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Lessons from international environmental regimes for an internationally accepted binding standard on business and human rights

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For many years, advocates have argued for a binding international standard for business enterprises in relation to human rights. In 2011, the United Nations Human Rights Council endorsed Guiding Principles on Business and Human Rights that describe the obligation of states to protect against human rights abuses committed by businesses, and the responsibility of businesses to respect human rights. Although the Guiding Principles have been widely accepted, they are not, and were not intended to be, binding as a matter of international law.

In 2014, the Human Rights Council established an intergovernmental working group to elaborate a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. The working group has met regularly and it discussed the third revised draft of such an instrument at its most recent meeting, in October 2021. However, states from the Global North have not actively engaged in the negotiations.

In the effort to develop a binding standard on business and human rights that receives widespread international support, it may be possible to draw lessons from the experience of successful regimes from other fields, including international environmental law. To that end, this discussion paper addresses:

1. The added value of legally binding instruments in two important international environmental legal regimes.
2. The critical success factors with regard to content and process in building support for these regimes.
3. Based on the experience with these regimes, recommendations to build broad acceptance and engagement by all parties in discussions concerning a legally binding standard or instrument on business and human rights.

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1. The value of legally binding instruments in international environmental regimes

This section describes the added value of legally binding instruments in two international environmental regimes: (a) the regime for protection of the ozone layer; and (b) the regime for protection of the rights of individuals to information, participation in decision-making, and access to justice in relation to environmental matters (collectively called "access rights").

The ozone regime was chosen because it has near-universal state participation and is widely considered the most effective regime in international environmental law. The scope and effectiveness of the access rights regime are more limited, but its close connections to human rights law may make it particularly relevant to the development of an instrument on business and human rights.

A. The Ozone Regime

The stratospheric ozone layer protects against ultraviolet solar radiation that causes skin cancer, contributes to cataract formation, and damages DNA. In the late 1970s, it became clear that the increasing use of chlorofluorocarbons and other ozone-depleting substances (ODS) was depleting the ozone layer. Some states took actions in their domestic laws to regulate ODS. However, because ODS can be produced anywhere in the world, and because wherever they are consumed their effects are felt globally, the only way to ensure protection of the ozone layer was to adopt a comprehensive, detailed regime to phase out ODS everywhere.

The two principal legal instruments in this regime are the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. With 198 state parties each, the Vienna Convention and the Montreal Protocol have virtually universal membership. The regime that they established is one of the most effective in the history of international law. About 98 % of ODS production and consumption have already been phased out, and the ozone layer is expected to return to pre-1980 levels by the middle of the century. As a result, the UN Environment Programme (UNEP) estimates that two million people annually are saved from contracting skin cancer. Because some ODS are potent greenhouse gases, phasing them out has also significantly helped to reduce global warming.

The success of the ozone regime has depended on the willingness of states to adopt and implement binding standards at the national level. However, by using international legal instruments, states have channelled and reinforced that willingness in a comprehensive global regulatory structure with the following elements:

1. phase-out schedules that require the reduction and eventual elimination of ODS, with longer schedules for developing countries;
2. the ability to expand the coverage of the regime to new ODS and to accelerate the phase-out of existing ODS on the basis of super-majority votes of the parties;
3. the flexibility to allow limited exemptions for critical use;
4. financial mechanisms to assist developing countries meet their commitments;
5. trade restrictions on non-parties; and
6. non-confrontational procedures to oversee and promote compliance.

B. The Access Rights Regime

Unlike the ozone regime, the access rights regime does not have an overarching global legal framework. It does have a foundational global standard: Principle 10 of the non-binding Rio Declaration, which was adopted by states at the UN Conference on Environment and Development in 1992. Principle 10 states:
"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities ... and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participa-

tion by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

Other elements of the access rights regime include: provisions in many multilateral environmental agreements that encourage or require their parties to provide access to information and/or promote public participation on issues within the scope of the agreements[1]; the non-binding Bali Guidelines, which were adopted by the UNEP Governing Council in 2010 to elaborate how all states should implement the Principle 10 access rights; model laws on access to information adopted by the Organization of American States and the African Union; and, most notably, two regional agreements that codify the Principle 10 access rights and set out binding obligations on states.

