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Two Roads Converged: The Mutual Complementarity of a Binding Business and Human Rights Treaty and National Action Plans on Business and Human Rights

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Cover Page Footnote

Legal and Policy Coordinator of the Frameworks Program at the International Corporate Accountability Roundtable; ABA Section of International, Chair of the Corporate Social Responsibility Committee, Vice Chair of the Young Lawyers Interest Network, and Steering Committee Member of the International Human Rights Committee; J.D., Georgetown University Law Center

Two Roads Converged: The Mutual Complementarity of a Binding Business and Human Rights Treaty and National Action Plans on Business and Human Rights

Sara Blackwell[†] and Nicole Vander Meulen[‡]

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A INTRODUCTION

Adverse human rights impacts occur in business operations across all sectors.¹ There is well-documented evidence of such harms including, for example, low wages, excessive working hours, and child labor in the electronics and apparel

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¹ See e.g., Robert Stumberg et al., *Turning a Blind Eye? Respecting Human Rights in Government Purchasing* 8–15 (Sept. 2014), http://issuu.com/_icar_/docs/procurement_report_-_final/1?e=6698884/9237920.

sectors; human trafficking and questionable use of force in the private security sector; and forced labor and unsafe working conditions in the agricultural sector, to name a few.²

At the global level, two major initiatives are currently underway that aim to address such harms by increasing business respect for human rights. First, governments have begun to make commitments to implement business and human rights frameworks in policy documents known as National Action Plans (NAPs) on business and human rights.³ These NAPs are most often aimed at furthering implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs), which were unanimously adopted by the United Nations Human Rights Council (UNHRC) in 2011.⁴ Second, an international process toward a binding treaty on business and human rights has begun through the UNHRC's adoption in 2014 of a resolution tabled by a group of States demanding mandatory measures in addressing business-related human rights harms.⁵ Since the adoption of this resolution, however, some stakeholders have voiced concerns that this new treaty process and the creation of NAPs are in competition with one another.⁶ Specifically, some have expressed concerns that the treaty process may divert resources and attention away from domestic implementation of the UNGPs, that States would use the treaty process as an excuse not to make domestic reforms in line with the UNGPs, and that reopening negotiations around business and human rights standards could cause a weakening of consensus gained around the UNGPs.⁷

This article seeks to demonstrate that, not only are NAPs and the treaty process not in competition, these two global developments strongly benefit one another. First, NAPs processes will support the treaty process by identifying the most pressing gaps in protections and by highlighting which business and human rights issues governments agree on the most, which can then be used to target the content and scope of the treaty. Second, once a treaty is created, States that have

² *Id.*

³ *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks*, 8 DANISH INST. FOR HUMAN RIGHTS & INT'L CORPORATE ACCOUNTABILITY ROUNDTABLE, (June 2014), <http://icar.ngo/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>; BUS. & HUMAN RIGHTS RES. CTR., *National Action Plans*, <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (last visited Oct. 23, 2015).

⁴ SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS & TRANSNATIONAL CORPS. & OTHER BUS. ENTERS., *GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT, AND REMEDY" FRAMEWORK*, U.N. Doc. A/HRC/17/31 (2011) (by John Ruggie).

⁵ Human Rights Council Res. A/HRC/26/9, Rep. of the Human Rights Council, 26th Sess., June 10–27, 2014 (June 26, 2014).

⁶ See, e.g., Josua Loots, *Of Aims and Means: More Coordination and Harmonization of Efforts are Critical to Further Progress on Business and Human Rights*, INST. FOR HUMAN RIGHTS & BUSINESS (Oct. 29, 2014), <http://www.ihrb.org/commentary/of-aims-and-means.html>.

⁷ See, e.g., Mark Taylor, *A Business and Human Rights Treaty? Why Activists Should Be Worried*, INST. FOR HUMAN RIGHTS & BUSINESS (June 4, 2014), <http://www.ihrb.org/commentary/board/business-and-human-rights-treaty-why-activists-should-be-worried.html>

gone through NAPs processes will be better equipped to identify which domestic reforms are necessary to become treaty-compliant. Third, NAPs processes lead to increased stakeholder capacity and knowledge about complex business and human rights issues, which then contributes to stakeholder engagement in the treaty process becoming more meaningful. Fourth, the dialogue around the treaty may foster new or strengthened relationships between business and human rights stakeholders from the Global North and those from the Global South, as well as strengthen already existing networks of business and human rights stakeholders in a way that will foster collaboration on efforts to implement the UNGPs. Finally, the increased attention on business and human rights that the treaty process has generated may bring new voices to the discussion around the implementation of the UNGPs. As such, these two roads currently travelled by business and human rights stakeholders are more converged than diverged, and, rather than viewing these efforts to be in opposition, each initiative should leverage the opportunities provided by the other.

A.1 THE ORIGINS OF BUSINESS AND HUMAN RIGHTS FRAMEWORKS

The first international attempt to define the human rights responsibilities of business was the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (“Draft Norms”). The Draft Norms created direct legal obligations on companies in relation to human rights. However, these standards failed to gain support at the UN Commission on Human Rights (“Commission”).⁸

After the Draft Norms failed, the Commission requested that then-Secretary General Kofi Annan appoint a Special Representative to move the discussion on businesses and human rights forward.⁹ In response, the Secretary General appointed Professor John Ruggie to take on this role in 2005.¹⁰ After intensive research and global consultations with business, civil society, and governments over the course of three years, Professor Ruggie presented the *Protect, Respect, and Remedy Framework* to the UNHRC in 2008.¹¹ This framework is organized into three pillars. Pillar I outlines the State duty to protect against human rights abuses perpetrated by third parties, including business.¹² Pillar II outlines the corporate responsibility to respect human rights in their operations.¹³ Pillar III details the need for victims of human rights abuses to have access to

⁸ The UN Commission on Human Rights was the predecessor to the current UN Human Rights Council. The Commission no longer exists. UNITED NATIONS, *The UN “Protect, Respect and Remedy” Framework for Business and Human Rights* (Sept. 2010), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS & TRANSNATIONAL CORPS. & OTHER BUS. ENTERS., *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 4, U.N. Doc. A/HRC/8/5 (2008) (by John Ruggie).

¹² *Id.* at ¶ 9.

¹³ *Id.* at ¶¶ 54–55.

effective remedy, both judicial and non-judicial.¹⁴ After the UNHRC welcomed this framework, it extended Professor Ruggie's mandate for an additional three years, tasking him with operationalizing the framework.¹⁵

The outcome of Professor Ruggie's second mandate was the United Nations Guiding Principles on Business and Human Rights (UNGPs), which were unanimously adopted by the United Nations Human Rights Council in June 2011.¹⁶ The UNGPs are organized by the *Protect, Respect, and Remedy Framework's* three pillars and provide foundational principles and operational principles under each pillar. Each individual principle also includes detailed commentary.

A.2 THE THREE PILLARS

The three pillars of the UNGPs provide the most internationally recognized framework for discussing and understanding respective roles and responsibilities in addressing business-related human rights harms. Pillar I outlines the States' legal duty to protect against human rights abuses perpetrated by third parties, including business.¹⁷ For example, Guiding Principle 4 says that States should "take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence."¹⁸

Moving beyond the role of the State, Pillar II outlines the corporate responsibility to respect human rights, for example, by having a policy commitment to respect human rights (Guiding Principle 16), conducting human rights due diligence throughout its operations (Guiding Principle 17), and providing remediation when it has caused or contributed to adverse human rights impacts (Guiding Principle 22).¹⁹ The corporate responsibility to respect is not a legal obligation in the way the obligation of States is; instead, it constitutes society's baseline expectation of companies to "do no harm."²⁰ "Doing no harm" does not only entail refraining from action, but also entails taking positive steps to ensure business activities are not infringing on human rights.²¹ Additionally, because respecting human rights is a baseline expectation, any attempts to make up for infringing on human rights by making a positive contribution elsewhere (such as building a school or donating money) is inadequate.²²

¹⁴ *Id.* at ¶ 26; UNITED NATIONS, *supra* note 9.

¹⁵ *Id.*; UNITED NATIONS, *supra* note 9.

¹⁶ SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS & TRANSNATIONAL CORPS. & OTHER BUS. ENTERS., *supra* note 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Special Representative of the Secretary-General on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters.*, *supra* note 4.

