

Enforcing International Law Against Corporations: A Stakeholder Management Approach

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There is an important but oft neglected relationship between the problems of corporate governance and international law. Corporate managers grapple with how to respond to society's demands that their enterprises do better when it comes to protecting people and the planet. These demands take many forms, including increased pressure for "sustainability" and "environmental, social, and governance" ("ESG") measures. These demands are made in response to the economic, social, environmental, and political crises facing our world and a recognition of the responsibility of corporations and other business actors to contribute to their resolution. What is often unrecognized is that many of these crises occur because corporations fail to follow international law. Corporate misdeeds often arise from the violation of international law norms on human rights, environmental protection, sustainable development, and use of force, among others. International law can guide corporate managers on meeting the public's demand for more responsible business practices if they would only follow it.

The problem is enforcement: Many corporate actors do not abide by international law because the international legal order lacks adequate mechanisms to ensure their compliance. Specifically, an international legal order based on enforcement by state actors may fail to produce robust corporate compliance because, on many occasions, governments are unwilling or unable to ensure that corporations within their jurisdictions obey international law. This Article borrows insights from stakeholder management to reveal that corporate actors frequently align their behavior to conform to the values and expectations of a range of non-state actors—corporate stakeholders—such as consumers, employees, insurers, financial institutions, investors, industry organizations, and non-governmental organizations ("NGOs"), among others. These stakeholders can address important gaps in the international legal order by offering incentives that nudge corporate actors toward compliance with international law. This Article develops a typology of enforcement strategies practiced by corporate stakeholders: predicative, facilitative, direct, and amplification. It emphasizes the multiple audiences for international law enforcement: The actions of corporate stakeholders not only change the preferences of the targets—the corporate

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actors—to comply with international law, but also the incentives of the intermediaries—other corporate stakeholders—to enforce international law. This Article thereby contributes to the scholarship on who enforces international law, why they do so, and if they can be relied upon to do it again. In so doing, it provides corporate stakeholders with a framework to contextualize their own individual efforts and to calibrate their efforts with those of other stakeholders for more effective enforcement of international law.

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INTRODUCTION

Perhaps the most popular criticism of international law is that it is not real. Its lawyers and scholars operate under a shared fantasy that its norms are universal, its proscriptions observed, and its authority respected. The foundation for this criticism is its enforcement, which often proves lackluster.

Confronted by such criticism, international law scholars have been diligent and creative in explaining all the ways in which international law influences the behavior of states.¹ But by defending themselves on one flank, they leave another exposed. Much of today's frustration with international law concerns its failure to regulate not only state actors but also business actors. Corporations and other business enterprises² violate international norms on human rights, sustainable development, use of force, and access to medicine, among others. But corporations are more difficult to deter because there is still a debate on whether international law even binds them.³ They do not sign treaties as states do, and their participation is often not welcomed in international lawmaking because of fears of their influence.⁴

Despite this gap, international law would be deeply relevant to the work of corporate leaders if they only recognized its significance. Many of

1. See, e.g., Chris Brummer, *How International Financial Law Works (and How It Doesn't)*, 99 GEO. L.J. 257, 287 (2011); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1413 (1999); Christopher Ewell, Oona A. Hathaway & Ellen Nohle, *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1246 (2022); Natasha A. Affolder, *The Private Life of Environmental Treaties*, 103 AM. J. INT'L L. 510, 521–25 (2009).

2. Throughout this Article, I refer to corporations and business enterprises as "corporations."

3. See, e.g., ERIKA GEORGE, INCORPORATING RIGHTS: STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY 5 (2021) ("Private commercial actors with international operations have not been treated as bound by the public international human rights obligations that countries around the world have assumed as a matter of law through treaty accords or custom."); INT'L CHAMBER OF COM. & INT'L ORG. OF EMPS., JOINT VIEWS OF THE IOE AND ICC ON THE DRAFT "NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS" 3 (2004) ("Only States have legal obligations, so only States can fulfil human rights . . . Private persons are not the duty-bearers of the rights in the UN human rights treaties, and related agreements: consequently, private actors cannot violate human rights.").

4. See, e.g., Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201, 229 (2017).

the ESG issues that have landed corporate leaders in unflattering public spotlights are governed by international law norms.⁵ Managers do not need to formulate norms on armed conflict, climate change, sustainable development, labor rights, human rights, or ecological preservation, for example. *These norms have already been developed in international law.* All that corporate leaders need to do is to follow them.⁶

Many international agreements address the types of harms that corporations may cause to people or the planet: The Paris Climate Agreement was created to “hold ‘the increase in the global average temperature to well below 2°C above pre-industrial levels’ and pursue efforts ‘to limit the temperature increase to 1.5°C above pre-industrial levels.’”⁷ The Convention on Biodiversity pursues three related objectives: “conservation of biological diversity,” “sustainable use of the components of biological diversity,” and “fair and equitable sharing of the benefits arising out of the utilization of genetic resources.”⁸ The Outer Space Treaty seeks to ensure that the “exploration and use of outer space . . . shall be carried out for the benefit and in the interests of all countries . . . and shall be the province of all mankind.”⁹ The International Convention for the

5. See, e.g., Julie Creswell, *For Many Big Food Companies, Emissions Head in the Wrong Direction*, N.Y. TIMES (Sept. 22, 2023), <https://www.nytimes.com/2023/09/22/business/food-companies-emissions-climate-pledges.html> (discussing carbon emissions).

6. The United Nations and other organizations have provided ample guidance on how corporate actors should comply with international law. See, e.g., Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Rep. of the Special Rapporteur*, U.N. Doc. A/63/263, at 9 (Aug. 11, 2008) (providing guidance to pharmaceutical companies on their human rights obligations concerning access to health); UNITED NATIONS GLOBAL COMPACT OFFICE & PRINCIPLES FOR RESPONSIBLE INVESTMENT, GUIDANCE ON RESPONSIBLE BUSINESS IN CONFLICT-AFFECTED AND HIGH-RISK AREAS: A RESOURCE FOR COMPANIES AND INVESTORS (2010) (guiding companies on responsible business practices in conflict-affected areas); Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/75/212 (2020) (discussing practical steps that states and business enterprises should take to prevent and address business-related human rights abuse in conflict and post-conflict contexts, such as heightened human rights due diligence and access to remedies).

7. *The Paris Agreement*, UNITED NATIONS CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement> [<https://perma.cc/A2DC-LVCC>] (last visited Mar. 20, 2024).

8. *The Convention on Biological Diversity*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/intro> [<https://perma.cc/KCG4-ZGRA>] (last visited Mar. 20, 2024).

9. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 1, Jan. 27, 1967, 18 U.S.T. 2410.

Suppression of the Financing of Terrorism aims to “enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators.”¹⁰ And a treaty in progress—an international treaty on pandemic prevention and preparedness—seeks to “strengthen national, regional and global capacities and [build] resilience to future pandemics.”¹¹ One might, therefore, expect that these international norms would curb corporate misconduct *should* corporations comply with these international institutions.

The problem is incentives.¹² This Article addresses the following problem: *How do we convince corporate leaders to comply with international law when they may not be bound to do so?* The answer is to convince a particular group of intermediaries with influence over corporate actors: corporate stakeholders. According to its most famous definition, a stakeholder of an organization is “any group or individual who can affect or is affected by the achievement of the organization’s objectives.”¹³ Classic examples of corporate stakeholders include investors, consumers, suppliers, employees, regulators, media, and nongovernmental organizations (“NGOs”).¹⁴ All of these individuals and organizations have the power to influence corporate behavior, albeit to varying levels.

By focusing on stakeholder action, this Article makes two contributions to the international law scholarship on enforcement.

First, it explains how *non-state actors*—corporate stakeholders—enforce international law against *other non-state actors*—corporations and other business actors—using a variety of mechanisms, such as consumer boycotts and litigation; employee walkouts and open letters; director and officer insurance policy design; industry associations and codes of conduct; multi-stakeholder organizations and certifications; benchmarking

10. Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13075.

11. *An International Treaty on Pandemic Prevention and Preparedness*, EUROPEAN COUNCIL, <https://www.consilium.europa.eu/en/policies/coronavirus-pandemic/pandemic-treaty> [<https://perma.cc/6CU6-YPVV>] (last visited Apr. 3, 2024).

