

# Making 'Stakeholder Capitalism' Work: Contributions From Business & Human Rights



## **John G. Ruggie**

Corporate Responsibility Initiative, Harvard Kennedy School

## **Caroline Rees**

Corporate Responsibility Initiative, Harvard Kennedy School

## **Rachel Davis**

Corporate Responsibility Initiative, Harvard Kennedy School

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## **MAKING ‘STAKEHOLDER CAPITALISM’ WORK: CONTRIBUTIONS FROM BUSINESS & HUMAN RIGHTS**

**John G. Ruggie, Caroline Rees & Rachel Davis\***

*John G. Ruggie is the Berthold Beitz Research Professor in Human Rights and International Affairs, Faculty Chair of the Corporate Responsibility Initiative at Harvard’s Kennedy School of Government, and a Fellow of the American Academy of Arts & Sciences. He has served as UN Assistant Secretary-General for Strategic Planning and Special Representative of the Secretary-General for Business & Human Rights. In the latter capacity, he developed the UN Guiding Principles for Business & Human Rights. He chairs the Board of Shift, the leading center of expertise on the UN Guiding Principles, and is on the Board of the Arabesque Group, an ESG data provider and fund manager, as well as on Unilever’s Sustainability Council.*

*Caroline Rees is President and Co-Founder of Shift. She spent 14 years as a British diplomat, including 4 years at the UN in Geneva where she chaired the intergovernmental negotiations that created the first mandate on business and human rights. She served as lead policy advisor to John Ruggie during his UN mandate as Special Representative of the Secretary-General for Business & Human Rights, and is a Senior Program Fellow at Harvard Kennedy School’s Corporate Responsibility Initiative. Other positions include the Advisory Committee of the Investor Alliance for Human Rights, the Advisory Board to Ethical Corporation, and the Advisory Panel to the Capitals Coalition.*

*Rachel Davis is Vice President and Co-Founder of Shift. She leads Shift’s work with standard-setters and has advised FIFA, the International Olympic Committee, financial institutions, consumer goods and extractive companies on implementation of the UN Guiding Principles. Rachel clerked at the High Court of Australia and at the International Criminal Tribunal for former Yugoslavia and received an LLM degree from Harvard Law School. She was senior legal advisor to John Ruggie during his UN mandate and is a Senior Program Fellow at Harvard Kennedy School’s Corporate Responsibility Initiative.*

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## Abstract

For the first time in four decades, leading business associations, corporations, and the corporate law and governance community are seriously debating the social purpose of the corporation. The idea of stakeholder governance – moving beyond shareholder primacy toward some form of ‘stakeholder capitalism’ – is in play. But the *how* question unveils significant differences of opinion as well as difficulties. Some advocates place their bet on enlightened voluntary cooperation between corporations, large institutional investors, and other stakeholders. Yet considering the financial incentives the current system affords corporate directors and executives, especially in the Anglo-American system, driven by equity-based compensation, voluntarism by itself is unlikely to move the needle far enough. Others provide long and detailed lists of a dozen or more bodies of law and regulations that should be reformed to ensure that accountability to wider stakeholders is established. But that inevitably poses multiple political impediments and therefore takes time. For their part, critics of ‘stakeholderism’ posit what amounts to an impossibility theorem, contending that corporate leaders simply are unable to identify *ex ante* who the relevant stakeholders are, or to devise a formula regarding how to weigh and balance their conflicting interests – let alone how their concerns would be represented at board levels.

In contrast, we focus on a pathway that reflects the ambition of stakeholder capitalism, but which current reform proposals have largely overlooked. We draw on practical experience in the field of business and human rights, where leading companies are increasingly embedding human rights due diligence processes into their strategic decision-making. As human rights due diligence is made mandatory for companies, which it is in a growing number of jurisdictions – with debate centered in but not limited to Europe – risks to stakeholders become a significant corporate governance issue. It makes it necessary that their concerns are addressed and requires demonstration that indeed they are. Such changes by themselves may not constitute a full-blown system of multi-fiduciary obligations, but they mark substantial strides on the path toward it, and they are doing it in the relatively near-term.

Beginning in the 1980s, a series of ideological and policy shifts swept through the Anglo-American variant of capitalism. The shifts included weakening regulations, social safety nets, and unions; outsourcing government functions to private contractors; offshoring production; encouraging the ascendance of finance and the financialization of the real economy; and stipulating that maximizing shareholder value was the primary if not sole purpose of the listed corporation. Relatively few other countries embraced all these features outright. Nevertheless, they spread internationally through bilateral investment treaties; bilateral/regional free trade agreements; conditionalities imposed by the global financial institutions and World Trade Organization (WTO) rules; and by the new and powerful global market forces these developments unleashed. This brought benefits to people and countries well positioned to seize the new opportunities. But it also contributed to a more constricted conception and role of the state, as well as ever-widening gaps in income, wealth, status, health, and even life expectancy. It ultimately created deep social resentment and loss of trust in institutions of all kinds.

Recently, some of the world's leading business associations began to distance themselves from a core feature of this system of political economy: shareholder primacy. In August 2019, the U.S. Business Roundtable issued a new statement on 'the purpose of a corporation', signed by 181 of the 200+ membership. The press release noted that each previous update of its corporate governance guidance had endorsed the principle of maximizing shareholder value. In contrast, the new statement commits the signatory CEOs 'to lead their companies for the benefit

of all stakeholders – customers, employees, suppliers, communities and shareholders’.<sup>1</sup> For its part, the British Academy began deliberations on ‘Reforming business for the 21<sup>st</sup> century’ in 2017. The final report, ‘The Future of the Corporation’, was published in late 2019: ‘We set out here that a corporate purpose identifies how the company assists people, organizations, societies and nations to address the challenges they face, while at the same time avoiding or minimising problems companies might cause’.<sup>2</sup> That was followed by the World Economic Forum 2020 Davos Manifesto: ‘The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large’.<sup>3</sup>

Thus, for the first time in decades a serious mainstream debate has begun on the social purpose of the corporation. The *Wall Street Journal* savaged the BR statement for ‘undermining the morality of free markets and the moral and fiduciary duty’ of corporate leaders.<sup>4</sup> At the same time, one of the leading Wall Street law firms welcomed what it described as ‘the advent of

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<sup>1</sup> Business Roundtable, ‘Business Roundtable Redefines the Purpose of a Corporation’ (August 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> (accessed same day).

<sup>2</sup> British Academy, *Principles for Purposeful Business: How to deliver the Framework for the Future of the Corporation* (2019), <https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf> (accessed 6 January 2020).

<sup>3</sup> World Economic Forum, ‘Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution’, <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>. (Accessed 5 December 2019).