²⁰ SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS & TRANSNATIONAL CORPS. & OTHER BUS. ENTERS., *supra* note 4, at 13; *Protect, Respect and Remedy: a Framework for Business and Human Rights*, *supra* note 12, at ¶ 54-55.

²¹ *Id.*

²² *Id.*

Finally, Pillar III details the need for victims of human rights abuses to have access to effective remedy.²³ This pillar discusses the State's obligation to ensure judicial remedies are effective (Guiding Principle 26), discusses the State's obligation to provide effective non-judicial mechanisms alongside judicial mechanisms (Guiding Principle 27), and discusses the non-judicial grievance mechanisms of corporations and multi-stakeholder initiatives (Guiding Principles 29, 30, and 31).²⁴

A.3 FROM PILLARS TO PRACTICE

After adopting the UNGPs, the UNHRC also created the UN Working Group on Business and Human Rights (UNWG) to advocate for and facilitate implementation of the UNGPs at the national level.²⁵ The UNWG is composed of five independent experts,²⁶ and its mandate was extended for an additional three years in the summer of 2014.²⁷

The unanimous adoption of the UNGPs marked the first time that there was an international consensus around a business and human rights framework. Since their adoption, the UNGPs have been integrated into other business and human rights frameworks, such as the OECD Guidelines for Multinational Enterprises in 2011²⁸ and the International Finance Corporation (IFC) Performance Standards in 2012.²⁹ In addition, some States have begun initial initiatives to implement the UNGPs at the national level. As this article will address, a significant way in which States are taking steps to turn the UNGPs into actual practice at the national level is through the creation of National Action Plans on business and human rights.

A.4 NATIONAL ACTION PLANS

National Action Plans (NAPs) are policy documents created by States that detail the actions that the State is committed to taking in order to implement interna-

²³ *Protect, Respect and Remedy: a Framework for Business and Human Rights*, *supra* note 12, at ¶ 26.

²⁴ SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS & TRANSNATIONAL CORPS. & OTHER BUS. ENTERS., *supra* note 4.

²⁵ Human Rights Council Res. A/HRC/17/4, Rep. of the Human Rights Council, 17th Sess., May 30–June 17, 2011 (July 6, 2011).

²⁶ U.N. Working Group on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> (last visited Oct. 23, 2015).

²⁷ Human Rights Council Res. A/HRC/26/22, Rep. of the Human Rights Council, 26th Sess., June 10–27, 2014 (July 15, 2014).

²⁸ OECD Guidelines for Multinational Enterprises, at 3 (2011), *Organisation for Economic Co-operation and Development [OECD]*, <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

²⁹ *UN Guiding Principles on Business and Human Rights and IFC Sustainability Framework*, INTERNATIONAL FINANCE CORPORATION (IFC), <http://www.ifc.org/wps/wcm/connect/c3dedb0049c51e71886d99da80c2ddf3/UNGPsandIFC-SF-DRAFT.pdf?MOD=AJPERES>.

tional, regional, or national obligations.³⁰ States have created NAPs on a number of topics, including women's rights, human trafficking, and climate change.³¹ Some of these NAPs were the result of the State's own initiative, while others followed calls from international organizations for their creation.³² In the case of the UNGPs, multiple international and regional entities have called on States to create NAPs on business and human rights in order to fuel the implementation of these principles.

Specifically, the UNWG "strongly encourage[d] all States to develop, enact[,] and update a national action plan as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights."³³ In the *EU Strategy for Corporate Social Responsibility*, the European Commission issued a call for all EU Member States to develop a NAP detailing plans to implement the UNGPs, as well as a NAP on Corporate Social Responsibility, by 2012.³⁴ The European Council also called on all EU Member States to develop NAPs on business and human rights by 2013.³⁵ The Council of Europe (CoE) issued a Declaration in 2013, pushing CoE Member States to create NAPs on business and human rights as well.³⁶ Finally, in 2014, the UNHRC itself adopted a resolution that "encourages all States to take steps to implement the Guiding Principles, including to develop a national action plan or other such framework."³⁷

As of the date of this article's publication, eight countries have published NAPs on business and human rights: the United Kingdom, Denmark, Finland, the Netherlands, Lithuania, Sweden, Norway, and, most recently, Columbia.³⁸ In addition, Italy and Spain have released draft NAPs, and nearly forty countries

³⁰ DANISH INST. FOR HUMAN RIGHTS & INT'L CORPORATE ACCOUNTABILITY ROUNDTABLE., *supra* note 3, at 8.

³¹ *Id.* at 10.

³² *Id.*

³³ *State National Action Plans*, U.N. WORKING GROUP ON THE ISSUES OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Oct. 23, 2015).

³⁴ EUROPEAN COMM'N, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 final (Oct. 25, 2011), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>.

³⁵ *EU Strategic Framework and Action Plan on Human Rights and Democracy*, COUNCIL OF THE EUROPEAN UNION (2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.

³⁶ COUNCIL OF EUROPE, *Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights*, <https://wcd.coe.int/ViewDoc.jsp?id=2185745&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> (last visited Oct. 23, 2015).

³⁷ Human Rights Council Res. A/HRC/26/22., *supra* note 30, at ¶ 2.

³⁸ BUS. & HUMAN RIGHTS RES. CTR., *National Action Plans*, <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (last visited Oct. 23, 2015); U.N. WORKING GROUP ON THE ISSUES OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, *State National Action Plans*, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Oct. 23, 2015).

across world regions have committed to developing a NAP and/or have started the process of doing so.³⁹

NAPs provide many benefits. First, NAPs serve as a useful tool for stakeholders advocating for domestic reforms to implement the UNGPs. Because a NAP, in theory, should lay out the government's plan for implementing the UNGPs, stakeholders can use the explicit commitments made in the NAP, where they exist, to hold the State accountable if it fails to follow through. Second, the process of creating a NAP can enhance knowledge and capacity in relation to business and human rights issues more broadly.⁴⁰ This is true not only of government officials themselves, but also of business actors and civil society organizations (CSOs) that engage during the process.⁴¹ Third, if the government conducts a National Baseline Assessment (NBA), as it should prior to creating its NAP, the outcome provides a comprehensive mapping and gap analysis of current State practice that could, and should, highlight priority areas for the specific national context.⁴²

Although NAPs do provide benefits, there are also challenges. Some of these challenges are related to the process used to create a NAP. First, no government that has released a NAP so far has conducted a comprehensive NBA, contributing to the fact that the content of NAPs to date has been disappointing.⁴³ Second, while governments have conducted stakeholder consultations, as far as the authors are aware none of the governments that have released NAPs have made efforts to facilitate participation in these consultations by disempowered or at-risk stakeholders.⁴⁴ Finally, there has been an overall lack of transparency about the NAP drafting process.⁴⁵ Other challenges relate to the substantive content of NAPs. First, to date, the NAPs that have been published focus mainly on voluntary measures and trainings, with few commitments to regulate companies.⁴⁶ Second, many of the commitments made in the current NAPs are also overly vague and do not include specific timelines or assign responsibility to a particular entity within the government.⁴⁷ Finally, Pillar III has received little to no attention in most of the existing NAPs, which is problematic given the

³⁹ *Id.* at 1.

⁴⁰ DANISH INST. FOR HUMAN RIGHTS & INT'L CORPORATE ACCOUNTABILITY ROUNDTABLE, *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* 1, 9 (June 2014), <http://icar.ngo/analysis/napsreport/>.

⁴¹ *Id.* at 27.

⁴² *Id.* at 33.

⁴³ The assessment currently includes Denmark, Finland, the UK, the Netherlands, Sweden and Lithuania, and will include Norway's and Colombia's when a translation is available. Neither Sweden nor Lithuania have conducted an NBA. INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE & EUROPEAN COALITION FOR CORPORATE JUSTICE, *Assessment of Existing National Action Plans (NAPs) on Business and Human Rights* (Nov. 2015) <http://icar.ngo/analysis/icar-eccj-release-2015-update-of-national-action-plans-assessments/>.

