Does the World Need a Treaty on Business and Human Rights?

Weighing the Pros and Cons

Notes of the Workshop and Public Debate, Notre Dame Law School, 14th May 2014, by the Business and Human Rights Resource Centre

The proposal for an international binding treaty on business and human rights is a hot topic. The Government of Ecuador proposed the treaty at the UN Human Rights Council session in September 2013 and over 80 states have supported the initiative. It has also gained the support of over 150 civil society organisations. The UN Human Rights Council in June 2014, will discuss whether and how this will progress.

Notre Dame University and the Business and Human Rights Resource Centre held a workshop of experts, followed by a public meeting. Our motive was to bring together some of the academics, lawyers, activists, and business representatives, committed to furthering human rights at the core of business operations, to consider the balance of arguments for and against a treaty on business and human rights. This note is a summary of some of the arguments which were put forward at both events. It is in no way comprehensive, nor a formal record of the debate (we hope that will be available soon). The Business and Human Rights Resource Centre has not sought to editorialise the debate but give a balanced account of the excellent arguments from both sides.

Motives for a Treaty?

There was general recognition that advocates of business and human rights have made some extraordinary progress in the last two decades. Participants expressed enormous respect for the achievements of the UN Guiding Principles. They represent an unprecedented consensus around a coherent, normative framework, and authoritative policy guidance for companies and governments.

But those seeking a treaty expressed a sustained frustration at their perception of a glacial pace of progress in the face of widespread corporate abuse of human rights, and the lack of effective prevention and remedy. The continued exposure of vulnerable and less powerful people to arbitrary dispossession of land, poverty wages and dangerous working conditions, harmful pollution, internet censorship and surveillance, and rising attacks on human rights defenders, serve as reminders that there is a long road yet to travel.

Everyone agreed that there is a dangerous 'governance gap' between the powerful globalising forces, and the often weak capacity of societies to cope with the problems and damage these forces can create (alongside the wealth and technological advance they create). The question our debate grappled with was: how best to close this gap in the current context?

Proponents of a treaty also argued that there are advantages of a treaty for business: it could create a level playing field where now there are huge discrepancies in human rights enforcement across jurisdictions; it could enhance legal predictability and stability and contribute to risk management; it potentially reduces the cost to companies of protest and crime; and could induce an environment of greater trust and enhanced reputation in which responsible business can thrive.

Will a Treaty Strengthen or Weaken the Guiding Principles?

Those against a treaty highlighted the fact that the Guiding Principles are just three years old – a blink in the lifetime of a UN framework. The GPs have already made positive contributions to business approaches to human rights, and governments' action. To achieve their potential, they need sustained effort from across all those concerned with business and human rights. The development of a Treaty, on the other hand, would be a vast endeavour that would draw many key actors into interminable UN debates that are likely to be "largely symbolic gestures, of little practical use to real people in real places"[i], while draining away momentum from the implementation of Guiding Principles.

Treaty opponents feared that confrontation between governments over the treaty, as well as business and civil society, would undermine the carefully constructed consensus of the Guiding Principles, and instead reintroduce a barren, polarised debate over business and human rights. Opponents underlined the legal complexity of an international binding treaty: it would likely have to embrace all major areas of civil, political, social, economic, and cultural rights (including environmental impacts); and would likely have to cover all significant businesses, not just large corporations – after all some of the worst abuse is by small and medium sized domestic and international companies.

Human rights advocates within companies also warn of a rapid 'legal chill' if a treaty negotiation starts: most, if not all, company positioning on human rights will be determined by General Counsel (Chief Legal Officer), and the CEO will hear far less from more progressive voices within the company and its stakeholders.

In contrast, proponents of the treaty argued that, far from a 'legal chill' falling over business and human rights, the treaty debates would act as a 'political spur' for governments and businesses to implement the Guiding Principles faster and more fully, in order to avoid or anticipate the treaty. Whether or not a treaty is finally agreed and ratified by governments, the process of treaty development itself will encourage and cajole greater action.

Proponents were unimpressed with the results, so far, of initiatives that do not establish human rights obligations for business, and voluntary initiatives to prevent and redress business abuse of people's human rights. Some proponents believed the Guiding Principles need a Treaty to bring hard-law coherence and power to their full implementation: the Guiding Principles would be far more effective if they have 'teeth'. Instead of being seen as an alternative to the Guiding Principles a treaty could complement them. Proponents described the tragic irony that the major trade and investment treaties, from bilateral investment treaties to free trade agreements often pay only lip-service, or politely refer to soft law regarding the responsibility of companies to respect and promote human rights, while enshrining extensive rights of companies in hard law. The current negotiations of the Transatlantic Trade and Investment Partnership will be another litmus test for human rights in this regard.