The first of these agreements, the Aarhus Convention, was adopted in 1998 under the auspices of the UN Economic Commission for Europe (UNECE). It requires each of its parties to: provide environmental information (defined broadly) on request; provide for public participation in environmental decision-making; and ensure that members of the public have access to legal remedies for failures to provide environmental information and facilitate public participation.[2] The Convention entered into force in 2001, and it now has 47 parties (including the European Union) in Europe and central Asia.

In 2018, under the auspices of the UN Economic Commission for Latin America and the Caribbean (UNECLAC), states adopted the Escazú Agreement, which also includes detailed provisions requiring that its parties: ensure the public's right of access to environmental information; collect and disseminate environmental information; provide for public participation in environmental decision-making; and ensure access to remedies in relation not only to information and public participation, but also to 'any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment'.[3] The Escazú Agreement entered into force in April 2021, and it currently has 24 signatories and 12 parties.

In comparison to the ozone regime, the effectiveness of the access rights regime is difficult to measure. Many states have adopted national legislation guaranteeing one or more access rights. For example, by 2012, twenty years after the adoption of Principle 10, one-half of all countries had enacted legislation guaranteeing access to environmental information. Today, 187 states have adopted laws on environmental impact assessment.[4] UNEP has published a detailed implementation guide for the Bali Guidelines that describes many examples of good practices by states around the world in providing rights to participation and remedy as well as information. In some cases, the international standards have helped lead to the adoption of such legislation at the national level.[5]

However, many states do not respect and protect access rights. Even many states that have adopted laws recognizing the rights do not effectively implement and enforce them in practice. Nevertheless, it seems clear that the access rights regime, especially the Aarhus Convention, has contributed to greater protection and implementation of these rights at the national level than would otherwise exist.

The Aarhus Convention has been described as "a driving force behind the strengthening of procedural environmental rights throughout Europe and Central Asia."[6] To promote compliance with the Convention, the first Meeting of the Parties (MoP) established a Compliance Committee, composed of nine independent experts, which receives complaints of non-compliance, including from members of the public, and issues non-binding reports and recommendations. The MoP reviews the Committee's reports and may take a number of responses, including providing advice and facilitating assistance to individual parties; requesting parties to submit strategies to achieve compliance; issuing declarations of non-compliance, and even suspending a party's rights under the treaty.[7]

Scholarly studies have emphasized the role of the Compliance Committee in promoting compliance.[8] This type of mechanism is unusual for international environmental

agreements, which usually rely on non-adjudicative intergovernmental mechanisms (as the Montreal Protocol does) to promote voluntary compliance. In this respect, Aarhus more closely resembles human rights treaties, which often establish tribunals or other independent monitoring bodies with the authority to receive complaints and issue decisions.

The Aarhus Convention has also been the catalyst for, or contributed to, other international efforts to promote access rights. For example, the Organization for Security and Co-operation in Europe (OSCE) has established 60 Aarhus Centres in 14 countries in Eastern Europe and Central Asia. The Centres promote implementation of the Convention and generally assist the public in exercising their access rights. In addition, the European Court of Human Rights has cited Aarhus in interpreting the obligations of states under the European Convention on Human Rights in relation to environmental matters.[9]

The Escazú Agreement established a "Committee to Support Implementation and Compliance," which "shall be of a consultative and transparent nature, non-adversarial, non-judicial and non-punitive and shall review compliance of the provisions of the present Agreement and formulate recommendations." Like Aarhus, Escazú left the rules on the structure and functions of this mechanism to be established by the Conference of the Parties at its first meeting, to be held 19–22 April 2022. Because the mechanism has not yet begun to function, it would be premature to try to assess its effectiveness.