<sup>4</sup> ‘King Warren of the Roundtable’” *Wall Street Journal* editorial (6 October 2019), [www.wsj.com/articles/king-warren-of-the-roundtable-11570395953](http://www.wsj.com/articles/king-warren-of-the-roundtable-11570395953) (Accessed: 11 November 2019).

stakeholder governance.’<sup>5</sup> The question has shifted, it stated, from *whether* corporate boards should take stakeholder interests into account, to *how* it should do so.

But therein lies a problem. The *how* question unveils significant differences of opinion as well as structural and political impediments. Some who welcome stakeholder governance place their bet on the enlightened voluntary cooperation between corporations, large institutional investors, and other stakeholders.<sup>6</sup> Yet considering the financial incentives the current system of equity-based compensation affords corporate directors and executives, especially in the Anglo-American world, voluntarism by itself is unlikely to move the needle far enough. Others, such as the British Academy and former Delaware Chief Justice Leo Strine, provide long and detailed lists of various areas of domestic law and regulation that should be reformed significantly in order to hold directors responsible for ensuring that accountability to wider groups of stakeholders is established.<sup>7</sup> But the longer the list, the greater the political difficulties they face and the longer they take to implement. For their part, opponents of ‘stakeholderism’ posit what amounts to an impossibility theorem, arguing that corporate leaders simply are unable to identify *ex ante* who the relevant stakeholders are, or a formula regarding how to weigh and balance their conflicting interests – let alone how they would be represented on corporate boards.<sup>8</sup> Many

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<sup>5</sup> Martin Lipton, Steven A. Rosenblum & Karessa L. Cain, ‘Thoughts for Boards of Directors in 2020’, *Harvard Law School Forum on Corporate Governance*, (10 December 2019), <https://corpgov.law.harvard.edu/2019/12/10/thoughts-for-boards-of-directors-in-2020/>. (10 December 2019).

<sup>6</sup> Martin Lipton, ‘It’s Time to Adopt the New Paradigm’, *Harvard Law School Forum on Corporate Governance* (11 February 2019), <https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/>. (Accessed 12 February 2019).

<sup>7</sup> Leo F. Strine, Jr. ‘Toward Fair and Sustainable Capitalism’, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3461924](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461924) (11 October 2019).

<sup>8</sup> Lucian A. and Tallarita, Roberto, *The Illusory Promise of Stakeholder Governance* (February

continue to view the ‘single objective function’ of profit maximization as the only clear and easily measurable performance metric, and believe it has served corporations and society well.

Foundational questions of corporate purpose and governance are unlikely to be resolved anytime soon. The tasks are complex and contentious, and they are burdened by decades of institutional sediment coupled with strong self-interest. In the wise words of William Allen, former Chancellor of the Delaware Court of Chancery, who assessed previous such paradigmatic shifts in corporate governance, they ‘will be worked out, not deduced.’<sup>9</sup>

We write in that same spirit: we set out a pathway to advance – indeed, one that has contributed to – the concept and practice of multi-fiduciary obligations of corporate management and boards. Our article draws on the experience of the United Nations Guiding Principles on Business and Human Rights (UNGPs), unanimously endorsed by the UN Human Rights Council in 2011, and the multiple recursive effects they have generated within an emergent global regulatory ecosystem.<sup>10</sup> The UNGPs are a text, to be sure. But as César Rodríguez-Garavito has observed, and as we intended, they should be understood not only as a static text, ‘but also in their *dynamic dimension* (such as their capacity to push the development of new norms and practices that go beyond the initial content of the [UN]GPs and improve companies’ compliance with human rights standards.’<sup>11</sup>

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26, 2020), <https://ssrn.com/abstract=3544978>; forthcoming, *Cornell Law Review*, December 2020.

<sup>9</sup> William T. Allen, ‘Our Schizophrenic Conception of the Business Corporation’ 14 *Cardozo Law Review* 261, 281.

<sup>10</sup> United Nations, *Guiding Principles on Business and Human Rights* (New York and Geneva, 2011), [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).

<sup>11</sup> César Rodríguez-Garavito, ‘Business and Human Rights: Beyond the End of the Beginning’, in César Rodríguez-Garavito, ed., *Business and Human Rights: Beyond the End of the Beginning*

A core element in the regulatory ecosystem of which the UNGPs are a part requires companies to embed effective human rights due diligence (HRDD) processes in their decision-making and oversight systems in order to identify, prevent, mitigate and account for the adverse human rights impacts connected to their operations and business relationships. HRDD thereby brings the concerns of affected stakeholders into a company's strategic and operational decision sphere and requires it to take these concerns into account. Once HRDD is made mandatory, as is beginning to happen in a number of jurisdictions, centered in but not limited to Europe, it is on its way to becoming a significant corporate governance issue for management and boards alike.

Our discussion is divided into 5 parts. The first briefly reviews what is at stake in the shareholder/stakeholder debate. The second introduces the concept of human rights due diligence and demonstrates that even in its soft law form it is bringing stakeholder concerns and corporate practice into closer alignment. Section three explains how this experience with soft law is informing national and supranational legal requirements in a growing number of jurisdictions, with knock-on effects for corporate governance. Section four briefly describes how these trends are reinforced by the remarkable rise in ESG investing (taking corporate environmental, social and governance factors into account in making investment decisions). The conclusion briefly summarizes how, a mere decade after UN endorsement of the Guiding Principles, they have turned the idea that companies are responsible for preventing and addressing adverse impacts of

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(New York: Cambridge University Press, 2017), 11, emphasis in original. For the UNGPs analytical underpinnings, see John G. Ruggie, 'The social construction of the UN Guiding Principles on Business and Human Rights', in Surya Deva & David Birchall, eds., *Research Handbook on Human Rights and Business* (Cheltenham, UK: Edward Elgar, 2020).



their business on people’s basic dignity and equality into a mainstream proposition – and have helped open the door for ‘the advent of stakeholder governance’.

## I. THE THOUGHT HEARD AROUND THE WORLD<sup>12</sup>

Whatever their differences, advocates of stakeholder capitalism share one core belief: the urgency of leaving Milton Friedman and his legacy behind. For Friedman, one of the twentieth century’s foremost advocates of largely unfettered markets, the idea that corporations should have a role in addressing larger social issues represented a step on the road to socialism.

Corporate directors and executives, he maintained, are agents intended to serve the interests of their principals, shareholders, which he (wrongly) considered to be the owners of the listed corporation.<sup>13</sup> If agents wished to spend money on worthy causes, they were free to do so using their own.

Friedman’s popular writings were intended to promote an ideological agenda. Not so for finance theorists Michael Jensen and William Meckling.<sup>14</sup> In a technical paper that has more than 85,000 citations, they took up Friedman’s contention in formal terms: what became known as the ‘agency problem.’ Drawing among other sources on the theory of property rights, it

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<sup>12</sup> This was the title of a special *New York Times* feature, edited by Andrew Ross Sorkin, ‘Greed is Good. Except When It’s Bad’ (September 13, 2020), published on the 50<sup>th</sup> anniversary of Milton Friedman’s landmark essay, ‘The Social Responsibility of Business is to Increase Its Profits’, published in the *New York Times Magazine*.

