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Remarks at Plenary Session on
"Business and the rules of the game:
From rule-takers to rule-makers?"

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Thank you for asking me to lead off this discussion on business and the rules of the game. I am pleased that you will address the Millennium Development Goals at this Forum. As the principal author of Kofi Annan's report to the Millennium Summit, in which we first proposed the MDGs, I had always hoped that they would serve not merely as a mechanical benchmarking tool, but also become an instrument for broader social mobilization, generating innovative responses to society's systemic challenges by, and among, all social actors. Having business support the MDGs—making them part of their rules of the game—would be a most welcome development.

Being the UN's current voice on business and human rights, I will focus this morning on the rules of the game as they relate specifically to the enjoyment of rights. I suspect that many in the human rights community would be somewhat puzzled by the sub-title of this session, and might even advocate that it be reversed: from rule-makers to rule-takers. Perhaps what I could do most usefully in the few minutes I've been allotted is to unravel this apparent paradox.

Business already is deeply involved in global governance—quite apart from its influence on individual governments. Employers associations, along with labor, have been constitutionally represented in the ILO since 1919. Today, business participates as a rule maker in such diverse areas as setting global telecommunications standards and protecting intellectual property rights.

Through bilateral investment treaties and host government agreements, companies can seek to insulate their direct foreign investments from future legislative or regulatory changes in host countries, including policies that promote human rights. And they are able to proceed directly to binding international arbitration, bypassing the host country's courts, if they believe that their investments are adversely affected by such regulatory changes.

But while business has become a direct participant in the system of global governance, it has proven a far greater challenge to render it subject to international rules for harms committed abroad—to make business a global rule taker, in other words. For example, a parent company generally is not legally liable for wrongs committed by an overseas subsidiary, even where it is the sole shareholder, unless the subsidiary is under such close operational control by the parent that it can be seen as its mere agent. And sourcing goods and

services from contracted suppliers generally is considered an arms-length market exchange, even for sole suppliers, not a related-party transaction.

To be sure, each legally distinct entity within a corporate group or network is subject to the laws of the countries in which it operates. But host country governments and courts often are unable or unwilling to confront major global corporate players. And the group or network as a whole is not governed directly by international law.

In short, we see an emerging trend whereby business as rule *maker* increasingly operates in a single global economic space; but business as rule *taker* largely continues to operate in the world of separate national jurisdictions, with only a thin overlay of relatively weak international institutions and legal instruments.

In the area of human rights, the main bridges between these two worlds are lawsuits where they are permitted, thus far primarily under the US Alien Tort Claims Act; "naming and shaming" campaigns by NGOs; and self-governance or multi-stakeholder initiatives that corporations adopt voluntarily.

To put it simply: we need stronger bridges. History suggests that such a pronounced divergence between rule maker and rule taker may not be politically sustainable—that pushback against globalization driven by increased populism, protectionism and various forms of fundamentalism is likely to occur unless ways can be found to establish more effective transnational means of governance, covering all key international players, including business.

Many who speak for victims of corporate related human rights abuses have advocated drafting a binding international legal instrument as their preferred answer. But let us recall that the recently adopted United Nations Declaration on the Rights of Indigenous Peoples was twenty-two years in the making—and it is not now, nor will it soon become, a legally binding treaty. So whatever long-term aspirations one has, and however meritorious they may be, victims cannot wait a quarter century—they need help now.

My own approach to this challenge is to build up from what we've got—and aim to close "law free" zones where they exist.

My UN work currently focuses on three areas of concern. The first is the state duty to protect against human rights abuses by third parties, including business. This is a foundational principle of the international human rights regime. But it remains poorly understood by governments, and in many cases is inadequately implemented. One dimension that requires particular attention is what, if any, obligations the home states of companies may have, individually or collectively, where host states are incapable of enforcing their own laws because of civil war or other forms of significant social conflict.

A second focus is the corporate responsibility to respect human rights. Broadly speaking, this translates into a due diligence standard to ensure that company activities do not harm human rights. But not many companies currently can possibly know whether they meet that standard. Few have ever conducted systematic human rights impact assessments, for example, and to my knowledge only one has made public even a summary of the results. Here we need more robust means to identify and disseminate “good practices, which would be ratcheted up by continuous improvement—in some respects, the corporate counterpart of the "progressive realization" of rights required of states. The UN Global Compact, which I helped create, would seem to be uniquely positioned to play this role.

The third focal point concerns grievance and accountability mechanisms. Many business-related human rights issues could be readily resolved if more, and more effective, grievance mechanisms were to exist, and if companies utilized social accountability practices, such as meaningful public reporting, more extensively. This spectrum of mechanisms spans from project levels, to National Human Rights Institutions, the OECD National Contact Points, and beyond.

For each of these three areas of concern, I am attempting to identify workable guiding principles for governments and business alike, through extensive research and consultations.

Before concluding, I was asked to pose a question for you to discuss at your tables, with you then reporting back to plenary. So here it is: what do you believe is the most effective mix of mandatory and voluntary measures to achieve improved human rights performance by business around the world?

Thanks again. I look forward to our dialogue.