2. Critical success factors in building consensus around these instruments

The ozone regime and the access rights regime provide examples of how to build consensus around legally binding instruments. Although states are the key actors in adopting and implementing such instruments in international law, these lessons also apply with respect to support from other actors, including civil society and business enterprises.

In each case, three factors seem to have been especially important in building consensus: (a) identifying an important problem that raised international concerns and that was not being satisfactorily addressed; (b) establishing an inclusive process to develop and implement a legal regime to address the problem; and (c) incorporating flexibility within the regime itself. These factors played out in different ways in the two regimes.

A. Identification of the problem

The impetus to develop the ozone regime came directly from greater scientific attention to the nature of the threat that ODS posed to the ozone layer and to human health. Soon after the threat was identified, governments agreed to study it together: in 1977, UNEP adopted a World Plan of Action that called for international research on, and monitoring of, the ozone layer. As it became clear that the causes and effects of ozone depletion were global and therefore could not be addressed without effective collective action, states turned to international legal cooperation. An important aspect of this identification and clarification of the problem was that it was done publicly, through the dissemination of information internationally and domestically, which resulted in heightened popular demand for efforts to address it.

The lack of access rights is a more difficult problem, because it stems from both a lack of capacity and, perhaps more important, a lack of political will on the part of governments and political elites.[10] Nevertheless, from early in the modern environmental movement, and increasingly after the 1992 Rio Conference, there have been continuous efforts to draw attention to the importance of access rights to effective environmental governance as well as the enjoyment of human rights. At the global level, examples include the Bali Guidelines adopted by the UNEP Governing Council in 2010 and the first UNEP report on the environmental rule of law in 2019. Regionally, the Aarhus Convention and the Escazú Agreement were both preceded by regional discussions of the nature of the challenge, and the adoption of non-binding guidelines at the regional level, which paved the way for the negotiation of the binding treaties.

B. Inclusive processes

Both the ozone and the access rights regimes have had inclusive processes in their negotiation and implementation. The processes have been open to all UN member states (or, for the regional agreements on access rights, the states within the UN regional commission), and they have also provided for participation by interested non-state actors.

In both regimes, some states initially took a more active role in requesting and pursuing the negotiations. With respect to ozone, the United States and Scandinavian states took the lead in pressing for action in the late 1970s. Other European states initially resisted but later participated actively in the negotiations. However, the openness of the regime was not enough to ensure widespread engagement and support. Many states in the Global South did not fully engage until after the Vienna Convention and Montreal Protocol had been negotiated in the 1980s.

To a large degree, the greater involvement of states over time in the regime can be attributed to the growing realization of the dangers of ozone depletion. However, several features of the regime have also facilitated and encouraged broader inclusion. First, the regime restricts trade with non-parties in ODS and products containing ODS. Second, in 1990, at the second Montreal Protocol MoP, developed and developing countries agreed on a program of financial assistance to help developing countries, including China and India, adopt substitutes for ODS. These two elements provided strong incentives for states to join the regime, in order to benefit from financial assistance and to avoid trade restrictions. A third attractive feature of the ozone regime is that it has included mechanisms, described in the next section below, which allow some flexibility in the application of its obligations to states in different situations.

With respect to non-state parties, it is noteworthy that the most affected business enterprises – in particular, the major chemical companies – played a very active role in the negotiation of the ozone regime. Although they did not participate directly in the intergovernmental negotiations, the companies closely followed the talks and their representatives regularly interacted with governments, including by often being present in the negotiating room itself (albeit not at the negotiating table). Indeed, one of the chief U.S. negotiators later said, "we negotiated the [Montreal] Protocol and its subsequent amendments with industry and with other governments simultaneously."[11] Another mechanism through which business enterprises have participated is the Technology and Economic Assessment Panel (TEAP), which the parties created in 1990 to serve as an advisory body on technical and economic issues. TEAP has regularly included experts from industry as well as government and academia.