<sup>13</sup> Robé has expressed Friedman’s error most succinctly: “After the process of incorporation, shareholders have *no right of access* to the assets of the corporation; they *do not enter into any contract* in its name. *No liability* can arise for them from the corporate activity. They *do not run* the corporation and *do not own it*.” J-P Robé, ‘Being Done with Milton Friedman’ (2012) 2 *Accounting, Economics, and Law* 1, 8.

<sup>14</sup> Michael C. Jensen and William H. Meckling, ‘Theory of the firm: Managerial behavior, agency costs and ownership structure’ (1976) 3 *Journal of Financial Economics* 305-360.

addressed the means by which principals can most effectively minimize ‘agency costs’ – literally the costs of monitoring and incentives that principals incur in regulating agents. In the corporate context, their solution was to structure contracts in such a way that agents were led to behave more like principals by bearing financial risks of their own decisions – linking CEO compensation to stock performance. These ideas fit well into the broader ascendance of the ‘Chicago School’ of economics and the conservative Law and Economics movement, backed by serious money.<sup>15</sup> The shareholder primacy doctrine emerged from this mix. It achieved near epistemic closure in business schools and academic corporate law programs, becoming a governing norm in the business world well before it was memorialized in corporate law and securities regulation<sup>16</sup>-- which began during the Thatcher and Reagan administrations.

Jack Welch, legendary CEO of General Electric, described maximizing shareholder value as ‘the dumbest idea in the world’<sup>17</sup> – eight years after he retired from a career during which GE met or beat analysts’ earnings forecasts with ‘unnatural precision’.<sup>18</sup> Linking compensation to

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<sup>15</sup> Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008); Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (New York: Doubleday, 2017); Kurt Andersen, *Evil Geniuses: The Unmaking of America* (New York: Random House, 2020).

<sup>16</sup> Lynn Stout, *The Shareholder Value Myth* (San Francisco: Berrett-Koehler, 2012); N. Craig Smith and David Rönnegard, ‘Shareholder Primacy, Corporate Social Responsibility and the Role of Business Schools’ (2016) 134 *Journal of Business Ethics* 463-478; Henry Hausman, & Reinier Kraakman, 2001, ‘The End of History for Corporate Law’. 89 *Georgetown Law Journal*, 439–468.

<sup>17</sup> Francesco Guerra, ‘Welsh condemns share price focus’, *Financial Times* (12 March 2009), <https://www.ft.com/content/294ff1f2-0f27-11de-ba10-0000779fd2ac>.

<sup>18</sup> Roger Martin, former Dean of the Rotman School of Management at the University of Toronto, quoted in Steve Denning, ‘The Dumbest Idea in the World: Maximizing Shareholder Value’, *Forbes* 28 November 2011), <https://www.forbes.com/sites/stevedenning/2011/11/28/maximizing-shareholder-value-the-dumbest-idea-in-the-world/#388522d92287>. (Accessed 16 January 2020).

performance typically came to mean short-term performance. The Welch example suggests that earnings reports can be easily manipulated. Buying back shares boosts their price. So too does cutting costs by cutting social and environmental corners. In short, shareholder primacy contributed to an explosion in executive compensation and stagnation in workers' wages, with short-termism a threat to the long-term health of firms – and of the societies in which they operate.

The origins of modern stakeholder theory typically are attributed to the work of R. Edward Freeman, a professor of management and business ethics. In his 1984 book, *Strategic Management*, Freeman argued that 'current approaches to understanding the business environment fail to take into account a wide range of groups who can affect or are affected by the corporation, its 'stakeholders'.<sup>19</sup> Freeman did not see himself in competition with Friedman; shareholders, in his view, were one among many stakeholders. But his position on what this implied evolved over time. In its early iteration, he saw stakeholder theory as a tool that businesses should use to scan and manage their external environments more effectively. A decade later he outlined an ethical basis for a multi-fiduciary view of corporate obligations.<sup>20</sup> Still more recently, he sought to 'reframe the narrative of capitalism' altogether, focused on 'individuals voluntarily working together to create sustainable relationships in the pursuit of value creation'.<sup>21</sup>

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<sup>19</sup> R. Edward Freeman, *Strategic Management: A Stakeholder Approach* 2<sup>nd</sup>. Ed. (New York: Cambridge University Press, 2010), p. 1.

<sup>20</sup> R. Edward Freeman. 'The politics of stakeholder theory: some future directions' (1994) 4 *Business Ethics Quarterly*, 409-421.

<sup>21</sup> R. Edward Freeman, Kirsten Martin & Bidhan Parmar, 'Stakeholder Capitalism' (2007) 76 *Journal of Business Ethics*, 303, 311.

Voluntary approaches to corporate responsibility in the 1990s and 2000s made extensive use of Freeman’s notion of stakeholder theory as a management tool – in such forms as stakeholder mapping and interviews, stakeholder panels, and various forms of structured dialogue. Today the question of multi-fiduciary obligations is central to the stakeholder capitalism debate: whether it can be achieved, and how. As we indicated at the outset, our contribution draws on the experience of human rights due diligence requirements prescribed by the UNGPs, initially stipulated as a normative expectation that companies demonstrate that they respect human rights throughout their operations and business relationships. That expectation has provided the focal point for mandatory measures in a growing number of jurisdictions. In the investment realm, this development is reinforced by the fact that human rights issues constitute the core of the S in ESG investing, attention to which has increased significantly in the context of the Covid-19 pandemic.

## **II. SOFT LAW**

In 2005, the UN Human Rights Council requested the UN Secretary-General to appoint a Special Representative on Business and Human Rights. The initial mandate was modest: to identify and clarify standards and best practices in the area of business and human rights; to clarify such concepts as ‘corporate complicity’ in human rights abuses committed by a related party, as well as the ‘corporate sphere of influence’; and to develop materials and methodologies for human rights impact assessments.<sup>22</sup> Six years and some 50 international consultations and hundreds of research reports later, the Council unanimously endorsed the Guiding Principles on

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<sup>22</sup> United Nations Document E/CN.4/2005/87 (15 April 2005). Ruggie served as the Special Representative; Rees was his senior policy advisor and Davis senior legal advisor. At the end of the mandate Rees and Davis founded Shift, the non-profit center of expertise on the UNGPs.

Business and Human Rights (UNGPs).<sup>23</sup> This marked the first time the UN had issued official guidance to states and firms on their respective duties and responsibilities in relation to business and human rights; and it was the first time it ‘endorsed’ a normative text that had not been negotiated by governments themselves. That endorsement elevated the UNGPs beyond pure voluntarism, into the domain of ‘soft law’.<sup>24</sup>

In brief, the UNGPs are based on three ‘pillars’: the state duty to *protect* against human rights abuse, including by third parties such as business; an independent corporate responsibility to *respect* human rights, that is, actively to avoid people’s human rights being harmed through their activities or business relationships, and to address harms that do occur; and that victims should have access to effective *remedy*, in which both states and enterprises have a role to play. For present purposes, we focus on the embedding of human rights due diligence as the main management tool for enterprises to know and show that they respect human rights. The process includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking the effectiveness of these responses, and communicating how impacts are addressed. Such impacts may occur as a result of an enterprise’s own activities, or they may be linked to its operations, products or services by business relationships up and down the value chain.

