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## TREATY PENUMBRAS

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### ABSTRACT

The classic question in international law concerns its effectiveness. Today, this old debate concerns the usefulness of treaties. Yet those engaging in this debate share a common problem. They evaluate treaty success by focusing on the effects of treaties on one type of actor: states. This narrow lens is misguided; it leads to a skeptical view of the effectiveness of treaties because of the number of countries declining to negotiate, adopt, ratify, or enforce treaties.

This article challenges this skeptical view by introducing the

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concept of “treaty penumbras” to explain how even treaties rejected by state actors exert considerable effects on the actions of an important non-state actor: transnational businesses. This article identifies three types of penumbral effects: pre-emption, coordination, and noise. Pre-emption effects encourage businesses to upgrade their self-regulation when a treaty is imminent. Coordination effects galvanize business actors to support (or oppose) treaty norms, and noise effects increase external pressure for corporate reform. Each of these effects magnifies the reach of treaties over businesses but these effects are unnoticed in the traditional legal framework that prioritizes state behavior.

Penumbral effects have important policy and academic implications. National policymakers, individually and collectively, increasingly target corporate transgressions globally, such as human rights abuses, environmental contamination, and financial misconduct. Treaties are designed to address these very problems but are increasingly limited in doing so under the traditional “statist” framework. In contrast, this article offers strategies for operationalizing penumbral effects to reach corporate conduct through treaty regulation. For academics, penumbral effects necessitate re-evaluation of both the criteria used for evaluating the effectiveness of treaties and the conclusions reached under that evaluation.

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## 1. INTRODUCTION

The classic question in international law concerns its effectiveness, especially concerning the use of treaties. Those engaging in this debate tend to evaluate treaty success by focusing on the effects of treaties on one type of actor: states.<sup>1</sup> In contrast, this article introduces the concept of *treaty penumbras* to explain how treaties exert effects on *non-state* actors—effects that are generally unnoticed in both academic and political circles.<sup>2</sup> Treaty penumbras necessitate a re-evaluation of how international legal scholars measure a treaty's success and the conclusions reached under such evaluation.

For treaties affecting business activity, a treaty's penumbra refers to its indirect effects on corporations and other business enterprises. Although penumbral effects may influence the behavior of other non-state actors, this article focuses on the effects on business actors because their conduct is increasingly the subject of treaty regulation.

Traditionally, states were the relevant audience for treaties because most treaty obligations concerned state behavior: waging war, reducing tariffs, claiming territory, punishing war crimes, exploring space, etc. But today's global problems are not the fault of states alone. Global businesses pollute waterways,<sup>3</sup> employ slave

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<sup>1</sup> Shima Baradaran et al., *Does International Law Matter?*, 743 MINN. L. REV. 743, 747 (2013) (“[T]he current theories of international law inappropriately concentrate on states rather than individuals.”).

<sup>2</sup> This article is part of a broader conversation regarding the role of private actors within international law. Recent scholarship in this area has focused on the role of private actors in international law-making. See, e.g., Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 237 (2015) (discussing the “internationalized” power of contract); Melissa Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 109 (2013) (discussing the importance of aligning stakeholder interests with treaty goals for “persuasion treaties”); Paul Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1595–1617 (2011) (discussing participation by private actors in “upstream” and “downstream” law production). But see Baradaran et al., *supra* note 1, at 765 (discussing the motivations of private actors to comply with international law).

<sup>3</sup> See Clifford Krauss, *Big Victory for Chevron Over Claims in Ecuador*, N.Y. TIMES (March 4, 2014), <http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html> [https://perma.cc/P5L9-YA2R] (reporting allegations against Chevron); Laura Smith-Spark, *Farmers Sue Oil Giant Shell Over Niger Delta Pollution*, CNN (Oct. 24, 2012),

labor,<sup>4</sup> and cheat government regulations,<sup>5</sup> to name a few recent transgressions. Therefore, when evaluating a treaty's success, it is important to understand and account for a treaty's effects on these businesses actors.<sup>6</sup>

The ways that treaties affect businesses are surprising. The familiar story is that treaties command businesses only when they first command states that, in turn, command businesses; treaties do not command businesses directly. Unfortunately, this chain of command is breaking down in the 21st century. States may be less willing to create treaties.<sup>7</sup> When they do sign a treaty, domestic legislatures often resist ratification. Many treaties have died in the United States Senate.<sup>8</sup> When this occurs, a treaty cannot reach

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<http://www.cnn.com/2012/10/11/world/europe/netherlands-nigeria-shell-oil/> [<https://perma.cc/S855-BPKF>] (reporting pollution allegations against Shell).

<sup>4</sup> Edvard Pettersson & Robert Burnson, *Nestle Accused of Putting Fish from Slave Labor in Cat Food*, BLOOMBERG (Aug. 27, 2015), <http://www.bloomberg.com/news/articles/2015-08-27/nestle-accused-of-putting-fish-from-slave-labor-in-cat-food> [<https://perma.cc/6J5P-2G7J>] (“Nestle SA was sued over claims that its Fancy Feast cat food contains fish from a Thai supplier that uses slave labor.”).

<sup>5</sup> Vanessa Houlder, Vincent Boland & James Politi, *Tax Avoidance: The Irish Inversion*, FIN. TIMES: COMMENT (Apr. 29, 2014), <https://www.ft.com/content/d9b4fd34-ca3f-11e3-8a31-00144feabdc0> [<https://perma.cc/2NK9-WKLA>] (discussing mergers between U.S. companies and foreign companies in order to lower tax rates).

<sup>6</sup> See Baradaran et al., *supra* note 1, at 801–16 (assessing rates and reasons for corporate compliance with financial transparency laws).

<sup>7</sup> See Joost Pauwelyn, Ramses A. Wessel & Jans Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT'L L. 733, 734–75 (2014) (collecting data from official sources – including the United Nations, the United States, and other sovereign governments – that suggests multi-lateral treaty-making is “stagnating”).

<sup>8</sup> See Associated Press, *US Senate Rejects UN Treaty on Disability Rights Amid GOP Opposition*, GUARDIAN (Dec. 4, 2012), <https://www.theguardian.com/world/2012/dec/04/senate-rejects-un-treaty-disability> [<https://perma.cc/Y8Y7-A4W2>] (demonstrating an instance of this when the United States Senate declined to ratify the UN Convention on Persons with Disabilities). See also Lisa Baldez, *U.S. Drops the Ball on Women's Rights*, CNN (March. 8, 2013) <http://www.cnn.com/2013/03/08/opinion/baldez-womens-equality-treaty/> [<https://perma.cc/8UN8-8CUK>] (noting that the United States is only one of seven UN member nations that has failed to ratify the U.N. Convention to Eliminate All Forms of Discrimination Against Women); David D. Caron, *The U.S. Must Ratify the Law of the Sea Treaty*, N.Y. TIMES (May 19, 2015), <http://www.nytimes.com/roomfordebate/2015/05/19/global-priorities-in-the-arctic/the-us-must-ratify-the-law-of-the-sea-treaty> [<https://perma.cc/N6RQ-RUVA>] (describing the US failure to ratify the UN Convention on the Law of the Sea); Joe Lauria, *Why Won't the US Ratify the UN's Children's Rights Convention?*,

business conduct. Or at least, that is the conventional wisdom.

This article challenges this view by arguing that treaties can affect businesses even when treaties fail at some stage from negotiations to ratification. These failed treaties continue to influence business behavior through a range of “penumbral effects.” These effects do not command a business to obey a treaty, but they nonetheless improve business compliance with treaty norms by altering the environment in which businesses operate.<sup>9</sup> This article identifies three types of penumbral effects: *pre-emption*, *coordination*, and *noise*.

*Pre-emptive penumbral effects* encourage business actors to improve the quality of their voluntary regulation in a particular policy area, such as environmental contamination or labor practices. These effects are apparent when a treaty is on the horizon. Industry actors opposed to treaty regulation in the policy area will upgrade the quality of their voluntary regulation in order to demonstrate the efficacy of private regulation.

This is an old idea applied to a new context. In the domestic setting, policymakers are more than familiar with the likelihood of industry good behavior under the shadow of new or enhanced regulation.<sup>10</sup> These “spillover effects” are documented in policy areas as diverse as environmental disclosures<sup>11</sup> to credit card inter-

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HUFFINGTON POST: THE BLOG (Nov. 25, 2014), [http://www.huffingtonpost.com/joe-lauria/why-wont-the-us-ratify-th\\_b\\_6195594.html](http://www.huffingtonpost.com/joe-lauria/why-wont-the-us-ratify-th_b_6195594.html) [<https://perma.cc/8WRT-UHBE>] (noting that the United States is one of only three countries that has not ratified the UN Convention on the Rights of the Child).

<sup>9</sup> See, e.g., Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 147, 150–54 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (discussing factors that drive institutional change within organizations).

<sup>10</sup> See, e.g., John W. Maxwell et al., *Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism*, 43 J.L. & ECON. 583, 613 (2000) (concluding that corporations are more likely to engage in voluntary self-regulation as political pressure and the threat of formal regulation increases).

<sup>11</sup> Hyunhoe Bae, *Voluntary Disclosure of Environmental Performance: Do Publicly and Privately Owned Organizations Face Different Incentives/Disincentives?*, 44 AM. REV. PUB. ADMIN. 459, 460 (2012); Eun-Hee Kim & Thomas P. Lyon, *Strategic Environmental Disclosure: Evidence from the DOE's Voluntary Greenhouse Gas Registry*, 61 J. ENVTL. ECON. & MGMT. 311, 326 (2011); Erin M. Reid & Michael W. Toffel, *Responding to Public and Private Politics: Corporate Disclosure of Climate Change Strategies*, 30 STRATEGIC MGMT. J. 1157, 1164–67 (2009).

est rates.<sup>12</sup> Pre-emptive penumbral effects are the global equivalents of this domestic practice. These penumbral effects can reinforce under-enforced treaties or disseminate norms from treaties that never emerged.

*Coordination penumbral effects* occur when businesses rally around a treaty, or prospective treaty, to support or resist it. If they support it, they use it as the basis for their own contracts or industry standards, even when no state commands them to do so.<sup>13</sup> If they resist it, they will coordinate their opposition against it, but this opposition forces industry actors to recognize industry issues and begin to identify solutions. Regardless of whether the treaty wins industry favor or resistance, the common outcome is that the treaty galvanizes industry actors into action in a manner they would not were it not for the treaty (or prospective treaty).

Finally, treaties are noisy. We are accustomed to witnessing triumphant presidents sign treaties before global audiences, precipitating media pundits to disseminate and scrutinize, praise, and censure. These *noise penumbral effects* create pressure for businesses to reform their current practices by raising awareness of policy issues and risking reputational shaming of recalcitrant business actors. Even treaties that never reach this stage may attract noise because of the attention that the resistance draws.

These penumbral effects are especially important in the current political environment—both domestic and international—that poses risks to treaty-making and successful implementation.<sup>14</sup> Penumbral effects partially compensate for treaty failures when we are primarily concerned with the behavior of non-state actors. A treaty that ultimately “fails” because of a breakdown in the treaty

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<sup>12</sup> Victor Stango, *Strategic Responses to Regulatory Threat in the Credit Card Market*, 46 J.L. & ECON. 427, 430 (2003).

<sup>13</sup> See Natasha Affolder, *The Market for Treaties*, 11 CHI. J. INT'L L. 159, 161 (2010) [hereinafter Affolder, *The Market for Treaties*] (explaining that treaty norms from international environmental treaties are incorporated into private contracts). See also Anne van Aaken, *Effectuating Public International Law Through Market Mechanisms?*, 165 J. INST. THEORETICAL ECON. 33, 41 (2008) (explaining incentive structures for encouraging market actors to comply with public international law); Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 133 (explaining how market mechanisms, as part of a private governance scheme, offer “the standard-setting, implementation, monitoring, enforcement, and adjudication roles traditionally played by public regulatory regimes”).

<sup>14</sup> See *infra* notes 39–47 and accompanying text.

process may still precipitate spillover effects within the shadow regions of the treaty where voluntary industry regulation occurs.

Critically, a treaty may not need to emerge for these penumbral effects to occur. The treaty process itself involves important features that can affect the quality of industry self-regulation, including identification of deficiencies with current self-regulatory projects, articulation of policy recommendations, increased coordination among stakeholders, and reputational shaming. Viewing treaties in this manner preserves their important role in the regulation of international affairs but adapts this role in light of contemporary challenges.

This article illustrates treaty penumbral effects with a case study of a potential treaty that also involves both high stakes and a high risk of failure: an international treaty on transnational business and human rights. In 2014, the Human Rights Council established an open-ended intergovernmental working group (OEIGWG) to elaborate an international legally binding instrument on transnational corporations and other business enterprises regarding respect for human rights.<sup>15</sup>

Business and human rights provides a good case study for studying penumbral effects for the following reasons. First, this treaty may fail spectacularly, as some have already predicted. In that case, it is important to examine the regulatory effects of the treaty-making process itself, as opposed to the treaty outcome, to understand better the effect of this process on the behavior of the non-state actors the treaty is addressing. Second, many regulatory methods were attempted over the past few decades to reform transnational business conduct. Some of these methods relied on hard law strategies whereas others favored non-binding approaches. This history provides important information regarding the efficacy of these various regulatory methods, including how the former interacted with and influenced the latter.

This article is organized as follows. Section 2 discusses the traditional framework for evaluating the effectiveness of treaties that privileges the effects of treaties on state actors as opposed to non-state actors. This section explains why these criteria for effective-

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<sup>15</sup> U.N. Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, ¶ 1, U.N. Doc. A/HRC/26/L.22/Rev.1 (June 24, 2014).

ness are no longer tenable in light of fractured international politics and the rising role of multinational corporations. Section 3 describes the primary contribution of the article: an alternative theoretical framework for assessing the effectiveness of treaties that accounts for treaty effects on businesses. This section explains the regulatory benefits of “penumbral” effects: preemption, coordination, and noise. Section 4 applies this theoretical framework to a case study on business and human rights, concluding with an assessment of how this case study illustrates penumbral effects in practice. Finally, Section 5 outlines strategies for operationalizing penumbral effects and implications of this framework for policymakers.

## 2. EVALUATING EFFECTIVENESS: THE STATIST VIEW OF TREATY SUCCESS

A treaty is an international agreement between states whereby they bind themselves legally to act in a particular way.<sup>16</sup> For centuries, treaties regulated conduct on the international stage.<sup>17</sup> The scholarship on the effectiveness of international law is vast, and this Section does not attempt to provide a comprehensive account. Instead, it examines a common thread within this literature: its focus on state behavior.<sup>18</sup>

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<sup>16</sup> See Vienna Convention on the Law of Treaties art. 2(a), May 23, 1969, 1155 U.N.T.S. 332, 333 (defining the role and purpose of treaties in international law); MALCOLM SHAW, *INTERNATIONAL LAW* 88 (5th ed. 2003) (discussing the consent-based nature of treaties).

<sup>17</sup> See MARK WESTON JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARY* 31–52 (5th ed., 2014) (providing excerpts from treaties over the centuries).