Because the United States had already moved to regulate ODS through domestic law, U.S. companies were more inclined to support binding international measures as a way of levelling the playing field with their competitors in other countries. In countries that had not taken such domestic regulatory measures, the chemical companies resisted international regulation more strongly. However, as alternatives to ODS became more technically and economically feasible, the industry as a whole became less resistant to the adoption of stricter limitations on ODS.

The negotiations of the two regional treaties on access rights were each open to all states in the relevant UN Economic Commission: UNECE and UNECLAC. The Aarhus Convention is also open to membership by non-UNECE member states upon approval by the Aarhus MoP, which has made clear that the approval would not require a substantive review of the national legal system of any state wishing to join. However, no non-UNECE state has yet joined the Convention.

Environmental civil society organizations (CSOs) have been involved in the Aarhus Convention since its inception. Among other things, CSOs have the rights to bring cases to the Compliance Committee, nominate potential members of the Committee, and observe its proceedings. In the negotiation of the Escazú Agreement, governments decided to provide a formal role for CSOs, literally giving them a seat at the negotiating table. The CSOs

were asked to appoint a representative, on a rotating basis, who could speak on their behalf directly to governments in the formal negotiations, including by suggesting language in the negotiating text and commenting on proposals. Governments and CSOs have emphasized the importance of this approach to fostering widespread support for the Escazú Agreement.

C. Flexibility in implementation

One of the challenges in any international legal regime is to develop standards that are flexible enough to encourage participation, but are not so flexible that they require no changes in behavior and are therefore ineffective. Flexibility can be incorporated in several ways, including by setting out different levels of obligation for different types of duty-holders, and by providing mechanisms through which the regime may change its standards over time to respond to new information.

In the ozone regime, the parties incorporated flexibility along three main lines. First, they realized that it would be inappropriate to impose exactly the same obligations on developed and developing countries. (The reasons for this differentiation included the greater historical responsibility of developed countries for the problem, the greater resources they had to adopt substitutes for ODS, and the need to ensure that phasing out ODS did not interfere with the development of lower-income countries.) As a result, the regime gives developing countries more time (generally, ten years) to phase out ODS and, as noted above, provides them substantial financial support to find replacements.

Second, the parties understood that some types of uses of ODS may be extremely difficult to phase out. As a result, the Protocol provides that even after a full ban on production takes effect, the parties may permit limited production of ODS for specific uses that they agree are "critical uses."

Third, the creators of the ozone regime recognized that further scientific research might identify other ODS and/or reveal that known ODS were a greater threat than previously realized. Therefore, the Vienna Convention and Montreal Protocol authorized parties to add new chemicals to the list of controlled substances and to tighten restrictions on ODS once added. Bringing new substances under the regime requires that the parties agree by a two-thirds vote to amend the Montreal Protocol. These amendments bind only those parties that accept them. However, after an ODS has been added, the MoP may tighten restrictions on it more easily, through deciding by a two-thirds vote (including a double majority of developed and developing countries) to adopt an "adjustment" to the Protocol. Once adopted, an adjustment amends the Protocol and becomes binding on all parties whether or not they have formally agreed to it. At MoPs in London (1990), Copenhagen (1992), Vienna (1995), Montreal (1997), Beijing (1999), and Kigali (2016), the parties used these provisions to expand the coverage of the regime and to tighten its ODS phase-out schedules.

Conferences/Meetings of the Parties (CoPs/MoPs) in international environmental law facilitate this kind of dynamism, because each one is a governance body specific to the particular agreement. If the agreement gives the CoP or MoP the authority to do so, it can oversee subsidiary bodies, monitor compliance by states, take decisions, and adopt amendments and interpretations of the underlying treaty. Human rights treaties, in contrast, generally do not use COPs/MOPs in this way. Instead, they rely primarily on tribunals or treaty bodies composed of independent experts to monitor compliance.

