Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations

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[1] We are grateful to Doug Cassel, Peter Muchlinski, Jane Nelson and John Sherman for their comments on an earlier draft.

In 2005, the United Nations Human Rights Council requested the UN Secretary-General to appoint a Special Representative on Business and Human Rights. The 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.[2] Six years and some 50 international consultations and dozens of research reports later, the Council unanimously endorsed the Guiding Principles on Business and Human Rights (UNGPs) developed by the Special Representative.[3] 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 the UN 'endorsed' any normative text that had not been negotiated by governments themselves. That endorsement placed the UNGPs beyond pure voluntarism, into the domain of 'soft law'.[4]

The UNGPs are based on three normative 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 a

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[2] United Nations Document E/CN.4/2005/87 (15 April 2005).

[3] The full text of the UNGPs is available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf. The resolution endorsing them is UN Document A/HRC/RES/17/4 (6 July 2011). Ruggie served as the Special Representative of the Secretary-General (SRSG); Rees was senior policy advisor and Davis senior legal advisor. At the end of the mandate Rees and Davis founded the non-profit Shift; Ruggie chairs its Board.

[4] Soft law refers to international instruments that derive their normativity from broad political consensus but do not in themselves have legally binding force.

company's activities and business relationships, as well as to address harms that do occur; and the need for victims to have access to effective *remedy*, in which both states and enterprises have a role to play. The three pillars are elaborated in 31 Principles, each with explanatory commentary.

Soft law instruments such as the UNGPs differ from treaties in ways other than legal status. Once a treaty text is adopted it is meant to be ratified in its totality, enforced by its States parties, and typically some oversight entity is established to monitor compliance – in the case of UN human rights treaties, each has its own Treaty Body to perform those functions. No oversight or enforcement mechanism exists for soft law instruments. Nor is there any expectation that one as comprehensive as the UNGPs would be adopted as hard law as a single instrument. Guiding principles authoritatively define a universe of discourse and establish its basic parameters and perimeters. Their constitutive elements achieve uptake to the extent that they have intrinsic persuasive power, inspire or justify prescribed conduct, engender shared expectations of ends and means, as well as other such normative and epistemic factors.[5]

The UNGPs are a text, to be sure. But as César Rodríguez-Garavito has observed, and as we intended, they should be understood '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

[5] The effectiveness of certain soft law instruments in part inspired the constructivist approach to global governance theorizing. See Friedrich Kratochwil and John Gerard Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986) 40 *International Organization* 753; and Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52 *International Organization* 855.

[UN]GPs and improve companies' compliance with human rights standards'.[6] This article describes one such process: how the construct of human rights due diligence (HRDD), a core component of the UNGPs, is helping to provide a path beyond shareholder primacy, a ruling corporate governance norm for nearly a half century, toward multi-fiduciary obligations.

This is a critical development for human rights insofar as shareholder primacy coupled with its correlative cost cutting methods have been major drivers of outsourcing and offshoring, risk-shifting, and socializing externalities of one sort or another. It was in the context of these business practices that that formal field of business and human rights (BHR) was established. A significant shift away from shareholder primacy to some form of stakeholder governance – that is, governance in the interests of all of a company's stakeholders – changes the BHR landscape.

Our discussion is divided into five parts. The first recaps the current debate regarding the purpose of the corporation, which centers on whether and how stakeholder governance should and could supersede shareholder primacy. The second provides a brief backstory on shareholder primacy vs. stakeholder governance. The third introduces the elements of HRDD and demonstrates that even in its soft law form it is bringing stakeholder concerns and corporate practice into closer alignment. Section four describes how this experience with soft law is informing national and supranational legal requirements in a growing number of jurisdictions,

[6] 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* (New York: Cambridge University Press, 2017), 11, emphasis in original. For some of the UNGPs' analytical underpinnings, see John Gerard 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); and Ruggie, 'Corporate Globalization and the Liberal Order: Disembedding and Reembedding Governing Norms', in Peter J. Katzenstein and Jonathan Kirshner, *The Downfall of the American Order: Liberalism's End?*', (New York: Cambridge University Press, 2021).

with knock-on effects for corporate governance. The conclusion endeavors to draw some lessons from 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 their business on people's basic dignity and equality into a mainstream proposition with significant implications for corporate governance, while acknowledging that large remain gaps in the business and human rights space.