Apart from unanimous support from the Human Rights Council for the Guiding Principles, their due diligence provisions in particular were welcomed by governments, business,

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<sup>23</sup> All documentation was posted on the Business and Human Rights Resource Centre website; <https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/>. (Accessed 15 November 2020).

<sup>24</sup> UN Document A/HRC/RES/17/4 (6 July 2011). Soft law refers to international instruments that derive their normativity from broad political consensus but do not in themselves have legally binding force.

workers organizations, and many civil society organizations. As we already noted and will elaborate in the next sections, for governments they provided a focal point for policy developments and engagement with business, and ultimately for a move toward mandatory measures. For business, they provided a conceptual framework and a template for management tools with which to address risks posed to stakeholders. For affected individuals, communities, and those who advocate for their cause, human rights due diligence provided an authoritative framework for evaluating companies' behavior and seeking to engage them in reducing harms

In the remainder of this section, we consider how the implementation of human rights due diligence by companies – properly done – brings the concerns and interests of affected stakeholders into greater prominence in corporate decision-making at both operational and leadership levels, and why it offers a window into what one effective and viable path toward 'stakeholder capitalism' looks like in practice.

The construct of human rights due diligence was deliberately adapted from other (legal, financial, technical) due diligence processes traditionally familiar to business, but with certain key distinctions. The first distinction is that it is not a transactional process, as for a new acquisition, partnership or investment, but an on-going process that continues and evolves. This reflects the fact that human rights risks connected to a company's operations and value chain are themselves constantly changing, whether due to internal factors such as a new product development or evolving workforce composition, or due to external factors such as regulatory changes, moves into new markets or the emergence of local conflict.

It flows from this that human rights due diligence is more about a consistent practice of reviewing how business decisions and actions may impact different people in different contexts, than it is about a single technical exercise; it is about the whole business, not just the actions of

one function or set of experts; its success is a product in good part of the company's governance, leadership and culture, and cannot be achieved on the basis of mere checklists and compliance.

As the UNGPs state:

*'business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships...[This commitment] should be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights'.*<sup>25</sup>

The second key distinction between human rights due diligence and more traditional forms of this process lies in the critical role of engagement with stakeholders. Human rights due diligence reflects the general categories of stakeholder – employees, suppliers, customers and communities – that is typically cited in reference to stakeholder capitalism. Yet it avoids the common critique that these categories are too expansive, and the interests of their members too varied, for executives to make sense of in their deliberations. Instead, human rights due diligence places the focus squarely on those people whose basic dignity and equality are at risk of harm from the ways in which business gets done. Those may be employees or members of the wider workforce who are on low pay, low hour or unpredictable contracts or lacking access to benefits. They likely include low paid workers (often women) in supply chains, migrant workers with limited protections in local law and those unable to unionize. They are more likely to include poor, indigenous or minority communities displaced to make way for a new project or investment than wealthier communities around a flagship store. And in many instances their

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<sup>25</sup> See the commentary to UN Guiding Principle 16.

livelihoods may be at risk from illegal land grabs, or their lives from the rogue conduct of public or private security forces. Therefore, companies need to learn the difference between human rights violations that are salient to individuals, without immediately being material to company itself – although the latter may soon follow the former.

These potentially affected stakeholders are present in developed and developing countries alike, and they are typically subjected to the greatest social and economic inequalities. It is consultation with *these* stakeholders – to understand their views and experiences so these can be factored into business decisions and actions – that is essential to the construct of human rights due diligence under the UN Guiding Principles.<sup>26</sup> While experts and other types of stakeholder play a role in the process, affected individuals and groups are front and center.

These two facets of human rights due diligence – a ‘whole of business’ approach and a focus on specific stakeholders whose human rights are at risk – differentiate those companies that make consistent progress in meeting their responsibility to respect human rights from those that do less well or simply fail. No company gets it right all the time. But a view into how these approaches come through at each stage of due diligence shows which businesses are on the right trajectory.

When it comes to the first component of due diligence – identifying and assessing human rights risks and impacts connected to the company’s operations and value chain – companies that get it right are those looking at every turn to find out what they don’t know, rather than hoping or assuming there is nothing to find out. They recognize the importance of identifying human rights issues that are salient due to the severity of their impact on people. And where they find a severe

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<sup>26</sup> See UN Guiding Principles 17, 19 and 20 respectively.



risk or impact, they don't just want to deal with it and move on, but to understand why and how it arose and where it may do so again, so they can address its causes, not just the symptoms.

They recognize that engaging with at-risk stakeholders and those who represent them (as well as relevant experts) is central to understanding what's going on. Furthermore, leading companies connect this enquiry to their business strategy and their business model, knowing that where human rights risks have their roots in either, they will recur and compound. For these businesses, social audits in factories and farms are not a policing exercise of their suppliers aimed at forcing short-term fixes, but a process of discovery that looks to understand how various factors and incentives may drive workplace abuses, including whether and how their own purchasing (or other) practices may be part of the problem.

The second component of human rights due diligence focuses on the action companies need to take to prevent or mitigate the identified risks and impacts. In many instances, a policy or process may need to be developed or adapted to better define what people in the company *should* do. However, it is only in ensuring that this changes day-to-day practices – what people *actually* do – that harms can be consistently reduced. A risk or impact that has complex, systemic causes usually requires collaborative solution-finding, not just unilateral action. Smart companies know how to use their leverage together with partners and allies to drive change; the most successful ones build formal leverage (for example, contracts) and informal leverage (persuasion, incentives, collective action) into their key business relationships even before problems arise. They join collaborative initiatives not to hide in the pack but to capitalize on the combined influence of the group to achieve clear goals. Companies that do well in mitigating human rights risks commit adequate leadership, innovation, time and resources to the task. Wherever feasible,

they involve the affected stakeholders or their representatives in discussions of the actions to be taken, and in any event provide them with updates on progress.

The third component of human rights due diligence is to track the effectiveness of the company's efforts to prevent and mitigate the adverse impacts it has identified. Surveys and benchmarks consistently show that this is the most under-reported part of companies' human rights due diligence – almost certainly because it is also implemented least often and least well. There has been impressive growth in the number of company and collaborative initiatives that aim to improve the situation of affected stakeholders, yet good intentions and sincere efforts too rarely carry through to rigor in assessing whether these investments are working.