These two approaches are not mutually exclusive. The Aarhus Convention illustrates how they can be combined. As noted above, Aarhus has a Compliance Committee of independent experts, but the Aarhus MoP plays a primary role in governance, including by deciding what actions to take in relation to the reports of the Compliance Committee. As a result, the Aarhus compliance mechanism combines the advantages of an objective review of a state's compliance by a body of independent experts with the flexibility of intergovernmental review and engagement with the state in question on how best to bring the state back into compliance. In addition, the

UNECE can provide technical support for compliance where needed, as can the OSCE through the Aarhus Centres.

The access rights regime also provides another type of flexibility, by allowing different sets of countries to reach agreements at their own speed. At the broadest level, in the 1992 Rio Declaration and the 2010 Bali Guidelines, global agreement was achieved by adopting non-binding standards written in general language. In contrast, the two regional agreements, which included binding and more detailed provisions, were negotiated at different times by smaller groups of countries. This enabled the UNECE states that felt able to adopt binding legal obligations more quickly to do so in the 1990s, without waiting for a global agreement, and then the Latin American and Caribbean countries to do likewise nearly two decades later. (At the moment, there is still no significant movement towards adoption of similar regional agreements in Africa or Asia.)

In addition, pursuing agreements at the regional level allowed states and CSOs to focus attention on problems and concerns of particular interest to that region. For example, the Escazú Convention includes a path-breaking provision requiring the protection of environmental rights defenders, who have been at great risk in many countries in Latin America.

The concept of different groups of countries proceeding at different speeds could be realized in ways other than along regional lines. In the context of business and human rights, for example, countries that are linked through being the home and host countries of many of the same multinational corporations, and that share similar attitudes about how to regulate those corporations, could decide to enter into agreements together without waiting for a global agreement. Alternatively, a global agreement might provide a kind of menu of options, from which home and host countries facing shared issues could jointly decide to adopt the standards they felt made most sense for their situations.

3. Recommendations to build broad support for an instrument on business and human rights.

The ozone regime shows that it is possible to achieve a very high level of participation in and compliance with international instruments that require real changes in states' laws and practices, including changes in how they regulate private actors. The access rights regime indicates that, even in the absence of such a uniformly high level of engagement and compliance, an international regime may still be effective in that it results in changes in behavior toward achieving shared goals and standards.

The experience with these regimes suggests some recommendations in relation to building support for an instrument on business and human rights, in relation to each of the three factors described above: (a) identifying the problem; (b) establishing inclusive processes; and (c) providing for flexibility.

A. Identification of the problem

A prerequisite for international support for a new instrument is that the interested actors must agree that there is a problem that requires international cooperation to solve. The following recommendations all have to do with building consensus on that point.

- **Obtain initial, broad-based support.** Ideally, the initiative should be supported from the outset by a representative group of stakeholders. In this context, that means including representatives of states in the Global North, states in the Global South, business enterprises, and relevant CSOs. The experience with the ozone and access rights regimes shows that progress can begin with a relatively small group of states, as long as they take steps as soon as possible to expand the support more broadly.

- **Clarify the problem to be addressed.** The ozone and the access rights regimes illustrate the importance of starting the broad-based discussions by examining the areas of concern that could be addressed by a legally

binding instrument. Before negotiating the elements of a possible instrument, the interested parties should hold open discussions to identify exactly what issue the instrument will address. In many cases, as in the ozone regime, it will be useful to have preliminary studies on the scope and extent of the problem, to clarify its characteristics and how it might be addressed.

In relation to business and human rights, much of this groundwork has already been done, including by the former Special Representative of the Secretary-General, John Ruggie, in his work on business and human rights between 2005 and 2011, and by the working group on business and human rights established by the Human Rights Council in 2011. Nevertheless, it would be important to clarify which particular problems in relation to business and human rights this instrument might address. Will its scope include all types of business-related human rights abuses? Or will it address a narrower set of issues, such as filling potential gaps in national jurisdiction over business enterprises, or developing uniform standards for supply chain due diligence?