12. International law scholars have also stressed the limitations of coercion in enforcing international law against its own subjects. *See, e.g.*, Koh, *How is Human Rights Law Enforced?*, *supra* note 1, at 1413.

13. R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* 46 (1984).

14. *Id.*

organizations and rankings; NGOs and litigation, education, monitoring, and representation; and shareholder proposals.

The diversity of these enforcers and their methods provide insights into how non-state actors enforce international law and why they do it.¹⁵ For example, very few of these strategies involve a courtroom, whether international, regional, or national. International law is not enforced through prosecution or litigation. Instead, it influences corporate conduct by first influencing the intermediaries—corporate stakeholders—who create the vital incentives for corporations to comply with international law. While many of these stakeholder mechanisms have been examined in isolation,¹⁶ this Article examines their aggregate effects on the preferences of (a) corporate actors to *comply* with international law, and (b) other

15. These stakeholder interactions are consistent with the polycentric governance predicted by John Ruggie, U.N. Special Representative on Business and Human Rights, regarding how human rights norms will apply to business actors. See JOHN G. RUGGIE, *THE SOCIAL CONSTRUCTION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS* 12 (2017) (“The UNGPs rest on the observation 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. Important as this is, by itself it has been unable to do all the heavy lifting on many global policy challenges, from poverty eradication to combating climate change. The second is a system of civil governance involving stakeholders concerned about adverse effects of business conduct and employing various social compliance mechanisms, such as advocacy campaigns, law suits [sic] and other forms of pressure, but also partnering with companies to induce positive change. 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.”); John F. Sherman III, *Human Rights Due Diligence and Corporate Governance* 3–4 (Corp. Resp. Initiative, Working Paper No. 79, 2021) (“The [United Nations] Guiding Principles combine into a mutually supporting framework three independent sources of governance: (1) voluntary business practices and policies and self-regulation (often known as corporate social responsibility, or CSR); (2) State enforcement of laws to protect people from business-related human rights abuse; and (3) the robust advocacy by civil society. Each is necessary to prevent and address the problem of global business-related human rights abuse. Yet none is sufficient by itself to solve the problem.”); Joanne Bauer, *Seeing Business and Human Rights as a Web of Corporate Accountability*, OPEN GLOBAL RTS. (Mar. 5, 2020), <https://www.openglobalrights.org/seeing-business-and-human-rights-as-a-web-of-corporate-accountability> [<https://perma.cc/5B2F-DLYQ>] (last visited Apr. 17, 2024).

16. See generally Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913 (2007); Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711 (2009); Pammela S. Quinn, *Regulation in the Shadows of Private Law*, 28 DUKE J. COMP. & INT’L L. 327, 349–60 (2018); Tomer Brode, *Behavioral International Law*, 163 U. PENN. L. REV. 1099 (2015).

corporate stakeholders to *enforce* international law. Critically, it examines the interactions between enforcement actions undertaken by a variety of corporate stakeholders.

Second, it argues that the aggregate effect of these stakeholder actions constitutes international law enforcement. It distinguishes between four types of enforcement activity performed by stakeholders: *direct*, *predicative*, *facilitative*, and *amplification*. Not all enforcement activity is the same. It is performed by different stakeholders with different objectives and for different reasons. This Article explains the variety of enforcement actions available and explains how each relates to the other in influencing corporations to comply with international law.

This Article proceeds as follows: Part I discusses the international law scholarship on the enforcement of international law by non-state actors. It highlights common insights produced by this scholarship and the unanswered questions that this Article seeks to address. Part II provides a descriptive account of how the following corporate stakeholders enforce international human rights norms: states, consumers, employees, shareholders, insurers, financial institutions, ranking organizations, industry organizations, multi-stakeholder organizations, and NGOs. Part III provides a typology of the stakeholder enforcement actions discussed in Part II; not all of these strategies have common objectives, and Part III explains how various strategies relate to each other. Part IV discusses the reasons why corporate actors concede to or resist stakeholder demands, whether individually or collectively, to adopt international law norms. Part V examines which international law norms stakeholders enforce.

I. THE ROLE OF NON-STATE ACTORS IN ENFORCING INTERNATIONAL LAW

The story told in these pages shares much in common with insights provided by scholars who study transnational law and its actors, networks, and substantive content.¹⁷ Section A explains how the transnational law

17. See, e.g., Gregory C. Shaffer, *Theorizing Transnational Legal Ordering of Private and Business Law*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 1, 1 (2016) ("By a transnational legal order, Halliday and Shaffer refer to law and regulation that seek to produce *order* in an issue area that relevant actors construe as a 'problem'; that are *legal* insofar as they adopt legal form to address the problem, including through directly or indirectly engaging national legal bodies; and that are *transnational* insofar as they transcend and permeate state boundaries."); Benedict Kingsbury & Megan Donaldson,

literature emphasizes the role played by non-state actors in enforcing international law; highlights the importance of institutionalization for international law compliance; explains the importance of interactions between these actors within transnational networks; and notes the significance of non-judicial institutions in encouraging states to commit to and comply with international law.

Section B explains that this scholarship leaves several questions unanswered that are relevant to enforcing international law against corporations, such as: Who are the norm entrepreneurs that enforce international law norms against corporations? What are their motivations in doing so? What types of interactions occur between these actors, how do the actions of one influence the actions of the other, and how do their combined actions influence the actions of the corporation? Under what circumstances do corporations institutionalize the norms advocated by these actors?

A. *The Enforcement of International Law Through Transnational Processes*

First, transnational law scholars have emphasized the *importance of transnational networks* in enforcing international law.¹⁸ These networks

Global Administrative Law, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2012) (discussing the actors, processes, and sources of global administrative law). See generally JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000) (discussing the different actors, mechanisms, and interactions involved in the global business regulation of a variety of issues).

18. For example, Professor Harold Hongju Koh defines transnational legal process as the “theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.” Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996); see also Cynthia A. Williams, *The Global Reporting Initiative, Transnational Corporate Accountability, and Global Regulatory Counter-Currents*, 1 U.C. IRVINE J. INT’L, TRANSNAT’L & COMP. LAW 67, 74 (2016) (describing the role of NGOs in developing disclosure standards under the Global Reporting Initiative); Melissa J. Durkee, *Interpretive Entrepreneurs*, 107 VA. L. REV. 431, 467–70, 475–77 (2021) (describing the role of industry groups in encouraging state compliance with treaties); Jay Butler, *Corporate Commitment to International Law*, 53 N.Y.U. J. INT’L L. & POL. 433, 441 (2021) (providing examples of when corporate actors declined to assist governments when the former believed that such assistance would facilitate violation of international law); see also Vandenberg, *supra* note 16, at 921–26 (explaining how corporations enforce global norms through contract); Lin, *supra* note 16, at 721–23 (explaining how corporations enforce global norms through contract); Quinn, *supra* note 16, at 349–60

may consist of regulators from around the world;¹⁹ local and international NGOs;²⁰ and private sector participants such as bankers and insurers.²¹ Collectively, these networks support the efforts of their participants to enforce international law against state actors.²² They also develop best practices and norms that influence the development of international law.²³

Second, scholars explain that international law compliance is facilitated by the *institutionalization of international law norms*—usually within a state’s domestic system—rather than through reliance on external sanctions.²⁴ Professors Thomas Risse and Kathryn Sikkink explain that an

(explaining the regulatory potential of contract provisions in political risk insurance policies issued by Multilateral Investment Guarantee Agency (“MIGA”), an affiliate of the World Bank). See generally Daniel Brinks et al., *Private Regulatory Initiatives, Human Rights, and Supply Chain Capitalism*, in POWER, PARTICIPATION, AND PRIVATE REGULATORY INITIATIVES 14–34 (Daniel Brinks et al. eds., 2021) (explaining the role of multi-stakeholder initiatives in influencing corporate compliance with global norm through norm production, monitoring, and enforcement); Xinyuan Dai, *Orchestrating Monitoring: The Optimal Adaptation of International Organizations*, in INTERNATIONAL ORGANIZATIONS AS ORCHESTRATORS 140–60 (Kenneth Abbott et al. eds., 2015) (describing how intergovernmental organizations enlist the assistance of non-state actors as intermediaries who perform monitoring functions); Jonas Tallberg, *Orchestrating Enforcement: International Organizations Mobilizing Compliance Constituencies*, in INTERNATIONAL ORGANIZATIONS AS ORCHESTRATORS 168 (Kenneth Abbott et al. eds., 2015) (“From the perspective of IGOs, the principal attraction of engaging private actors as complainants and litigants is the possibility of achieving more effective and efficient enforcement of international rules.”).