That said, various consumer-facing companies in the apparel and food and beverage sectors have made notable strides in setting targets for the outcomes they want to achieve in the lives of affected stakeholders – be it in relation to living wages or incomes, improved workplace protections for women, or greater collective bargaining. They usually do so with the explicit support of top management given that both the human rights risks concerned and therefore the targets being set will involve certain factors over which the company has limited control. This in turn demands transparency and accountability, working with civil society and other partners, to both convey and explain any setbacks as well as progress. Those companies showing the leadership to get serious about measuring the change they aim to make stand out from the pack and often report benefits to the company itself. In companies that don't, practitioners face frustrations that they cannot demonstrate the value of their efforts for either stakeholders or the company, and the budgets they work with therefore remain both arbitrary and inadequate.

The fourth and final component of human rights due diligence is for companies to communicate how they are addressing human rights impacts. The UNGPs emphasize

communication to affected stakeholders themselves, as a key form of accountability. Formal public reporting is also part of the picture. This is not about the kind of glossy report of twenty years ago, describing philanthropic projects unrelated to the core business. The expectation that companies report on at least some aspects of their human rights due diligence processes is now routine in a number of jurisdictions, at least for large listed companies. With it comes a growing recognition that a company's salient human rights risks – its most severe potential impacts on people – converge ever more strongly with risks to the business, be they reputational, legal, operational or financial.

Indeed, regulations related to human rights due diligence started first in the realm of reporting on due diligence, before the focus shifted to regulating the process of due diligence itself, as we discuss in the next section. Many of those early reporting regulations homed in on human rights risks such as slavery, human trafficking and forced labor in corporate supply chains where questions of their financial materiality to shareholders was seen as moot – the untenable nature of the impacts on workers and their families was paramount. In cases such as the Modern Slavery Acts of the UK and Australia, these developments were coupled with the expectation that the board put their name to the account of how their company identifies and tackles these risks in its supply chains. In other words, some of these early regulatory initiatives already focused on affected stakeholders and sought to engage the company's leadership and governance structures.

As this discussion of voluntary human rights due diligence shows, there can be a wide gulf between companies that have been building up their policies, practices, processes and monitoring and those that have taken a compliance approach or sought to hide from scrutiny altogether. Latterly, a growing number of companies that have come to understand the value of

human rights due diligence have gone further. They have recognized that the only way to close the gap and ensure that treating affected stakeholders with respect becomes the norm, is for this kind of due diligence to become a legal requirement. In the next section we look at the regulatory evolution that has brought us to this point.

### **III. THE RISE OF MANDATORY MEASURES**

The UNGPs envisaged that a dynamic mix of approaches by states would be needed to transform how businesses behave on a global scale. This included both mandatory and voluntary measures – encompassing everything from authoritative guidance for business, to positive incentives, to sanctions and appropriate forms of liability. It also included measures at both national and international levels. The first five years of implementation of the UNGPs were characterized at the national level by states encouraging voluntary action by businesses and adopting National Action Plans: policy documents that sought to bring greater coherence to the work of relevant ministries and agencies in order to set more consistent human rights expectations for business. 2015 onwards saw a growing use of human rights reporting requirements, particularly within the European Union (EU), but these were typically lacking in any meaningful consequences for non-compliance.

At the UN level, an intergovernmental working group on a potential treaty on business and human rights was established in 2014. In parallel, the expectations of the UNGPs were being increasingly included in commercial contract requirements by major global brands with their suppliers, and by some financial institutions in their agreements with project operators and clients. The ‘hardening’ of the corporate responsibility to respect was thus largely occurring in the realm of private not public law.

By 2017, it was clear that this patchwork of state policy and private contractual arrangements did not add up to a deliberate and proactive approach by states to assess existing regulatory frameworks, identify gaps and weaknesses, and adopt appropriate measures to drive greater business respect for human rights – as the UNGPs expect them to do.<sup>27</sup> The adoption of the French Duty of Vigilance Law marked a turning point in this regard.<sup>28</sup> It was the first legislation to apply comprehensive human rights and environmental due diligence obligations to (certain) companies, with consequences for a failure to meet them.

By 2020, there were legislative proposals for versions of human rights due diligence on the table in Germany, the Netherlands, Norway and Switzerland, with active debates underway in countries including Sweden, Finland, Denmark, the UK and, notably, at EU level. However, the question of what accompanying policy measures would be needed to make any new legal requirements as effective as possible was yet to receive the attention it merited. Taking a different approach, the U.S. Customs and Border Patrol (CBP) had significantly stepped up action, issuing twelve orders between mid-2019 and mid-2020 to prohibit the import of goods that were suspected of being produced with forced labor.<sup>29</sup> This brought home the hardening of due diligence expectations for a growing number of U.S. companies, because lifting of the orders

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<sup>27</sup> See especially Guiding Principles 1 and 3 and the commentary to 3.

<sup>28</sup> Law 2017-399 related to Duty of Vigilance of Parent Companies and Commissioning Companies 2017 (France).

<sup>29</sup> CBP acts under Section 307 of the Tariff Act 1930 (US), which prohibits the import of goods produced in whole or in part with forced labor or convict labor. CBP appears to have increasingly focused on evidence of improved outcomes for workers (such as reimbursement of recruitment fees) in more recent actions. Corporate Accountability Lab, ‘Using the Master’s Tools to Dismantle the Master’s House’ (31 August 2020), <https://corpaccountabilitylab.org/calblog/2020/8/28/using-the-masters-tools-to-dismantle-the-masters-house-307-petitions-as-a-human-rights-tool>. (Accessed 2 November 2020).

is conditional on demonstrating, through appropriate HRDD, that the goods are not tainted with forced labor.

In this section, we consider the relevance and limitations of the ‘first generation’ of human rights reporting requirements, and the rapid acceleration of support for comprehensive human rights due diligence obligations, including from leading businesses themselves. Most of the obligations that have been adopted or are under debate do not explicitly address the role of corporate boards. However, by requiring consideration of companies’ impacts on human rights at the strategic level, they have implications not only for core management issues including risk identification, action plans and disclosure, but also for board oversight of those areas.

Turning first to the role of human rights reporting requirements, the focus on modern slavery as a key topic of disclosure began with the California Transparency in Supply Chains Act 2010 (TISC), which came into force in January 2012, half a year after the adoption of the UNGPs. TISC was one of the first laws to recognize the role of business, particularly major apparel and electronics companies, in tackling slavery, human trafficking and forced labor abuses in their global supply chains. The law was grounded in an assumption that if consumers were provided with greater information about how products were being made, they could play a greater role in the fight against these abuses. While not envisaged in the Act itself, individuals have used it to bring a handful of cases against companies regarding the scope of their disclosures. However, there is limited evidence of the impact of the law within companies subject to it.

A similar assumption informed the adoption by the UK government of the Modern Slavery Act 2015. While it included a focus on Board approval of corporate statements, both the Act and its accompanying guidance were criticized for lacking precision in terms of the actual

due diligence that should underpin corporate reporting, and for the absence of enforcement mechanisms, with the task of monitoring compliance in effect left to civil society organizations and investors.

