador proposal the Council adopted a second resolution, introduced by Argentina, Ghana, Norway, and Russia along with forty additional co-sponsors from all regions of the world. It extends the mandate of the expert working group the Council established in 2011 to promote and build on the GPs, and requests the High Commissioner for Human Rights to facilitate a consultative process with states, experts, and other stakeholders exploring “the full range of legal options and practical measures to
improve access to remedy for victims of business-related human rights abuses.” It also asks the expert working group to report on GPs implementation—lack of awareness of what is actually happening being a main reason for the belief by many that not much is. This resolution was adopted by consensus, requiring no vote.

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