19. See, e.g., Anne-Marie Slaughter, *Everyday Global Governance*, 132 DAEDALUS 83, 84–87 (2003); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041, 1048–53 (2003); Brummer, *supra* note 1, at 273–84.

20. Thomas Risse & Kathryn Sikkink, *The Socialization of Human Rights Norms*, in THE POWER OF HUMAN RIGHTS 18 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

21. Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125, 132–72 (2005).

22. See Risse & Sikkink, *supra* note 20, at 18–25.

23. Levit, *supra* note 21, at 132–73; see also Brummer, *supra* note 1, at 306–07.

24. According to Professor Koh, internalization occurs through a variety of processes: social internalization that “occurs when a norm acquires so much public legitimacy that there is widespread general adherence to it”; political internalization that “occurs when the political elites accept an international norm, and advocate its adoption as a matter of government policy”; and legal internalization that “occurs when an international norm is incorporated into the domestic legal system through executive action, legislative action, judicial interpretation, or some combination of the three.” Koh, *How Is International Human Rights Law Enforced?*, *supra* note 1, at 1413; see also Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 628–29

important stage of the socialization of state actors to human rights law consists of institutionalization, a process by which international law norms are incorporated into critical domestic institutions.²⁵ Similarly, Professor Koh argues, “[t]rue compliance is not so much the result of externally imposed sanctions so much as internally felt norms.”²⁶

Third, institutionalization is itself the *product of interactive processes that occur between and among both states and non-state actors at the domestic and international levels in a variety of fora*. Professors Greg Shaffer and Terence Halliday explain how “transnational legal orders”²⁷ emerge through discursive processes involving multiple actors: “[A]ctors at different levels of social action—local, national, and international—engage in transnational legal-ordering processes often through a mix of cooperation, competition, and conflict.”²⁸

(1998) (describing processes of norm internalization that begin with coincidence and conformity and ends with obedience); Risse & Sikkink, *supra* note 20, at 11 (“The goal of socialization is for actors to internalize norms, so that external pressure is no longer needed to ensure compliance.”).

25. See Risse & Sikkink, *supra* note 20, at 29; Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 636–38 (2004).

26. Koh, *How Is International Human Rights Law Enforced?*, *supra* note 1, at 1407; see also Koh, *Bringing International Law Home*, *supra* note 24, at 629 (“For if our goal is more compliance with prescribed rules, our preferred regulatory strategy is not so much coerced compliance, as it is more *obedience*, or what may be thought of as *internalized compliance*.”).

27. Gregory Shaffer & Terence C. Halliday, *International Law and Transnational Legal Orders: Permeating Boundaries and Extending Social Science Encounters*, 22 CHI. J. INT’L L. 168, 180 (2021) (“By transnational legal ordering, we refer to the processes through which legal norms are framed, propagated, settled, institutionalized, contested, and changed transnationally.”).

28. *Id.* at 180–81 (“Research will reveal which combinations of substate, state, and supra-state actors, together with non-state, civil society and market actors, engage each other in a bid to produce legal responses.”); see also Terence C. Halliday, *The Theory of Transnational Legal Orders*, 110 AM. SOC’Y INT’L L.: PROC. ANN. MEETING 64, 66 (2016) (“Episodes of TLO creation or adaptation frequently involve (1) diagnostic struggles, where actors with interests compete with one another to frame what is the underlying problem and how it should be understood These struggles can continue, only partially or incompletely resolved, within and beyond state lawmaking and thereby they drive multiple iterations of change before norms settle.”); BRAITHWAITE & DRAHOS, *supra* note 17, at 270–78 (discussing the interaction among business actors, NGOs, states, civil society, and international organizations in the global regulation of the environment). Professor Koh argues that repeated cycles of “interaction-interpretation-internalization” lead to the ultimate internalization of international law norms within a State’s domestic system: “[O]ne of these agents triggers an interaction at the

Fourth, *transnational actors often operate through transnational issue networks that allow them to share knowledge and coordinate action.* In the “spiral model” of state change, Professors Risse and Sikkink explain the important role of transnational networks that connect domestic groups with global allies. They explain that a “boomerang pattern of influence exists when domestic groups in a repressive state bypass their state and directly search out international allies to try to bring pressure on their states from outside.”²⁹ They explain that “[n]ational opposition groups, NGOs, and social movements link up with transnational networks and [international NGOs] who then convince international human rights organizations, donor institutions, and/or great powers to pressure norm-violating states.”³⁰ The value of these networks is that they “provide access, leverage, and information (and often money) to struggling domestic groups.”³¹

Fifth, *judicial processes may or may not play a central role in the interactive processes that lead to norm internalization by a state.* On some occasions, judicial interpretations of international law may facilitate the subsequent revision of domestic law to adhere to such interpretations.³² On other occasions, transnational issue networks involving nongovernmental organizations and individuals work with domestic legislators to introduce policy changes while simultaneously allying with prominent activists, politicians, and celebrities to create global support in favor of the norm.³³

international level, works together with other agents of internalization to force an interpretation of international legal norm in an interpretive forum, and then continues to work with those agents to persuade a resisting nation-state to internalize that interpretation into domestic law.” Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN. ST. INT’L L. REV. 745, 746–47 (2005); see also Koh, *Transnational Legal Process*, *supra* note 18, at 203 (“In part, actors obey international law as a result of repeated interaction with other governmental and nongovernmental actors in the international system.”); Koh, *Bringing International Law Home*, *supra* note 24, at 644.

29. Risse & Sikkink, *supra* note 20, at 18.

30. *Id.*

31. *Id.*

32. See, e.g., Koh, *Bringing International Law Home*, *supra* note 24, at 645 (describing how the International Court of Justice’s judicial interpretation was incorporated into domestic law); *id.* at 663–66 (describing how judicial interpretations of the international law norm proscribing torture facilitated subsequent legislative action).

33. See *id.* at 656–57 (describing the transnational legal processes used to limit the use of antipersonnel landmines).

B. *Unanswered Questions Concerning Application to Corporations and Other Business Enterprises*

The insights from transnational law scholars do not apply perfectly to the enforcement of international law against corporations. It is trite to attribute this gap to the differences in enforcing international law against a state compared to a corporation. Those differences do matter, but the real gaps concern the identity of “norm entrepreneurs”³⁴ and the precise processes that lead to organizational internalization. As such, answering these questions not only benefits those who want to enforce international law against corporations but may also help to refine the processes for enforcing the same against state actors.

First, *who are the actors advocating that one or more corporations comply with international law?* In much of transnational law scholarship, these actors are NGOs, individuals, and government officials.³⁵ But corporations maintain relationships with a wide variety of state and non-state actors, such as consumers, employees, insurers, creditors, investors, regulators, and suppliers, among others. We know that, on occasion, one or more of these actors will publicly advocate for a corporation to change its policies and practices on the environment, human rights, labor, data privacy, or another issue. What is not known is whether these same actors advocate for compliance with international law and, if so, under what circumstances.

Second, *what are the incentives of these actors to advocate for international law?* In the transnational scholarship, many norm entrepreneurs are NGOs that are created to advocate for a particular issue or whose mandate encompasses the issue area. But what may motivate an actor who is agnostic about the issue, or whose main goal is not ensuring that a corporation complies with international law? It is worth exploring the incentives of “part-time” norm entrepreneurs (e.g., shareholders, insurers, etc.) whose mission and strategic objectives do not involve encouraging corporations to comply with international law.

34. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1173 (2007) (defining norm entrepreneurs “as individuals or groups who try to influence popular opinion in order to inculcate a social norm”).

35. See, e.g., CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM* 143–61 (2011) (discussing the role of regulators in enforcing international financial law).

There is a range of actors beyond NGOs, politicians, and activists, and it is worth asking what role, if any, they can play in encouraging the enforcement of international law against corporations. It is important to resist the assumption that norm entrepreneurs have fixed preferences, or that the ones who advocate for international law do so because their preferences are such and have always been so. This may prove true for NGOs and certain individuals. But a story of transnational law processes must account for the dynamic preferences of norm entrepreneurs; it must not only include the committed and courageous but also the reluctant, ambivalent, and even those initially hostile to international law.³⁶ They too have a role to play in encouraging corporations to comply with international law. The processes by which they change their own preferences is a story in itself, one worth understanding separate from how they contribute to the changed preferences of corporations.