Drafting of the Australian Modern Slavery Act 2018 (Cth) sought to learn from this experience, including by detailing what businesses were required to do and to report, in line with the UNGPs. The implementation guidance made clear that companies were expected to be proactive in aligning with the expectations of the corporate responsibility to respect, including by using leverage and providing or participating in remedy where appropriate. The less well-known law passed by the Australian state of New South Wales – the Modern Slavery Act 2018 (NSW) which is not yet in effect – goes further in allowing for fines to be imposed on companies for failing to make, or for making false or misleading, statements. A Canadian Modern Slavery Act was proposed in early 2020 along similar lines, requiring reporting and providing for sanctions for non-compliance, also including liability for directors.<sup>30</sup>

In 2014, the European Parliament adopted the Non-Financial Reporting Directive (NFRD).<sup>31</sup> The NFRD required certain large companies operating in the single market to report on the impact of their activities on a range of non-financial issues, including human rights. The Directive provided that companies ‘may rely on...international frameworks such as...[the UNGPs]’. The non-binding guidance on the NFRD did little to clarify matters. While failing to

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<sup>30</sup> An Act to enact the Modern Slavery Act and to amend the Customs Tariff (Bill S-211), First reading, 5 February 2020, <https://www.parl.ca/DocumentViewer/en/43-1/bill/S-211/first-reading>. (Accessed 17 November 2020.)

<sup>31</sup> Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1. EU member states were required to implement the Directive by December 2016.

report could result in sanctions, these were left to Member States to determine, with the result being a relatively weak and uneven set of both reporting requirements and potential consequences. A 2019 evaluation of reporting under the NFRD by 1,000 companies found that only 22% described their HRDD processes and just under 15% explained their most significant human rights risks – the fundamental starting point for any serious strategy to prevent and address adverse impacts.<sup>32</sup>

Outside European and Anglo-American legal systems, there are general non-financial reporting requirements, including on human rights, in jurisdictions including South Africa (for listed companies) and India (for the largest 1,000 listed companies based on the National Guidelines on Responsible Business Conduct, which reference the UNGPs).

Unsurprisingly, implementation of these reporting laws has been highly varied. Leading companies have used them to provide some real insight into both the challenges and opportunities for addressing their salient human rights issues, and they have connected their disclosure to concrete action and evidence of progress.<sup>33</sup> But too many others have either ignored them or delivered the minimum lip service required. Nevertheless, the inadequacies in the design and implementation of these reporting requirements have influenced calls from many stakeholders – including from some businesses committed to the UNGPs – for more comprehensive mandatory measures.

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<sup>32</sup> Alliance for Corporate Transparency, ‘2019 Research Report: An analysis of the sustainability reports of 1000 companies pursuant to the EU Non-Financial Reporting Directive’ (2020), <https://www.allianceforcorporatetransparency.org/> (Accessed 26 October 2020).

<sup>33</sup> Shift, ‘Dissecting Disclosure Series’ (March 2020) <https://shiftproject.org/resource/dissecting-disclosure-series/intro/>. (Accessed 2 November 2020).



In 2020, as part of its new sustainable finance strategy, the EU embarked on a review of the NFRD to address its weaknesses from the perspectives of both companies and users of non-financial information. This includes exploring a potential EU-wide non-financial reporting standard – mandating specific information, indicators and metrics to be reported – to bring more rigor and consistency to such disclosure. That offers a critical opportunity to further define what meaningful human rights reporting in line with the UNGPs should look like and is important because corporate disclosure will be an essential complement to the effective implementation of comprehensive HRDD legislation.

Also adding to the momentum in favor of more comprehensive mandatory measures were Government-commissioned assessments in key European countries that highlighted slow rates of corporate implementation of HRDD, particularly the studies carried out between 2018-20 in Germany,<sup>34</sup> and 2017-20 in the Netherlands.<sup>35</sup> At EU level, an assessment commissioned by the European Commission’s Directorate-General for Justice and Consumers (DG JUST) showed similar results.<sup>36</sup> It also showed a high degree of convergence among businesses interviewed regarding their reasons for supporting a more comprehensive regulatory approach – reasons that have been echoed in subsequent business statements. These included the view that, after a decade

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<sup>34</sup> German Federal Foreign Office, ‘Monitoring the National Action Plan for Business and Human Rights’ (13 October 2020), <https://www.auswaertiges-amt.de/en/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2131054> (accessed 2 November 2020).

<sup>35</sup> Dutch Ministry of Foreign Affairs, ‘Evaluation and Revision of policy on Responsible Business Conduct’, <https://www.government.nl/topics/responsible-business-conduct-rbc/evaluation-and-renewal-of-rbc-policy>. (Accessed 2 November 2020).

<sup>36</sup> European Commission Directorate-General for Justice and Consumers, ‘Study on Due Diligence Requirements through the Supply Chain: Final Report’ (January 2020).

of adoption by leading companies, such regulation could: 1) now create a level playing field by holding laggards to the same standard, 2) provide companies with more leverage with their business partners on human rights issues and 3) if the standard is set at EU level, increase legal certainty for many businesses by creating a harmonized approach.

Equally important, and at the root of demands from civil society for enhanced mandatory measures, were the ongoing and significant challenges experienced by victims and survivors who continued to struggle to access meaningful remedy for harms, particularly judicial remedy. While case law in the UK and Canada confirmed that access to their courts for harms occurring abroad was possible in some situations, the unpredictability and expense of pursuing such cases in companies' home state courts remained prohibitive for most. EU-level regulation could help alleviate that constraint.<sup>37</sup>

At the heart of the critiques of first generation reporting requirements and the debates about new forms of comprehensive due diligence was the issue of accountability: for any measure that requires companies to meet a standard of conduct to be successful, there needs to be some form of consequence for companies that fail to act appropriately.<sup>38</sup> If mandatory regimes are going to help level the playing field in practice, they need to be accompanied by consequences that will be strong enough to ensure that a critical mass of the businesses they cover embed HRDD into business strategy and risk management, and to a high enough standard.

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<sup>37</sup> Anti-Slavery International and European Coalition for Corporate Justice, 'What If? Case studies of human rights abuses and environmental harm linked to EU companies, and how EU due diligence laws could help protect people and planet' (September 2020).

<sup>38</sup> This discussion draws on Shift, 'Accountability as part of Mandatory Human Rights Due Diligence' (October 2020), <https://shiftproject.org/resource/accountability-mhrdd/> (accessed 2 November 2020).

They need to recognize the efforts of those companies that demonstrate they are taking meaningful steps towards meeting the standard, and to employ a range of accountability measures to drive wider uptake.