<sup>18</sup> See, e.g., Joel Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 *CHI. J. INT'L L.* 127, 127 (2010) (“If international law is to be a useful tool of international cooperation, we must know more about its social effects: its ability to cause states to take action that they would not have taken, or to refrain from taking action that they would have taken but for the existence of the international law rule.”). See also Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 623 (2004) (explaining that an understanding of “the social forces that shape the behavior of states” is necessary when grappling with questions of international regime design); Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 *CAL. L. REV.* 1823, 1826 (2002) (noting that

This focus not only influences the scholarship on treaties but also the study of international law generally. This focus is understandable because many of the global problems that international law addresses result from state behavior. The Section below discusses both the importance of studying state compliance as well as the limitations of this focus.

### 2.1. *Focusing on Core Effects: State Compliance*

The state centric evaluation of treaty success focuses on the effects of a treaty on conduct by state actors.<sup>19</sup> This makes sense given that treaties are ultimately international agreements between states. Treaties are negotiated, drafted, signed, and ratified by state actors with the intent of influencing state behavior going forward. Consequently, the evaluation of treaty success historically focused on the effects of treaties on state behavior; this is referred to as the “core” effects of treaties. This focus encourages international law scholars to evaluate state compliance with international legal rules<sup>20</sup> and offer explanations for compliance (or non-compliance).<sup>21</sup> Some scholars explain compliance with reference to

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most international law scholars believe that international law “matters,” that it “affects the behavior of states,” and introducing a comprehensive theory to explain why states are influenced by international law); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2646 (1997) (suggesting that the concept of transnational legal process—the process by which domestic legal systems internalize international norms—is fundamental to understanding why sovereign states obey international law).

<sup>19</sup> Baradaran et. al, *supra* note 1, at 747.

<sup>20</sup> See Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 83–85 (2007) (analyzing trends in investment treaty arbitration using empirical data on the identity and number of parties involved and on the resulting outcomes); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1968–76 (2002) (measuring state compliance with international treaty rules on genocide, torture, fair and public trials, civil liberties, and political representation of women); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 347 (1997) (“[T]he dearth of good empirical studies of correspondence between state behavior and international legal rules and decisions is a serious obstacle to adequate understanding and evaluation of the international legal system.”). *But see* Baradaran et. al, *supra* note 1, at 804–06 (measuring private actor compliance with financial transparency laws).

<sup>21</sup> Guzman, *supra* note 18 (“Indeed, the absence of an explanation for why

rational actor theories. According to Andrew Guzman, states act from rational self-interest and choose to comply (or not) based on calculations of reputational costs and direct sanctions associated with violating international law.<sup>22</sup> Joel Trachtman similarly employs a rationalist model of compliance but disaggregates the state unit to examine the effects of domestic political processes on a state's decision to comply or violate international law.<sup>23</sup>

In contrast, another group of scholars emphasizes the importance of international legal rules and their associated regimes in encouraging compliance. The "managerial school" of Abram Chayes and Antonia Chayes prioritizes cooperation rather than sanctions.<sup>24</sup> They focus on encouraging compliance through "justification, discourse, and persuasion."<sup>25</sup> Thomas Franck emphasizes the characteristics of the rules we want obeyed, explaining that the fairness of international legal rules encourages states to comply.<sup>26</sup> Fairness of rules depends upon both procedural and substantive fairness and particularly depends upon determinacy, symbolic validation, coherence, and adherence.<sup>27</sup>

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states obey international law in some instances but not others threatens to undermine the very foundations of the discipline."). For a literature review of dominant theories of compliance with international law see Guzman, *supra* note 18, at 1823; Hathaway, *supra* note 20, at 2002-20; Kingsbury, *supra* note 20, at 348.

<sup>22</sup> See *id.* at 1860-61 ("The decision to honor or breach a promise made to another state imposes costs and benefits upon the promising country and its decision-makers. The model assumes that decision-makers behave in such a way as to maximize the payoffs that result from their actions. Thus, where the benefits of breach outweigh its costs, a country is expected to violate its agreements with other states. International law succeeds when it alters a state's payoffs in such a way as to achieve compliance with an agreement when, in the absence of such law, states would behave differently.") (internal citations omitted).

<sup>23</sup> See Trachtman, *supra* note 18, at 131 ("Compliance with international law can be analyzed by reference to the domestic political coalitions that exist in order to induce entry into the international legal rules, as well as those that will be precipitated by the establishment of the international legal rule.").

<sup>24</sup> See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) (discussing the managerial approach to compliance).

<sup>25</sup> Guzman, *supra* note 18, at 1830-32; Hathaway, *supra* note 20, at 1955-57; Koh, *supra* note 18, at 2636.

<sup>26</sup> THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 7 (2002) (explaining that states tend to comply with international law when these rules satisfy expectations of distributive justice and right process).

<sup>27</sup> See *id.* at 30-46 (providing more detailed definitions of the four factors).

A final group of scholars emphasizes the role of norm diffusion and socialization on encouraging compliance. Harold Koh focuses on the dissemination of international legal rules into domestic legal regimes, arguing that the “process of interaction, interpretation, and internalization of international norms into domestic legal systems is pivotal to understanding why nations ‘obey’ international law.”<sup>28</sup> Ryan Goodman and Derek Jinks highlight the relationship between state compliance and acculturation—“the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture.”<sup>29</sup>

These research questions are undoubtedly important for both international legal scholars and policymakers. Every legal field must possess some level of self-awareness regarding its authority over its own subjects, especially about whether the latter listen and the reasons they do. This knowledge is also important for policymakers who set trade terms, honor territorial boundaries, discipline corporate activity, and even wage wars against this background of knowledge.

Unfortunately, this research reveals only a partial picture of how international law works. It ignores the effects of international law’s key instrument—treaties—on a significant class of global actors: corporations and other business enterprises.<sup>30</sup> As explained below, this neglect compromises the study and practice of international law in significant ways.

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<sup>28</sup> Koh, *supra* note 18, at 2603. *See also id.* at 2646 (“One or more transnational actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party’s internal normative system. The aim is to ‘bind’ that other party to obey the interpretation as part of its internal value set.”).

<sup>29</sup> Goodman & Jinks, *supra* note 18, at 626.

<sup>30</sup> Baradaran et al., *supra* note 1, at 747 (“Whether international law is ultimately effective in accomplishing its goals may depend less on whether a state complies and more on whether sub-state entities act consistently with the goals of international law. This misplaced focus on nations as the primary actors in international law neglects key players in international law: individuals and firms.”).

## 2.2. *The Limitations of the Statist View*

The problem with the state centric evaluation of treaties is that it is insufficient to address two significant challenges in the 21st century. First, we need to care about treaty effects beyond the state because corporations create a range of transnational harms that also need regulation; therefore, we need to know about *non-state* actor compliance with treaties. Second, as discussed below, we witness warning signs suggesting that it is becoming more difficult to get treaties across the finish line. That is why it is also important to consider the regulatory effects of treaties at various stages—negotiation and drafting, adoption, signature, and ratification—upon corporations and other business actors because these effects suggest strategies for achieving treaty success despite the limitations with the state-centric approach discussed below.

### 2.2.1. *Need to Regulate Corporations*

States are not the only actors in need of international regulation. Instead, our daily headlines tell us why it is important to regulate at least one type of non-state actor: transnational businesses.

Shell and Chevron face accusations of dumping oil into local waterways in Nigeria and Ecuador, respectively.<sup>31</sup> Apple faces similar allegations of pollution problems in its global supply chain, including using Chinese factories that fail to comply with regulations, discharge toxic metals, ignore the health concerns of local communities, and dispose of hazardous waste in problematic ways.<sup>32</sup> Shell also came under heavy scrutiny in *Kiobel v. Royal*

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<sup>31</sup> See Krauss, *supra* note 3 (describing claims by Ecuadorean farmers that Chevron had polluted local sections of the Amazon River with millions of gallons of toxic wastewater); Smith-Spark, *supra* note 3 (reporting that Nigerian farmers and an environmental group brought suit against Shell for polluting local water sources with oil over a period of several years).

<sup>32</sup> See David Barboza, *Apple Cited as Adding to Pollution in China*, N.Y. TIMES (Sept. 1, 2011), <http://nyti.ms/1OdXYoc> [<https://perma.cc/9Q5M-PXKU>] (describing a report released by an environmental policy institute in Beijing accusing Apple suppliers of repeatedly failing to properly dispose of hazardous and toxic waste); Xie Xiaoping, *Apple Wakes up to Chinese Pollution Concerns*, GUARDIAN (Oct.

*Dutch Petroleum* for its involvement in massive human rights violations in Nigeria.<sup>33</sup> Even Disney is under fire. Labor activists accuse the cartoon giant of using children to make toys for other children, as well as contracting with factories that push workers to perform three times the overtime permitted by law.<sup>34</sup>

We witness these practices because of the “governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.”<sup>35</sup> National regulators are stretched to their limit to control business behavior because businesses can relocate to a place where the regulators’ laws do not apply and where local laws are absent or unenforced.<sup>36</sup> The countries in which corporations operate are constrained in their ability to regulate the conduct of transnational corporations operating within their borders.<sup>37</sup> Limited institutional capacity may constrain their ability to enforce their laws; however, sometimes host states purposefully avoid laws proscribing certain forms of corporate con-

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4, 2011), <http://www.theguardian.com/environment/2011/oct/04/apple-chinese-pollution-concerns> [<https://perma.cc/ASF4-MPTX>] (describing pollution problems in Apple’s supply chain).

<sup>33</sup> 133 S. Ct. 1659, 1663 (2013) (listing the violations of the law of nations alleged by the Nigerian plaintiffs); Nina Totenberg, *Human Rights Victims Seek Remedy At High Court*, NPR (Feb. 28, 2012), <http://www.npr.org/2012/02/28/147507940/human-rights-victims-seek-remedy-at-high-court> [<https://perma.cc/JWU2-HCTL>] (describing the plaintiffs’ claims that Shell “worked hand-in-glove with the Nigerian military to brutally suppress any opposition to the way the company operates”).

<sup>34</sup> Gethin Chamberlain, *Disney Factory Faces Probe into Sweatshop Suicide Claims*, GUARDIAN (Aug. 27, 2011), <http://www.theguardian.com/law/2011/aug/27/disney-factory-sweatshop-suicide-claims> [<https://perma.cc/D38F-4BS5>] (reporting that Disney’s toys from the movie “Cars” were made with child labor).

<sup>35</sup> John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 3, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Framework*].

<sup>36</sup> See Tricia D. Olsen, *Access to Remedy: Accountability for Allegations of Corporate Human Rights Abuse in Latin America* 5-6 (September 16, 2016) (unpublished manuscript) (on file with author) (explaining that a significant number of allegations of corporate misconduct are not met with any remedies).

<sup>37</sup> Beth Stephens, *Making Remedies Work: Envisioning a Treaty-Based System of Effective Remedies*, in BUILDING A TREATY ON BUSINESS & HUMAN RIGHTS (Surya Deva & David Bilchitz eds., forthcoming) (manuscript at 5-6, 15-17) (discussing various limitations with obtaining remedies against transnational corporations in host states).

duct in an effort to attract investment.<sup>38</sup>

### 2.2.2. Risks to Future Regulation by Treaties

The second limitation with the statist view is that, although we need to regulate transnational businesses, treaties may not be up to this task.<sup>39</sup>

Joost Pauwelyn, Ramses Wessel, and Jans Wouters identify the reduced number of multilateral treaties deposited with the United Nations Secretary General in recent decades.<sup>40</sup> They interpret these declining figures as signs of “stagnation” in multilateral treaty making in the 21st century.<sup>41</sup> The problems do not end with treaty creation. Even if state officials can agree on a treaty, they often need the support of domestic legislatures, but this support is not always forthcoming.<sup>42</sup> For example, senators have communicated

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<sup>38</sup> See John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Promotion and Protection of Human Rights*, ¶¶ 29–30, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (noting the lack of government regulations related to social and human rights issues, which sometimes requires companies to take on quasi-governmental functions to fill the void); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 503 (2009) (analyzing the ways in which nongovernmental actors can innovate international regulation); *Framework*, *supra* note 35, ¶ 14 (describing how some states lack regulatory enforcement capabilities or may choose not to utilize it to attract international business and investment).

<sup>39</sup> See, e.g., Doug Cassel & Anita Ramasastry, *Anatomy of a Business and Human Rights Treaty?*, INST. HUM. RTS. & BUS.: COMMENTARY (June 25, 2015), <http://www.ihrb.org/commentary/anatomy-business-and-human-rights-treaty.html> [<https://perma.cc/WA33-N37K>] (“Current international law imposes certain human rights obligations on business, but the coverage is incomplete, indirect and largely ineffective.”).

<sup>40</sup> Pauwelyn et al., *supra* note 7, at 734. See also KENNETH W. ABBOTT ET AL., HARV. PROJECT CLIMATE AGREEMENT DISCUSSION PAPER NO. 13-57, ORGANIZATIONAL ECOLOGY IN WORLD POLITICS: INSTITUTIONAL DENSITY AND ORGANIZATIONAL STRATEGIES 2 (2013), [http://belfercenter.hks.harvard.edu/files/dp57\\_abbott-green-keohane.pdf](http://belfercenter.hks.harvard.edu/files/dp57_abbott-green-keohane.pdf) [<https://perma.cc/X5AM-RMUH>] (noting the decline in both formal international law-making and formation of intergovernmental organizations). Some argue, however, that the treaty projects of the present era address more niche and controversial topics, thereby compromising cooperation.

<sup>41</sup> Pauwelyn et al., *supra* note 7, at 734.

<sup>42</sup> Associated Press, *supra* note 8.

opposition to ratifying the U.N. Convention on the Law of the Sea,<sup>43</sup> the Trans-Pacific Partnership,<sup>44</sup> and the Paris Climate Agreement.<sup>45</sup>

Do these signs signal the end of treaty making in the 21st century? Perhaps not. But they do signal that treaties may have an uncertain future and there is a need for adaptation, be it great or small. The extent of the treaty uncertainty affects the degree of adaptation. The Section below explains how international lawyers and scholars can adapt treaties under different conditions of uncertainty to exert regulatory effects on businesses. As discussed below, a “treaty as process” approach can produce valuable side-effects that are often neglected when we focus only on the regulatory effects of treaties as products. The treaty process can itself

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<sup>43</sup> See Julian Pecquet, *Opposition to Law of the Sea Treaty Heats Up*, HILL (May 25, 2012), <http://thehill.com/policy/international/229637-opposition-to-law-of-the-sea-treaty-heats-up> [<https://perma.cc/5YE2-RSCX>] (reporting that twenty-seven U.S. Senators had signed a letter expressing opposition to the ratification of the convention).

<sup>44</sup> Sen. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), <http://wpo.st/fN081> [<https://perma.cc/D92N-KBBY>] (arguing that the TPP’s arbitration clause would undermine U.S. sovereignty).

<sup>45</sup> Timothy Cama, *GOP Chairman Blasts Paris Climate Accord*, HILL (Dec. 12, 2015), <http://thehill.com/policy/energy-environment/263049-gop-chairman-blasts-paris-climate-accord> [<https://perma.cc/WV3N-S4PC>] (“[Senator] Inhofe, an outspoken doubter of the human role in climate change, has worked in recent months to undermine the agreement and demand that it be submitted to the Senate for approval, which it would not get.”).