⁴⁴ *Id.* at 3.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 4.

importance of access to remedy for victims.⁴⁸

A.5 TREATY RESOLUTION

While the above efforts and developments have demonstrated movement in terms of implementation of business and human rights frameworks, many stakeholders have at the same time expressed deep frustration with the slow pace of actual change on the ground in terms of human rights protections.⁴⁹ As a result, many of these stakeholders have turned to the idea of a legally binding international treaty as the next step.⁵⁰

With the backing of several key States, support for a treaty on business and human rights culminated in the UNHRC adopting a resolution in June 2014 to start the process of creating such a treaty.⁵¹ The treaty resolution, which was put before the UNHRC during its 26th session, was drafted by Ecuador and South Africa and signed by Bolivia, Cuba, and Venezuela.⁵² The resolution called for the UNHRC to “establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights.”⁵³ Twenty countries, mostly from the Global South, voted in favor of the treaty resolution. These countries were Algeria, Benin, Burkina Faso, China, Congo, Cote d’Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, and Vietnam.⁵⁴ The fourteen countries that voted against the resolution are home to many transnational corporations, including: Austria, the Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, the United Kingdom, and the United States.⁵⁵

The rationale behind many States’ opposition to the treaty was based in part on the fact that international human rights law has historically only governed States.⁵⁶ For example, the U.S. representative in the UNHRC at the time raised concerns about practical questions related to how such an instrument could be

⁴⁸ *Id.*

⁴⁹ See, e.g., Josua Loots, *Of Aims and Means: More Coordination and Harmonization of Efforts are Critical to Further Progress on Business and Human Rights*, INST. FOR HUMAN RIGHTS & BUSINESS (Oct. 29, 2014), <http://www.ihrb.org/commentary/of-aims-and-means.html>; Peter Frankental, *A Business and Human Rights Treaty? We Shouldn't be Afraid to Frighten the Horses*, INST. FOR HUMAN RIGHTS & BUSINESS (June 9, 2014), <http://www.ihrb.org/commentary/business-and-human-rights-treaty-we-shouldnt-be-afraid.html>.

⁵⁰ LOOTS, *supra* note 6.

⁵¹ Human Rights Council Res., *supra* note 5, at 1.

⁵² BUS. & HUMAN RIGHTS RES. CTR., *Human Rights Council Sessions*, <http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions> (last visited Oct. 23, 2015).

⁵³ Human Rights Council Res., *supra* note 5, at 2.

⁵⁴ BUS. & HUMAN RIGHTS RES. CTR., *supra* note 52, at 2.

⁵⁵ *Id.*

⁵⁶ Thalif Deen, *After Losing Vote, U.S.-E.U. Threaten to Undermine Treaty*, INTER PRESS SERVICE NEWS AGENCY (June 28, 2014), <http://www.ipsnews.net/2014/06/after-losing-vote-u-s-eu-threaten-to-undermine-treaty/>.

applied to corporations and how States would implement the treaty domestically.⁵⁷ The European Union and the United States also argued that the UNGPs are adequate to help decrease instances of human rights abuses in business operations and that proponents of the treaty had simply not given States enough time to implement the UNGPs.⁵⁸

Another contentious issue that States did not agree on during the treaty resolution vote is the inclusion of a footnote that would, arguably, limit the treaty's application to transnational corporations and exclude domestic companies.⁵⁹ The footnote, which was included in the treaty resolution, defines the term "other business enterprises" as "all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law."⁶⁰ Many States that are home to these transnational corporations, and several transnational corporations themselves, believe that this will undermine their companies' competitiveness by placing additional burdens on them that companies that only operate within one country will not face.⁶¹ Civil society has also been split on the issue; however, this disagreement is being discussed as part of the process of building consensus around the scope and content of the treaty going forward.⁶²

The Intergovernmental Working Group (IGWG), which was created by the June 2014 resolution and tasked with coordinating the elaboration of the treaty, held its first meeting from 6–10 July 2015.⁶³ The purpose of the first session was to allow for "constructive deliberations on the content, scope, nature[,] and form" of the treaty, with a particular focus on collecting oral and written inputs from States and other stakeholders.⁶⁴ The second session, which is scheduled to occur in 2016, will have the same overall purpose as the first session.⁶⁵ The program of work for the second session will be informed by informal stakeholder consultations that will take place prior to the session.⁶⁶

Initially, some stakeholders viewed the treaty as an "anti-UNGPs" process that would undermine advocacy for national measures to implement the UNGPs,

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Phil Bloomer, *Negotiating and Fighting for a Binding Treaty on Business and Human Rights*, THE GUARDIAN, (July 27, 2015), <http://www.theguardian.com/global-development-professionals-network/2015/jul/27/negotiating-and-fighting-for-a-binding-treaty-on-business-and-human-rights>.

⁶⁰ Human Rights Council Res., *supra* note 5, at ¶ 1.

⁶¹ Bloomer, *supra* note 62, at 2.

⁶² ESCR-NET, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, *ESCR-NET & FIDH: New Joint Treaty Initiative*, <https://www.escr-net.org/node/365756> (last visited Oct. 23, 2015).

⁶³ UNITED NATIONS HUMAN RIGHTS COUNCIL, *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect for Human Rights*, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>

⁶⁴ UNITED NATIONS HUMAN RIGHTS COUNCIL, *Draft Report of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect for Human Rights* para. 1 (July 10, 2015), <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Draftreport.aspx>.

⁶⁵ *Id.* at 20.

⁶⁶ *Id.*

including NAPs.⁶⁷ Namely, there was concern that the treaty would divert resources and attention away from domestic implementation of the UNGPs (including through NAPs), that States would use the treaty process as an excuse not to make domestic reforms in line with the UNGPs, and that opening up the discussion again could cause a weakening of the consensus gained around the UNGPs in 2011.⁶⁸ These arguments are discussed in more detail in the next section of this article.

These concerns led some to believe that the treaty process and NAPs processes (or the UNGPs more broadly) are in competition with one another and, therefore, governments, civil society, business, and other stakeholders must choose which one to support.⁶⁹ However, not only are these two “tracks” not in competition, but they can actually benefit each other, as this article argues.

B THESIS: TWO ROADS DIVERGED

One of the main arguments that the treaty process and the creation of NAPs are in competition revolves around the limited resources available in the business and human rights community.⁷⁰ Specifically, there is concern that the resources of governments, CSOs, and business, would be diverted to the treaty process, thereby taking away resources from and undermining the UNGPs and their implementation at the national level.⁷¹ This concern was heightened by the fact that the treaty process will likely be a very political and very drawn out process, increasing the likelihood that resources would be sucked up by involvement with extensive Member State negotiations with no clear end date.⁷² Because of this, financial and staff resources of CSOs, which are already stretched thin, could either be moved away from pushing for domestic implementation of the UNGPs entirely or, worse yet, could be split between the two, making the voice of CSOs largely ineffective in both processes.

Proponents of the notion that the treaty and NAPs are in competition also argue that, even if there is still attention given to the domestic implementation of UNGPs, and even if CSOs are still able to mobilize around and advocate for domestic implementation, States may use the treaty process as an excuse not to act domestically.⁷³ Because the ultimate content of the treaty is very unclear, States may argue that doing anything on the national level before the treaty is established will put their businesses at a competitive disadvantage if national efforts go beyond treaty requirements or beyond what other States are doing while the treaty is being drafted.⁷⁴ As a consequence, States may use this as

⁶⁷ See LOOTS, *supra* note 6.

⁶⁸ See Taylor, *supra* note 7.

⁶⁹ See LOOTS, *supra* note 6.

⁷⁰ See Taylor, *supra* note 7.

⁷¹ *Id.*

⁷² See, e.g., Mark Taylor, *The Movement and the IGWiG*, INST. FOR HUMAN RIGHTS & BUSINESS, July 3, 2015, <http://www.ihrb.org/commentary/the-movement-and-the-igwig.html>.

⁷³ See Taylor, *supra* note 7.

⁷⁴ *Id.*

an excuse either not to create a NAP at all or to create a NAP, but only make commitments to voluntary measures rather than more robust action.

Finally, it is possible that by reopening the discussion about the role of business in relation to human rights abuses as part of the treaty process, there may be backsliding, and the unprecedented consensus that was gained around the UNGPs may be lost.⁷⁵ The fact that the UNGPs received such wide support, not only from governments, CSOs, and international organizations, but also from business, was a hard won achievement. It should not be assumed, some argue, that reopening the discussion will lead to greater protection of human rights in relation to business activities but may instead result in a weakening of the consensus around the UNGPs.⁷⁶ If this consensus does break down it could undermine existing NAPs as well as the need for governments to create them in the future. Beyond the NAPs processes, a breakdown of this sort could also undermine other ongoing efforts to implement the UNGPs, such as mandatory non-financial reporting and the creation of a duty of care for parent corporations.⁷⁷ If this fear is fulfilled, it would truly be a blow to ensuring corporations do not cause or contribute to human rights violations in their operations.