Third, *how do these actors interact with each other?* Transnational scholarship envisions networks between like-minded individuals and organizations that are accustomed to sharing knowledge and coordinating action.³⁷ It is worth exploring how the efforts of actors may converge in the absence of explicit coordination. It is also important to explore how the actions of an actor influence the actions of *other* actors, as well as the corporation.

Fourth, *under what conditions do these actors succeed?* Transnational law scholarship frequently identifies domestic legislatures as the critical site for a state's internalization of international law.³⁸ Corporations do not have legislatures, so who needs to be convinced of international law's value for that corporation to internalize it?

36. See, e.g., BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS* 146 (2009) ("The ratification of a treaty has the potential to bring in a broader range of allies to join the core beneficiaries in demanding rights implementation. One group might be individuals who oppose or want to constrain the government for reasons that do not relate explicitly to their own individual current rights struggles.")

37. See, e.g., Risse & Sikkink, *supra* note 20, at 17–18 (explaining networks involving domestic opposition groups, NGOs, INGOs, social movements, and donor organizations, among others); Tallberg, *supra* note 18, at 168 (describing the 1999 memorandum of understanding between CITES Secretariat and the international NGO network TRAFFIC, providing for the latter to augment the resource constrained capabilities of the former).

38. See, e.g., SIMMONS, *supra* note 36, at 126 (explaining that because of the weaknesses of external mechanisms in ensuring compliance with international human rights, "(t)he real politics of change is likely to occur at the domestic level").

C. *The Potential and Pitfalls of Stakeholder Enforcement*

Scholarship in both corporate governance and strategic management has highlighted the role of corporate stakeholders in encouraging corporations to improve their impacts on people and the planet.³⁹ This existing scholarship provides extensive insights on why stakeholder views matter to corporate managers and the conditions under which the latter may concede to the former.

Professor Hillary Sale explains that attending to stakeholder interests can help managers preserve their corporation's social license to operate, which is important because "businesses and other entities exist with permission from the communities in which they are located, as well as with permission from the greater community and outside stakeholders."⁴⁰ Professor Sale explains that social licenses are earned when stakeholders perceive the corporation and its actions as legitimate, credible, and trustworthy.⁴¹ To companies, it is worth demonstrating these traits to stakeholders because "[w]hen it operates effectively, social license can prevent demonstrations, boycotts, shutdowns, negative publicity, and the increases in regulation that are a hallmark of publicness."⁴²

More broadly, Professor Sale explains that companies are constantly framed in the public mind by information that they supply but which is subsequently analyzed, evaluated, and disseminated by a range of stakeholders.⁴³ Professor Sale describes "publicness" as "the interplay between the insiders who develop and release the stories and the outside actors who report on and recap the material."⁴⁴ According to Professor Sale, "[w]hen public actors outside of the corporation reframe and retell the

39. See generally R. EDWARD FREEMAN ET AL., *STAKEHOLDER THEORY: THE STATE OF THE ART* (2010) (describing the development of stakeholder theory and its influence on strategic management, finance, and business ethics, among other disciplines); Flore Bridoux & J.W. Stoelhorst, *Stakeholder Theory, Strategy, and Organization: Past, Present, and Future*, 20 *STRATEGIC ORG.* 797, 798 (2022) ("At heart, stakeholder theorists see strategic management as managing social relationships: the central idea of the theory is that strategy is about building the fair and durable relationships with the firm's stakeholders that are essential to value creation.").

40. Hillary A. Sale, *The Corporate Purpose of Social License*, 94 *S. CAL. L. REV.* 785, 819 (2021).

41. *Id.* at 821–29.

42. *Id.* at 820.

43. Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 *BROOK. L. REV.* 1629, 1630 (2014).

44. *Id.*

stories, those actors come to play a role in the corporation,⁴⁵ and “these outside actors can even become part of the governance rubric, creating pressure for changes in the decision-making structure or the allocation of power within the corporation.”⁴⁶

Managers also listen to stakeholders because the former can gain information that they may not possess but which may nonetheless place the corporation at risk. Professors Stavros Gadinis and Amelia Miazad explain that stakeholders can fulfill an important information-sharing role that can help corporate managers prevent or mitigate social risks to the company.⁴⁷ They explain that “[s]ocial risks arise when a company makes a business choice that exemplifies, epitomizes, or overlooks challenges rattling large societal groups, whole areas of economic activity, or even society as a whole.”⁴⁸ Corporate managers may be unable to foresee the potential impacts of their actions on third parties, but stakeholders can help to address these blind spots. According to Professors Gadinis and Miazad, “ESG remedies gaps in boards’ understanding of social risk by turning directly to potentially impacted third parties in order to source information about the consequences of company practices.”⁴⁹ They argue that “these stakeholders know the company intimately and can provide the board with specific feedback it would have trouble obtaining through more established information avenues.”⁵⁰ They explain that corporate sustainability officers gather and utilize information from stakeholders in

45. *Id.* at 1631.

46. *Id.*; see also Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1013 (2013) (“When corporate actors lose sight of the fact that the companies they run and decisions they make impact society more generally, and not just shareholders, they are subjected to publicness. Outside actors like the media, bloggers, and Congress demand reform and become involved in the debate. Decisions about governance move from Wall Street to Main Street. The process for deciding who should earn what, for example, becomes a subject of public debate and scrutiny.”) (citations omitted); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. REG. 499, 511–19 (2020) (explaining that the public disclosure of corporate information to non-shareholder audiences can improve stakeholders’ contracting with companies; improve competition among companies; foster community activism and political participation; and improve regulation).

47. Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1426 (2020) (“[B]y operationalizing their commitment to these values, companies are also seeking to avert the reputational uproar, stock price drop, and legal troubles following misconduct.”).

48. *Id.* at 1410.

49. *Id.* at 1411.

50. *Id.*

three important stages: conducting materiality assessments that involve consultations with internal and external stakeholders, developing initiatives responsive to information shared by stakeholders, and monitoring the implementation of initiatives.⁵¹

But there is a critical difference between *listening* to what stakeholders have to say and *doing* what they want. What explains the situations in which stakeholders win rather than lose? Management studies reveal three important dimensions that help to explain when one or more stakeholders can successfully influence management's conduct. The first dimension relates to the characteristics of individual or groups of *stakeholders* and the relationships between them.⁵² The second dimension concerns the characteristics of the *cause or issue* that is at stake.⁵³ The final dimension concerns the *nature of dependence* between a corporation and one or more of its stakeholders.

First, specific characteristics of a stakeholder can impact the likelihood that corporate managers will listen to that stakeholder's demands. Some scholars argue that stakeholder influence is a product of three attributes: power, legitimacy, and urgency.⁵⁴ Power refers to a "relationship among social actors in which one social actor, A, can get another social actor, B, to do something that B would not have otherwise done."⁵⁵ In contrast, legitimacy refers to "[a] generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within

51. See *id.* at 1429–30; *id.* at 1432 (“In the context of the materiality assessment described above, sustainability leaders seek to identify issues that are not on the company’s radar by turning to external stakeholders, such as customers, civil society groups, NGOs, the media, and academia.”). Stakeholders are also valuable for supplementing knowledge when it comes to value creation. See, e.g., Vladislav Valentinov, *Stakeholder Theory and the Knowledge Problem: A Hayekian Perspective*, 31 BUS. ETHICS, ENV’T & RESP. 536, 541 (2022) (“[S]takeholder engagement can be considered a novel institutional solution to the knowledge problem, supplementing the traditional solution of the price mechanism proposed by Hayek” and “the process of value creation for stakeholders utilizes novel knowledge that is continually generated within moral and well-functioning stakeholder relationships.”).

52. See Ronald K. Mitchell, Bradley R. Agle & Donna G. Wood, *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 ACAD. MGMT. REV. 853, 869 (1997).

53. Jonathan Bundy, Christine Shropshire & Ann K. Buchholtz, *Strategic Cognition and Issue Salience: Toward an Explanation of Firm Responsiveness to Stakeholder Concerns*, 38 ACAD. MGMT. REV. 352, 358 (2013).