- **Draw on institutional support.** The experience of both the ozone and access rights regimes shows the importance of being able to draw on expertise from international secretariats: UNEP in the case of ozone and the global access rights standards, and UNECE/UNECLAC for the regional agreements. In addition to providing logistical support in holding discussions, expert meetings, and negotiations, a secretariat can provide drafting and technical support. The secretariat that has supported the negotiation of a legal instrument on business and human rights to date is the Office of the High Commissioner for Human Rights (OHCHR). It may be worth considering whether to supplement OHCHR's expertise with support from other sources within the UN family of organizations that have more experience in international jurisdiction and/or business regulation.

- **Build on existing frameworks.** It is critical to stress that any negotiation for a new instrument on business and human rights is not starting from a blank slate. First, any new initiative must take into account the fact that several rounds of negotiations towards a binding international instrument have already taken place under the auspices of the Human Rights Council. Any new initiative should make clear from the outset that it will build on the work already accomplished by this negotiation, despite the fact that governments from the Global North have not actively participated in it.

  Second, and more generally, any new initiative must be in accordance with the international framework already established for business and human rights. The most important instrument describing that framework remains the Guiding Principles on Business and Human Rights, which have received a large amount of support from governments, business enterprises, and civil society organizations. The first pillar of the UN Guiding Principles clearly sets out the fundamental obligation of states in respect of business enterprises. Guiding Principle 1 states: "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."

Although the Guiding Principles are not binding in themselves, they reflect that the "duty to protect" is already a well-established principle of international human rights law. Human rights treaty bodies and other authoritative sources have expanded on this duty and other duties of states in relation to businesses.[12]

The international framework on business and human rights also includes detailed statements of the responsibilities of businesses to respect human rights, which are set out, in particular, in the second pillar of the UN Guiding Principles and in chapter four of the OECD

Guidelines for Multinational Enterprises. Again, even though these statements of the responsibility of business enterprises to respect human rights are not legally binding in themselves, they represent the often-expressed societal expectations of the international community for a minimum standard of conduct. Moreover, in many respects, they reflect legally binding norms at the national level.

Any new instrument must build on and promote the implementation of these normative standards, and under no conditions allow regression from them.

B. Inclusion

To achieve widespread support, the most important factor, again, is agreement among states that there is a problem that requires international cooperation to solve. There is no substitute for that. However, procedures for negotiating and implementing an international regime can encourage and facilitate engagement by states and other actors.

- **Adopt an inclusive negotiating process.** The importance of having an inclusive process cannot be over-emphasized. It will be critical for any negotiation to be open to representatives from all interested states and stakeholders. However, the ozone regime shows that a smaller group of states can play a more active role initially and still begin to develop an international regime that eventually has very widespread engagement and support. Similarly, the access rights regime illustrates that if the problem to be addressed is one that is of particular interest to a smaller group of interested parties, it may be more appropriate and feasible for them to go forward rather than wait for universal agreement.

- **Include incentives to join.** As explained above, the ozone regime included persuasive incentives to join: financial aid for developing states within the regime, coupled with trade restrictions against all states outside the regime. Proponents of a legally binding instrument in the area of business and human rights should consider what incentives they can provide other states to join. What obstacles do different groups of states face in adopting and implementing standards in this area? If those obstacles are due to lack of capacity, how could capacity be built? If the problems are due to barriers to jurisdiction, how could those barriers be overcome? If the problems are due to the difficulty of meeting "one-size-fits-all" legal standards, how could those standards take into account the different situations and concerns of states without making the standards ineffective?

- **Facilitate participation by non-state actors.** The ozone regime and the access rights regimes illustrate the advantages of setting up formal mechanisms through which interested non-state actors, such as business enterprises and CSOs, can participate in the development and implementation of an international regime. Those advantages include: greater transparency, since the views of these actors will be expressed more openly; and potentially greater acceptance of the end-result by those most affected, since they will have been able to provide input into the process.