C ANTITHESIS: MOVING TOWARDS HARMONY

C.1 DIVERSION OF RESOURCES AND ATTENTION

The fear that, due to diversion of resources and attention, the UNGPs (and NAPs) would fall to the wayside as the treaty process moves forward, has so far turned out to be unfounded.⁷⁸ Specifically, this fear is undermined by the fact that there is clear mobilization around the UNGPs.⁷⁹ The list of NAPs that have been completed or launched has grown since the treaty resolution was adopted.⁸⁰ Furthermore, the United Kingdom committed to reviewing and up-

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ SECURITIES AND EXCHANGE COMMISSION, *Specialized Corporate Disclosure* (last modified May 20, 2013), <https://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml>; SHERPA, *A Historic First Step for Multinationals' Duty of Care!* (Mar. 31, 2015), <http://www.asso-sherpa.org/historic-first-step-multinationals-duty-care#.ViVE5X6rSuk>; Gabriela Quijano, *Parent Company Liability: Could Discussions Around a Treaty Prompt States to do what they have so far Resisted?*, BUS. & HUMAN RIGHTS RES. CTR., <http://business-humanrights.org/en/parent-company-liability-could-discussions-around-a-treaty-prompt-states-to-do-what-they-have-so-far-resisted>.

⁷⁸ See Taylor, *supra* note 74.

⁷⁹ *Id.*

⁸⁰ FINNISH MINISTRY OF EMPLOYMENT AND THE ECONOMY, NATIONAL ACTION PLAN FOR THE IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS(2014), http://www.tem.fi/files/41214/TEMjul_46_2014_web_EN_21102014.pdf; PERMANENT MISSION OF THE REPUBLIC OF LITHUANIA TO THE UNITED NATIONS OFFICE, LITHUANIA'S ACTION PLAN ON THE IMPLEMENTATION OF THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2015), http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Lithuania_NationalPlanBHR.pdf; GOVERNMENT OFFICES OF SWEDEN, ACTION PLAN FOR BUSINESS AND HUMAN RIGHTS (2014), <http://www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf>.

dating its NAP (which was released in 2013) in 2015 and has indeed embarked on that process.⁸¹ The fact that the United Kingdom is continuing to engage with its NAP, along with the growing number of States that have published NAPs, begun a NAP process, or committed to beginning a NAP process, suggests that the treaty resolution has not, in reality, undermined advocacy around domestic implementation of the UNGPs.⁸²

The fact that there have been attempts on the national and regional level to implement the UNGPs provides further evidence that the fear that the treaty process would divert resources and attention has not come to fruition. Examples include legislation in France, Switzerland, and the United States, as well as European Union Directives on extractives, non-financial reporting, and conflict minerals.

In France, a landmark bill that would have created a duty of care for parent companies in relation to human rights abuses and environmental damage in their supply chains was introduced in November 2013.⁸³ CSOs such as Sherpa and the European Coalition for Corporate Justice (ECCJ) worked tirelessly to support this bill. Ultimately, the bill passed the first reading at the French National Assembly on 30 March 2015, but unfortunately, was rejected by the French Senate on 18 November 2015.⁸⁴

If it had been enacted, this bill would have required the largest companies in France (those with over 5,000 employees in France and over 10,000 employees worldwide) to create a “vigilance plan” to prevent environmental damage and adverse human rights impacts in their supply chains.⁸⁵ The bill would have also created civil and criminal liability for these companies for human rights violations abroad and, in such cases, the burden of proof would have been flipped, requiring the company to show that it took necessary and reasonable measures to prevent violations.⁸⁶ Although the bill was not passed by the Senate, the fact

⁸¹ BUS. & HUMAN RIGHTS RES. CTR., *Submissions: UK Natl. Action Plan Review Process* (2015), last visited Oct. 23, 2015, <http://business-humanrights.org/en/submissions-uk-natl-action-plan-review-process-2015>.

⁸² In addition to those countries that have already published a NAP, twenty-eight countries are either in the process of developing a NAP or have committed to creating one. These countries include the United States, Tanzania, Switzerland, Slovenia, Scotland, Portugal, the Philippines, Peru, Myanmar, Mozambique, Morocco, Mexico, Mauritius, Malaysia, Latvia, Jordan, Ireland, Greece, Germany, France, Ecuador, Colombia, Chile, Brazil, Belgium, Azerbaijan, Austria, and Argentina. On file with authors.

⁸³ SHERPA, *supra* note 79; Elodie Aba, *Opportunity for France to Hold Companies Legally Responsible for Human Rights Abuses by Subsidiaries Abroad*, BUS. & HUMAN RIGHTS RES. CTR., <http://business-humanrights.org/en/opportunity-for-france-to-hold-companies-legally-responsible-for-human-rights-abuses-by-subsidiaries-abroad>

⁸⁴ William Bourdon & Sandra Cossart, *Open Letter to Mr. Eydoux, President of the National Bar Council on a Resolution of 29 and 30 May on the Diligence of Multinationals*, SHERPA (July 21, 2015), http://www.asso-sherpa.org/open-letter-mr-eydoux-president-national-bar-council-resolution-29-30-may-diligence-multinationals#.Vtct5_krKUL; *French Senate Rejects Duty of Care Law: a Vote in Favour of Maintaining Corporate Impunity*, EUROPEAN COALITION FOR CORPORATE JUSTICE (Nov. 23, 2015), <http://corporatejustice.org/French-Senate-rejects-duty-of-care-law-a-vote-in-favour-of-maintaining.html?lang=en>.

⁸⁵ SHERPA, *supra* note 79; Bourdon & Cosart, *supra* note 86.

⁸⁶ Aba, *supra* note 85.

that the French National Assembly approved the bill, and that CSOs are rallying behind it, is further evidence that resources and attention have not faded away from the implementation of the UNGPs as a result of the treaty process.

Similarly, in Switzerland, a parliamentary proposal was put forward that would have made human rights and environmental due diligence mandatory for Swiss companies.⁸⁷ The Swiss lower chamber of parliament initially accepted the motion with a vote of 91 in favor and 90 against.⁸⁸ However, after pressure from business, a second vote was conducted and the motion was narrowly dismissed with a vote of 86 in favor and 95 against.⁸⁹ In response to this denial, the Swiss Coalition of Corporate Justice (SCCJ) has launched the Responsible Business Initiative, which aims to advocate for mandatory human rights and environmental due diligence for Swiss companies.⁹⁰ Specifically, the Responsible Business Initiative is using a Swiss mechanism known as a “popular initiative” to request a Constitutional amendment.⁹¹ The initiative is currently comprised of about seventy-seven organizations.⁹²

In the United States, mandatory non-financial reporting is required under Dodd Frank Section 1502, which requires companies that use conflict minerals in their products to conduct a “good faith” inquiry into their country of origin and disclose whether those minerals came from the Democratic Republic of Congo (or adjoining countries).⁹³ Dodd Frank Section 1504 also requires extractive companies (oil, natural gas, and minerals) to provide reports on the amount of money paid to each government.⁹⁴ The SEC issued a rule to implement Section 1504 in August 2012; however, the rule was challenged, and the U.S. District Court for the District of Columbia vacated the rule in 2013.⁹⁵ The SEC has yet to promulgate a new final rule implementing section 1504.⁹⁶ However, on 2 September 2015 Oxfam America won a case against the SEC in the U.S. Federal District Court.⁹⁷ The Court found that the SEC had ‘unlawfully withheld’ a

⁸⁷ CORPORATE JUSTICE, *Conservative Backlash Blocks Increased Corporate Accountability*, Mar. 13, 2015, http://www.corporatejustice.ch/media/medialibrary/2015/03/150311-sccj_press_release_-_swiss_vote_on_mandatory_human_rights_due_diligence.pdf.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ CORPORATE JUSTICE, *Global Business? Global Responsibility!* (Apr. 20, 2015), <http://www.corporatejustice.ch/en/>; *The Responsible Business Initiative*, HOW THE INITIATIVE WORKS, <http://konzern-initiative.ch/initiativtext/?lang=en>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ SECURITIES AND EXCHANGE COMMISSION, *Fact Sheet: Disclosing the Use of Conflict Minerals* (last modified July 24, 2014), <http://www.sec.gov/News/Article/Detail/Article/1365171562058>; SECURITIES AND EXCHANGE COMMISSION, *supra* note 79.

⁹⁴ SECURITIES AND EXCHANGE COMMISSION, *supra* note 79.