54. See Mitchell et al., *supra* note 52.

55. *Id.*

some socially constructed system of norms, values, beliefs, definitions.”⁵⁶ Urgency describes “[t]he degree to which stakeholder claims call for immediate attention.”⁵⁷ A stakeholder’s influence depends on whether it possesses one, two, or all of these attributes. Stakeholders who enjoy power, legitimacy, and urgency are most likely to command attention.⁵⁸

When stakeholders lack one or more of these attributes, their influence may wane. For example, the victims of corporate misconduct—whether environmental, financial, or social—often possess both urgent and legitimate claims that corporations “do something” or, even more frequently, “stop doing something”: pay workers a living wage; protect the privacy of consumers; curb greenhouse gas emissions from factory sites; do not contract with suppliers who engage in forced labor; or do not sell weapons to regimes that commit human rights violations. The list goes on. But the stakeholders who make these demands often lack power, thereby enabling managers to ignore them and their concerns.⁵⁹

However, these attributes are dynamic and may be gained or lost. Critically, stakeholders can compensate for their own lack of certain attributes by allying with other stakeholders who possess the missing attributes.⁶⁰ Environmental groups often possess legitimacy and urgency but lack power. They can gain that missing attribute and get on the radar of corporate leadership by forming alliances with those who do possess power, such as institutional investors.⁶¹ As explored below, stakeholder alliances may prove critical in enforcing international law against corporations.

The relationships between different stakeholders can also affect their combined influence over a corporation. In network analysis parlance, this is referred to as “density,” which describes “the relative number of ties in the network that link actors together.”⁶² Greater density—connections between separate stakeholders—foster both increased information flows between stakeholders and norm diffusion, which in turn creates shared

56. *Id.*

57. *Id.*

58. *See id.* at 878.

59. *See id.* at 877.

60. *See id.*

61. *See id.*; *see also* Jeff Frooman, *Stakeholder Influence Strategies*, 24 *ACAD. MGMT. REV.* 191, 198 (1999) (defining indirect stakeholder strategies “as those in which the stakeholder works through an ally, by having the ally manipulate the flow of resources to the firm”).

62. Timothy J. Rowley, *Moving Beyond Dyadic Ties: A Network Theory of Stakeholder Influences*, 22 *ACAD. MGMT. REV.* 887, 896 (1997).

expectations for behavior.⁶³ These characteristics determine the relative strength of stakeholder pressure on a corporation and affect the likelihood of managerial acquiescence. Densely connected stakeholder networks are more likely to constrain corporate conduct because stakeholders who share a common set of behavioral expectations make it more challenging for corporate managers to “play[] one group against another or find[] a sympathetic group of stakeholders with whom it can form an alliance.”⁶⁴ The improved efficiency of communication within dense networks also allows for better collective monitoring of corporate conduct and “coordinating pressure on it to match expectations.”⁶⁵

Second, stakeholder influence also depends on the salience of the issue or cause that the stakeholder raises. Scholars argue that corporate management is more likely to prioritize an issue depending on how it relates to its organizational identity, and especially to its core values and beliefs.⁶⁶ Organizational identity “reflects that which is distinctive and enduring about an organization[] or how an organization views and defines itself.”⁶⁷ Managers prioritize issues depending on whether the relationship with the stakeholder proponent or the issue touches upon an organization’s core values and beliefs. For example, “an organizational identity defined by a relationship with a particular stakeholder will render the concerns of that stakeholder material to identity and, hence, expressively salient.”⁶⁸ Similarly, “an organizational identity strongly rooted in conceptions of justice or fairness may influence a firm’s managers to give salience to justice-related requests from stakeholders.”⁶⁹ It is also important to recall that the purpose of an organizational identity is to distinguish that organization among its peers; for that reason, “[s]takeholder issues that offer little opportunity for a firm to express its unique identity will likely

63. *Id.* at 896.

64. *Id.* at 897; see also Christine Oliver, *Strategic Responses to Institutional Processes*, 16 *ACAD. MGMT. REV.* 145, 162 (1991) (explaining that “acquiescence is more likely to occur when *multiplicity*, defined as the degree of multiple, conflicting, constituent expectations exerted on an organization, is low”).

65. Rowley, *supra* note 62, at 898. A corporation’s location within a network also matters. If it maintains a central position within the network, “it is able to influence behavioral expectations and manage information flows so that its actions either go unnoticed or are presented in a self-serving fashion.” *Id.* at 900.

66. See Bundy et al., *supra* note 53, at 357.

67. *Id.*

68. *Id.* at 358.

69. *Id.*

be perceived as unrelated to organizational identity.”⁷⁰ But managers also prioritize issues viewed as essential to strategic objectives. Therefore, they will similarly prioritize stakeholder concerns that are relevant to competitive advantage and performance.⁷¹ Collectively, this analysis suggests that issues are most likely to command managerial attention when they relate to both organizational identity and strategic objectives.⁷² They are least likely to invite a response when neither of these dimensions is implicated.⁷³

Additionally, management scholars recognize that corporate managers will want to maintain autonomy over important decisions. This makes it more likely that they will “acquiesce more readily to pressures that do not constrain substantive organizational decisions, such as resource allocation, product or service selection, resource acquisition, or organizational administration.”⁷⁴ Corporate managers are also more willing to acquiesce when legal coercion is high because “the consequences of nonconformity are highly punitive and strictly enforced.”⁷⁵ Alternatively, corporate managers are also more willing to acquiesce if the set of expectations imposed on it by stakeholders has already achieved widespread recognition and acceptance within the organizational field.⁷⁶

Third, corporate executives may listen to stakeholders when it is in their interest to do so. Under a resource-dependence approach, “a firm’s need for resources provides opportunities for others to gain control over it.”⁷⁷ This allows stakeholders to control a corporation by “determining whether the firm gets the resources it needs” and “determining whether the firm can use the resources in the way it wants.”⁷⁸ Thus, stakeholders can influence the direction of corporate practices by refraining from “providing a resource to a firm with the intention of making the firm change a certain behavior”⁷⁹ or, alternatively, “continu[ing] to supply a

70. *Id.* at 359.

71. *See id.* at 360.

72. *See id.* at 364; *see also* Oliver, *supra* note 64, at 162, 164–65.

73. Bundy et al., *supra* note 53, at 368.

74. Oliver, *supra* note 64, at 166.

75. *Id.* at 168.

76. *See id.* at 169 (“[T]he more broadly diffused an institutional expectation or practice, the higher the likelihood that organizations will conform with these expectations.”).

77. Frooman, *supra* note 61, at 196.

78. *Id.*

79. *Id.*

resource, but with strings attached.”⁸⁰ Management scholars predict that stakeholders are particularly likely to use these strategies when the corporation is dependent on the stakeholder and the resources it provides.⁸¹

II. WHO ENFORCES INTERNATIONAL LAW AGAINST CORPORATIONS? STAKEHOLDERS AS NORM ENTREPRENEURS

Corporations rely on a variety of stakeholders to compete and succeed: consumers, shareholders, suppliers, employees, insurers, creditors, ratings agencies, financial analysts, proxy advisors, industry organizations, NGOs, and local, national, and international media. It is therefore essential to consider the role of these non-state corporate stakeholders in enforcing international law against corporations. This Part explains how these different stakeholders apply international law on human rights to corporations. On some occasions, these stakeholders seek to enforce specific provisions of international agreements or recommendations. On other occasions, they reference the broader goals of human rights protection in a particular industry or on a particular issue. Collectively, they can incentivize corporations to improve their policies and practices on the protection of human rights.

A. States

The state is certainly an important corporate stakeholder. Viewed under stakeholder theory, it is practically unrivaled as a stakeholder because it possesses all three attributes of stakeholder influence: power, legitimacy, and urgency. State actors with strong legal capacity possess the power to offer incentives that change corporate behavior, such as legal sanctions. They are also endowed with legitimacy to make, interpret, and enforce legal rules, which enables them to regulate corporate conduct that causes transnational harms. Finally, they can convey the urgency of the issue through policymaking and enforcement mechanisms. It would not be surprising if state actors prove to be successful in enforcing international law against corporations, should they choose to do it.

80. *Id.* at 197.

81. *See id.* at 200. *See generally* Ronald K. Mitchell et al., *Stakeholder Agency and Social Welfare: Pluralism and Decision Making in the Multiple-Objective Corporation*, 41 *ACAD. MGMT. REV.* 252, 264 (2016).