Over the past few decades, regulatory networks have emerged as popular fora for international policy-making. Chris Brummer, *How International Financial Law Works (and How It Doesn’t)*, 99 GEO. L.J. 257, 290–91 (2011); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 12 (2002); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113, 118 (2009); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283, 290 (2004); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041, 1053 (2003); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT’L L.J. 281, 284–85 (1998). In these networks, government actors come together to share information, harmonize rules, and improve enforcement activities in a range of issue areas, including securities regulation, banking supervision, insurance, and the environment. Raustiala, *supra*, at 12; Zaring, *supra*, at 282. For example, many issues in cross-border financial regulation are addressed within networks through informal processes. Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 737–39, 745–48 (2014).

create side-effects with significant implications for the success of other regulatory strategies that also aim to constrain transnational business behavior. The treaty process, therefore, can bolster the efficacy of these other institutions.

### 3. FROM CORE TO PENUMBRA: TREATY EFFECTS BEYOND THE STATE

The problem with the state-centric evaluation of treaty success is that it neglects that treaties can have indirect effects on business actors without the active involvement of state actors. This belief understandably fuels a pessimistic view of treaties because of the difficulties with obtaining state cooperation in the treaty process.

Fortunately, treaties have significant effects on actors beyond the state by offering a complex range of incentives to a diverse range of business actors. This analysis reveals three important insights about treaties that relate to audience, effects, and measuring success.

Treaties have at least two sets of distinct audiences and, therefore, exert at least two different types of effects. The most familiar audience is states; traditional legal scholarship focuses on a treaty's effects on compliance by state actors ("core effects"), as discussed in Section 2.1., *supra*.

However, treaties also exert important effects on actors beyond the state. Treaty norms intended for adoption and enforcement by states can influence private ordering between business actors.<sup>46</sup> A number of businesses incorporate treaty norms into private contracts between themselves and their suppliers or in codes of conduct within particular industries.<sup>47</sup> Multi-stakeholder groups also develop their own techniques for disseminating international law norms within their own communities.<sup>48</sup>

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<sup>46</sup> See Affolder, *The Market for Treaties*, *supra* note 13 (explaining that treaty norms from international environmental treaties are incorporated into private contracts). See also Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 133 (; Aaken, *supra* note 13).

<sup>47</sup> See, e.g., Affolder, *The Market for Treaties*, *supra* note 13, at 161, 168–89 (detailing corporate engagement with international treaties).

<sup>48</sup> See *infra*, note 62 and accompanying text.

These are some of the many ways that treaties have a private, non-state audience. For the purpose of this article, these are “penumbral effects” of treaties and are distinguishable from a treaty’s “core effects” on states. There are three primary forms of penumbral effects on transnational businesses: *pre-emption*, *coordination*, and *noise*. *Pre-emptive* effects can precipitate industry regulation by businesses in an attempt to demonstrate the efficacy of voluntary regulation and discourage future treaty regulation. *Coordination* effects occur because treaties, in their various stages of development, offer strong incentives for private coordination in regulation. Finally, *noise* effects result from the attention received by a treaty making process that creates and sustains pressure for reform.

These effects are important because they offer strategies for achieving treaty success despite the limitations with the state-centric approach discussed in Section 2.2., *supra*. First, penumbral effects concern the regulatory effects of treaties on businesses. As such, they identify ways to regulate transnational business conduct using the traditional international law mechanism of a treaty.

Second, penumbral effects offer different strategies for addressing “treaty uncertainty”: the likelihood of state cooperation in the negotiation, drafting, adoption, signing, and ratification of future treaties. The type of penumbral effects we can expect depends on the nature and severity of the treaty uncertainty. If this treaty uncertainty is weak so that the overall number of treaties created remain the same or decrease without disappearing altogether, then we can expect all three types of effects, including pre-emptive penumbral effects.

If the treaty uncertainty is strong, then state cooperation is unlikely regarding any future treaty and industry actors will realize this. In this situation, preemptive penumbral effects are unlikely, but the process of treaty negotiations and drafting still create two important penumbral effects, noise and coordination, that create beneficial spillover effects. These different penumbral effects are summarized in Table 1 and described below.

**Table 1: Types of Penumbral Effects**

Treaty Uncertainty	Penumbral Effect
Weak	Pre-emptive Effects Noise Effects

	Coordination Effects
Strong	Noise Effects Coordination Effects

Treaty uncertainty does not exist as a binary; this uncertainty can occur along the range between strong and weak. We may also witness a blending of penumbral effects. Although pre-emptive penumbral effects may dissipate if the treaty uncertainty is strong, noise and coordination effects can accompany both strong and weak treaty uncertainty; however, these effects are more important when the treaty uncertainty is strong because they represent the most robust penumbral effects and best hope for stimulating industry regulation.

Finally, penumbral effects are important because they partially compensate for the absence of a treaty when the absent treaty targets business behavior. Treaty enthusiasts may wish to answer all forms of transnational business misconduct with a treaty.<sup>49</sup> However, such a possibility is unlikely even if the treaty uncertainty is weak. Penumbral effects partially compensate for this absence by fostering renewed voluntary regulation.

The penumbral effects are even more important when the treaty uncertainty is strong and the prospect of a treaty remote. In these situations, the most viable form of regulation may be voluntary regulation. Penumbral effects demonstrate how treaty-making processes can facilitate such regulation.

### 3.1. Weak Treaty Uncertainty: Pre-Emption Penumbral Effects

If the number of treaties that states produce stays the same or declines without disappearing, then the treaty-making process

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<sup>49</sup> Joost Pauwelyn & Liliana Andonova, *A "Legally Binding Treaty" or Not? The Wrong Question for Paris Climate Summit*, LINKEDIN (Dec. 3, 2015), <https://www.linkedin.com/pulse/legally-binding-treaty-wrong-question-paris-climate-summit-pauwelyn?trk=mp-reader-card> (<https://perma.cc/35SE-B3EV>) (“[T]he idea of a ‘binding treaty’ continues to be portrayed as the Holy Grail, a silver bullet that will solve all problems. This is wrongheaded. Making something a ‘binding treaty’ at the international level does not, as such, add much. Yet, it takes longer to negotiate and ratify, may reduce the level of ambition, sets the issue in stone and limits the parties involved to states.”).

can produce important spillover effects that partially compensate for treaties that fail to emerge. Even a decline in treaties is not the same thing as the extinction of treaties. A decline is important because it suggests that treaty regulation may not be available to address important international issues in the future. However, so long as states remain capable of creating treaties, albeit at a lower rate, the treaty-making process can incentivize another form of regulation: voluntary industry regulation.

In the domestic setting, scholars in law and economics and management studies observed improvements in self-regulation in the period following the announcement of potential impending public regulation.<sup>50</sup> Pre-emptive penumbral effects are the global equivalents of these domestic phenomena. These penumbral effects can reinforce under enforced treaties or disseminate norms from treaties that never emerged. Similar to the domestic situation, the regulatory threat of a treaty – manifested by the onset of a treaty drafting and negotiation process – may incentivize improved voluntary regulation as industry actors ramp up efforts at voluntary regulation in anticipation of a treaty that is heading down the road.

These pre-emptive penumbral effects are different from the way we usually envision and expect treaties to operate. Here, treaties provide the incentive to self-regulate; they are not the sources of substantive rules and do not provide mechanisms for enforcement. Instead, these functions are performed by private standard-setting and a widening range of regulatory strategies.<sup>51</sup> These pre-emptive effects make two important regulatory contributions. First, they may occur even if a final treaty never enters into force. Second, these effects could partially compensate for the absence of

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<sup>50</sup> See Maxwell et al., *supra* note 10, at 613 (“When it is costly for consumers to organize and to influence the political process, firms can match the net utility consumers expect from regulatory controls with a lower level of voluntary controls and can thereby deter consumer groups from mobilizing to enter the political process. As the threat of regulation grows, for example, because of reductions in consumers’ informational and organizational costs, self-regulation becomes more stringent.”) (emphasis added); Stango, *supra* note 12, at 434 (“Within 1 day after the threat, two of the largest issuers in the country (AT&T and First Chicago) immediately announced interest rate cuts . . . . These initial responses were followed by an industry-wide period of rate cutting.”).

<sup>51</sup> See Abbott & Snidal, *supra* note 38, at 514–18 (describing various forms of regulatory standard-setting schemes involving a variety of stakeholders).

a final treaty because these effects stimulate another kind of regulation: voluntary regulation.

Will penumbral pre-emptive effects always accompany a prospective treaty? No. Preemptive effects rely on certain treaty conditions, as explained in the following hypotheticals.

In Hypothetical 1, assume that state parties adopt Treaty A on child labor but fail to adopt a subsequent Treaty B on child labor. The treaty-making process for Treaty B can incentivize voluntary self-regulation related to child labor that partially compensates for the failure of Treaty B to result. For treaty enthusiasts, the best-case scenario is if states sign and ratify Treaty B. If Treaty B is not adopted and ratified, the second best outcome is for the preemptive effects associated with the treaty process for Treaty B to stimulate improved behavior by industry actors.

The fact that state parties adopted and ratified Treaty A results in stronger signals to industry during the treaty negotiation for Treaty B, increasing the likelihood of improvements in voluntary regulation.

In Hypothetical 2, assume that there is no Treaty A on child labor but that states had created Treaty C on arms trading. Preemptive effects can still occur in a policy area previously unregulated by treaties so long as *other treaties* emerge. Treaty C could still incentivize voluntary regulation during the treaty negotiation process for Treaty B because Treaty C demonstrates to industry actors that states are still willing and capable of producing treaties. Absent other factors, industry actors may not be able to predict that an overall decline in treaty making will result in reduced treaty making in the particular policy area affecting them, *i.e.* child labor.

The problem arises when there is no Treaty C (or Treaty D, E, etc). Hypothetical 3 lacks both Treaty A (on child labor), Treaty C (on arms trading), or any other recent treaty. If signs not only indicate the decline of treaties but also the end of treaties *per se*, then the signals to industry during the treaty-negotiation process are likely insufficient to incentivize pre-emptive industry regulation.<sup>52</sup> When that credibility is gone, so is the likelihood of pre-emptive

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<sup>52</sup> IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 39 (1992) (explaining that it is "the existence and signaling of the capacity to get as tough as needed [that] can usher in a regulatory climate that is more voluntaristic and nonlitigious" with most of the regulatory action occurring in the realms of self-regulation.).

self-regulation. However, as discussed below, the treaty-making process can still generate important spillover effects based on the noise generated and the incentives for coordination.

Finally, even if penumbral pre-emptive effects do occur, one may reasonably wonder what is to prevent a business from rolling back its voluntary practices if the treaty-making process breaks down and the treaty threat abates. In this situation, industry may refrain from adopting additional initiatives or commitments, but it is unlikely that they will roll back their current practices. First, businesses broadcast their good practices in sustainability reports that they post to their corporate website or file with the UN Global Compact (if they are members).<sup>53</sup> These sites usually contain several years' worth of reports.<sup>54</sup> NGOs and consumers who consult these websites will therefore notice any backsliding.

Second, company policies may similarly prove difficult to roll back after institutional changes have occurred, such as improved training, enhanced feedback, integrated human rights decision-making, and improved due diligence. Finally, industry initiatives are even more difficult to ignore. A number of these initiatives involve other stakeholders who will notice, and likely publicize, industry abandonment of initiatives.<sup>55</sup>

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<sup>53</sup> See generally ROYAL DUTCH SHELL, SUSTAINABILITY REPORT 2014 (2014), [http://reports.shell.com/sustainability-report/2014/servicepages/downloads/files/entire\\_shell\\_sr14.pdf?cat=b](http://reports.shell.com/sustainability-report/2014/servicepages/downloads/files/entire_shell_sr14.pdf?cat=b) [<https://perma.cc/V5TJ-3MKK>] (describing the self-disclosure by Royal Dutch Shell as to its practices in 2014); *Communication on Progress 2014*, UNITED NATIONS GLOBAL COMPACT (Apr. 30, 2015), <https://www.unglobalcompact.org/participation/report/cop/create-and-submit/advanced/142431> [<https://perma.cc/4FCD-AVPG>] (providing further background for Shell's disclosures).

<sup>54</sup> Shell's website allows the viewer to compare Shell's 2014 Report with its previous report from 2013. *Human Rights and Indigenous Peoples*, SHELL, <http://reports.shell.com/sustainability-report/2014/our-approach/living-by-our-principles/human-rights-and-indigenous-peoples.html> [<https://perma.cc/54VQ-TWR7>] (last visited Nov. 9, 2016). See also *Royal Dutch Shell plc*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/participants/8082-Royal-Dutch-Shell-plc#cop> [<https://perma.cc/F7SA-C3YM>] (last visited Nov. 9, 2016) (providing links to Shell's communications on progress from 2004–2014).

<sup>55</sup> See, e.g., *Accountability*, ETHICAL TRADING INITIATIVE, <http://www.ethicaltrade.org/about-eti/accountability> [<https://perma.cc/UCB2-PJFV>] (last visited Oct. 31, 2016) (keeping companies accountable for following industry standards and initiatives).

In summary, treaty threats incentivize changes to business practices, but there are a variety of other forces (market forces, media coverage, consumer pressure, NGO lobbying) that keep these changes in place.

### 3.2. *Strong Treaty Paralysis: Coordination and Noise Penumbra Effects*

If treaty uncertainty is strong, then it undermines the ability of states both to create new treaties and to *threaten* to create new treaties. However, even if the prospect of a treaty is remote, the treaty-making process can create other penumbral effects even if it cannot stimulate industry pre-emptive self-regulation. Specifically, a treaty process can create pressure for industry reform through the noise created by the treaty-making process. Second, prospective treaties can also serve as private coordination devices.

#### 3.2.1. *Coordination Effects*

Coordination refers to the ability of many diverse actors to work together to achieve a common goal.<sup>56</sup> Coordination takes many forms and pre-emption is only one example of coordinated behavior. Even if a treaty does not encourage pre-emption by affected business actors, it can still encourage other forms of *ex ante*, and even *ex post*, coordination. The type of coordination depends on the *nature* of the treaty uncertainty. These effects are summarized in Table 2.

**Table 2: Types of Private Coordination**

Type of Treaty Uncertainty	Type of Treaty	Nature of Private Coordination

<sup>56</sup> F. Scott Kieff, *Coordination, Property, and Intellectual Property: An Unconventional Approach to Anticompetitive Effects and Downstream Access*, 56 EMORY L.J. 327, 345 (2006).

Enforcement	Treaty in Force	Private Enforcement
Ratification	Treaty in Waiting	Private Compliance
Adoption	Prospective Treaties	Private Alternatives

If the uncertainty affects state *enforcement* of treaties but not their adoption or ratification, then we already have treaties in force and these treaties lower the costs of coordination in a particular policy area by providing a template for private parties to use in private ordering and therefore increasing the likelihood of private enforcement. Coordination effects through private standard-setting and private enforcement can partially compensate for the ineffective enforcement of treaties already in force.<sup>57</sup>

For example, the eight core conventions of the International Labour Organization (ILO) are reflected in many of the world's dominant industry codes of conduct. This adoption is important because it extends the ILO's normative standards to a subset of corporate actors despite national regulation that, on many occasions, is lacking.<sup>58</sup> Second, many of these trade associations also provide for the enforcement of these ILO normative standards through grievance mechanisms or auditing and certification.<sup>59</sup>

<sup>57</sup> See Affolder, *The Market for Treaties*, *supra* note 13 (explaining that corporations use treaties as sources of private environmental standards).