⁹⁵ SECURITIES AND EXCHANGE COMMISSION, *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act* (last modified Aug. 6, 2015), <http://www.sec.gov/spotlight/dodd-frank.shtml#>; David Buck Et. Al., *D.C. District Court Vacates Dodd-Frank Disclosure Rule for Payments by Resource Extraction Issuers*, AMERICAN BAR ASSOCIATION (Aug. 2013), http://www.americanbar.org/publications/blt/2013/08/keeping_current_buck.html.

⁹⁶ SECURITIES AND EXCHANGE COMMISSION, *supra* note 79.

⁹⁷ OXFAM AMERICA, *Victory for Oil Transparency Advocates as Federal Court Sides with Oxfam America* (Sept. 2, 2015), <http://www.oxfamamerica.org/press/victory-for-oil->

final rule, and its decision requires the SEC to expedite the rulemaking process for Section 1504.⁹⁸ In response, the SEC issued new draft rules to implement section 1504 on 11 December 2015.⁹⁹

The European Union has issued a directive similar to Dodd Frank Section 1504. In 2013, the EU passed a new Accounting Directive (2013/34/EU), which requires annual reports from large extractive and logging companies on the amount of money paid to governments in countries in which they operate.¹⁰⁰ These reports will only have to include information about payments made in excess of €100,000, but must be reported on a project-by-project basis.¹⁰¹ The purpose of this directive is to increase transparency around company payments to governments.¹⁰² This transparency will enable activists to see how much their government earns from these companies, which can help those activists in the fight against corruption.¹⁰³ EU Member States were required to transpose this directive into national law by 20 July 2015.¹⁰⁴ Additionally, the Accounting Directive was amended by an EU Directive on non-financial reporting (2014/95/EU) which was issued in the fall of 2014.¹⁰⁵ This Directive requires that large public

transparency-advocates-as-federal-court-sides-with-oxfam-america/.

⁹⁸ *Id.*

⁹⁹ Oxfam, *Oxfam welcomes draft oil and mining sunshine rule*, OXFAM AMERICA (Dec. 11, 2015), <http://www.oxfamamerica.org/press/oxfam-welcomes-draft-oil-and-mining-sunshine-rule/>.

¹⁰⁰ Directive 2013/34, of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. (L 182) 19, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0034&from=EN>; UK Department for Business Innovation & Skills, *UK Implementation of the EU Accounting Directive 1, 3-6* (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/343599/bis-14-1006-eu-accounting-directive-implementation-extractive-industries-reporting-response.pdf.

¹⁰¹ This means that a mining company operating in Peru will have to disclose payments to the Peruvian government for each individual project, instead of just the total amount paid to the Peruvian government. Mark Tran, *EU's New Laws Will Oblige Extractive Industries to Disclose Payments*, THE GUARDIAN, June 12, 2013, <http://www.theguardian.com/global-development/2013/jun/12/european-union-laws-extractive-industries-payments>.

¹⁰² EUROPEAN COMMISSION, *New Disclosure Requirements for the Extractive Industry and Loggers of Primary forests in Accounting (and Transparency) Directives (Country by Country Reporting) — Frequently Asked Questions* (June 12, 2013), http://europa.eu/rapid/press-release_MEMO-13-541_en.htm.

¹⁰³ *Id.*

¹⁰⁴ Council Directive 2013/34, 2013 O.J. (L 182) 19 (EU), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0034&from=EN>.

¹⁰⁵ Directive 2014/95, of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34 as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Article 1, 2014 O.J. (L 330) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN>; Federation of European Accountants, *Factsheet on EU Directive on Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups*, FEE, <http://www.fee.be/our-work/corporate-reporting/50-publications/corporate-reporting/1437-factsheet-on-eu-directive-on-disclosure-of-non-financial-and-diversity-information-by-certain-large-undertakings-and-groups.html> (last visited Mar. 2, 2016).

interest entities (e.g. listed companies) include information about their policies and risks related to human rights, the environment, diversity, social and employee related issues, and anti-corruption and bribery.¹⁰⁶ The EU is also moving towards issuing a directive on the topic of human rights due diligence and conflict minerals, although what the exact content of the directive will be remains unknown.¹⁰⁷

In addition to the legislation mentioned above, there is also movement among some businesses to adapt the UNGPs' due diligence standard and to become a part of reporting frameworks such as the Reporting and Assurance Frameworks Initiative (RAFI).¹⁰⁸ Because the UNGPs include broad principles on reporting, initiatives such as RAFI have been created to give companies further guidance on both the scope and scale of reporting, as well as methods of gathering and disclosing that information.¹⁰⁹ Companies are becoming more and more involved in these initiatives.¹¹⁰ For example, five different companies in five different sectors have already adopted RAFI's reporting framework.¹¹¹ These companies include Nestlé, Unilever, H&M, Ericsson, and Newmont Mining Corporation.¹¹² This movement is a positive sign and suggests that the treaty is not diverting attention, including the attention of business, away from UNGP implementation.

The attention of civil society has also not been diverted by the treaty process. Members of the business and human rights community have been heavily engaged in the implementation of the UNGPs by producing assessments, developing benchmarking metrics, and ranking companies within certain sectors. For example, IICAR and ECCJ re-released an updated assessment in November 2015 (originally released in 2014) that provides an in-depth look at the strengths and weaknesses of each individual NAP that had been released at that point, as well as an overall assessment of trends in existing NAPs.¹¹³ This assessment was also used as a mechanism to engage with governments about the content of their NAPs, as well as to provide examples of best practices and pitfalls to other governments embarking on a NAP process.

Moreover, a new benchmarking initiative, the Corporate Human Rights Benchmark (CHRB), is expected to be in its pilot phase in 2015, with its first official

¹⁰⁶ *Id.*

¹⁰⁷ EUROPEAN PARLIAMENT, *Conflict Minerals: MEPs Ask for Mandatory Certification of EU Importers*, <http://www.europarl.europa.eu/news/en/news-room/content/20150513IPR55318/html/Conflict-minerals-MEPs-ask-for-mandatory-certification-of-EU-importers> (last visited May 20, 2015, 2:19 PM).

¹⁰⁸ Amol Mehra & Sara Blackwell, *The Rise of Non-financial Disclosure: Reporting on Respect for Human Rights*, NYU STERN 3 (2015), on file with authors; See, e.g., Mark Taylor, *The Movement and the IGWiG*, INST. FOR HUMAN RIGHTS & BUSINESS (July 3, 2015), <http://www.ihrb.org/commentary/the-movement-and-the-igwig.html>; SHIFT, *Human Rights Reporting and Assurance Frameworks Initiative — RAFI* (May 2015), <http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi>.

¹⁰⁹ Mehra & Blackwell, *supra* note 107.

¹¹⁰ See, e.g., Taylor, *supra* note 107.

¹¹¹ Mehra & Blackwell, *supra* note 107.

¹¹² *Id.*

¹¹³ INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE & EUROPEAN COALITION FOR CORPORATE JUSTICE, *supra* note 43.

company ranking publicly available in 2016.¹¹⁴ The CHRHB plans to rank the top 500 listed companies and will consider each corporation's "human rights policy, process[,] and performance."¹¹⁵ In addition to this benchmarking initiative, other ranking initiatives that focus on individual sectors have been or will be released despite the ongoing treaty process. For example, Ranking Digital Rights will release its 2015 Corporate Accountability Index in November 2015.¹¹⁶ This Index ranks sixteen of the largest internet and telecommunications companies (ICT) based on thirty-one indicators on company commitments, policies, and practices related to human rights generally and freedom of expression and right to privacy specifically.¹¹⁷

Oxfam's Behind the Brands campaign is another example of a sector specific ranking of companies based on human rights performance.¹¹⁸ The Behind the Brands campaign is a ranking of the 'big 10' food and beverage companies, including General Mills, Mondelez, and Unilever, among others.¹¹⁹ The ranking considers company policies in relation to seven different themes and provides a score from one to ten for each company under each topic.¹²⁰ Those themes are land, women, farmers, workers, climate, transparency, and water.¹²¹ The scorecard was first released in February 2013 and has had subsequent iterations in September 2013, February 2014, October 2014, and most recently in March 2015.¹²²

The fact that CSOs are still engaging in assessments of UNGP implementation, that a large-scale human rights benchmarking initiative is in the works, and that sector-based rankings of companies are still underway provides further evidence that energy around and resources devoted to the UNGPs and their implementation has not been undermined by the treaty process.