C. Flexibility

As noted above, any new instrument should build on existing frameworks. More specifically, any flexibility provided to states in this instrument must be consistent with their obligations under human rights law. Nevertheless, it is possible to take into account the situations faced by different states, and to construct some flexibility mechanisms.

- **Take into account the different situations of states.** A fundamental principle of human rights law is that all human beings are entitled to the same rights. But the content of some of the human rights obligations of states varies according to the situation, including in particular any constraints on the resources of the state in question. Not all obligations vary in this way: article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), for example, simply requires each of its parties "to respect and to ensure to all

individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant". As is well understood, however, economic, social and cultural rights cannot always be fulfilled immediately. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) reflects this understanding, by requiring each of its parties "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means."

It would be an oversimplification to suggest that all duties relating to economic, social and cultural rights are subject to progressive realization, or that all duties relating to civil and political rights require exactly the same conduct of states. Some obligations under the ICESCR, including the duty of non-discrimination, are of immediate effect. And while all parties to the ICCPR are required to respect civil and political rights by taking (or refraining from taking) essentially the same actions, the "duty to protect" requires states to exercise due diligence to prevent and redress the impairment of civil and political rights by private entities, including of course business enterprises. What level of diligence is due in a particular instance could therefore be affected by a number of factors that might vary from situation to situation, including the capacity of the state.

Any negotiation of a new instrument on business and human rights offers the opportunity to discuss frankly how different states face different types of challenges, and how those challenges might be addressed through international cooperation in ways that are fully consistent with states' obligations under human rights law.

- **Include appropriate flexibility mechanisms.** As the experience of the ozone and access rights regimes shows, flexibility does not mean including only "soft" obligations. Both of these regimes include specific, detailed obligations on states. At the same time, they provide a number of different flexibility mechanisms, some of which may be worth considering in the context of a new instrument on business and human rights.

  To be clear, any flexibility mechanisms in such an instrument must be consistent with states' obligations under international human rights law. But as noted above, it may well be possible to adopt flexibility mechanisms that both take into account the different capabilities and conditions of states and help them to comply with their obligations under international human rights law, including in particular their obligations to protect against human rights abuses by business enterprises.

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Endnotes

1 Eg UN Framework Convention on Climate Change, art. 6(a); Paris Agreement on Climate Change, art. 12; Stockholm Convention on Persistent Organic Pollutants, arts. 7(2), 10(1); Minamata Convention on Mercury, art. 18(1).

2 The full name of the agreement is the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

3 The full name of the agreement is the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean.

4 UNEP, Environmental Rule of Law: First Global Report (2019), p. 2.

5 UNEP, Putting Rio Principle 10 into Action: An Implementation Guide (2015), p. 14.

6 J. Wates, "Aarhus Convention: A Driving Force for Environmental Democracy", 2 J. Eur. Envtl. & Planning Law 2, 2 (2005).

7 Report of the First Meeting of the Parties, Decision I/7 (23 October 2002), para. 37.

8 See, e.g., M. Dellinger, "Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law," 23 Colorado Journal of Int'l Envtl. Law & Policy 309 (2012). To be clear, compliance is far from complete; one recent study found that states had recorded some degree of compliance in only eight of 17 Committee recommendations on access to justice issued between 2004 and 2012. G. Samvel, "Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice," 9(2) Transnational Envtl. Law 211 (2020).

9 E.g., Tatar v Romania, No. 67021/01 (2009), para. 118.

10 See UNEP, Environmental Rule of Law, pp. 95–97.

11 See "Negotiating the Montreal Protocol on Protecting the Ozone Layer" (interview with Robert Reinstein).

12 See, e.g., Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36 (30 October 2018), para. 22; Committee on Economic, Social and Cultural Rights, General Comment 24, on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24 (10 August 2017); Committee on the Rights of the Child, General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, UN Doc. CRC/C/GC/16 (17 April 2013).