The UNGPs clearly foresaw liability as one form of accountability for businesses in ensuring they meet their responsibility to respect human rights.<sup>39</sup> In particular, civil liability for failures of due diligence has a legitimate role to play in setting a foundation for judicial remedy for business-related human rights harms. At the same time, under existing legislation and case law, as well as in the more developed proposals for new measures, it is a relatively narrow set of business relationships that could give rise to such liability for a parent or lead company, with the scope often turning on the concept of ‘controlled’ entities, typically drawing on existing legal definitions.<sup>40</sup> As a result, other forms of accountability will be essential to encourage businesses to carry out HRDD to the full scope of the value chain, as envisaged in the UNGPs. We now turn to consider some of these existing and proposed due diligence regimes.

As noted above, the French Duty of Vigilance Law was the first such obligation. It came into force in March 2017. By 2019 there were already assessments of the ‘vigilance plans’ that the largest French companies covered by the Act were required to disclose regarding their global supply chains, as well as the first civil claims alleging failures of due diligence in connection with severe harms. The Act is also applicable to foreign firms with a significant business presence in France. In 2019, the Netherlands adopted a law requiring companies to conduct due diligence with respect to child labor and report on it, with sanctions for repeated non-compliance.

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<sup>39</sup> See the commentary to Principle 17.

<sup>40</sup> The French Duty of Vigilance Law goes furthest, including suppliers with whom the company maintains ‘an established commercial relationship’, a concept that is familiar to French businesses and grounded in domestic law.

It is similar to some reporting-only regimes in that it limited corporate obligations to a specific topic. In 2020, Dutch stakeholders recommended that the government should push for comprehensive human rights due diligence requirements at EU level.<sup>41</sup> The government committed to do so.

In Germany, after national monitoring efforts showed that the proportion of companies voluntarily implementing adequate HRDD fell short of the coalition government's stated goal, key Ministers put forward a proposal in mid-2020 for a due diligence law, which included civil liability. In Switzerland, a citizens' initiative to amend the Swiss constitution to require human rights due diligence, accompanied by civil liability, generated a substantive parliamentary counter proposal that would have addressed many of the major elements. After a narrow defeat of the counter proposal in the Upper House, the 'Responsible Business Initiative' will be put to a popular vote on 29 November 2020. In Norway, a government-mandated expert committee proposed an Act that would require companies offering goods or services in the Norwegian market to conduct and report on their due diligence efforts and impose a duty to disclose information in response to requests about their approach. In Finland, the government commissioned a study into options for a due diligence law, following its political commitment to do so.<sup>42</sup> Legislative proposals were also put forward by parliamentarians in Denmark, Austria

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<sup>41</sup> See the recommendations made by the Social and Economic Council of the Netherlands (SER), a body with employer, worker and expert members that advises the Dutch government: SER, 'Samen naar duurzame ketenimpact: Toekomstbestendig beleid voor internationale MVO' (September 2020), <https://www.ser.nl/-/media/ser/downloads/adviezen/2020/imvo-duurzame-ketenimpact.pdf> (accessed 2 November 2020).

<sup>42</sup> Finnish Ministry of Economic Affairs and Employment, 'Judicial Analysis on the Corporate Social Responsibility Act' (2 September 2020), <https://julkaisut.valtioneuvosto.fi/handle/10024/162411> (accessed 2 November 2020).

and the UK. Outside the EU, Kenya’s National Action Plan proposes the consideration of new due diligence requirements. In mid-2020, in a significant development, DG JUST launched a consultation process on comprehensive mandatory human rights and environmental due diligence that will culminate in a legislative proposal in mid-2021.<sup>43</sup> Grounded in the European Green Deal, the consultation is framed as an initiative on ‘sustainable corporate governance’, and is focused on encouraging and requiring companies to take account of impacts on people and planet in corporate decision-making and to adopt a long-term perspective. (The consultation is also looking at the separate question of amending directors’ duties.) As the consultation document states: ‘Whilst the NFRD is based on incentives “to report”, the sustainable corporate governance initiative aims to introduce duties “to do”’, grounded in the UNGPs and the OECD Guidelines for Responsible Business Conduct.<sup>44</sup>

The European Parliament has proposed its own legislative initiative on a comprehensive due diligence obligation, and the German Presidency of the Council of the EU made this issue a priority in its 2020 agenda, building on the Finnish Presidency’s leadership in 2019.

Growing business support for these developments – particularly at EU level – has been striking.<sup>45</sup> Amfori, a business association focused on sustainable trade, and the Responsible

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<sup>43</sup> This moves away from the prior EU approach of developing regimes that focus on human rights and environmental harms involving specific commodities, such as timber and conflict minerals.

<sup>44</sup> European Commission Directorate-General for Justice and Consumers, ‘Consultation Document: Proposal for an Initiative on Sustainable Corporate Governance’ (October 2020), <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation>, (accessed 2 November 2020).

<sup>45</sup> The statements referenced here are available at Business and Human Rights Resource Centre, ‘Companies and Investors in Support of mHRDD’, <https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/companies-investors-in-support-of-mhrdd/>. (Accessed 2 November 2020).

Business Alliance, a large industry coalition focused on the rights of workers and communities in electronics supply chains, issued positive statements in late 2019. In June 2020, 50 companies wrote positively to the Dutch government; as of August, 65 companies had written to the German government; and in September, 26 leading companies and business associations wrote to the European Commission, expressing their support. In October 2020, the European Brands Association, AIM, joined them with the most detailed business association statement yet, which specifically recognized the importance of accountability measures, including the role of liability. While many of these companies and associations remain cautious about the specifics of legislative proposals, they have demonstrated their commitment to a discussion about ‘what’ not ‘whether’. This momentum was reinforced by a statement from investors with over \$5 trillion in assets under management calling on governments to institute mandatory HRDD measures.

The growing support from European and some U.S.-headquartered business for such measures shows that leading companies increasingly feel equipped to identify those stakeholders whose human rights are most at risk in connection with their business, and to take these risks into account in corporate decision-making – so much so that they are comfortable with these expectations becoming binding. This suggests another path toward stakeholder governance, one that complements others being advocated while also calling into question the ‘impossibility theorem’ advanced by some critics. It opens up space for discussion among all stakeholders (government, business, civil society and investors) about how best to design new comprehensive due diligence regimes in such a way that they minimize unintended consequences and maximize positive outcomes for people – the overriding objective of the UNGPs and a core objective of stakeholder capitalism.

## IV. ESG INVESTING

ESG investing is emerging as a major market factor reinforcing the voluntary and mandatory developments discussed in the previous two sections. It morphed out of the socially responsible investing (SRI) industry, which has existed at least since the 1970s when the first socially screened mutual funds were established.<sup>46</sup> SRI funds initially focused on the exclusion of certain stocks from portfolios (for example, weapons, tobacco, gambling, or alcohol), and they were very active in the anti-apartheid divestment campaign. The term ESG was first introduced in a United Nations report, ‘Who Cares Wins: Connecting Financial Markets to a Changing World’, prepared for the launch of the Principles for Responsible Investment (PRI) in 2006.<sup>47</sup> In effect, the Principles were a mission statement for institutional asset owners and managers not unlike the recent BR statement. Today PRI is an independent non-profit entity and the Principles have some 3,000 institutional and individual signatories with \$100 trillion in assets under management (AUM).