C.2 THE TREATY PROCESS AS AN EXCUSE FOR INACTION

Although there was a concern that States would use the treaty process as an excuse to halt any domestic implementation of the UNGPs (including by creating

¹¹⁴ INST. FOR HUMAN RIGHTS & BUS., *Corporate Human Rights Benchmark (CHRHB)*, <http://www.ihrb.org/our-work/corporate-human-rights-benchmark.html> (last visited Oct. 23, 2015).

¹¹⁵ *Id.*

¹¹⁶ Rebecca MacKinnon, *2015 Corporate Accountability Index*, RANKING DIGITAL RIGHTS (June 11, 2015), <https://rankingdigitalrights.org/>.

¹¹⁷ *Id.*; RANKING DIGITAL RIGHTS, *Frequently Asked Questions*, <https://rankingdigitalrights.org/who/frequently-asked-questions/#Q1> (last updated Nov. 6, 2015).

¹¹⁸ OXFAM INTERNATIONAL, *Behind the Brands*, <https://www.oxfam.org/en/campaigns/behind-brands> (last visited Oct. 23, 2015).

¹¹⁹ *Id.*

¹²⁰ *Id.*; OXFAM INTERNATIONAL, *Behind the Brands 1, 3* (Feb. 26, 2013). <https://www.behindthebrands.org/en/~media/Download-files/bp166-behind-brands-260213-en.ashx>.

¹²¹ *Behind the Brands*, *supra* note 118; *Behind the Brands*, *supra* note 120.

¹²² OXFAM INTERNATIONAL, *Company Scorecard*, <http://www.behindthebrands.org/scorecard> (last visited Oct. 23, 2015).

NAPs), there are examples of States *not* doing this. Specifically, the U.K. Modern Slavery Bill was introduced to Parliament on 10 June 2014.¹²³ Section 54 of the Act (Transparency in Supply Chains) applies to businesses with total annual turnover of £36 million or above that do business in the United Kingdom.¹²⁴ This section requires these businesses to create a “slavery and human trafficking statement” and publish it on their website.¹²⁵ The statement must include information about what steps the business is taking to ensure that there is no modern day slavery in its supply chains. If the business is not taking any steps, it must be expressly stated.¹²⁶ The State could have argued that it would be better to wait to enact such a bill (i.e. halt implementation of the UNGPs) until the contents of the treaty are established to ensure that other States would be required to create similar bills. However, the U.K. passed this Bill into law on 26 March 2015.¹²⁷ The Modern Slavery Act is an example of a State having the opportunity to use the treaty process as an excuse, but not doing so.

Additionally, although the mandatory human rights due diligence motion was not ultimately passed in Switzerland, the fact that it passed during the first vote suggests that the government is at least willing to consider taking national action to implement the UNGPs despite the existence of the treaty process.¹²⁸

C.3 FEAR OF BACKSLIDING

The argument that the consensus around the UNGPs could be weakened or lost by opening up the dialogue again is the most concerning. This could still be a danger. One way that civil society is attempting to ensure the backslide does not happen is by narrowing the scope of the treaty discussion.¹²⁹ Specifically, ESCR-Net and FIDH have launched a two-year project with the aim of providing concrete proposals about the treaty to the IGWG.¹³⁰ These proposals will be based on multiple consultations with civil society, academics, activists, and representatives of people affected by business activity.¹³¹

As Professor Ruggie himself pointed out in his remarks to the Human Rights Council when he presented them with the UNGPs, the UNHRC’s endorsement of the UNGPs “mark[s] the end of the beginning: by establishing a common

¹²³ *UK Modern Slavery Law Comes into Effect*, BUS. & HUMAN RIGHTS RES. CTR., <http://business-humanrights.org/en/uk-modern-slavery-act-comes-into-effect>

¹²⁴ UK HOME OFFICE, *TRANSPARENCY IN SUPPLY CHAINS ETC. A PRACTICAL GUIDE* 4–5 (Oct. 29, 2015), available at <https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *UK Modern Slavery Law Comes into Effect*, BUS. & HUMAN RIGHTS RES. CTR., <http://business-humanrights.org/en/uk-modern-slavery-act-comes-into-effect>.

¹²⁸ CORPORATE JUSTICE, *Conservative Backlash Blocks Increased Corporate Accountability* (Mar. 13, 2015), http://www.corporatejustice.ch/media/medialibrary/2015/03/150311_sccj_press_release_-_swiss_vote_on_mandatory_human_rights_due_diligence.pdf.

¹²⁹ ESCR-NET, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, *ESCR-NET & FIDH: New Joint Treaty Initiative* (Jan. 28, 2015), <https://www.escr-net.org/node/365756>.

¹³⁰ *Id.*

¹³¹ *Id.*

global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.”¹³² Although the fear of backslide exists, the treaty and NAPs processes may actually be able to *build* on the consensus that exists around the UNGPs. As discussed in more detail below, the process required to create a NAP and the process required to negotiate a binding treaty both have the potential to build capacity and trust among different stakeholders. This capacity and trust can help stakeholders ensure that the treaty dialogue builds upon the UNGPs, instead of dissolving the consensus.

D SYNTHESIS: TWO ROADS CONVERGED

As noted above, in his remarks to the UNHRC when he presented them with the UNGPs, Professor John Ruggie stated that the UNGPs were not intended to be an end goal, but rather a floor that could be built upon in the future.¹³³ Both NAPs and the treaty process are a means of building upon the UNGPs and pushing the implementation of business respect for human rights further. On the one hand, through NAPs, governments provide concrete commitments to implement the UNGPs on a national level, and CSOs can then work to hold governments accountable for the commitments made therein.¹³⁴ On the other hand, an international treaty will create binding obligations, either on States or directly on companies, to ensure that companies do not have adverse human rights impacts in their operations. Both of these measures build upon the UNGPs, which were meant to be a floor, and push the business and human rights agenda further. In addition to both building on the UNGPs, NAPs and the treaty process can affirmatively support and complement each other.

D.I TARGETING THE TREATY

In order to be effective, the binding treaty cannot remain a broad treaty that attempts to cover all business and human rights issues.¹³⁵ As mentioned above, civil society is currently attempting to build consensus about what topics the

¹³² John Ruggie, Special Representative of the Sec’y-Gen. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*, U.N. Doc. A/HRC/17/31, Para. 13 (Mar. 21, 2011).

¹³³ *Id.*

¹³⁴ DANISH INST. FOR HUMAN RIGHTS & INT’L CORPORATE ACCOUNTABILITY ROUNDTABLE, *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (June 2014), <http://icar.ngo/analysis/napsreport/>.

¹³⁵ John Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty—Commentary*, INST. FOR HUMAN RIGHTS & BUSINESS (July 8, 2014), http://www.ihrb.org/commentary/past-as-prologue.html#_ednref11; Anita Ramasastry & Doug Cassel, *Anatomy of a Business and Human Rights Treaty?*, INST. FOR HUMAN RIGHTS & BUSINESS (June 25, 2015), <http://www.ihrb.org/commentary/anatomy-business-and-human-rights-treaty.html>.

treaty should cover.¹³⁶ The process of creating a NAP can help inform this dialogue and the ultimate content of the treaty.¹³⁷ As highlighted above, one major step in creating a NAP that all States should engage in is creating a National Baseline Assessment (NBA).¹³⁸ As mentioned earlier, the States that have published NAPs so far have not conducted NBAs. However, Germany, which is in the process of drafting its NAP, released its NBA on 6 May 2015.¹³⁹ Similarly, Chile has committed to using a NBA to inform the creation of its NAP.¹⁴⁰ The purpose of a NBA is to map existing laws and policies that provide human rights protections in the context of business operations.¹⁴¹ This mapping is then used to identify gaps that exist that should be “filled” through commitments in the NAP.¹⁴² NBAs created as part of the NAPs process in each country can be used to identify trends in gaps across jurisdictions.¹⁴³ These trends could shed light on the sectors or business and human rights issues (e.g., parent company liability or access to and quality of non-judicial grievance mechanisms) where there are the most pressing gaps, which in turn could inform the content of the treaty and help to move it in a more targeted direction.¹⁴⁴ Similarly, NBAs and commitments that governments make in NAPs can provide evidence about where there is the most agreement among States.¹⁴⁵ Because State consensus will be needed to create a binding treaty, finding out what types of business and human rights issues States already agree on through their NAPs commitments could be useful for narrowing the content of the treaty.¹⁴⁶

D.2 COMPLIANCE WITH TREATY OBLIGATIONS

Regardless of the ultimate content of the treaty, it will still need to be implemented domestically once enacted. If a State has already conducted a NBA, produced an initial NAP, and updated and revised its NAP, it will be much easier for that State to identify the legal and policy changes that need to be made domestically in order to be treaty compliant.¹⁴⁷ By beginning the NAP process now, States will be able to at least know what domestic changes need to be made more quickly if and when a treaty is enacted than if they have not completed a NAP.