<sup>58</sup> See Laurence Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 *VAND. L. REV.* 649, 653 (2006) (discussing the increasing discrepancy between treaty adoption and treaty ratification and declining ratification rates of ILO conventions).

<sup>59</sup> For example, the Ethical Trading Initiative is a "leading alliance of companies, trade unions and NGOs that promotes respect for workers' rights around the globe." *About ETI*, ETHICAL TRADING INITIATIVE, <http://www.ethicaltrade.org/about-eti> [https://perma.cc/UCB2-PJFV] (last visited Oct. 31, 2016). Its members include popular retailers like the Body Shop, Gap, and Tesco. *Our Members*, ETHICAL TRADING INITIATIVE, <http://www.ethicaltrade.org/about-eti/our-members> [https://perma.cc/G2VN-KF2L] (last visited Oct. 31, 2016). The ETI Base Code is based upon the ILO conventions and includes the following tenets: (1) Employment is freely chosen; (2) Freedom of association and the right to collective bargaining are respected; (3) Working conditions are safe and hygienic; (4) Child labour shall not be used; (5) Living wages are paid; (6) Working hours are not excessive; (7) No discrimination in practices; (8) Regular employment is pro-

If the uncertainty affects the *entry into force* of treaties, then “treaties-in-waiting” can encourage private coordination, even compliance, depending on the incentives that the treaty offers to business actors.<sup>60</sup> The distributional outcomes associated with the

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vided; and (9) No harsh or inhumane treatment is allowed. *ETI Base Code*, ETHICAL TRADING INITIATIVE, <http://www.ethicaltrade.org/eti-base-code> [<https://perma.cc/JS9D-5BVX>] (last visited Nov. 9, 2016). The ILO core conventions are also reflected in industry codes of conduct, such as the Electronic Industry Citizenship Coalition Code of Conduct and the Forest Stewardship Council certification standards. *Code of Conduct*, ELEC. INDUS. CITIZENSHIP COAL., <http://www.eiccoalition.org/standards/code-of-conduct/> [<https://perma.cc/9JDF-9G56>] (last visited Oct. 31, 2016); *Principles and Criteria for Forest Stewardship (Version 4)*, FOREST STEWARDSHIP COUNCIL, <https://ic.fsc.org/principles-and-criteria.34.htm> [<https://perma.cc/XQP9-QMP2>] (last visited Oct. 31, 2016). All member companies of the ETI are expected to abide by the terms of the Base Code and ensure that their suppliers comply. *About ETI, supra*. The ETI also includes a member-wide grievance mechanism to enforce the provisions of the Base Code. Under this grievance mechanism, any ETI member can raise complaints against a corporate member or its supplier. CAROLINE REES & DAVID VERMIJS, MAPPING GRIEVANCE MECHANISMS IN THE BUSINESS AND HUMAN RIGHTS ARENA, CORP. SOC. RESPONSIBILITY INITIATIVE REPORT NO. 28, 42 (2008). The ETI Base Code is not only enforced at the level of the industry association. Instead, the different members of the ETI also enforce the Base Code at the company level. For example, the retail supermarket Tesco expects all its suppliers to abide by the standards of the ETI Base Code. TESCO, OUR ETHICAL TRADING APPROACH: SUPPORTING DECENT LABOUR STANDARDS IN TESCO'S SUPPLY CHAIN 2 (2014), [http://www.tescopl.com/assets/files/cms/Resources/Trading\\_Responsibly/Our\\_Ethical\\_Trading\\_approach.pdf](http://www.tescopl.com/assets/files/cms/Resources/Trading_Responsibly/Our_Ethical_Trading_approach.pdf) [<https://perma.cc/N5LQ-YFZW>]. It developed a grievance mechanism for farm level disputes in the Western Cape Region of South Africa in order to enforce the standards of the ETI Base Code among its fruit suppliers. Hendrik Kotze, *Farmworker Grievances in the Western Cape, South Africa*, 3 ACCESS CASE STORY SERIES 3 (2014), <http://accessfacility.org/sites/default/files/Farmworker%20Grievances%20Western%20Cape%20South%20Africa.pdf> [<https://perma.cc/QE7L-LXRE>] (describing how Tesco undertook this project in cooperation with the Corporate Social Responsibility Initiative (CSRI) of Harvard University's Kennedy School and how both Tesco and CSRI did this project on behalf of the UN Special Representative on Business and Human Rights, John Ruggie).

<sup>60</sup> For example, The Minamata Convention on Mercury (“Minamata Convention”) is a global treaty to protect human health and the environment from the adverse effects of mercury. Minamata Convention on Mercury, art. 1, Jan. 19, 2013, U.N. ENV'T. PROGRAMME, [http://www.mercuryconvention.org/Portals/11/documents/Booklets/Minamata\\_Convention\\_on\\_Mercury\\_booklet\\_English.pdf](http://www.mercuryconvention.org/Portals/11/documents/Booklets/Minamata_Convention_on_Mercury_booklet_English.pdf) [<https://perma.cc/EBQ5-LTGB>] [hereinafter Minamata Convention]. As of writing, it has 128 signatures and thirty-five ratifications but needs fifty ratifications before it enters into force. Minamata Convention, *supra*, art. 1; *Convention*, MINAMATA CONVENTION ON MERCURY, <http://www.mercuryconvention.org/Convention/tabid/3426/Default.aspx> [<https://perma.cc/L7GJ-LMRZ>] (last visited Nov. 27, 2016). Despite the fact that it is a treaty-in-waiting, the Minamata

treaty text can incentivize industry cooperation even if the treaty is not yet in force.

Finally, if treaty uncertainty affects the possibility of negotiating, drafting, and adopting treaties, the associated penumbral effects may still influence industry behavior. Specifically, prospective treaties may serve as penalty defaults in both form and substance of regulation. Penalty defaults are legal rules that are so undesirable that parties contract around these provisions in order to avoid their effects.<sup>61</sup> These defaults are non-majoritarian because the parties will often choose not to adopt these rules.<sup>62</sup> However, penalty defaults exert information-forcing effects by encouraging parties to negotiate terms that they might not otherwise address.

A prospective treaty provides a template of the form of regulation that will result if voluntary regulation fails. As a result, we may expect increased industry engagement in voluntary initiatives

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Convention is already driving private action in favor of compliance, at least among the world's dentists. Dentists care about the Minamata Convention because one of their primary tools, dental amalgam, is a mercury-added product. Dental amalgam contains approximately 50% mercury and forms an intermetallic alloy with copper, silver, and tin. FDI WORLD DENTAL FEDERATION, POLICY STATEMENT: DENTAL AMALGAM AND MINAMATA CONVENTION ON MERCURY 1 (2014), [http://www.fdiworldental.org/media/55201/6-fdi\\_ps-dental\\_amalgam\\_and\\_minamata\\_adopted\\_gab\\_2014.pdf](http://www.fdiworldental.org/media/55201/6-fdi_ps-dental_amalgam_and_minamata_adopted_gab_2014.pdf) [<https://perma.cc/QUC2-QK9T>]. During negotiations on the Minamata Convention, the World Dental Federation (FDI) advocated for a reduction (phase-down) in the use of dental amalgam—versus a ban (phase-out), and they were successful in obtaining a phase-down. FDI WORLD DENTAL FEDERATION, DENTAL RESTORATIVE MATERIALS AND THE MINAMATA CONVENTION ON MERCURY: GUIDELINES FOR SUCCESSFUL IMPLEMENTATION 3 (2014), [http://www.fdiworldental.org/media/54670/minamata-convention\\_fdi-guidelines-for-successful-implementation.pdf](http://www.fdiworldental.org/media/54670/minamata-convention_fdi-guidelines-for-successful-implementation.pdf) [<https://perma.cc/6AEF-RN39>]. This concession to the global dental association prompted the organization to urge its members (including national dental associations) to comply with the terms of the Minamata Convention even before the Convention is in effect. The FDI issued a recent set of industry guidelines that encourage its member dental associations to comply in order to prevent a reconsideration of the concession granted to the dental industry under the Convention. *Id.* at 6.

<sup>61</sup> Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (“Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer . . . [P]enalty defaults are purposefully set at what the parties would not want – in order to encourage the parties to reveal information to each other or to third parties (especially the courts).”).

<sup>62</sup> *Id.*

in order to demonstrate the efficacy of an alternative to treaty regulation.<sup>63</sup> This is a variant of pre-emptive penumbral effects and is dependent upon weak treaty uncertainty.

If the treaty uncertainty is strong, a prospective treaty serves as a penalty default regarding substance because the treaty's draft text may contain terms that industry does not like and may reject. However, the draft text already placed certain categories of terms on the table. This influences the mandate of topics and issues addressed by voluntary regulation.

### 3.2.2. Noise Effects

When the treaties at issue concern conduct by transnational business actors, the noise surrounding the treaty process creates important regulatory effects. Specifically, the noise alerts the public and policymakers to weaknesses with current industry practices, raises awareness of policy issues, creates pressure for reform of current business practices, and threatens reputational shaming for businesses with poor practice records. Corporations may not willingly alter their practices without the pressure created by this noise.<sup>64</sup> This interaction between external pressure and internal firm culture emphasizes the importance of a treaty *process* in achieving results.

These effects are not limited to treaty-making processes. Media campaigns and publicized lawsuits can also create similar pressure. But the pressure generated by a treaty-making process is distinguishable in two important ways. First, prospective treaties have a global audience, thereby raising awareness of policy issues in a manner difficult to achieve through these other methods. A Virginian resident may be unaware of environmental litigation in Germany, but they are likely aware of the climate change summit held in Paris in December 2015.

Second, prospective treaties may serve as harbingers of future

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<sup>63</sup> Reid & Toffel, *supra* note 11, at 1162 ("Organizations often respond to threats of tighter government regulation by adopting forms of self-regulation in an attempt to credibly signal to the government that the desired behavior is occurring even without additional regulation.").

<sup>64</sup> Telephone Interview with International Policy Advisor (Sept. 3, 2015).

domestic legislation. State parties to a treaty routinely undertake obligations to enforce the treaty's substantive rules within their national jurisdiction.<sup>65</sup> Therefore, a treaty may signal future changes to the domestic legal regime of a state joining a treaty. Admittedly, this signal depends on the nature of the ratification process. Businesses situated in states with simplified ratification processes are likely more sensitive to treaty threats compared to their peers in jurisdictions with more onerous ratification processes. This signal also depends on the extent of deadlock within domestic legislatures and the prospect for successful ratification of treaties.<sup>66</sup>

#### 4. PENUMBRAL EFFECTS IN ACTION: A REGULATORY HISTORY OF BUSINESS & HUMAN RIGHTS

This Section applies the theoretical framework described in Section II to the regulation of international business and human rights and evaluates whether this history provides evidence of penumbral effects in practice.

The policy area of business and human rights was chosen for a number of reasons. First, it is an area rich in regulatory pluralism where a variety of methods are employed to reform transnational business conduct.<sup>67</sup> Second, there are several decades' worth of regulation in this area. This Section only focuses on approximately

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<sup>65</sup> Durkee, *supra* note 2, at 109.

<sup>66</sup> Coral Davenport, *Nations Approve Landmark Climate Accord*, N.Y. TIMES (Dec. 12 2015), <http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html> [<https://perma.cc/2VZP-KW5D>]. The effects on industry actors may also vary depending on their expectation that a state can effectively enforce the treaty's provisions within domestic law. See Durkee, *supra* note 2, at 91-92 (distinguishing between resolution and persuasion treaties).

<sup>67</sup> See, e.g., California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43(a)(1) (West 2012) (requiring that covered firms disclose "its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale"); HEWLET-PACKARD AGREEMENT, SUPPLIER SOCIAL AND ENVIRONMENTAL RESPONSIBILITY AGREEMENT (2008), <http://www.hp.com/hpinfo/globalcitizenship/environment/pdf/supagree.pdf> [<https://perma.cc/F9DZ-AGZ5>] (describing the company code of conduct); *Participation*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/participation> [<https://perma.cc/ELW2-6ULC>] (last visited Nov. 9, 2016) (describing UN guidelines); *Framework*, *supra* note 35, ¶ 4 (outlining the various methods that John Ruggie has employed).

the past fifteen years, but the history traces back to at least the 1970s and the draft Code of Conduct on Transnational Corporations.<sup>68</sup> This history provides an opportunity to evaluate how these various regulatory methods fared. Third, globalization exacerbates the negative impact of transnational business conduct.<sup>69</sup>

Finally, we are at a potentially historic moment in the regulation of business and human rights. In 2014, a close vote of the Human Rights Council established an open-ended intergovernmental working group (OEIGWG) to elaborate on an international legally binding instrument on transnational corporations and other business enterprises regarding respect for human rights.<sup>70</sup> The prospects for success are mixed, with some already dooming the venture to failure.<sup>71</sup> It is more than possible that this prospective international instrument may fail to arrive. That is why it is important to consider this prospective instrument in its full context and examine whether it can still create beneficial regulatory effects even if it “fails.”

#### 4.1. Phase 1: The United Nations Global Compact

In January 1999, United Nations Secretary General Kofi Annan

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<sup>68</sup> David Kinely et al., *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, 30 CO. & SECS. L.J. 30, 32 n.7 (2007).

<sup>69</sup> Chamberlain, *supra* note 34 (reporting on the use of child labor by factories that make Disney toys); Krauss, *supra* note 3 (iterating Chevron/Texaco's oil contamination of Ecuadorian rainforest); Smith-Spark, *supra* note 3 (describing Shell's oil contamination in the Niger Delta); Totenberg, *supra* note 33 (describing Shell's involvement in human rights abuses in Nigeria); Xiaoping, *supra* note 32 (explaining the poor environmental practices of Apple's suppliers in China).

<sup>70</sup> Human Rights Council Res. 26/9, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, ¶ 1, U.N. Doc. A/26/L.22/Rev.1 (June 25, 2014).

<sup>71</sup> See, e.g., John Ruggie, *Get Real or We'll Get Nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business and Human Rights Treaty*, BUS. & HUM. RTS. RES. CTR., <http://business-humanrights.org/en/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty> [https://perma.cc/23J5-H7L3] (last visited Oct. 24, 2016) (“If present dynamics continue, the process is likely to yield one of two outcomes: no treaty at all, or one that squeaks through to adoption but is ratified by few if any major home countries and thus would be of no help to the victims in whose name the negotiations were launched.”).

proposed the United Nations Global Compact (the “Compact”) in order to improve global corporate conduct in the wake of globalization at the end of the millennium.<sup>72</sup> The Compact promotes a set of values based on internationally recognized documents, such as the Universal Declaration of Human Rights.<sup>73</sup>

The Compact is a voluntary initiative.<sup>74</sup> As a consequence, businesses are encouraged but not required to join the Compact. If a corporation does become a member, it is required to abide by the Compact’s ten foundational principles that relate to human rights, labor, the environment, and anti-corruption.<sup>75</sup> It is also required to report annually on its progress towards these commitments by submitting a Communication on Progress (COP).<sup>76</sup>

The Compact began well with support from at least fifty companies in diverse industries, including mining, banking, pharmaceuticals, footwear, and media.<sup>77</sup> But not all industry players were pleased with the Compact, and the International Chamber of Commerce initially opposed it.<sup>78</sup>

The Compact also failed to please some actors in the NGO community. Following the announcement of the Compact, Human Rights Watch (HRW) wrote to the Compact’s founder, UN Secretary General Kofi Annan, sharing its concerns that the effectiveness

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<sup>72</sup> Press Release, Secretary-General, Executive Summary and Conclusion of the High-Level Meeting on the Global Compact, U.N. Press Release SG/2065 (July 27, 2000) [hereinafter Press Release, UN Global Compact].