Proponents argued that human rights are so fundamental to human well-being and to companies' social license to operate, that they need a hard-law 'floor' of minimum standards, at least equivalent to companies' rights, not a soft-law or voluntary code. Equally, the greater coherence of hard law which a binding treaty would create, is a further argument for the treaty to enshrine the principle of extraterritoriality, after the exhaustion of all national channels for remedy (the latter to avoid any accusations of imperialism).

Is a Better Route to Ending Impunity to Make the National and Regional Systems Work?

Given the consensus on the important progress that the Guiding Principles represent, there was debate on what forms of hard law were the most effective complement to the Guiding Principles.

Opponents to the Treaty argued that, even if successfully negotiated, the Treaty could take decades to negotiate (as has too often been the case with other treaties). The resulting Treaty would be weak, in order to accommodate the most recalcitrant states influenced by the most recalcitrant companies. A far more effective approach, and efficient use of our time, as advocates of business and human rights, would be to drive effective hard law approaches from the bottom up. Opponents argued we should unite to harness the existing patchwork of conventions, including the two international covenants on human rights, the International Criminal Court, plus regional and national law and regulation.

Much of what is needed to strengthen human rights in business is there already in diverse statutes in diverse legal domains. Just one example is the US Foreign Corrupt Practices Act, which has now spread, in part through US advocacy, to the OECD. One of the most powerful arguments against a Treaty is that it would be negotiated by the very same states that do not implement their own human rights laws and constitutions now, and many governments would either not ratify the treaty, or would do so at a snail's pace. In contrast, if regional and national advocates and movements could harmonise and accelerate implementation of laws and augment their application in courts, this would likely drive greater respect and remedy for human rights than a moribund treaty debate.

But proponents of the treaty believed that these efforts are complementary: national and regional actors would be emboldened by the global treaty debate, rather than distracted by it. The attraction of achieving international coherence and consistency through hard law, like a treaty, will also drive the creation of guidance and normative way-markers to get states to act both nationally and internationally. Proponents explained the treaty as a key part of the "multiple regulatory strategies….to achieve an acceptable level of preventive and redressive efficacy.……Rather than being a stand-alone magical tool"[ii].

Is Now a Propitious Time?

A number of current opponents are, in principle, in favour of a binding treaty, but they argued that the geo-political conditions for a treaty are at a nadir. Pushing for a treaty now would be a poor investment of resources. With few exceptions, the governments and elites of developing countries are currently the last to criticise their own successful companies, and even less so their foreign investors. Equally, the governments of industrialised countries are showing no appetite for advancing effective business regulation: not even in areas that affect them directly such as aggressive tax avoidance. The landscape is so unfavourable and so fragile that there is a danger that hard-headed agitation could even lead to the collapse of what we currently have.

Proponents argued that we must accept that an effective Treaty will take time to negotiate. This being the case, and given the importance of the task: the time to start this endeavour is now.
If we wait for a more benign moment, then we will not be prepared with the concrete propositions to take advantage of a more propitious alignment of forces in the future. Equally, if there is obdurate opposition from a few states then, as happened with the landmines treaty, there is always the opportunity or threat of a binding treaty being negotiated and implemented by a 'coalition of the willing', with reluctant parties being brought in later.

Resources are Vital

An area of consensus was that resources for the development and implementation of a treaty or to advances to the Guiding Principles are vital. Without them, neither the Treaty nor the enhanced patchwork of existing laws and regulations will be effective in promoting, protecting, or respecting human rights nor in guaranteeing remedy. The lack of resources for victims of abuse to seek redress in the great majority of countries remains one of the greatest impediments to justice, and to the prevention of abuse (as the threat of just legal cases acts as a major deterrent to abuse by some companies).

Next Steps

Despite the differences of principle, strategy, and tactics which were expressed in the sessions, there was equally a great deal of common purpose, and a strong sense of complementarity of many of the different approaches described.

This division in the business and human rights movement over the treaty will have real costs in terms of our collective effectiveness. But those costs can be reduced if all sides adopt strategies and tactics that seek to complement and strengthen the work or others in our broad movement, where possible. One individual summed up this sense of unity in diversity, and optimism, with the phrase: 'forward on all fronts'.

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[i] Ruggie, John - A UN Business and Human Rights Treaty? 28th January 2014

[ii] Deva, Surya – The Human Rights Obligations of Business: Reimagining the Treaty Business. March 2014