There are certainly positive signs that many governments are exercising their leverage to push corporations towards international law. The California Transparency in Supply Chains Act requires covered companies to inform the public of their policies and practices to address human trafficking and slavery.⁸² This and similar mandatory supply chain disclosure laws encourage companies to conform to international law norms on human rights due diligence by forcing them to inform their consumers and others of what they do and not do to detect, prevent, and address human trafficking, forced labor, and other human rights abuses in their supply chains.⁸³

Other countries have adopted legislation that *requires* covered companies to take specific steps to perform human rights due diligence. The German Act on Corporate Due Diligence Obligations in Supply Chains requires the establishment of a risk management system; internal designation of responsibilities; creation of human rights policies; and “[t]he implementation of due diligence measures with regard to risks at indirect suppliers.”⁸⁴

In the United States, U.S. Customs and Border Protection (“CBP”) has issued Withhold Release Orders (“WRO”) against businesses suspected of using forced labor in their supply chains. CBP is responsible for enforcing 19 U.S.C. § 1307,⁸⁵ which prohibits importation of “merchandise mined, produced, or manufactured, wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor,” including “forced or indentured child labor.”⁸⁶ In 2021, CBP issued a region-wide WRO under which it “will detain cotton products and tomato products produced in China’s Xinjiang Uyghur Autonomous Region” (“XUAR”).⁸⁷

82. See CAL. CIV. CODE § 1714.43 (2012).

83. See also Modern Slavery Act 2015 (U.K.).

84. Civ. § 1714.43 (Ger.).

85. See generally CHRISTOPHER A. CASEY, CATHLEEN D. CIMINO-ISAACS & MICHAEL A. WEBER., CONG. RSCH. SERV., IF11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR (2023).

86. 19 U.S.C. § 1307.

87. Press Release, U.S. Customs & Border Prot., CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang (Jan. 13, 2021), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave> [https://perma.cc/EB37-2PVV] (“The WRO was issued against cotton and tomatoes and their downstream products produced in whole or in part in the Xinjiang region, and includes downstream products produced outside the Xinjiang region that incorporate these inputs. These products include apparel, textiles, tomato seeds, canned tomatoes, tomato sauce, and other goods made with cotton

In another industry, WROs have been issued against a palm oil company over concerns of forced labor in their supply chains.⁸⁸ In 2020, the Department of State (along with other agencies) issued the Xinjiang Supply Chain Business Advisory recommending that companies conduct human rights due diligence in conformity with the UN Guiding Principles on Business & Human Rights (“UNGPs”) in order to avoid the reputational, legal, and business risks associated with a supply chain dependent on forced labor.⁸⁹ Finally, the Uyghur Forced Labor Prevention Act “makes a determination that ‘any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part’ in the XUAR should be assumed to be the product of forced labor unless proven otherwise by ‘clear and convincing evidence.’”⁹⁰ The Act’s “rebuttable presumption” means that all such goods are barred from entry into the United States under Section 307 of the Tariff Act of 1930.⁹¹

B. Consumers

Consumers can incentivize corporations to improve their human rights practices in two important ways. The most familiar is consumer boycott by which consumers refrain from purchasing the goods or services

and tomatoes. Importers are responsible for ensuring the products they are attempting to import do not exploit forced labor at any point in their supply chain, including the production or harvesting of the raw material.”).

88. See, e.g., Press Release, U.S. Customs & Border Prot., CBP Issues Detention Order on Palm Oil Produced with Forced Labor in Malaysia (Sept. 30, 2020), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-order-palm-oil-produced-forced-labor-malaysia> [https://perma.cc/MS2B-FC37] (“The order is the result of a year-long investigation that revealed forced labor indicators including abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, debt bondage, abusive working and living conditions, and excessive overtime. The investigation also raised concerns that forced child labor is potentially being used in FGV’s palm oil production process. . . . This WRO will require detention of palm oil produced by FGV and any palm oil products or derivatives traceable to palm oil produced by FGV at all U.S. ports of entry.”).

89. U.S. Dept. of State et al., Xinjiang Supply Chain Business Advisory, at 3 (July 13, 2021).

90. Marti Flacks & Madeleine Songy, *The Uyghur Forced Labor Prevention Act Goes into Effect*, CTR. FOR STRATEGIC & INT’L STUD. (June 27, 2022), <https://www.csis.org/analysis/uyghur-forced-labor-prevention-act-goes-effect> [https://perma.cc/ARM2-6YVF].

91. *Id.*

of a corporation because of that company's human rights practices.⁹² In recent years, many companies—representing various sectors—have been subjected to consumer boycotts for issues relating to human rights, animal rights, tax avoidance, and environmental issues, among other concerns⁹³—many of which are addressed by one or more international agreements. For example, following the Russian invasion of Ukraine in 2022, consumers threatened to boycott companies that remained in Russia.⁹⁴ The boycott threat was facilitated by two developments that made this threat particularly potent. The first was the availability of public lists that identified the corporations that remained in or exited from Russia.⁹⁵ The second development was social media that facilitated public criticism of corporations and allowed for immediate coordination of boycotts.⁹⁶

92. See Sonnet Frisbie, *Global Corporate Purpose Tracker*, MORNING CONSULT (Aug. 23, 2022), <https://pro.morningconsult.com/trackers/global-corporate-purpose-tracker> [<https://perma.cc/5883-4AVL>] (“Majorities of adults in all 18 countries surveyed said they prefer to buy from brands that reflect their social values. The United States currently holds the bottom slot, but a majority (58%) of U.S. adults nevertheless express a preference for values-based purchasing.”).

93. *Boycotts List*, ETHICAL CONSUMER, <https://www.ethicalconsumer.org/ethical-campaigns/boycotts> [<https://perma.cc/GBA5-DY5V>] (last visited Mar. 28, 2024).

94. See, e.g., Elisha Fieldstadt, *Papa John's Faces Backlash After U.S. Franchisee Refuses to Close 190 Russia Stores*, NBC NEWS (Mar. 16, 2022), <https://www.nbcnews.com/news/world/papa-johns-faces-backlash-american-russia-franchisee-refuses-close-190-rcna20255> [<https://perma.cc/6A9D-CMY7>] (“Pizza chain Papa John's is facing heavy criticism on social media after a U.S. franchise operator in Russia refused to close 190 stores, even after the company said it would suspend all corporate operations there after Moscow's invasion of Ukraine.”).

95. *Over 1,000 Companies Have Curtailed Operations in Russia—But Some Remain*, YALE SCH. OF MGMT. (Jan. 28, 2024), <https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain> [<https://perma.cc/EGC7-KYU3>] (last visited Mar. 28, 2024).

96. See Annabelle Timsit & Maite Fernández Simon, *Russia Boycott: A List of Global Campaigns That Are Underway in Support of Ukraine*, WASH. POST (May 16, 2022), <https://www.washingtonpost.com/world/2022/03/02/boycotts-russia-invasion-ukraine> [<https://perma.cc/QVC6-8MHN>]; Jeremy W. Peters, *That Russian Business You're Boycotting Isn't Actually Russian*, N.Y. TIMES (Mar. 12, 2022), <https://www.nytimes.com/2022/03/12/business/russian-business-boycotts.html>; see, e.g., Leila Abboud, *Nestlé Justifies Staying in Russia as Criticism Mounts*, FIN. TIMES (Mar. 21, 2022), <https://www.ft.com/content/1484606c-3e8f-494e-9e88-528a79aeeea> [<https://perma.cc/RWK7-KSB6>] (“Ukrainian president Volodymyr Zelensky called out Swiss group Nestlé in a streamed speech to protesters in Switzerland's capital of Bern on Saturday, pointing out the incongruity between its slogan ‘good food, good life’ and its actions.”); Anne-Françoise Hivert, *War in Ukraine: Swedes and Norwegians Boycott Mondelez Confectionery*, LE

The second way that consumers pressure corporations to respect human rights is through litigation. In the past ten years, consumers have filed lawsuits against several corporations alleging that they violated consumer protection laws by failing to disclose the risk of child labor or forced labor in their supply chains. In *Hodsdon v. Mars*, for example, plaintiff noted that Mars's human rights policy referenced the United Nations Guiding Principles on Business and Human Rights and expressed Mars's intent to perform human rights due diligence in its cocoa supply chains.⁹⁷ The complaint also referenced Mars's supplier code of conduct that prohibits child labor, forced labor, and human trafficking, and reserves the right to audit suppliers' facilities.⁹⁸ Plaintiff argued that "although Mars recognizes that the use of child and/or slave labor in its supply chain is wrong and its corporate business principles and supplier code explicitly forbid child and slave labor by its suppliers, it materially omits to disclose to consumers at the point of purchase the likelihood that its Chocolate Products are made from cocoa beans produced by Ivorian children engaged in the Worst Forms of Child Labor."⁹⁹

C. Employees

Employees can also encourage companies to adapt their policies and practices to conform to international law. For example, in 2019, employees of Wayfair, an online retailer, walked out to protest their employer's sale of furniture to a new Texas detention center intended for detained migrant children.¹⁰⁰ After learning of the sale, over 500 employees contacted management to object.¹⁰¹ Wayfair responded to the employee

MONDE (June 25, 2023), https://www.lemonde.fr/en/economy/article/2023/06/25/war-in-ukraine-swedes-and-norwegians-boycott-mondelez-confectionery_6037356_19.html [<https://perma.cc/5LH4-GQHK>] ("Like all other Mondelez International brands, Marabou has been the subject of an unprecedented boycott in Sweden and Norway since Ukraine's National Agency on Corruption Prevention put the American multinational on its list of 'international war sponsors' on May 25, 2023.")