<sup>73</sup> *Id.*

<sup>74</sup> George Kell, Ann-Marie Slaughter & Thomas Hale, *Silent Reform Through the Global Compact*, 1 UN CHRONICLE 26, 27 (2007).

<sup>75</sup> *The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> [<https://perma.cc/D7YH-FM23>] (last visited Oct. 24, 2016) (“Corporate sustainability starts with a company’s value system and a principled approach to doing business. This means operating in ways that, at a minimum, meets fundamental responsibilities in the areas of human rights, labour, environment and anti-corruption.”).

<sup>76</sup> *Id.*

<sup>77</sup> See Press Release, UN Global Compact, *supra* note 72 (noting the number of transnational companies that had pledged to adopt the compact).

<sup>78</sup> David Weissbrodt, Keynote Address, before University of California, Berkeley: International Standard-Setting on the Human Rights Responsibilities of Businesses (Mar. 14, 2008) in 26 BERKELEY J. INT’L L. 373, 384 (2008) (“These international business organizations—reflecting the most hard-line big corporate perspective—oppose any standards that are not voluntary.”).

of the Compact would be compromised by a number of design features.<sup>79</sup> In particular, HRW emphasized the lack of a monitoring and enforcement mechanism and the ambiguity of the standards presented in the Compact.<sup>80</sup> It also communicated its hope that the Compact would not serve as a substitute for a legally binding instrument but instead serve as its precursor.<sup>81</sup>

Lack of credible enforcement mechanisms may have disappointed the NGO sector but that is how some industry actors preferred it. According to Maria Livanos Cattai, secretary-general of the ICC, “[b]usiness would look askance at any suggestion involving external assessment of corporate performance, whether by special interest groups or by UN agencies.”<sup>82</sup> The ICC preferred to honor the original vision of the Compact that did not involve any monitoring or enforcement mechanisms.<sup>83</sup> This view was consistent with the Compact’s self-image as an initiative that “is not and does not aspire to be a legally-binding code of conduct.”<sup>84</sup>

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<sup>79</sup> Letter from Kenneth Roth, Exec. Dir., Human Rights Watch, to Kofi Annan, Secretary-General, United Nations (July 28, 2000), <https://www.hrw.org/legacy/press/2000/07/hrw-ltr-july.htm> [<https://perma.cc/9LHS-BUW5>] [hereinafter Letter from Roth to Annan].

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* A few years later, a number of organizations expressed concern that the UN Global Compact had become the exclusive regulatory instrument, albeit in voluntary form, and may even exert chilling effects on regulatory alternatives. See generally Peter Utting, *The Global Compact: Why All the Fuss?*, 40 UN CHRONICLE 65 (2003) (outlining both the positive and negative discussion of the Global Compact).

<sup>82</sup> Maria Livanos Cattai, *Yes to Annan's 'Global Compact' If It Isn't a License to Meddle*, N.Y. TIMES (July 26, 2000), <http://www.nytimes.com/2000/07/26/opinion/26iht-edmaria.2.t.html> [<https://perma.cc/ZF4L-4U3V>].

<sup>83</sup> Nicole Winfield, *UN Launches Partnership with Business, Environment and Rights Groups*, ASSOCIATED PRESS, July 27, 2000; Jonathan Birchall, *Annan Urges Commitment to Ethical Business*, FIN. TIMES (June 25, 2004), <http://on.ft.com/1nGhPVm> [<https://perma.cc/6FMU-N364>] (“Businesses are wary of the introduction of any compliance element into the compact, while its rapid growth means it lacks the resources to provide any system of enforcement.”).

<sup>84</sup> Kell, Slaughter & Hale, *supra* note 74, at 29.

4.2. *Phase 2: The United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*

The United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (the “Norms”) were drafted by a working group of the United Nations Sub-Commission on the Protection and Promotion of Human Rights.<sup>85</sup> The Norms contained a number of features that concerned members of the transnational business community.

Vocal and persistent opposition came from two global trade associations: the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE).<sup>86</sup> The ICC was founded in 1919 and based in Paris, France with membership ranks that include thousands of companies from over 130 countries.<sup>87</sup> Similarly, the IOE is the largest organization for employers with 135 members, including the United States Council for International Business.<sup>88</sup> Both the ICC and IOE were emphatic that the United Nations Commission on Human Rights should reject the Norms.<sup>89</sup>

The common strain of their opposition concerned the “privatization of human rights.”<sup>90</sup> By this phrase, the ICC and IOE feared

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<sup>85</sup> David Weissbrodt & Maria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L 901, 905 (2003). See also Weissbrodt, *supra* note 78, at 381 (explaining that the UN Sub-Commission consisted of twenty-six human rights experts from twenty-six countries).

<sup>86</sup> UN Observer & Int’l Report, *Shell Leads International Business Campaign*, GLOBAL POLICY FORUM (Mar. 15, 2004), <https://www.globalpolicy.org/component/content/article/225/32247.html> [<https://perma.cc/23E7-CBQZ>].

<sup>87</sup> *Direct Members*, INT’L CHAMBER COM., <http://www.iccwbo.org/worldwide-membership/members/direct-members/> [<https://perma.cc/3LVW-CUPL>] (last visited Dec. 3, 2016); *ICC Global Headquarters*, INT’L CHAMBER COM., <http://www.iccwbo.org/About-ICC/Organization/ICC-Headquarters/ICC-Global-Headquarters/> [<https://perma.cc/L38M-TZHY>] (last visited Dec. 3, 2016).

<sup>88</sup> *IOE Members*, INT’L ORG. EMPS., <http://www.ioe-emp.org/ioe-members/> [<https://perma.cc/7ZWU-23QN>] (last visited Dec. 3, 2016).

<sup>89</sup> INT’L CHAMBER OF COM., JOINT VIEWS OF THE IOE AND ICC ON THE DRAFT “NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS” 2 (2003), [http://www.ioe-emp.org/fileadmin/ioe\\_documents/publications/Policy%20Areas/business\\_and\\_human\\_rights/EN/\(2003-11\)%20Business%20and%20Human%20Rights%20Draft%20Norms%20joint%20statement.pdf](http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/(2003-11)%20Business%20and%20Human%20Rights%20Draft%20Norms%20joint%20statement.pdf) [<https://perma.cc/JPL7-PWFA>] [hereinafter ICC & IOE, *Joint Views on the Draft Norms*].

<sup>90</sup> Letter from Maria Livanos Cattau, Secretary-General, Int’l Chamber of

that the Norms would displace human rights duties from national governments to private actors, such as transnational corporations.<sup>91</sup>

In a joint statement, the ICC and IOE explained that “[t]he essential problem with the draft Norms is that it privatizes human rights by making private persons (natural and legal) the duty-bearers. Privatisation leaves the real-duty bearer – the State – out of the picture. This will have profoundly negative consequences, legal and practical.”<sup>92</sup>

The ICC and IOE insisted that the primary duty-bearers of human rights are governments, not corporations.<sup>93</sup> They criticized the Norms for not going far enough to ensure that governments possessed the capacity to deliver on their human rights duties and instead shifted this burden on to the transnational business sector.<sup>94</sup>

They were equally emphatic that transnational businesses could not have human rights obligations under international law but only under domestic laws:

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Com., to Dzidek Kedzia, Office of the High Comm’r for Hum. Rts., United Nations 5 (Sept. 7, 2004) [hereinafter Letter from Cattau to Kedzia].

<sup>91</sup> Thomas Niles (President of the USCIB), *UN Code No Help to Companies*, FIN. TIMES, Dec. 17, 2003; John Eaglesham, *Business Calls for Action on Human Rights Liability Plan*, FIN. TIMES, Mar. 8, 2004; Alison Maitland, *Amnesty Hits Back at CBI Stance on Human Rights Plans*, FIN. TIMES, Mar. 9, 2004; ICC & IOE, *Joint Views on the Draft Norms*, *supra* note 89, at 2 (“The Sub-Commission’s draft Norms is an extreme case of the ‘privatization of human rights.’ Among other things, it shifts human rights duties from States to civil society actors.”). The IOE and ICC emphatically stressed this concern, even though Article 1 of the UN Global Norms recognizes the distinct and separate roles of government versus business actors: “States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognised in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.” Comm’n on Human Rights, Subcomm’n on the Promotion and Protect. of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights art. 1, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter UN Global Norms].

<sup>92</sup> ICC & IOE, *Joint Views on the Draft Norms*, *supra* note 89, at 4.

<sup>93</sup> *Id.* at 2–6.

<sup>94</sup> *Id.* at 12; Niles, *supra* note 91.

“Only States have legal obligations, so only States can fulfil human rights. And, conversely, only a State can violate human rights. Private persons are not the duty-bearers of the rights in the UN human rights treaties, and related agreements: consequently, private actors cannot violate human rights. A private actor can violate a national law that a State has enacted to implement its international obligations: but a private person is not a ‘human rights violator,’ properly speaking.”<sup>95</sup>

The privatization concern was not the only objection to the Norms raised by the ICC, IOE, and other industry actors. They also objected to the lack of consultation between the drafters of the Norms and other stakeholders, such as members of the business community.<sup>96</sup> Next, they objected to the way the Norms attempted to impose direct obligations on corporations. In the words of Shell Vice-President, Robin Aram, “It’s the packaging that business doesn’t like. . . . The problem is the legalistic form that has been used in drafting the Norms.”<sup>97</sup>

Shell was not alone. A number of other companies also preferred to leave corporations outside the domain of international obligations and instead to rely on voluntary initiatives and soft law tools.<sup>98</sup> David Vasella, former CEO of Swiss drug maker Novartis, explicitly stated that he preferred the voluntary initiatives approach undertaken through the UN Global Compact to the

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<sup>95</sup> ICC & IOE, *Joint Views on the Draft Norms*, *supra* note 89, at 3 (emphasis omitted).

<sup>96</sup> David Kinley et al., *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, 25 CO. & SEC. L.J. 30, 34 (2007). However, some commentators dispute the accuracy of this criticism, pointing to a number of multi-stakeholder consultations such as the International Business Leaders Forum and the World Business Council for Sustainable Development. *Id.* at 34–35. See Emily Rabin, *In the Hot Seat: Shell VP Robin Aram*, GREEN BIZ (June 21, 2004), <https://www.greenbiz.com/news/2004/06/21/hot-seat-shell-vp-robin-aram> [<https://perma.cc/DQ46-PYKF>] (explaining that Reebok and Novartis participated in the first round of consultations on the Norms but that Shell and the majority of companies did not); Weissbrodt, *supra* note 78, at 383 (noting that the subcommittee did reach out to businesses and corporations while drafting the Norms).

<sup>97</sup> Rabin, *supra* note 96 (internal quotations omitted).

<sup>98</sup> Kinley, *supra* note 96, at 36.

Norms.<sup>99</sup> According to Vasella, “Our experience demonstrates that voluntary standards work. But if the UN norms are adopted as currently drafted - policed in ways that have yet to be defined, and supported by financial sanctions - we too would have to reject them.”<sup>100</sup>

The debate over the Norms ended in April 2004 with the decision of the UN Commission on Human Rights to subject the Norms to additional study.<sup>101</sup> The Commission requested the Office of the High Commissioner of Human Rights “to consult with all the relevant stakeholders, and to compile a report analyzing the Norms in light of the various existing initiatives and standards on business and human rights.”<sup>102</sup>

Many business groups welcomed the decision.<sup>103</sup> As a spokesperson for the ICC explained, “We’re very pleased with the outcome and more than happy to take part in an open discussion on what business can contribute to promoting human rights.”<sup>104</sup>

#### 4.3. *Phase 3: The UN Global Compact Revisited and the United Nations Guiding Principles on Business & Human Rights*

The 2004 decision of the UN Commission on Human Rights may have terminated the debate regarding the Norms, but it was not the end of the business and human rights agenda. This Section discusses how the business and human rights agenda adapted in the years following that debate. Interestingly, business actors that were set on ending the Norms adopted a more cooperative attitude towards voluntary regulatory initiatives that were already in place

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<sup>99</sup> Daniel Vasella, *Business Must Help Frame New Human Rights Rules*, FIN. TIMES (Apr. 8, 2004).

<sup>100</sup> *Id.*

<sup>101</sup> Kinley, *supra* note 96, at 32.

<sup>102</sup> *Id.*

<sup>103</sup> See Letter from Cattai to Kedzia, *supra* note 90, at 2 (interpreting the UN Commission’s decision to mean that “the draft prepared by the Sub-Commission was not requested by the Commission, that as a draft it has no legal standing and that the Sub-Commission should not perform any monitoring function with respect to the draft”).

<sup>104</sup> Frances Williams, *Human Rights to Stay on UN Agenda*, FIN. TIMES, Apr. 21, 2014.

or emerging. Therefore, the Norms still had important effects on the *voluntary* regulation of business and human rights.

For example, in 2004 – the year that the Norms were effectively suspended – the number of new business signatories to the UN Global Compact rose to new levels.<sup>105</sup> In mid-2004, there were only sixty-one American signatories to the Compact, but nearly a quarter of these signatories joined between March and July 2004.<sup>106</sup> Every subsequent year, the number of new business signatories exceeded the pre-2004 rates.<sup>107</sup> For example, 128 oil producing companies actively participate in the UN Global Compact; only twenty-two joined prior to 2004.<sup>108</sup>

The UN Global Compact was not the only voluntary initiative to benefit from industry's renewed interest. After the UN Commission on Human Rights tabled the Norms, the UN Secretary General appointed John Ruggie as a Special Representative on Business and Human Rights.<sup>109</sup> Ruggie's mandate was to "identify and clarify' international standards and policies in relation to business and human rights and to submit 'views and recommendations' for consideration by the commission."<sup>110</sup>

In contrast to their hostility to the Norms, the ICC and the IOE sought to engage with Ruggie on his mandate. The same trade associations that had opposed the Norms, fearing UN regulation over business affairs, were now engaging with the UN's Special Representative on Business & Human Rights.<sup>111</sup> The ICC and IOE

<sup>105</sup> UNITED NATIONS GLOBAL COMPACT, ACTIVITY REPORT 2013, 6 (2014).

<sup>106</sup> See Alexandra MacRae, *More Firms Join UN Push to be Good Corporate Citizens*, CHRISTIAN SCIENCE MONITOR (July 19, 2004), <http://www.csmonitor.com/2004/0719/p16s01-wmgn.html> [<https://perma.cc/97VM-D3Y6>] (describing the increased membership to the UN Global Compact initiative); Lisa Singhanian, *American Firms Scarce At UN Forum on Ethics*, BOSTON GLOBE (June 25, 2004), [http://archive.boston.com/business/globe/articles/2004/06/25/american\\_firms\\_scarce\\_at\\_un\\_forum\\_on\\_ethics/?camp=pm](http://archive.boston.com/business/globe/articles/2004/06/25/american_firms_scarce_at_un_forum_on_ethics/?camp=pm) [<https://perma.cc/27Q5-KHTQ>] ("Organizers say that American corporations are starting to sign on at a quicker clip.").