I. CORPORATE PURPOSE IN PLAY

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.[7] It ultimately created deep social resentment and loss of trust in institutions of all kinds.

Recently, several of the world's leading business associations and related expert groups have begun to distance themselves from a core feature of this form of corporate governance: shareholder primacy. In August 2019, the U.S. Business Roundtable, comprised of the CEOs of the 200 largest U.S. corporations, issued a new statement on 'the purpose of a corporation', signed by 181 of its members. 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'.[8] For its part, the British Academy began deliberations on 'Reforming business for the 21st 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'.[9] That was followed by the World Economic Forum 2020 Davos

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[7] Anne Case & Angus Deaton, *Deaths of Despair and the Future of Capitalism* (Princeton: Princeton University Press, 2020).

[8] 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).

[9] 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). The Academy is an association of scholars in the humanities and social sciences, which seeks to academic expertise to bear on matters of public policy. The initiative was led by Colin Mayer, former Dean of the Saïd Business School at Oxford and author of an influential book on corporate

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'.[10]

Thus, for the first time in decades a serious mainstream debate has begun on the social purpose of the corporation. Not unexpectedly, the *Wall Street Journal* savaged the BR statement for 'undermining the morality of free markets and the moral and fiduciary duty' of corporate leaders.[11] But at the same time, one of the leading Wall Street law firms welcomed what it described as 'the advent of stakeholder governance.'[12] The question has shifted, it stated, from *whether* corporate boards should take stakeholder interests into account, to *how* it should do so.[13]

But therein lies a problem. The *how* question unveils significant differences of opinion as well as practical difficulties. Some who welcome stakeholder governance place their bet on the

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'repurposing': *Prosperity: better business makes the greater good* (Oxford: Oxford University Press, 2018).

[10] 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/.

[11] 'King Warren of the Roundtable'' *Wall Street Journal* editorial (6 October 2019), www.wsj.com/articles/king-warren-of-the-roundtable-11570395953 (accessed 11 November 2019). The reference is to Senator Elizabeth Warren who, in 2018, introduced a Senate bill she called the Accountable Capitalism Act.

[12] 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/ (accessed 11 December 2019).

[13] In some countries, notably Germany, workers' representatives sit on supervisory boards, but corporate repurposing advocacy seeks to include a wider range of stakeholders.

enlightened voluntary cooperation between corporations, large institutional investors, and other stakeholders.[14] 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 laws and regulations that would need to be changed or newly adopted to ensure that accountability to wider stakeholder groups is established.[15] But the longer the lists, the greater the political contestation, which makes this an inherently slow process that also has a high risk of generating unanticipated consequences. 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 fix a formula regarding how to weigh and balance their conflicting interests – let alone how those interests would be represented on corporate boards.[16]

Such foundational questions of corporate purpose and governance are unlikely to be fully 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

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[14] 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).

[15] Leo F. Strine, Jr. 'Toward Fair and Sustainable Capitalism', https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461924 (11 October 2019).

[16] Lucian A. and Tallarita, Roberto, The Illusory Promise of Stakeholder Governance (26 February, 2020), https://ssrn.com/abstract=3544978; forthcoming, *Cornell Law Review,* December 2020.

paradigmatic shifts in corporate governance, they 'will be worked out, not deduced.'[17] HRDD has not been mentioned in this grand debate; but as we shall see, it provides a path toward that end – indeed, one that is already under way.

II. THE THOUGHT HEARD AROUND THE WORLD[18]

Whatever their differences, advocates of stakeholder capitalism share one core belief: the urgency of leaving behind Milton Friedman and his legacy. 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.[19] If agents wished to spend money on worthy causes, they were free to do so using their own. In his scheme, dealing with externalities that business generates is the job of governments; he neglected to address business influence over policymaking.

[17] William T. Allen, 'Our Schizophrenic Conception of the Business Corporation' 14 *Cardozo Law Review* 261, 281.

[18] 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 50th anniversary of Milton Friedman's landmark essay, 'The Social Responsibility of Business is to Increase Its Profits', published in the *New York Times Magazine*.