¹³⁶ ESCR-NET, *supra* note 126.

¹³⁷ DANISH INST., *supra* note 131.

¹³⁸ *Id.*

¹³⁹ *German Institute for Human Rights Presents Baseline Assessment for National Action Plan on Business & Human Rights*, BUS. & HUMAN RIGHTS RES. CTR., <http://business-humanrights.org/en/germany-german-institute-for-human-rights-presents-baseline-assessment-for-natl-action-plan-on-business-human-rights>

¹⁴⁰ *Important Business and Human Rights Tool now Available in Spanish*, THE DANISH INSTITUTE FOR HUMAN RIGHTS, <http://www.humanrights.dk/news/important-business-human-rights-tool-available-spanish>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See id.* at 1-3

¹⁴⁴ *Id.*

¹⁴⁵ DANISH INST., *supra* note 131.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

D.3 BUSINESS AND HUMAN RIGHTS CAPACITY BUILDING

Another important aspect of the NAPs process that could benefit the treaty is stakeholder consultation.¹⁴⁸ These consultations should aim to bring together a diverse group of individuals and organizations from civil society, government, business, and affected communities.¹⁴⁹ In addition to these consultations, States should also create a NBA as part of the NAPs process.¹⁵⁰ In some States, civil society organizations have conducted shadow NBAs.¹⁵¹ Both these consultations and these official and shadow NBAs create or increase the capacity and knowledge of stakeholders, including government, around business and human rights issues.¹⁵² Additionally, participation in consultations and the research required to create an official or shadow NBA can help stakeholders learn about the current level of implementation of the UNGPs, as well as major gaps in their own domestic context.¹⁵³ This knowledge and capacity can help ensure that government and civil society engagement with the treaty process is deeper and more meaningful.

Because business and human rights covers such a broad area of topics, those responsible within government for implementing the UNGPs and any treaty obligations that are created are interspersed throughout government.¹⁵⁴ For example, relevant actors include procurement officials and policymakers, prosecutors, and legislators, to name a few.¹⁵⁵ This fact makes it difficult for civil society and government officials themselves to identify those within government responsible for various tasks that are relevant to business and human rights. By engaging in consultations, shadow or official NBAs, and the NAPs process generally, civil society actors and government officials have and will learn key business and human rights actors in government. Beyond simply knowing who the key government actors are, the NAPs process may help to create lasting relationships between civil society and relevant government officials, as well as enhanced communication and collaboration within the government itself. The knowledge of key players, as well as the formation of relationships, will benefit the treaty process because civil society will know whom within government to push to be involved

¹⁴⁸ *Id.* at 16, 38.

¹⁴⁹ *Id.* at 16,38, 43.

¹⁵⁰ *Id.* at 31, 17, 37, 44.

¹⁵¹ INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, “Shadow” National Baseline Assessment (NBA) of Current Implementation of Business and Human Rights Frameworks: The United States, Pillar I (Mar. 2015), <http://icar.ngo/analysis/launch-of-icars-shadow-u-s-national-baseline-assessment-pillar-1/>; INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, “Shadow” National Baseline Assessment (NBA) of Current Implementation of Business and Human Rights Frameworks: The United States, Pillar III (June 2015), <http://icar.ngo/analysis/launch-of-icars-shadow-u-s-national-baseline-assessment-pillar-iii/>.

¹⁵² DANISH INST., *supra* note 3, at 81.

¹⁵³ *Id.* at 17

¹⁵⁴ The UNGPs themselves evidence the broad topics covered—procurement, prosecutors, trade, etc. For example, commentary to UNGP 7 says “home states should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors.” RUGGIE, *supra* note 4.

¹⁵⁵ *Id.*

in the treaty negotiations, and civil society's relationships with them will make their participation in the treaty process more likely.

Staff at the International Corporate Accountability Roundtable (ICAR) have personal knowledge of the power of consultations and shadow NBAs to increase the business and human rights capacity and knowledge of civil society and government. In November 2014, ICAR, the Legal and Human Rights Centre (LHRC) in Tanzania, the Centre for Human Rights at the University of Pretoria (CHR) in South Africa, and the Khulumani Support Group in South Africa launched a NAPs project in both Tanzania and South Africa.¹⁵⁶ One objective of this project was to build the capacity of civil society groups in Tanzania and South Africa¹⁵⁷ on business and human rights issues in general, and NAPs in particular.¹⁵⁸ To achieve this objective, ICAR and its partners worked with three National Human Rights Institutions (NHRIs) to conduct workshops in both South Africa and Tanzania.¹⁵⁹ These NHRIs were the Danish Institute for Human Rights (DIHR), the Tanzanian Commission on Human Rights and Good Governance (CHRAGG), and the South African Human Rights Commission (SAHRC).¹⁶⁰

Both workshops took place in July 2015, and both workshops had about twenty civil society representatives and twenty NHRI representatives present.¹⁶¹ These workshops provided a valuable opportunity to build civil society capacity in relation to business and human rights, and to increase knowledge about relevant actors within the government. ICAR's partners in Tanzania and South Africa are also currently writing shadow NBAs, which has and will continue to increase their (and ICAR's) knowledge about the existing level of UNGP implementation in their own domestic context.¹⁶² ICAR has recently announced a similar project in Mexico in partnership with the Project on Organizing, Development, Education, and Research (PODER).¹⁶³

Additionally, when the U.S. Government announced that it would be creating a NAP on business and human rights, staff at ICAR began researching and

¹⁵⁶ INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, *ICAR Partners with LHRC, CHR, & Khulumani to Support the Development of National Action Plans on Business & Human Rights in Tanzania and South Africa*, <http://icar.ngo/analysis/icar-partners-with-lhrc-chr-khulumani-to-support-the-development-of-naps-in-tanzania-south-africa/> (last visited Oct 23, 2015).

¹⁵⁷ Tanzania has announced it will create a NAP, while South Africa has not.

¹⁵⁸ DANISH INST., *supra* note 131; INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, *Project Update: Workshops on Business & Human Rights in Tanzania & South Africa*, <http://icar.ngo/analysis/project-update-workshops-on-business-human-rights-in-tanzania-south-africa/> (last visited Oct. 23, 2015).

¹⁵⁹ INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, *Project Update: Workshops on Business & Human Rights in Tanzania & South Africa*, <http://icar.ngo/analysis/project-update-workshops-on-business-human-rights-in-tanzania-south-africa/> (last visited Oct. 23, 2015).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ International Corporate Accountability Roundtable, *ICAR & PODER Partner to Support the Development of a National Action Plan on Business & Human Rights in Mexico*, ICAR, <http://icar.ngo/analysis/icar-poder-partner-to-support-the-development-of-a-national-action-plan-on-business-human-rights-in-mexico/> (last visited Mar. 2, 2016).

writing a shadow NBA on U.S. implementation of Pillars I and III.¹⁶⁴ Through this process, ICAR staff and the broader business and human rights community working on U.S. Government policy learned invaluable information about laws, policies, and initiatives in the United States that are relevant to business and human rights, the strengths and weaknesses of those laws, and existing gaps in UNGP implementation. This information allowed ICAR to create very targeted and detailed recommendations to the U.S. Government about what should be included in the NAP.¹⁶⁵ The capacity and knowledge built through the workshops and shadow NBA process in Tanzania and South Africa, and through the shadow NBA process in the United States, will increase the likelihood that if these organizations engage in the treaty process, that engagement will be deeper and more meaningful.

D.4 INCREASING SOUTH-SOUTH AND NORTH-SOUTH RELATIONSHIPS

Historically, the Global North has dominated the human rights agenda.¹⁶⁶ As noted earlier, many of the States that are backing the treaty are from the Global South.¹⁶⁷ Additionally, CSOs in the Global South are mobilizing and joining together to discuss the treaty, for example, through the Peoples Forum on Human Rights and Business.¹⁶⁸ As these Global South CSOs mobilize around the treaty discussion, it could help to foster and strengthen South-South business and human rights networks.¹⁶⁹ Not only will the dialogue around the treaty strengthen South-South relationships, it could also provide an opportunity for CSOs in the Global North and those in the Global South to strengthen or create relationships with one another. Both types of relationships can benefit not only the movement around the treaty but also the business and human rights movement more generally, including the UNGPs and NAPs.