<sup>107</sup> UNITED NATIONS GLOBAL COMPACT, *supra* note 105.

<sup>108</sup> *Id.*

<sup>109</sup> Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE, 278, 289 (2009).

<sup>110</sup> *Id.*

<sup>111</sup> In their initial reactions to the mandate of the UN Special Representative, the IOE and ICC stressed the importance of consultation with the business community. Letter from Guy Sebban, Secretary General, ICC, and Antonios Peñalosa,

did this despite their firm position that the world does not need another international framework on the subject of business and human rights.<sup>112</sup>

In 2008, the UN Special Representative introduced his tripartite framework for business and human rights known as the "Protect, Respect, and Remedy Framework."<sup>113</sup> This framework consists of three important but separate pillars: (a) the state's duty to protect against human rights abuses by third parties; (b) the corporate responsibility to respect human rights; and (c) greater access by victims to effective remedies, both judicial and non-judicial.<sup>114</sup>

The "corporate responsibility to respect" requires that companies refrain from infringing on the rights of others.<sup>115</sup> This responsibility is centered around due diligence, understood as "a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it."<sup>116</sup> A company's responsibility for due diligence includes evaluating: (a) the "country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose"; (b) "human rights impacts their own activities may have within that context - for example, in their capacity as producers, service providers, employers, and neighbours"; and (c) "whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors."<sup>117</sup>

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Secretary General, IOE, to John Ruggie, Special Representative of the UN Secretary-General for "business and human rights" 1 (Oct. 14, 2005) [hereinafter ICC & IOE, *Initial Views on the Mandate*]. The IOE and the ICC were not the only ones adopting a different attitude to voluntary initiatives. One commentator notes that many of the governments that opposed the Norms are also staunch supporters of the most important voluntary initiatives on business and human rights. See Mantilla, *supra* note 109 (noting the support of the governments of the United States and the United Kingdom for the Voluntary Principles on Security and Human Rights, as well as South Africa's role in the Kimberley Process).

<sup>112</sup> Letter from Cattau to Kedzia, *supra* note 90, at 4 ("Therefore, the issue in our view is not whether we need yet another initiative or standard on business and human rights - we do not."); ICC & IOE, *Initial Views on the Mandate*, *supra* note 111, at 2.

<sup>113</sup> *Framework*, *supra* note 35, at 6.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* ¶ 25

<sup>117</sup> *Id.* ¶ 57

Appropriate due diligence requires formulating a firm-specific human rights policy, impact assessments, integration of the human rights policy throughout the firm, and tracking performance through monitoring and auditing.<sup>118</sup>

Despite these responsibilities, the ICC and IOE did not oppose the Ruggie Framework as they had with the Norms.<sup>119</sup> Joined by the Business and Industry Advisory Committee to the OECD (BIAC), they supported the due diligence approach to human rights,<sup>120</sup> even offering to identify a group of companies that could serve as resource for the UN Special Representative on due diligence issues.<sup>121</sup>

4.4. *Phase 4: The Open-Ended Intergovernmental Working Group on an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights*

On June 26, 2014, the United Nations Human Rights Council adopted a resolution “to establish an open-ended intergovernmental working group with the mandate to elaborate an international

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<sup>118</sup> John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*, 16, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter Ruggie, *Guiding Principles*]

<sup>119</sup> See INT’L CHAMBER COM. ET AL., JOINT INITIAL VIEWS OF THE INTERNATIONAL ORGANISATION OF EMPLOYERS (IOE), THE INTERNATIONAL CHAMBER OF COMMERCE (ICC) AND THE BUSINESS AND INDUSTRY ADVISORY COMMITTEE TO THE OECD (BIAC) TO THE EIGHTH SESSION OF THE HUMAN RIGHTS COUNCIL ON THE THIRD REPORT OF THE SPECIAL REPRESENTATIVE OF THE UN SECRETARY-GENERAL ON BUSINESS AND HUMAN RIGHTS 1 (2008), <https://business-humanrights.org/sites/default/files/reports-and-materials/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf> [<https://perma.cc/WY5E-H2XP>] [hereinafter ICC ET AL., *Joint Initial Views to the Eighth Session of the HRC*] (discussing the ICC and IOE’s endorsement of the Ruggie Framework).

<sup>120</sup> *Id.* at 2. See also Ruggie, *Guiding Principles*, *supra* note 118 (outlining the requirements of due diligence).

<sup>121</sup> INT’L CHAMBER COM. ET AL., *Joint Views of the International Organisation of Employers, the International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD to the Special Representative of the UN Secretary-General on Business and Human Rights 1* (2009), [<https://perma.cc/9K8T-6N6Z>] [hereinafter ICC & IOE, *Joint Views to the Special Representative*].

legally binding instrument on transnational corporations and other business enterprises with respect to human rights.”<sup>122</sup> This resolution was drafted by Ecuador and South Africa and was supported by twenty countries,<sup>123</sup> opposed by another fourteen countries,<sup>124</sup> with thirteen additional countries abstaining.<sup>125</sup>

The ICC was “disappointed” with the outcome of the resolution.<sup>126</sup> It warned that “the adoption of a resolution for a binding human rights treaty on multinational corporations will undermine progress already made by the widely supported UN Guiding Principles on Business and Human Rights.”<sup>127</sup> It reiterated its persistent fear that this treaty—like the Norms that preceded it—would shift human rights obligations from states to the transnational business sector.<sup>128</sup> It concluded its initial reaction by re-emphasizing its commitment to voluntary regulation under the UN Guiding Principles.<sup>129</sup>

Following the first session of the Intergovernmental Working Group on an international legally binding instrument on business and human rights, the ICC submitted a joint statement with the IOE, BIAC, and the World Business Council for Sustainable Development (WBCSD).<sup>130</sup> The trade organizations emphasized the suc-

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<sup>122</sup> Human Rights Council Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/26/L.22/Rev.1, at 2 (June 24, 2014).

<sup>123</sup> Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam. *UN Human Rights Council Session*, BUS. & HUM. RTS. RES. CTR. (2014), <http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions> [https://perma.cc/K6B5-WZYT].

<sup>124</sup> Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, UK, USA. *Id.*

<sup>125</sup> Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, UAE. *Id.*

<sup>126</sup> *ICC Disappointed by Ecuador Initiative Adoption*, INT'L CHAMBER COM. (June 30, 2014), <http://www.iccwbo.org/News/Articles/2014/ICC-disappointed-by-Ecuador-Initiative-adoption/> [https://perma.cc/7TVG-52YB].

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> INT'L CHAMBER COM. ET AL., UN TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS: INITIAL OBSERVATIONS BY THE INTERNATIONAL BUSINESS COMMUNITY ON A WAY FORWARD 1 (2015) [hereinafter ICC ET AL., *Initial Observations on a Way For-*

cesses with the implementation of the Guiding Principles on Business & Human Rights, which they identified as the “authoritative international framework on business and human rights.”<sup>131</sup> They pointed to the influence of the Principles on industry operations, “rang[ing] from public commitments on human rights policies, enhancement of governance mechanisms related to human rights, including efforts to improve understanding of impacts across diverse functions and to undertake human rights due diligence in diverse forms, as well as training programmes and capacity building both within the company and with business partners.”<sup>132</sup>

While continuing to emphasize the role of government actors, the initial comments by the trade associations did not take issue with the idea of a legally binding instrument, *per se*. Instead, they chose to comment on the substantive content of such an instrument.<sup>133</sup> Specifically, the trade associations argued that aspects of the UN Guiding Principles should be adopted within a new international treaty.<sup>134</sup>

One factor motivating the call for a treaty is the demand for accountability and remedies. In 2013, over 600 organizations spanning the world signed a joint statement emphasizing the need for

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<sup>131</sup> *Id.*; Press Release, Int’l Org. Emps., IOE Calls for Use of Existing Mechanisms in Discussion on UN Treaty Process on Business and Human Rights (June 7, 2015), <http://www.ioe-emp.org/policy-areas/csr/csr-news-details/article/ioe-calls-for-use-of-existing-mechanisms-in-discussion-on-un-treaty-process-on-business-and-human-rights/> [<https://perma.cc/T23Q-UB73>].

<sup>132</sup> ICC ET AL., *Initial Observations on a Way Forward*, *supra* note 130, at 1.

<sup>133</sup> See Oral Statement, International Organization of Employers, Open Debate on Different Approaches and Criteria for the Future Definition of the Scope of the International Legally Binding Instrument (Oct. 27, 2016), <https://business-humanrights.org/sites/default/files/documents/InternationalOrganizationEmployers.doc> [<https://perma.cc/S8YU-ECTN>] (arguing for a broad treaty scope by explaining, “[T]o have an effective, international legally binding instrument, . . . it is of fundamental importance that the scope of this treaty should include all business enterprises, which means not only multinational enterprises, but also state-owned enterprises and domestic enterprises.”).

<sup>134</sup> Oral Statement, International Chamber of Commerce, The Relation Between the United Nations Guiding Principles and the Elaboration of an International Legally Binding Instrument on TNCs and Other Business Enterprises (Oct. 27, 2016) (<https://business-humanrights.org/sites/default/files/documents/InternationalChamberCommerce.doc> [<https://perma.cc/VF63-JSAG>] (“Any legally binding instrument should be based on the UNGPs’ three-pillar architecture.”)).

an international legally binding instrument on business and human rights.<sup>135</sup> Part of their motivation was their belief in the need “to ensure access to justice and remedy and reparations for victims of corporate human rights abuse.”<sup>136</sup> Consequently, they want a treaty that “[p]rovides for an international monitoring and accountability mechanism” and “[r]equires States Parties to provide for legal liability for business enterprises for acts or omissions that infringe human rights.”<sup>137</sup> As national courts close their doors to corporate misconduct abroad, NGOs demand new and effective fora for the resolution of disputes involving toxic contamination, building collapses, and even armed violence.<sup>138</sup> The treaty’s supporters hope that it can provide access to remedies that are currently unavailable to many affected communities.<sup>139</sup> For example, Ecuador’s Ambassador to the United Nations, H.E. Luis Gallegos Chiriboga, stated that the resolution proposed by Ecuador and South Africa “could level the playing field of victims deprived of a voice for many years in search of corporate liability and accounta-

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<sup>135</sup> Joint Statement, Call for an International Legally Binding Instrument on Human Rights, Transnational Corporations and Other Business Enterprises (Nov. 1, 2013), <http://business-humanrights.org/sites/default/files/media/call-for-binding-instrument.pdf> [<https://perma.cc/8WSE-L2AA>] (prepared during the People’s Forum on Human Rights and Business in Bangkok, Thailand, Nov. 5-7, 2013) (calling for states to agree to enforce human rights obligations against businesses and to create an effective monitoring and accountability mechanism).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., COOPÉRATION INTERNATIONALE POUR LE DÉVELOPPEMENT ET LA SOLIDARITÉ, UN BUSINESS & HUMAN RIGHTS FRAMEWORK: TIME TO OPEN CONSTRUCTIVE DISCUSSIONS TOWARDS DEVELOPING AN INTERNATIONAL LEGALLY BINDING INSTRUMENT 3 (2015) (“By ratifying this instrument, a State would express its consent to a new monitoring and enforcement mechanism applying directly to the transnational corporations under its jurisdiction.”) (bold removed).

<sup>139</sup> Press Release, Amnesty Int’l, All States Must Participate in Good Faith in the UN Intergovernmental Working Group on Business and Human Rights 2 (June 18, 2015), <https://www.amnesty.org/download/Documents/IOR4018972015ENGLISH.pdf> [<https://perma.cc/R6Z8-QXS4>]. See also CHRIS ALBIN-LACKEY, HUM. RTS. WATCH, WITHOUT RULES: A FAILED APPROACH TO CORPORATE ACCOUNTABILITY 4 (2013), [https://www.hrw.org/sites/default/files/related\\_material/business.pdf](https://www.hrw.org/sites/default/files/related_material/business.pdf) [<https://perma.cc/4E57-GWL4>]. (“[W]ithout any mechanism to ensure compliance or to measure implementation, they cannot actually *require* companies to do anything at all. Companies can reject the principles altogether without consequence—or publicly embrace them while doing absolutely nothing to put them into practice.”).

bility.”<sup>140</sup>

Access to remedies is not a unique feature of a potential treaty on business and human rights. Instead, it is already recommended under other regulatory approaches concerning business and human rights. Under Article 29 of the UN Guiding Principles, “business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”<sup>141</sup> An operational-level grievance mechanism is “accessible directly to individuals and communities who may be adversely impacted by a business” and “can engage the business enterprise directly in assessing the issues and seeking remediation of any harm.”<sup>142</sup> Businesses can administer these mechanisms either independently or in collaboration with other stakeholders, such as NGOs.<sup>143</sup> Corporations’ failure to make good on this requirement under voluntary regulation may now drive NGO demands for better accountability through a treaty.

#### 4.5. Summary: Penumbral Effects

The Section below discusses whether the regulatory history discussed above illustrates evidence of penumbral effects in practice.

##### 4.5.1. Pre-emptive Penumbral Effects

The first type of penumbral effects are pre-emptive penumbral effects. These occur when industry actors attempt to discourage treaty regulation in a particular policy area by upgrading their current practices, especially voluntary regulation, in the prelude to a

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<sup>140</sup> H.E. Luis Gallegos Chiriboga, *Human Rights Defenders: The Cornerstone for the Development of an International Legally Binding Instrument in Business and Human Rights*, INT’L SERV. HUM. RTS. (Nov. 23, 2014), <http://www.ishr.ch/news/stating-case-how-human-rights-defenders-can-gain-strengthened-implementation> [https://perma.cc/2ZZF-HC4H].

<sup>141</sup> Ruggie, *Guiding Principles*, *supra* note 118, at 25.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

treaty. Extreme examples of pre-emptive effects occur when corporations intentionally self-regulate in order to pre-empt treaty regulation.<sup>144</sup> However, preemptive effects may also occur even when the causation is less clear.

Those dissatisfied with voluntary regulation are looking to treaty intervention through binding norms.<sup>145</sup> One deficiency identified by treaty proponents is the inadequate access to remedies by victims of human rights abuses by transnational corporations.<sup>146</sup> But that situation may be changing. A number of corporations adopted operational-level grievance mechanisms over the past few years. In 2014, the Working Group on the issue of human rights and transnational corporations and other business enterprises convened a workshop of experts to discuss non-judicial access to remedies.<sup>147</sup> According to their report, although operational-level grievance mechanisms are not yet mainstream, “[t]here is a general impression that operational-level grievance mechanisms. . . . have increased in number since the Guiding Principles were endorsed in 2011.”<sup>148</sup>

In 2013, a study on operational-level grievance mechanisms performed by the International Institute for Environment and Development (IIED) found that there was “a growing number of grievance mechanisms in operation today.”<sup>149</sup> According to the report, the proliferation of grievance mechanisms reflected both wider application and more purposeful and integrated use of the grievance mechanisms.<sup>150</sup> The report identified twenty company-community grievance mechanisms used by companies in the extractive sector, including BP, ExxonMobile, Rio Tinto, and New-

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<sup>144</sup> See notes 53–55 and accompanying text.

<sup>145</sup> See notes 140–45 and accompanying text.