[19] 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.

Friedman's popular writings were intended to promote an ideological agenda. Not so for finance theorists Michael Jensen and William Meckling. 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.'[20] Drawing among other sources on the theory of property rights, it 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.[21] 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[22]-- which it did during the

[20] 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.

[21] Philip Mirowski & Dieter Plehwe (eds.), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (Cambridge, MA: Harvard University Press, 2009); 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).

[22] 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.

conservative Thatcher and Reagan administrations, and continued even under later Labour governments in the UK and Democratic administrations in the U.S.

Jack Welch, legendary CEO of General Electric, has described maximizing shareholder value as 'the dumbest idea in the world'[23] – eight years after he retired from a career during which GE met or beat analysts' earnings forecasts with 'unnatural precision'.[24] Linking compensation to 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 and risk-shifting. 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. In terms of the institution of the corporation itself, these developments fundamentally transformed its identity, from a 'social' to a more purely 'private property' conception, using Allen's terms.[25]

The origins of contemporary stakeholder theory typically are attributed to the work of R. Edward Freeman, a professor of management and business ethics. In his 1984 book, *Strategic*

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[23] Francesco Guerra, 'Welsh condemns share price focus, *Financial Times* (12 March 2009), https://www.ft.com/content/294ff1f2-0f27-11de-ba10-0000779fd2ac (accessed 15 March 2009).

[24] 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).

[25] Allen, note 14. Allen was commenting primarily on the U.S. corporation, but of course it had international implications.

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'.[26] Freeman did not see himself in competition with Friedman; shareholders, in his view, were simply one among many stakeholders, providers of capital. 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.[27] More recently still 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'.[28]

Voluntary corporate social responsibility approaches 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 stated at the outset, we focus on

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[26] R. Edward Freeman, *Strategic Management: A Stakeholder Approach* 2nd. Ed. (New York: Cambridge University Press, 2010), 1. The classic stakeholder position addressed to an earlier era is E. Merrick Dodd, 'For Whom are Corporate Managers Trustees?,' 45 *Harvard Law Review* (1932) 1145-63.

[27] R. Edward Freeman. 'The politics of stakeholder theory: some future directions' (1994) 4 *Business Ethics Quarterly,* 409-421.

[28] R. Edward Freeman, Kirsten Martin & Bidhan Parmar, 'Stakeholder Capitalism' (2007) 76 *Journal of Business Ethics,* 303, 311.

the role that HRDD as prescribed in the UNGPs is playing in creating a path toward more stakeholder-oriented corporate governance.

III. SOFT LAW

The UNGPs introduced the construct of HRDD 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. In short, HRDD brings the concerns of affected stakeholders into greater prominence in corporate decision-making at both operational and leadership levels.

The construct of HRDD was deliberately adapted from other due diligence processes traditionally familiar to business (legal, financial, technical). Indeed, the SRSG established a corporate law project, involving more than 20 leading corporate law firms from around the world, which provided pro bono assistance in drawing lessons regarding the opportunities and constraints for human rights that derive from corporate and securities law in 39 jurisdictions.[29]

This research helped us to identify the critical ways in which HRDD needs to differ from standard corporate risk management. The first distinction is that it is not a transactional process, as for a new acquisition, partnership or investment, but an ongoing process that continues and

[29] SRSG, 'Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative', UN Document A/HRC/17/31/Add.2 (23 May 2011). The project was led by Vanessa Zimmerman, a core member of the SRSG's team.

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 unexpected developments in their operating environments.

It flows from this that HRDD 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 checklist-compliance. The UNGPs state that:

> 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.[30]

The second key distinction between HRDD and more traditional forms of this process lies in the critical role of engagement with stakeholders. HRDD reflects the general categories of stakeholder – employees, suppliers, customers and communities – that are typically cited in

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[30] See the commentary to UN Guiding Principle 16.

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, HRDD places the focus *specifically* on those people whose basic dignity and equality are at risk of harm from the ways in which business gets done. They 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. And in many instances their 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 identify the human rights at risk of the most severe negative impact through the company's activities and business relationships, even though they may not yet be financially material to the company itself. Indeed, it is highly likely that the more severe the risks to stakeholders are the higher the material risk to the company becomes – which a traditional risk management system would not catch early enough.