All major asset managers now offer some form of ESG products. Depending on definitions, there are a half-dozen or more types of ESG investing strategies. The most rapidly growing use values-based screening and integrating ESG metrics into financial analytics. ESG investing increased modestly until the 2008 financial sector meltdown; then it turned up like a hockey stick and has continued the same trajectory. In the U.S. it has nearly doubled since 2016,

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<sup>46</sup> Steven Lydenberg, *Corporations and the Public Interest: Guiding the Invisible Hand* (San Francisco: Berret-Koehler, 2005).

<sup>47</sup> UN Global Compact & International Finance Corporation, [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/publications/publications\\_report\\_whocareswins\\_wci\\_1319579355342](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_report_whocareswins_wci_1319579355342). (Accessed 5 November 2020).

in what *Barron's*, the business magazine, described as the “Trump bump.”<sup>48</sup> Today, ESG investing accounts for close to one-third of AUM globally.<sup>49</sup> Moreover, ESG funds have been performing as well if not better than conventional funds – at least since 2015, according to *Wall Street Journal* reporting.<sup>50</sup> During the Covid-19 market downturn, on average ESG funds saw better relative returns, lower volatility, and smaller net outflows.<sup>51</sup> ESG investing is expected to get a boost from millennial investors (born 1981-1996), who are reported to inherit as much as \$30 trillion from their baby boomer parents (1946-1964) over the next decade or two and are reported have a stronger preference for ESG issues.<sup>52</sup>

ESG investing reinforces the business and human rights agenda because most of the elements under the S in ESG are human rights issues or close cousins: workplace standards and employee relations; nondiscrimination and diversity issues; customer and community relations; responsible marketing and R&D; cybersecurity and privacy; and other such matters.<sup>53</sup> In

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<sup>48</sup> Darren Fonda, ‘The Trump Bump and Sustainable Investing’, *Barron's* (23 June 2018). (Accessed 11 November 2019).

<sup>49</sup> Dan Levkovitz, ‘ESG at a Tipping Point’ (20 July 2020), <https://blogs.cfainstitute.org/investor/2020/07/20/esg-at-a-tipping-point/>. (Accessed 5 November 2020).

<sup>50</sup> Dan Weil, ‘Do-Good Funds Finally Are Paying Off in Performance. Will It Last?’, *Wall Street Journal* (6 May 2018).

<sup>51</sup> Morningstar, ‘Global Sustainable Funds Report (Q3, 2020)’, <https://www.morningstar.com/lp/global-esg-flows>.

<sup>52</sup> John G. Ruggie & Emily K. Middleton, ‘Money, Millennials and Human Rights’. 10 *Global Policy* (February 2019), 144-150.

<sup>53</sup> Smith School of Enterprise and the Environment, Oxford University, and Arabesque Asset Management, ‘From the Stockholder to the Stakeholder’, [https://arabesque.com/research/From\\_the\\_stockholder\\_to\\_the\\_stakeholder\\_web.pdf](https://arabesque.com/research/From_the_stockholder_to_the_stakeholder_web.pdf). (Accessed 5 November 2020).



addition, the PRI recently adopted a plan that will require mandatory human rights reporting by its signatories by 2025 as a condition of membership.<sup>54</sup>

ESG investing is closely related to the ongoing debate about corporate purpose and stakeholder capitalism.<sup>55</sup> Both reflect the view that the large public corporation should consider itself as more of a social entity, not merely a piece of private property ‘owned’ by its shareholders. Both reflect the concern that the public corporation is not managing its adverse impacts on people and planet nearly well enough. And both reflect a growing belief among leading business associations, companies and investors that what they have considered to be ‘material’ to business has been too narrowly defined and inadequately reported – and may undermine the sustainability of businesses and the society in which they operate.

## V. CONCLUSION

This paper has documented the evolving regulatory ecosystem for business and human rights as a case study of movement toward stakeholder capitalism. Professor Steven Ratner summarizes well the developments in the human rights sphere:

For the many stakeholders concerned about the impact of business activity on human rights, the last decade has been a whirlwind of norm-making... More important, [it]

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<sup>54</sup> PRI, ‘Why and how investors should act on human rights’ (22 October 2020), <https://www.unpri.org/human-rights-and-labour-standards/why-and-how-investors-should-act-on-human-rights/6636.article> (Accessed 5 November 2020); and Fiona Reynolds and John G. Ruggie, ‘What institutional investors need to know about the ‘S’ in ESG’, *Responsible Investor* (23 October 2020), <https://www.unpri.org/pri-blogs/what-institutional-investors-need-to-know-about-the-s-in-esg/6635.article>. (Accessed 23 October 2020.)

<sup>55</sup> John G. Ruggie, ‘Corporate Purpose in Play: The Role of ESG Investing’, in *Sustainable Investment: A Path to a New Horizon*, eds Herman Bril, Georg Kell & Andreas Rasche (London: Routledge, 2020).

produced nothing less than a wave of lawmaking and standard setting at the national, international, and corporate level—in particular to elaborate for business the scope of their responsibilities under Pillar II [of the UNGPs: the corporate responsibility to respect human rights]. Domestic laws included statutory requirements to implement the UNGPs’ promotion of due diligence by companies as a way of determining their exposure to and involvement with human rights violations.<sup>56</sup>

The major missing piece remains judicial remedy where the harm occurs somewhere in a multinational’s value chain and those harmed cannot access justice in their own country. Suing the parent company in its home jurisdiction remains time consuming and costly, and has yielded only limited results, while all major countries have rejected the idea of a world court for this purpose. Hence the importance of the role of liability in proposed EU regulation and the potential for harmonization that that offers.

We also sought to show that human rights due diligence, a key feature of the Guiding Principles, provides a pathway to advance ‘the advent of stakeholder governance’ in a manner that supports other approaches without, at the same time, encountering the impediments of the ‘impossibility theorem’. Section 2 outlines the components of human rights due diligence, including risk assessment and engagement with affected stakeholders. Once these elements are mandatory, as discussed in Section 3, they affect the legal responsibility not only of management but also of boards. They make it necessary that concerns of affected stakeholders must be addressed and requires demonstration that, indeed, they are. These changes by themselves may

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<sup>56</sup> Steven R. Ratner. ‘Introduction to the Symposium on Soft and Hard Law on Business and Human Rights’, 114 *American Journal of International Law Unbound*, 163, <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/introduction-to-the-symposium-on-soft-and-hard-law-on-business-and-human-rights/1532C4E20155F5A925EF1D9F24948BD8>. (Accessed 30 October 2020)

not constitute a full-blown system of multi-fiduciary obligations, but they contribute to the path toward it, and they are attainable in the relatively near term.