<sup>146</sup> *Id.*

<sup>147</sup> Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report from an Expert Workshop entitled “Business Impacts and Non-Judicial Access to Remedy: Emerging Global Experience” held in Toronto in 2013*, ¶ 1, U.N. Doc. A/HRC/26/25/Add.3 (Apr. 25, 2014).

<sup>148</sup> *Id.* ¶ 17.

<sup>149</sup> David Vermijs, *Overview of Company-Community Grievance Mechanisms, in DISPUTE OR DIALOGUE? COMMUNITY PERSPECTIVES ON COMPANY-LED GRIEVANCE MECHANISMS* 14, 22 (Emma Wilson & Emma Blackmore eds., 2013).

<sup>150</sup> *Id.*

mont.<sup>151</sup> This list was based on publicly available information, and the authors, based on interviews with industry representatives, believe that the “total number is likely to be exponentially greater.”<sup>152</sup> The report also found that “more companies, particularly in the extractive industries, are adopting far-reaching, companywide commitments to having grievance mechanisms in place at all of their sites with substantial risks for community impacts.”<sup>153</sup>

Despite the suggestiveness of these signs, these developments are not likely signals of preemptive effects in action. It does not appear that industry actors are undertaking self-regulation in response to the threat of a treaty on business and human rights.<sup>154</sup> The treaty threat is too remote and speculative given that the process has only begun and is at least ten years away. At a minimum, these effects depend on states’ ability to signal capacity and willingness to employ treaty regulation. Recent challenges and failures of such regulation undermine the likelihood of these effects. However, even if pre-emptive penumbral effects are absent, there is support for the other forms of penumbral effects.

#### 4.5.2. *Coordination Penumbral Effects*

Coordination effects refer to industry actors’ willingness to use treaty, or prospective treaty, defaults as a basis for coordinated voluntary action. This responsiveness can take the form of support or opposition by industry actors to treaty regulation.

For example, the regulatory threat of the Global Norm was most apparent to industry between 2003–2004 when the ICC and the IOE opposed the development of the Norms.<sup>155</sup> Even if industry ultimately won out, they expended considerable resources in opposing the Norms.<sup>156</sup> The magnitude of the opposition is a testament to the severity of the risk. The UN Global Norms did exert reputational costs on those industry actors who opposed the

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<sup>151</sup> *Id.* at 23.

<sup>152</sup> *Id.* at 22.

<sup>153</sup> *Id.* at 24.

<sup>154</sup> Telephone Interview with International Policy Advisor, *supra* note 64.

<sup>155</sup> *See supra* notes 91–101 and accompanying text.

<sup>156</sup> *See id.*

Norms. In the words of former Shell VP Robin Aram, “This episode . . . has not been without damage to business. It has linked business with a perception of hostility to human rights.”<sup>157</sup>

This damage caused by the debate over the Norms may have contributed to industry attitudes and engagement with the Ruggie Principles in the wake of the Norms. The ICC and IOE engaged with Ruggie Tripartite Framework and the UN Guiding Principles in a very different manner compared to their hostility to the Global Norms.<sup>158</sup> With the Ruggie Framework, the industry associations desired engagement and consultation and even offered their services with data collection and information dissemination.<sup>159</sup> The ICC, IOE, and BIAC volunteered to collaborate with the UN Special Representative on implementing the third pillar of the Ruggie Framework: access to remedies.<sup>160</sup> Specifically, they offered to “identify a small number of companies from relevant sectors that would test pilot these Principles at plant or project level and disseminate the results as part of the learning experience.”<sup>161</sup> Interestingly, the Norms had also contained a similar requirement that transnational corporations and other business enterprises “provide prompt, effective, and adequate reparation to those persons, entities, and communities that have been adversely affected by failures to comply with these Norms.”<sup>162</sup> Despite their opposition to the Norms, industry actors seemed more receptive to the remedy provisions of the Ruggie Framework and the UN Guiding Principles.

These statements of support were not empty promises by the trade associations. Over an eight week period in 2012, the ICC and IOE, in collaboration with other organizations, disseminated a pilot survey project throughout their business networks in order to assess the implementation of the UN Guiding Principles.<sup>163</sup> The sur-

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<sup>157</sup> Rabin, *supra* note 96.

<sup>158</sup> See *supra* notes 124–26 and accompanying text.

<sup>159</sup> *Id.*

<sup>160</sup> ICC & IOE, *Joint Views to the Special Representative*, *supra* note 121.

<sup>161</sup> *Id.*

<sup>162</sup> UN Global Norms, *supra* note 91, art. 18. One reason that the trade associations may have supported the move to provide remedies is to discourage the extra-territorial application of laws. ICC ET AL., *Joint Initial Views to the Eighth Session of the HRC*, *supra* note 119, at 2.

<sup>163</sup> Working Group on Business & Human Rights, Report of Pilot Business Survey on Implementation of the Corporate Responsibility to Respect Human

vey was intended to identify current approaches and practices within different sectors (such as awareness of human rights, policy commitment, capacity development, policy integration, and reporting), as well as identifying obstacles to implementation.<sup>164</sup>

In 2015, IPIECA, the global oil and gas industry association for environmental and social issues, produced a manual for implementing operational-level grievance mechanisms in the oil and gas industry.<sup>165</sup> This manual was based on the practical experiences of seven pilot operational-level community grievance mechanisms conducted by IPIECA member companies, as well as shared learning from additional IPIECA members and stakeholder engagement.<sup>166</sup> Moreover, this manual uses the effectiveness criteria provided in the UN Guiding Principles on Business & Human Rights as the benchmarks for implementing successful community-level grievance mechanisms.<sup>167</sup>

Some may view these examples as evidence of the success of soft law regulation over other forms of regulation. However, it is important to view different types of regulation as part of the same narrative. The combination of voluntary initiatives and binding regulation facilitate results difficult to obtain through either alone. It is important to highlight points of contemporaneous development by also examining the negative spaces—the treaties that did not emerge and the voluntary initiatives that floundered. These negative spaces reveal the importance of not only examining regulatory methods that succeeded but also those that failed and placing both developments in context. When situated such, both sets of developments tend to overlap. The regulatory history of business and human rights is not a testament to the triumph of voluntary initiatives over other regulatory forms. Instead, the milestones

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Rights 2 (Dec. 2, 2012), [http://www.ohchr.org/Documents/Issues/Business/ForumSession1/Report\\_UNWGBusinessSurvey\\_Dec2012.pdf](http://www.ohchr.org/Documents/Issues/Business/ForumSession1/Report_UNWGBusinessSurvey_Dec2012.pdf) [<https://perma.cc/ZK8W-LT7C>].

<sup>164</sup> *Id.* at 3.

<sup>165</sup> See generally IPIECA, COMMUNITY GRIEVANCE MECHANISMS IN THE OIL AND GAS INDUSTRY: MANUAL FOR IMPLEMENTING OPERATIONAL-LEVEL GRIEVANCE MECHANISMS AND DESIGNING CORPORATE FRAMEWORKS (2015) (providing a practical guide to aid planning and implementing operational-level community grievance mechanisms).

<sup>166</sup> *Id.* at 2.

<sup>167</sup> *Id.* at 3.

reached may partially result from the failed regulatory strategies, like the Norms, that also litter this history.

#### 4.5.3. Noise Penumbral Effects

The noise created by the treaty process can also precipitate industry reform. Specifically, this noise creates pressure for reform of current business practices, awareness of policy issues and weaknesses with self-regulation and reputational shaming. These effects relate to coordination effects and can provide the stimulus for the latter.

According to a policy advisor for a large transnational corporation, it is unlikely that many corporations will engage in internal reform of corporate practices concerning business and human rights without this noise.<sup>168</sup> The combined attention on the importance of access to remedies—an issue particularly publicized by proponents of a treaty on business and human rights—provides external pressure for internal change within corporations.<sup>169</sup>

Critically, these productive noise effects are not unique to a treaty consultation and negotiation process. Voluntary initiatives, such as the UN Global Compact and UN Guiding Principles, also displayed similar features by increasing awareness of important policy issues and recommending strategies for improvement. These features are also shared by other enforcement strategies such as activist litigation. For example, the wave of human rights litigation in federal courts under the Alien Tort Statute created public awareness of transnational business practices. The complaints filed by plaintiffs documented serious human rights violations involving well known multinational corporations in the United States and abroad. Such litigation exposed named corporations and their associated industries to public scrutiny and shaming.

This litigation threat continues even after *Kiobel v. Dutch Petroleum*.<sup>170</sup> Lawsuits continue to serve as a driver for industry self-regulation, especially concerning the provision of remedies and

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<sup>168</sup> Telephone Interview with International Policy Advisor, *supra* note 64.

<sup>169</sup> *Id.*

<sup>170</sup> 133 S. Ct. 1659 (2013).

non-judicial grievance mechanisms.<sup>171</sup> For example, lawsuits against Nestle, Archer Daniels Midland (ADM), and Cargill alleging forced labor and torture formed the background for the cocoa industry to adopt voluntary initiatives in these policy areas.<sup>172</sup> Similar initiatives to address modern day slavery in the shrimp supply chains are receiving a lot of attention because of recent lawsuits filed against Nestle and Costco.<sup>173</sup>

Therefore, what matters is the collective creation of pressure points, such as increased public awareness and brand shaming. These pressure points can arise from the attention around a consultation process for a new treaty but can similarly accompany the introduction of new multi-stakeholder initiatives or the filing of a lawsuit against an industry actor.

What all these sources have in common is the aggregation of leverage by non-state actors vis-à-vis large corporations. States possess unique sources of leverage over corporations that non-state actors do not possess. Unfortunately, these state sources have proven inadequate to address all forms of transnational corporate wrongdoing. The history of business and human rights is also a history of a range of non-state actors attempting to affect business behavior. Individually, these actors do not possess the coercive qualities of state actors. Collectively, however, they can aggregate their own particular forms of leverage (NGO reports, media publicity, consumer boycotts, domestic litigation) to increase aware-

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<sup>171</sup> Telephone Interview with Mil Niepold, Senior Mediator (Sept. 8, 2015) [hereinafter September 8 Interview].

<sup>172</sup> *Id.* See also Pettersson & Burnson, *supra* note 4 (“In 2001, Nestle and other top chocolate makers and cocoa processors agreed to a plan to investigate and end child slave-labor practices on farms in West Africa that supplied them with cocoa. The industry collaboration followed media reports that boys as young as 11 were sold or tricked into slavery to harvest cocoa beans on some of the Ivory Coast’s 600,000 farms.”).

<sup>173</sup> September 8 Interview, *supra* note 171. See also Pettersson & Burnson, *supra* note 4 (reporting that Nestle was sued because of claims that its “Fancy Feast” cat food contained fish from a supplier that uses slave labor and that purchasers of the pet food would not have purchased the food had they known of the purchasing practices). Erik Larson, *Costco Sued Over Claims Shrimp Harvested With Slave Labor*, BLOOMBERG (Aug. 19, 2015), <http://www.bloomberg.com/news/articles/2015-08-19/costco-sued-over-claims-shrimp-is-harvested-with-slave-labor> [<https://perma.cc/LQ48-7RPM>] (reporting that Costco was sued for purchasing prawns from Thailand, where they are caught by unpaid forced laborers, and misrepresenting its supply chain to consumers).

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ness of harmful practices, recommend strategies for improvement, and shame recalcitrant corporations.<sup>174</sup> Such leverage may be varied and indirect but may prove as, or even more, effective as traditional state regulation over business actors.

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The lessons of this case study are important for at least two audiences. First, those advocating for a new treaty on business and human rights should pay particular attention to the past in order to understand the non-traditional functions of treaty negotiations and to recognize treaty penumbras. This understanding reveals the importance of voluntary regulation through this process. It suggests that those actors consulting, drafting, and negotiating a draft treaty should undertake these functions with an eye towards achieving these penumbral effects as second best options. These implications thereby transform the treaty negotiation process from single-objective (outcome based, focused on developments in formal treaty process) to a dual-objective that also considers the effects of the treaty process on industry actors.

Second, these lessons are also potentially relevant for actors negotiating treaties in other contexts. This case study focused on the policy area of business and human rights in order to provide an in-depth analysis of the regulatory history in this area. This focus does not mean that penumbral effects are limited to issues of business and human rights. Instead, these findings are consistent with industry practices in a variety of policy areas in the domestic context.<sup>175</sup> Further empirical research may reveal analogous regulatory histories for other international policy areas as well. The objective of this article is to illustrate penumbral effects in one policy area that can illuminate further research on the role of treaties in the regulation of other policy issues.

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<sup>174</sup> See Kishanthe Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 797–801 (2014) (describing how non-state actors, using the “reflexive coordination” approach and “recogniz[ing] the varied pressure points offered by other actors,” can coordinate their behavior to exercise leverage over a specific industry to facilitate an adjustment in behavior).

<sup>175</sup> See *supra* notes 11–12 and accompanying text.

## 5. IMPLICATIONS OF PENUMBRAL EFFECTS

Penumbral effects matter because these effects can facilitate treaty objectives even when a treaty does not emerge or does not perform as expected. Treaty proponents can encourage their desired changes by monitoring and engaging in the penumbral effects of the treaty or treaty process on voluntary regulation. These effects are not apparent under the classic lens of public international law that focuses on state behavior. Instead, penumbral effects occur off-stage in the realm of private ordering, but they can still be significant. Moreover, these effects concern the very changes that many treaties are ultimately attempting to achieve: behavior by business organizations. It is therefore important to include these effects in any assessment of the goals of a treaty process or evaluation of its results. The following section describes ways that treaty proponents and policymakers can operationalize penumbral effects strategically. It also identifies implications of penumbral effects policymakers may need to consider.

### 5.1. *Maximizing the Noise Effects: Shareholders as Intermediaries*

If the threats to treaty-making are significant, then pre-emptive penumbral effects are unlikely; instead, we will need to rely more on noise and coordination effects.<sup>176</sup> Unfortunately, treaty negotiations take a long time and a firm's management is unlikely to pay particular attention to the distant noise of a prospective treaty that is too remote and speculative; these are precisely the reasons that firms do not fear a prospective treaty on business and human rights.<sup>177</sup> But noise is dynamic, and there are important strategies for amplifying that noise. If firms will not pay attention to a distant treaty, and the policy noise surrounding it, then policy makers should use the treaty process to get the attention of actors who firm representatives will not ignore: shareholder intermediaries.

Some shareholders, such as institutional investors, are already

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<sup>176</sup> See *supra* Section 3 (discussing the calibration between penumbral effects and threats to treaty making).