97. Complaint at 17, *Hodsdon v. Mars*, No. 3:15-cv-04450-RS (N.D. Cal. Sept. 28, 2015).

98. *Id.*

99. *Id.* at 18.

100. Irina Ivanova, *Wayfair Employees Walk Out After Company's Sales to Migrant Children Holding Facility*, CBS NEWS (June 26, 2019), <https://www.cbsnews.com/news/wayfair-employees-plan-walkout-after-companys-sales-to-detention-centers> [<https://perma.cc/LX9G-Z5TH>].

101. *Id.*

concerns with a meeting between its CEO and several hundred employees and offered to donate \$100,000 to the Red Cross.¹⁰² Neither of these acts dissuaded employees from the walkout that subsequently followed.¹⁰³ Employees at Microsoft also protested the corporation's contracts with Immigration and Customs Enforcement in light of the latter's detention policies and practices toward minors and their families.¹⁰⁴ In the letter, Microsoft's employees argued that "Microsoft should not only cancel its contract with ICE but be open to a review of its contracts with government agencies domestically and internationally, and that it should create a policy stating it would not work with those 'who violate international human rights law.'"¹⁰⁵

In another example, engineers and managers at Google protested the corporation's development of Project Dragonfly, a censored search engine for Chinese users.¹⁰⁶ In their open letter, the employees expressed concern "about the Chinese government tracking dissidents through search data and suppressing truth through content restrictions."¹⁰⁷ Their fear was that the Chinese government would violate the human rights of those within its borders using Google's technology and that such use could serve as a precedent for other governments.¹⁰⁸ In their letter, the employees wrote

102. *Id.*

103. *Id.*; see also Rakeen Mabud, *Two Lessons from the Wayfair Walkout*, FORTUNE (June 12, 2019), <https://www.forbes.com/sites/rakeenmabud/2019/07/12/two-lessons-from-the-wayfair-walkout> [<https://perma.cc/NYF5-MFNN>] ("This demonstration of worker power is important for two key reasons. First, it shows that workers are willing and able to use organizing for issues beyond those that directly affect them. Second, it highlights the dependence of the private sector on government contracts and the way that these public-private relationships are an important point of leverage for new worker organizing and corporate activism.").

104. Sheera Frenkel, *Microsoft Employees Protest Work with ICE, as Tech Industry Mobilizes Over Immigration*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/technology/tech-companies-immigration-border.html>.

105. *Id.*

106. Google Employees Against Dragonfly, *We Are Google Employees. Google Must Drop Dragonfly*, MEDIUM (Nov. 27, 2018), <https://medium.com/@googlersagainstdragonfly/we-are-google-employees-google-must-drop-dragonfly-4c8a30c5e5eb> [<https://perma.cc/R8FN-ADE7>]. Google employees have objected to other projects as well. See, e.g., Butler, *supra* note 18, at 460–62 (discussing objections to Project Maven, a Pentagon contract to analyze drone surveillance footage using artificial intelligence).

107. *Google Employees Push to Stop Project Dragonfly*, REUTERS (Nov. 27, 2018), <https://www.reuters.com/article/idUSL4N1Y23E8> [<https://perma.cc/AZE6-S2WJ>].

108. Google Employees Against Dragonfly, *supra* note 106 ("Giving the Chinese government ready access to user data, as required by Chinese law, would make Google complicit in oppression and human rights abuses.").

that they chose Google as an employer because of its stated values and its previous positions on human rights issues.¹⁰⁹ Google's employees also protested Project Maven, a contract with the Department of Defense, that "used the company's artificial intelligence technology to analyze drone surveillance footage."¹¹⁰ Following protests by thousands of employees, Google decided not to renew the contract and, instead, "announced guiding principles for future AI projects that forbid work on weapons and surveillance projects 'violating internationally accepted norms.'"¹¹¹

D. Shareholders

Shareholders enjoy unique rights. One of these rights is the ability to submit a shareholder proposal that requests that the corporation's board take a particular action, such as disclosing information on a particular topic. Rule 14a-8 defines a shareholder proposal as a "recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders."¹¹² If Rule 14a-8's requirements are met, a "company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders."¹¹³

In 2023, Trillium Asset Management submitted a shareholder proposal to Starbucks requesting that the board of directors "commission and oversee an independent, third-party assessment of Starbucks's adherence to its stated commitment to workers' freedom of association and collective bargaining rights, as contained in the International Labour Organization's Core Labor Standards and as explicitly referenced in the company's Global Human Rights Statement."¹¹⁴ Critically, the proposal highlighted how Starbucks's violation of its commitment to international law norms could

109. *Id.*

110. Tom Simonite, *3 Years After the Project Maven Uproar, Google Cozies to the Pentagon*, WIRED (Nov. 18, 2021), <https://www.wired.com/story/3-years-maven-uproar-google-warms-pentagon> [<https://perma.cc/WWH4-SUZX>]; see also Butler, *supra* note 18, at 461 (describing Project Maven, relevant international law norms, and employee opposition to the project).

111. Simonite, *supra* note 110.

112. 17 C.F.R. § 240.14a-8(a) (2013).

113. *Id.*

114. *Starbucks Corp—Workers Rights Commitment (2023)*, TRILLIUM ASSET MGMT. (Feb. 7, 2023), <https://archive.trilliuminvest.com/shareholder-proposal/starbucks-corp-workers-rights-commitment-2023> [<https://perma.cc/8U9Z-TK8Z>].

expose it to risks: “We believe the apparent misalignment between Starbucks’s public commitments and its reported conduct represents material reputational, legal, and operational risks and may impact its long-term value. . . . Failing to respect workers’ rights could harm Starbucks’s reputation with consumers and hurt its ability to attract and retain a high-performing workforce, a crucial element of its ability to provide quality products and service.”¹¹⁵ This shareholder proposal garnered the support of proxy advisors,¹¹⁶ Glass Lewis and Institutional Shareholder Services,¹¹⁷ and Starbucks Workers United, which represents thousands of U.S. baristas.¹¹⁸ In response, Starbucks agreed to conduct a human rights impact assessment, including certain international labor rights principles, that would be performed by independent third parties and made available in 2023.¹¹⁹ This example demonstrated how three distinct stakeholders—shareholders, proxy advisors, and employees—incited Starbucks to comply with international law norms on labor rights. Shareholders have also withdrawn shareholder proposals in exchange for commitments or an agreement from a corporation to improve its practices.¹²⁰

Shareholders may also play a more robust role in human rights enforcement if they can demonstrate how a corporation’s violation of human rights involved a breach of duties by the corporation’s board of directors. As Professors Carliss Chatman and Tammi Etheridge explain, directors’ oversight duties require that they “ensure information and reporting

115. *Id.*

116. Proxy advisors are “private companies [that] collect information, analyze corporate elections, and provide voting recommendations to clients for a fee.” Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2594 (2021).

117. Hilary Russ, *Barista Union to Ask Starbucks Shareholders to Back Labor Review*, REUTERS (Mar. 10, 2023), <https://www.reuters.com/business/retail-consumer/barista-union-ask-starbucks-shareholders-back-labor-review-2023-03-10> [<https://perma.cc/97E3-LPR7>].