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 HRDD under the UN Guiding Principles.[31] 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 HRDD – 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 HRDD shows which businesses are on the right trajectory.

When it comes to the first component – 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 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

[31] See UN Guiding Principles 17, 19 and 20 respectively.

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 HRDD 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.[32] 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, through contracts) and informal leverage (through 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 HRDD 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' HRDD – almost certainly because it is also implemented least often and least well. There has been impressive growth in the number

[32] See UN Guiding Principles 17, 19 and 20 respectively.

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 typically 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 HRDD 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 HRDD processes is now routine in several 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 HRDD started first in the realm of reporting, before the focus shifted to regulating the process of due diligence itself, as we discuss in the next section.

Hard evidence on actual company practice is itself hard to come by. A 2019 civil society survey of 1000 EU-based firms found that some 80 percent reported on their human rights policies, but only 22 percent described the specifics of their human rights due diligence processes.[33] A survey conducted for the European Commission of more than 300 EU-based firms focused specifically on whether they conduct human rights and environmental due diligence in their supply chains. Roughly one-third stated that they did so, with the majority of those limited to first-tier suppliers. More than two-thirds agreed that an EU-wide mandatory due diligence requirement would have positive impacts on human rights.[34] Both reports affirm the influence of the UNGP's HRDD construct on the practices of the more advanced firms. No comparable surveys of firms based in other parts of the world exist.

This discussion allows us to draw three tentative inferences. First, there is still a wide gap between companies that have been building up their policies, practices, processes and monitoring, and those that have taken a formalistic compliance-based approach or hide from

[33] 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).

[34] European Commission, *Study on due diligence through the supply chain* (February 2020), https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1 (accessed 10 May 2020).

scrutiny altogether. Second, and on the flipside of the coin, the fact that the HRDD construct has been internalized by as many firms as it has in a relatively short period of time is a non-trivial achievement. Third, not only these surveys but also business statements regarding ongoing regulatory developments indicate that a growing number of companies have recognized that the only way to close the gap between leaders and laggards and ensure that treating affected stakeholders with respect becomes the norm, is for this kind of due diligence to become a mandatory requirement. In the next section we look at this evolving regulatory sphere.

IV. 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. This expectation has begun to gain momentum.

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 to elaborate a possible treaty on business and human rights was established in 2014. At the same time, 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. Thus, the initial 'hardening' of the corporate responsibility to respect was largely occurring in the realm of private not public law.

By 2017, it had become 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.[35] The adoption of the French Duty of Vigilance Law marked a turning point in this regard.[36] It was the first legislation to apply comprehensive human rights and environmental due diligence obligations to (certain large) companies, with consequences for a failure to meet them.

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 HRDD obligations, including from leading businesses themselves.

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

[35] See especially Guiding Principles 1 and 3 and the commentary to 3.

[36] Law 2017-399 related to Duty of Vigilance of Parent Companies and Commissioning Companies 2017 (France). According to Dominique Potier, a Member of the French National Assembly and a leading sponsor of the legislation, it was 'inspired' by the UNGPs (interview with Ruggie).

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. However, there is limited evidence of the impact of the law within companies that are 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.[37]

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[37] 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.)

In 2014, the European Parliament adopted the Non-Financial Reporting Directive (NFRD).[38] The NFRD requires 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 provides 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 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.

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.[39] But too many others have either ignored them or delivered the minimum lip service required. Nevertheless, the inadequacies in the design

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[38] 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.

[39] Shift, 'Dissecting Disclosure Series' (March 2020) https://shiftproject.org/resource/dissecting-disclosure-series/intro/. (Accessed 2 November 2020).

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.

In 2020, as part of its 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, among other reasons, because corporate disclosure will be an essential element in 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,[40] and 2017-20 in the Netherlands.[41] At EU level, an assessment commissioned by the European Commission's Directorate-General for Justice and Consumers (DG JUST) showed

[40] 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).

[41] 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).

similar results.[42] 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, having worked for the better part of a decade to internalize the UNGPs, 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, for example, 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.[43]

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

[42] European Commission Directorate-General for Justice and Consumers, 'Study on Due Diligence Requirements through the Supply Chain: Final Report' (January 2020).