<sup>177</sup> Telephone Interview with International Policy Advisor, *supra* note 64.

urging large corporations to conform their corporate policies to international human rights standards.<sup>178</sup> This behavior is part of a phenomenon that Virginia Harper Ho describes as “risk-related activism,” which refers to the “exercise of shareholder governance rights to motivate firms to effectively monitor, manage, and disclose risk, including nonfinancial environmental, social and governance (ESG) risks.”<sup>179</sup> Human rights, and other ESG issues, are important because they can “impact a firms’ financial performance, such as corporate governance, labor and employment standards, human resource management, and environmental practices.”<sup>180</sup>

Even if firms ignore treaty noise, some shareholders pay attention to international human rights standards—both “formal” treaty norms and non-binding norms from soft law guidelines and even “failed” treaties. For example, the UN Global Norms re-emerged in an unlikely setting: a 2014 shareholder proposal submitted by a group of religiously affiliated shareholders to the corporate executives of Caterpillar.<sup>181</sup> This proposal referenced the Norms and urged Caterpillar’s leadership to review and modify its internal corporate policies to bring them in line with international human rights standards articulated in other sources, such as the Universal Declaration of Human Rights, the Fourth Geneva Convention, the International Covenant on Civil and Political Rights, the core labor standards of the International Labour Organization, and the International Covenant on Economic, Cultural, and Social Rights.<sup>182</sup>

Shareholder actions like these amplify the penumbral noise effects of international standards by using the latter as reference points for corporate reform. In the Caterpillar example, shareholders demanded change by using a shareholder proposal under Rule 14a-8 of the Securities Exchange Act of 1934.<sup>183</sup> This rule allows

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<sup>178</sup> INST. S’HOLDER SERVS., 2014 PROXY SEASON REVIEW: ENVIRONMENTAL & SOCIAL ISSUES 6 (2014).

<sup>179</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 650–51 (2016).

<sup>180</sup> *Id.* at 651.

<sup>181</sup> Caterpillar Inc., Proxy Statement (Form 14A) 67–68 (May 1, 2014), [https://www.sec.gov/Archives/edgar/data/18230/000001823014000144/def14a\\_2014xproxyxv25.htm](https://www.sec.gov/Archives/edgar/data/18230/000001823014000144/def14a_2014xproxyxv25.htm) [<https://perma.cc/35HW-WVFB>].

<sup>182</sup> *Id.* at 67.

<sup>183</sup> Ho, *supra* note 179, at 661 (noting that shareholder proposals have “historically been the most widely used and least expensive means of shareholder activism”).

qualifying investors to submit a proposal to the company that it wants included in the annual meeting of the shareholders.<sup>184</sup> Shareholder proposals often serve to signal to management that the shareholders want to start a conversation on a particular topic.<sup>185</sup> Once a shareholder proposal is received, a company's management may be required to include an eligible proposal in its proxy statement that is distributed to all shareholders before the next annual shareholder meeting, possibly with an accompanying statement of opposition.<sup>186</sup>

This proposal is not alone. According to Institutional Shareholder Services (ISS), a private proxy advisor, shareholders filed more resolutions concerning environmental and social standards than corporate governance in 2014; this had not occurred since the 1980s.<sup>187</sup> There was also an increase in the number of resolutions concerning human rights with sixteen resolutions demanding improved human rights risk assessments.<sup>188</sup> Additionally, the resolutions that were voted upon received relatively high levels of shareholder support.<sup>189</sup>

These examples of shareholder action magnify penumbral noise effects in two important ways. First, Rule 14a-8 allows activist shareholders to disseminate policy recommendations and international norms among the corporation's shareholders using the proxy statement; this tool allows shareholders to learn of international norms when they otherwise may not. Second, management may also meet and negotiate a *withdrawal* of the proposal by the shareholders.<sup>190</sup> These withdrawals are also significant. They signal that management and the shareholders submitting a proposal may have reached a privately negotiated agreement regarding company practices going forward.<sup>191</sup> In these agreements, a firm's representatives set out commitments regarding how the business

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 *Yale L. J.* 262, 266 (2016).

<sup>187</sup> INST. S'HOLDER SERVS., *supra* note 178, at 1.

<sup>188</sup> *Id.* at 37.

<sup>189</sup> *Id.* at 38.

<sup>190</sup> Haan, *supra* note 186, at 279-80..

<sup>191</sup> *See id.*

will operate in the future. For example, in the campaign finance context, “at least thirty-one proposal settlements set campaign finance disclosure standards at U.S. public companies” between 2014–2015.<sup>192</sup> In light of this trend, Sarah Haan claims that shareholder proposal settlements offer a promising avenue for reforming corporate social and environmental policies.<sup>193</sup>

Privately negotiated settlements demonstrate ways that shareholders enforce public norms. Those desiring improved human rights practices by corporations may want to employ a similar strategy to achieve corporate reform. Under such a strategy, investors will “short-cut” the pathway from non-binding international human rights standards to corporate policies by serving as both audiences and enforcers of these human rights standards. This demonstrates yet another way that private intermediaries can amplify “failed treaties” or other non-binding standards.

### 5.2. *Iterative Upgrading of the Baseline*

Change is a challenging task for both voluntary regulation and public regulation. The history discussed in Section 4, *supra*, suggests that the interaction between the two forms of regulation upgrades the baseline between cycles of each. Section 4, *supra*, discusses at least two cycles of both voluntary regulation and attempted public regulation in the area of business and human rights. These cycles suggest that change is a product of both and not a consequence of only one. Industry reacts to both in each cycle. When one cycle ends and another begins, the starting point for the conversation is a little different.<sup>194</sup>

History may not repeat itself with the debate about an international legally binding instrument on business and human rights. As before, industry opposes it, but the nature of the opposition is different. Part of industry’s opposition to the Norms was its

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<sup>192</sup> *Id.* at 285.

<sup>193</sup> *Id.* at 266-67. *See id.* at 265 (“Although reform of campaign finance disclosure has stalled in Congress and at various federal agencies, disclosure reform is steadily unfolding in a firm-by-firm program of private ordering.”).

<sup>194</sup> Kinley, *supra* note 96 at 31.

“packaging” in legalistic form.<sup>195</sup> A number of industry actors preferred to leave business and human rights outside the realm of legally binding instruments.<sup>196</sup>

This time around, the IOE, as a representative of the global business community, does not ignore the work of the intergovernmental group and instead seeks engagement with the treaty process.<sup>197</sup> This is in sharp contrast to industry’s aloofness to the preparation of the UN Global Norms.<sup>198</sup> Second, the ICC, IOE, and other industry representatives appear as engaged with the *substance* of an international treaty as its *existence*.<sup>199</sup> In their first set of initial observations, these industry actors provide specific recommendations on the content of a treaty or international initiative on business and human rights.<sup>200</sup>

There are a few explanations for this engagement. First, industry may be interested in the substantive content of a treaty in order to limit their exposure. Second, and as a related point, industry actors may desire to preserve their inclusion in the consultation process. One of the key reasons that industry actors were more receptive to the Ruggie Framework and the Guiding Principles compared to the Global Norms was because of the consultation process used with the former.<sup>201</sup> They may desire at least the appearance of cooperation in order to avoid subsequent ostracism, as occurred with the international regulation of tobacco.<sup>202</sup> Activists

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<sup>195</sup> *Id.* at 36; Vasella, *supra* note 99.

<sup>196</sup> Kinley, *supra* note 96, at 36; Vasella, *supra* note 99.

<sup>197</sup> IOE Roundup of Proceedings of the IWG on UN Treaty on Business & Human Rights, INT’L ORG. EMPs. (July 13, 2015), <http://www.ioe-emp.org/index.php?id=2464> [<https://perma.cc/G3WQ-E8ZK>] (noting that the IOE participated in the intergovernmental working group’s first session and that it planned to continue its engagement in the treaty-making process).

<sup>198</sup> Rabin, *supra* note 96 (noting that the majority of companies chose not to engage in the UN Global Norms consultation process); Weissbrodt, *supra* note 78, at 383.

<sup>199</sup> ICC ET AL., *Initial Observations on a Way Forward*, *supra* note 130, at 1 (advocating for a treaty or “international initiative” that covers all companies, requires States to develop National Action Plans, and avoids new legal liabilities for companies along global supply chains, among other suggestions).

<sup>200</sup> *Id.*

<sup>201</sup> September 8 Interview, *supra* note 171 (explaining the credibility of the Ruggie Principles and the consultation process involved).

<sup>202</sup> See WHO Framework Convention on Tobacco Control, art. 5.3, Feb. 27,

have called on similar bans against industry in treaty talks concerning climate change<sup>203</sup> and also business and human rights.<sup>204</sup>

As always, it is difficult to pinpoint the causes of these changes in industry attitudes, but it is important to note the differences. These differences are productive because it means that the conversation regarding important, but controversial, international policy issues has a different starting point at the beginning of each cycle. Certain assumptions are no longer contested, and the parties may move on to new challenges. As a result, parties, even antagonistic ones, may begin at a slightly different starting point compared to previous years, even if they are once again polarized regarding the desirability or content of a new regulation in a particular issue area.

### 5.3. *Treaties as Process vs. Treaties as Products*

A treaty process is successful not only if it results in a binding treaty entering into force—“treaties as products”—but also if it can facilitate voluntary compliance with socially desirable goals consistent with the treaty in development. One issue concerns whether there is tension between “treaties as process” versus “treaties as products.” Actors desiring to maximize the beneficial regulatory effects of “treaties as process” may pursue particular strategic

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2005, 2302 U.N.T.S. 166, [http://www.who.int/fctc/text\\_download/en/](http://www.who.int/fctc/text_download/en/) [<https://perma.cc/Q846-CDWP>] (providing for the regulation of tobacco). See also WHO FCTC, GUIDELINES FOR IMPLEMENTATION OF ARTICLE 5.3 OF THE WHO FRAMEWORK CONVENTION 2-9 (2008), [http://www.who.int/fctc/guidelines/article\\_5\\_3.pdf](http://www.who.int/fctc/guidelines/article_5_3.pdf) [<https://perma.cc/LG38-9GG6>] (listing guidelines unfavorable to the tobacco industry and specifying how outside parties should interact with the tobacco industry in order to promote public health policies).

<sup>203</sup> *Open Letter Calling for Rules to Protect the Integrity of Climate Policy-Making from Vested Corporate Interests*, CORP. EUROPE (Nov. 21, 2013), <http://corporateeurope.org/blog/open-letter-calling-rules-protect-integrity-climate-policy-making-vested-corporate-interests> [<https://perma.cc/URU7-K8SZ>] (showing that more than seventy-five civil society organizations had signed on to the open letter calling on the U.N. to protect environmental policy negotiations from the fossil fuel industry's influence).

<sup>204</sup> See Bobby Ramakant, *What Can We Learn from Industry Interference around the Global Tobacco Treaty?*, BUS. & HUM. RTS. RES. CTR: BLOG (July 23, 2015), <http://business-humanrights.org/en/what-can-we-learn-from-industry-interference-around-the-global-tobacco-treaty> [<https://perma.cc/M4XF-GM4A>]

choices that reduce the likelihood that an actual treaty (“treaty as product”) may eventually result from the process.

One strategic factor that aids “treaties as process” but may impede “treaties as products” is transparency. A strategy that attempts to maximize the noise from a treaty process may depend on a certain level of transparency regarding the treaty process in order for the signaling function to work. For example, industry actors may need to know how quickly the treaty process is moving along in order to gauge its regulatory threat. Similarly, the content of a prospective treaty may influence external actors regarding voluntary self-regulation but only if these actors have some awareness of this content.

These “spillover effects” of a prospective treaty process are dependent upon a certain degree of transparency. The challenge is that lack of transparency is often the norm in treaty negotiations. For example, in July 2015, treaty negotiators drew the ire of politicians and civil society actors regarding their confidentiality policies concerning the Transatlantic Trade and Investment Partnership (TTIP).<sup>205</sup> The European Commission released a new rule restricting politicians’ access to the text to a secure “reading room” in Brussels.<sup>206</sup> These rules were adopted in order to protect the process against leaks that could undermine the negotiations process. The “reading room” rule was adopted after a series of leaks had occurred.<sup>207</sup> According to news sources, the Trans-Pacific Partnership (TPP) also had a “similar super-secure reading room.”<sup>208</sup> This is one example of tension between choices facilitating “treaties as process” versus “treaties as products,” but there may be other factors that promote the former to the neglect of the other.

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<sup>205</sup> See Zachary Davies Boren, *TTIP Controversy: Secret Trade Deal Can Only Be Read in Secure ‘Reading Room’ in Brussels*, INDEPENDENT (Aug. 17, 2015), <http://www.independent.co.uk/news/world/europe/ttip-controversy-secret-trade-deal-can-only-be-read-secure-in-reading-room-in-brussels-10456206.html> [<https://perma.cc/7XS2-AWLF>] (detailing the additional security measures put into place after several leaks threatened the confidentiality of the TTIP text).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> See *id.* (quoting Robert Smith, host of NPR’s Planet Money).

#### 5.4. *Thick Treaties, Thin Treaties*

Penumbral effects are external effects of the treaty or the treaty-making process. This article elaborated on a few types of penumbral effects, but this is not an exhaustive list. Much of this discussion related to the importance of penumbral effects for treaties that may never emerge for many of the reasons discussed in Section 2.2. Further research could explore factors that amplify the penumbral effects of treaties in force. Here is why it matters: penumbral effects may partially compensate for institutional features of treaties. In this context, penumbral effects concern what kind of institutional features that a treaty will possess.

These types of penumbral effects are not equally significant for all treaties. Some treaties are rich in institutional features, including well-developed enforcement mechanisms. In these situations, penumbral effects may not be as important because the treaty's design features are already robust and address important issues, such as enforcement. External institutional features may facilitate compliance, but the treaty itself provides incentives for actor compliance. Penumbral effects are only important here when these design features are compromised or ineffective.

Other treaties, however, are "thinner" with fewer institutional features. This can become a problem when this institutional profile results from lack of cooperation: the treaty is thin not because that's what the parties wanted but because it was what they could agree upon. For example, a treaty that could have benefited from an enforcement mechanism may have lost it during the treaty negotiation process as a compromise between the parties or because the parties could not agree on the features of the enforcement mechanism. In these situations, penumbral effects can partially compensate for the institutional weaknesses of the treaty's design or operation. Penumbral effects may offer incentives for compliance that are lacking or inadequate in the treaty itself. In this way, these penumbral effects provide hybrid institutional features that may even resemble the institutional features of thicker, institutionally developed treaties.

## 6. CONCLUSION

This article introduced the concept of “treaty penumbras” to explain how treaties exert indirect effects on businesses. Penumbras are important because they illuminate how a treaty may still succeed even if it is failing under a statist framework. Specifically, the treaty process generates positive penumbral effects within the realm of voluntary industry regulation that can incentivize improved business behavior. In this way, penumbral effects can partially compensate for treaties that fail to live up to our expectations. That is why it is important to account for penumbral effects when we evaluate treaty success.

Penumbras illustrate how the treaty process can be as important as the treaty product that the process is intended to achieve. However, penumbral effects do not substitute for treaty regulation; instead, these effects are dependent upon treaty regulation in general even if these effects can compensate for failed treaty regulation in a specific policy area. If treaty making is robust, all three forms of penumbral effects (preemptive, noise, and coordination) can foster improved business behavior. However, if treaty making is declining or non-existent, the possibilities for penumbral effects also decline, especially preemptive effects. We may expect noise and coordination effects even in this situation, but these effects may also disappear if all treaty making declines too substantially. In other words, penumbral effects offer hope in a world of dwindling treaties but they also vanish in a world without treaties.

The implications in the article arose from a close examination of only one international policy area. This examination yields insight that is significant for the hundreds of NGOs, labor unions, religious organizations, government officials, and industry representatives who are invested in the outcome of the treaty process concerning business and human rights. These implications are also relevant to treaty negotiations that similarly target business conduct. Additional empirical research may reveal similar penumbras in other international policy areas that policymakers can use to reinforce other treaty norms.