First, the dialogue among CSOs across the globe about the treaty can serve as a means to connect CSOs from the Global South and the Global North, forming relationships and helping them to identify potential areas of collaboration outside of the treaty process, namely, in relation to implementing the UNGPs.¹⁷⁰

¹⁶⁴ ICAR, *supra* note 146.

¹⁶⁵ INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, *Key Recommendations—Pillar I* (Mar. 2015), <http://icar.ngo/analysis/launch-of-icars-shadow-u-s-national-baseline-assessment-pillar-iii/>; INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE, *Key Recommendations—Pillar III* (June 2015), <http://icar.ngo/analysis/launch-of-icars-shadow-u-s-national-baseline-assessment-pillar-iii/>.

¹⁶⁶ PEOPLE'S FORUM ON HUMAN RIGHTS AND BUSINESS, *Welcome and Introduction*, <http://peoplesforum.escr-net.org/pf-live/2014/9/30/welcome-and-introduction> (last visited Oct. 23, 2015).

¹⁶⁷ LOOTS, *supra* note 6.

¹⁶⁸ PEOPLE'S FORUM ON HUMAN RIGHTS AND BUSINESS, <http://peoplesforum.escr-net.org> (last visited Oct. 23, 2015).

¹⁶⁹ See PEOPLE'S FORUM ON HUMAN RIGHTS AND BUSINESS, *Next Steps in Treaty Advocacy*, <http://peoplesforum.escr-net.org/pf-live/2014/10/1/next-steps-in-treaty-advocacy> (last visited Oct. 23, 2015).

¹⁷⁰ Margaret Keck & Kathryn Sikkink, *Transnational Advocacy Networks in International and Regional Politics*, UNESCO (1999), http://isites.harvard.edu/fs/docs/icb.topic446176.files/Week_7/Keck_and_Sikkink_Transnational_Advocacy.pdf.

Ensuring that measures taken to implement the UNGPs actually have an impact on affected communities is imperative. By having relationships across regions, CSOs across regions can take steps to make sure the business and human rights reforms for which they are advocating are actually the reforms that are needed.

Second, the strengthening of south-south networks around the treaty may bleed into advocacy around the UNGPs.¹⁷¹ The more organized these CSOs are, the easier it is for them to mobilize to advocate for shared objectives, and the louder their voice will be. This is especially important at the UN level, which is less accessible to CSOs in the Global South than CSOs from the Global North.¹⁷² Barriers to access to the UN for the CSOs in the Global South include the fact that they tend to be smaller and have fewer resources than their counterparts in the Global North, making attending multiple UN conferences impractical or even impossible.¹⁷³ Although measures to increase the ability of Global South organizations to participate at the UN would be ideal, having a unified movement on business and human rights in the Global South will at the very least increase the strength of these organizations' voice. If such a movement or network is built around the treaty, such as through the Peoples Forum, this could also benefit the movement around the implementation of the UNGPs and NAPs. For example, at the Peoples Forum in 2014 many organizations "emphasized the need to view the treaty as only one of many parallel efforts in attempting to end the evasion of corporate accountability."¹⁷⁴ One parallel effort could be the domestic implementation of the UNGPs.

D.5 THE TREATY AS A SPUR, NOT A LEGAL CHILL

Finally, the treaty may actually be mobilizing civil society around the UNGPs. As noted in a piece written by Phil Bloomer, a senior UN official informed him that "he had seen more energy in the GPs in the first month after the treaty vote than in the previous year—implying the treaty vote had acted as a political spur to the Guiding Principles rather than creating a 'legal chill.'"¹⁷⁵ Instead of diverting resources and attention away from the UNGPs, as feared by some, the

¹⁷¹ At the 2014 Peoples Forum, many organizations "emphasized the need to view the treaty as only one of many parallel efforts in attempting to end the evasion of corporate accountability." PEOPLES' FORUM ON HUMAN RIGHTS AND BUSINESS, *Next Steps in Treaty Advocacy*, <http://peoplesforum.escr-net.org/pf-live/2014/10/1/next-steps-in-treaty-advocacy> (last visited Oct. 23, 2015).

¹⁷² Although the percentage of UN Accredited organizations from the Global South has increased since 1996, in 2007 UN Accreditation is still dominated by the US (29%) and Europe (37%). UNITED NATIONS, *Number of NGOs in Consultative Status with the Council by Region*, <http://www.un.org/esa/coordination/ngo/pie2007.html> (last visited Oct. 23, 2015).

¹⁷³ ANGELA ZEITLER, *NGO Participation at the United Nations: Barriers and Solutions* 1, 5 (Dec. 2009), <http://csonet.org/content/documents/BarriersSolutions.pdf>.

¹⁷⁴ FORUM, *supra* note 165.

¹⁷⁵ Phil Bloomer, *Unity in Diversity: the Advocates for the Guiding Principles and Binding Treaty can be Complementary*, BUS. & HUMAN RIGHTS RES. CTR., <http://business-humanrights.org/en/unity-in-diversity-the-advocates-for-the-guiding-principles-and-binding-treaty-can-be-complementary>.

treaty process may actually be injecting the discussion around the UNGPs with more energy.¹⁷⁶

First, civil society and governments have not abandoned the UNGPs as a result of the treaty process. This is supported by the continued publication of NAPs, civil society publications assessing those NAPs, attempts to enact domestic legislation such as those in France and Switzerland, continued work around existing legislation such as Dodd Frank in the United States, and the existing EU directives on extractives and non-financial reporting, and the potential EU action.

Second, the attention generated by the treaty could bring business and human rights issues into the sphere of awareness of organizations and individuals that may not previously have engaged in the business and human rights community. The UNGPs have been around for over four years and, while they are key to players that are already in the business and human rights community, people and organizations outside of that community may be unfamiliar with them or entirely unaware of their existence. The attention-grabbing nature of this treaty resolution could cause CSOs not involved in business and human rights to become interested in the topic, attracting more voices with fresh perspectives to the conversation around business and human rights in general. Having more CSOs involved in the discussion will not only bring new voices to the table, but will also make the call for State and corporate action to ensure corporate respect for human rights throughout their operations much louder.

E CONCLUSION

Not only are the treaty process and efforts to implement the UNGPs (including through NAPs) not in competition, but they can actually benefit one another. There is evidence that initial fears that the treaty process would divert resources and attention away from the UNGPs and NAPs and that States would use the treaty process as an excuse not to take steps to implement the UNGPs have not come about. Specifically, States are continuing to engage in the NAPs process, there is regulatory action at the domestic and regional level to implement the UNGPs, corporations are engaging with the UNGPs through reporting initiatives, and civil society organizations are robustly assessing State implementation of the UNGPs through NAPs assessments and benchmarking initiatives. The fear that reopening the discussion will create the chance for backsliding and a loss of consensus about business responsibility for human rights abuses, while not entirely gone, should not paralyze us and keep us from pushing the conversation forward. The UNGPs were only ever meant to be a first step, with the intention that other steps would be taken to build on their foundation. Additionally, civil society is making efforts to narrow the scope of the treaty and build consensus around what the treaty should address, which will narrow the scope of the discussion and mitigate the risk of backsliding.

¹⁷⁶ *Id.*

Beyond not being in competition, the treaty process and the implementation of the UNGPs and creation of NAPs can reinforce one another. The NAPs process can support the treaty process by helping to target and focus the treaty, by helping States identify what changes need to be made domestically in order to comply with any treaty that does get drafted, and by making State and civil society engagement with the treaty process deeper and more meaningful by building business and human rights capacity. Conversely, the treaty process can enhance implementation of the UNGPs by creating or strengthening relationships among civil society organizations in the Global North and the Global South, strengthening already existing civil society networks, and by bringing new perspectives and breathing new energy into the business and human rights community.

There is much work to be done to drive up business respect for human rights. Civil society organizations are working towards this goal both by engaging in the treaty process and by advocating for the implementation of the UNGPs at the national level through NAPs and beyond NAPs. In the end, stakeholders do not need to choose one or the other, but can, and should, support and be involved in both initiatives.