[43] 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).

some form of consequence for companies that fail to act appropriately.[44] 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. 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 explicitly foresaw liability as one form of accountability for businesses in ensuring they meet their responsibility to respect human rights.[45] 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 whether a business has caused or contributed to harm itself or through a 'controlled' entity.[46] As a result, other forms of accountability will be essential to encourage

[44] 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).

[45] See the commentary to Principle 17.

[46] The French Duty of Vigilance Law currently 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. Law 2017-399 related to Duty of Vigilance of Parent Companies and Commissioning Companies 2017 (France).

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. It is was similar to some reporting-only regimes in that it limits corporate obligations to a specific topic. In 2020, Dutch stakeholders recommended that the government should push for comprehensive HRDD requirements at EU level.[47] The government committed to doing 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 HRDD, accompanied by civil liability, won the popular vote but failed to win in a majority of Cantons and therefore was not adopted. A government-sponsored countermeasure will go into effect,

[47] 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 international MVO' (September 2020), https://www.ser.nl/-/media/ser/downloads/adviezen/2020/imvo-duurzame-ketenimpact.pdf (accessed 2 November 2020).

largely limited to reporting.[48] 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.[49] Legislative proposals were also put forward by parliamentarians in Denmark, Austria and the UK.

Outside the EU, the U.S. Customs and Border Patrol (CBP) took a different approach. It 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.[50] This brought home the hardening of due diligence expectations for a growing number of U.S. companies, because lifting of the orders is conditional on demonstrating, through appropriate HRDD, that the goods are not tainted with forced labor. A similar approach has now been adopted in Canada and Mexico under the new United States-Mexico-Canada Agreement.

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[48] SRF News, 'Konzernverantwortungs-Initiative', https://www.srf.ch/news (29 November 2020), accessed same day.

[49] 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).

[50] 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).

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.[51] Grounded in the European Green Deal, the consultation on 'sustainable corporate governance' 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 Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.[52] The European Parliament has produced its own report on the need for a comprehensive due diligence obligation, which also draws on the UNGPs.[53] Liability provisions are expected to be included in the final legislation together with measures for administrative enforcement of the corporate duty; extending the requirements to non-EU-based firms that operate or provide goods and services into the single market is also under consideration.

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[51] 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.

[52] 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).

[53] Shift has provided support on these issues to several EU member states at national levels and in their role as presidency of the EU Council.

Growing business support for mandatory due diligence aligned with the UNGPs – by European and some U.S.-headquartered business – has been striking.[54] Amfori is a business association focused on sustainable trade, and the Responsible Business Alliance, a large industry coalition that includes major U.S. firms, is focused on the rights of workers and communities in electronics supply chains; both issued positive statements regarding mandatory HRDD 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 potential 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 of such mandatory measures. This support 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.

[54] 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).

By imposing a corporate duty to carry out HRDD it becomes a legal responsibility not only for management to execute but also for boards to oversee. It becomes necessary for the corporation to address and report on actual and potential impacts on stakeholders, with potential legal consequences or administrative penalties for non-compliance. Returning to the overarching theme of this article, making HRDD mandatory thereby provides a pathway to 'the advent of stakeholder governance' in a manner that supports and can complement other proposed pathways, yet without encountering the impediments of the 'impossibility theorem' raised by some critics. Its success, in turn, changes the BHR landscape.

V. CONCLUSION

In the Introduction to a recent symposium on hard and soft law in the BHR field, Steven Ratner writes:

> For the many stakeholders concerned about the impact of business activity on human rights, the last decade has…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] …If ever we have witnessed a norm cascade, to quote the constructivists, the last decade surely represents one in the BHR space.[55]

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[55] Steven R. Ratner. 'Introduction to the Symposium on Soft and Hard Law on Business and Human Rights', 114 *American Journal of International Law Unbound* (2020), 163, 164. 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). Internal footnote removed; the reference is to Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change', 50 *International Organization* (1998), 887.

To describe and explain this entire ‘cascade’ is well beyond the scope or purpose of this article. We limit ourselves to three points.

To begin, we framed the UNGPs in multi-perspectival terms, reflecting the fact that corporate conduct at the global level is shaped by three distinct governance systems. The first is the traditional system of public law and governance, domestic and international. The second is a system of civil governance involving stakeholders concerned about adverse effects of business conduct and employing various social compliance mechanisms. The third is corporate governance, which internalizes elements of the other two (unevenly to be sure), and shapes enterprise-wide strategy and policies, including risk management. The challenge was to formulate a normative platform on which the three systems could become better aligned in relation to business and human rights and begin to play mutually reinforcing roles, out of which significant cumulative change could evolve over time.

Thus, HRDD provides a focal point for governments in their own policy developments and engagement with business and, in the instances discussed earlier, for a move toward mandatory measures accompanied by remedial mechanisms. For business, HRDD provides a conceptual framework as well as a template for tools with which to manage the social risks of their own conduct and business relationships before they became material risks for the company itself. For affected individuals, communities, and their representatives, HRDD provides an authoritative framework for evaluating companies’ conduct, and to engage them in order to avoid or reduce harm and seek remedy, while lobbying governments to make the process mandatory.

Second, the ‘cascade’ was facilitated by collaboration from the start with other international standard setting entities in closely related domains. For example, the OECD incorporated Pillar II into its own Guidelines for Multinational Enterprises, extending the due diligence concept to environmental and other impacts as well, and subsequently issuing due diligence guidance for various industry sectors. The OECD also has a state-based complaints mechanism for allegations of misconduct by multinational enterprises that is accessible to all stakeholders. Another important partner was (and remains) the EU, which has long been involved in developing guidance for responsible corporate conduct, some of which we discussed in Sections III and IV. Others included the International Finance Corporation (performance standards for its clients), the International Organization for Standardization (ISO 26000 social responsibility standards), and the UN Commission on International Trade Law (investment law rules). These collaborations created distributed networks for disseminating the new normative expectations and practical concepts to different sub-universes of global business.

Finally, the 'cascade' has also benefited from related developments in the private sector too numerous to note here. But one that deserves particular mention because of its contemporaneous 'soft' origins in the UN is ESG investing – considering a company's environmental, social and governance performance in making investment decisions. The concept was first introduced in a UN Global Compact Report, 'Who Cares Wins: Connecting Financial Markets to a Changing World'. It served as the background document for the 2006 launch by then Secretary-General Kofi Annan of the Principles for Responsible Investing (PRI), now an independent entity whose signatories have roughly $100 trillion in assets under management. ESG funds now account for roughly one-third of all assets under management globally. What is of interest for our purposes is that the S elements in ESG are either outright human rights issues or close cousins. Because data quality remains poor, several public and private regulatory bodies have begun initiatives to establish more uniform ESG standards. The UNGPs inevitably will serve as a reference point in establishing greater consistency for the S elements.[56]

To close the circle, ESG investing is closely related to the ongoing push for stakeholder governance. Both reflect the view that the large public corporation should consider itself to be 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 societies in which they operate.[57] When investors get involved collectively, change happens at scale.

The UNGPs as a whole have been referenced in numerous legal cases against companies, not as a cause of action themselves but to illustrate overall shifts in the international normative landscape. That practice is consistent with our own expectations in crafting the UNGPs because, as Ruggie argued at the outset of the mandate, legalization in BHR requires 'carefully crafted precision tools complementing and augmenting existing institutional capacities'.[58] The move to

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[56] In October 2020 the PRI adopted a human rights reporting framework for institutional investors based on the UNGPs and will make reporting a condition of membership. Fiona Reynolds and John Ruggie, 'What institutional investors need to know about the "S" in ESG', *Responsible Investor* (22 October 2020). Reynolds is the CEO of the PRI.

[57] John Gerard Ruggie, 'Corporate Purpose in Play: The Role of ESG Investing' in *Sustainable Investing: A Path to a New Horizon,* in Andreas Rasche, Herman Bril & Georg Kell (eds.), London: Routledge, 2020).

[58] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819.

mandatory due diligence is a prime example. It helps transform the power imbalances currently embedded in the BHR space, and at the same time contributes to the move beyond shareholder primacy toward multi-fiduciary obligations.