118. *Id.*

119. *Id.*; see also Stephen Neukam, *Starbucks Shareholders Back Independent Review of Company’s Labor Practices*, THE HILL (Mar. 29, 2023), <https://thehill.com/business/3925041-starbucks-shareholders-back-independent-review-of-companys-labor-practices> [<https://perma.cc/CH7D-CLCU>] (“Shareholders for the coffee giant Starbucks approved an independent review of the company’s labor practices as it has come under federal scrutiny of its treatment of union organizing efforts.”).

120. *Investors Commend Kraft Heinz for Efforts to Advance Human Rights Due Diligence Throughout its Supply Chain*, INTERFAITH CTR. ON CORP. RESP. (May 5, 2021), <https://www.iccr.org/investors-commend-kraft-heinz-efforts-advance-human-rights-due-diligence-throughout-its-supply-chain> [<https://perma.cc/66C9-P547>].

systems exist in the organization that are reasonably designed . . . to allow management and the board . . . to reach informed judgments concerning both the corporation's compliance with law and its business performance."¹²¹ They further explain that this duty "demands that an adequate monitoring system capable of informing directors exists, and also demands that directors actually utilize the information provided in their business considerations."¹²² A director can be liable for breach of the duty of loyalty if the director fails to "make a good faith effort to oversee the company's operations."¹²³ Corporate law scholars have suggested that *Caremark* oversight duties may require boards of directors to establish monitoring systems to alert them to the risks that a corporation is violating international human rights norms.¹²⁴

E. D&O Insurers

While not dealing with human rights per se, Professor Amelia Miazad has explained how directors and officers ("D&O") insurers can become important players in promoting responsible climate governance among companies. These insurers provide directors and officers with liability insurance in order to insulate them from the financial costs associated with legal claims relating to their management of the company.¹²⁵ Professor Miazad explains that D&O insurers have strong incentives to become active monitors when it comes to climate risks. It is these D&O insurers who will pay out when directors and officers are held liable for poor climate governance. It is therefore in their interest to improve the quality of this governance,¹²⁶ and is not surprising that they may choose to exercise pressure on companies to abide by the Paris Agreement.

121. Carliss Chatman & Tammi S. Etheridge, *Federalizing Caremark*, 70 UCLA L. REV. 908, 945 (2023).

122. *Id.*

123. *Id.* at 945–46.

124. See William J. Moon, *Transnational Corporate Law Litigation*, 74 DUKE L.J. (forthcoming 2025).

125. Amelia Miazad, *D&O Insurers as Climate Governance Monitors* 3 (Feb. 11, 2023), <https://ssrn.com/abstract=4222100> [<https://perma.cc/8SZX-HKMV>].

126. *Id.* at 30 ("[C]limate-related liability exposure for directors and officers is causing D&O underwriters to gather climate governance information from insureds in engagement meetings.").

D&O insurers may not be as interested in human rights governance as they are in climate governance. As Professor Miazad explains, this is because climate change poses risks to both sides of their balance sheets: *liabilities*, as climate disasters increase globally, and *assets*, because insurers' own investments are vulnerable to systematic risks posed by climate change.¹²⁷ Human rights violations may not pose comparable risks to D&O insurers, thereby decreasing the likelihood that insurers will encourage companies to improve governance of human rights.

Nonetheless, D&O insurers' focus on climate governance often has an impact on human rights governance because of the natural relation between the two. In a joint statement, a number of U.N. bodies stated that: “[C]limate change poses significant risks to the enjoyment of the human rights protected in the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.”¹²⁸ They warned that the adverse impacts “threaten, among others, the rights to life, to adequate food, to adequate housing, to health and to water, and cultural rights,”¹²⁹ and that “[t]hese negative impacts are also illustrated in the damage suffered by ecosystems, which in turn affect the enjoyment of human rights.”¹³⁰ Finally, as with many global crises, “[t]he risk of harm is particularly high for those sectors of the population that are already marginalized or in vulnerable situations or that, owing to discrimination and pre-existing inequalities, have limited access to decision-making or resources, such as women, children, persons with disabilities, indigenous peoples, and persons living in rural areas.”¹³¹

F. *Financial Institutions*

Financial institutions can encourage their clients, such as multinational companies, to improve their practices on a range of issues governed by

127. *Id.* at 7.

128. Comm. on the Elimination of Discrimination Against Women et al., Statement on Human Rights and Climate Change, ¶ 3, HRI/2019/1 (May 14, 2020).

129. *Id.*

130. *Id.*

131. *Id.*

international law. For example, the palm oil sector has been criticized for deforestation, child labor, forced labor, indigenous rights violations, and land conflicts.¹³² Financial institutions have come under scrutiny from NGOs, U.N. agencies, and others for financing these violations of international law.¹³³ For example, Greenpeace targeted HSBC for its role in financing palm oil companies' contributions to deforestation, social conflict, and violations of the rights of local communities.¹³⁴ It is therefore not surprising that "[i]n a decision hailed as a first by a major bank, HSBC has asked the Roundtable on Sustainable Palm Oil ("RSPO"), a sustainability body for the palm oil industry, to investigate the claims"¹³⁵ raised against Noble Plantations concerning the company's alleged plans to clear thousands of hectares of rainforest in Papua for oil palm cultivation.¹³⁶ Many other banks similarly responded to criticism of their lending practices by requiring that clients receive certification from the

132. See, e.g., HUMAN RIGHTS WATCH, "WHEN WE LOST THE FOREST, WE LOST EVERYTHING": OIL PALM PLANTATIONS AND RIGHTS VIOLATIONS IN INDONESIA 44 (2019) (reporting that palm oil companies do not consult with indigenous populations throughout the project as required by international law and Indonesian law); AMNESTY INTERNATIONAL, THE GREAT PALM OIL SCANDAL: LABOUR ABUSES BEHIND BIG BRAND NAMES: EXECUTIVE SUMMARY 4 (2016) ("Amnesty International found serious human rights abuses on the plantations of Wilmar and its suppliers. These included forced labour and child labour, gender discrimination, as well as exploitative and dangerous working practices that put the health of workers at risk.").

133. See, e.g., FRIENDS OF THE EARTH, ARE YOU INVESTED IN EXPLOITATION? WHY US INVESTMENT FIRMS SHOULD QUIT FINANCING CONFLICT PALM OIL AND COMMIT TO HUMAN RIGHTS 13 (2016) ("Among the largest U.S. investors and asset managers involved in palm oil are the mutual fund managers BlackRock, Vanguard, Fidelity, and Dimensional Fund Advisors, the asset management arm of JPMorgan-Chase, and the pension funds CalPERS and TIAA-CREF. All of these financial institutions have significant gaps in their policies and practices on land rights and forests."); UNITED NATIONS ENVIRONMENT PROGRAMME, BANK AND INVESTOR RISK POLICIES ON SOFT COMMODITIES 13 (2015) ("The role that lenders and investors play by providing debt, equity and other forms of capital to companies that contribute to deforestation is increasingly gaining attention.").

134. GREENPEACE, DIRTY BANKERS: HOW HSBC IS FINANCING FOREST DESTRUCTION FOR PALM OIL 3–5 (2017).

135. Laura Paddison, *HSBC Triggers Investigation into Palm Oil Company over Deforestation Allegations*, GUARDIAN (July 17, 2017), <https://www.theguardian.com/sustainable-business/2017/jul/17/hsbc-investigation-palm-oil-company-deforestation-allegations-noble-plantations> [<https://perma.cc/3HXN-QKDA>].

136. *Id.* (explaining that HSBC and BNP Paribas also announced stricter lending policies, and that "Deutsche Bank and Standard Chartered have also been under pressure to publish stricter palm oil policies").

RSPO as a condition of financing.¹³⁷ The RSPO is a multi-stakeholder initiative that requires that its members comply with a variety of international laws that have been incorporated into its RSPO Principles and Criteria.¹³⁸ RSPO has itself been criticized by NGOs for failing to ensure that its members maintain sustainable practices on the ground.¹³⁹ As a consequence, RSPO continues to prioritize remedying these gaps in its periodic review of its principles and criteria.¹⁴⁰

G. *Rankings Organizations*

Rankings organizations can play an important role in producing indicators for international law compliance and reporting on corporate compliance with international laws.¹⁴¹

137. See, e.g., Jeevan Vasagar, *Banks Press Palm Oil Growers over Environmental Standards*, FIN. TIMES (Mar. 29, 2016), <https://www.ft.com/content/5a6ffebef15e-11e5-9f20-c3a047354386> [<https://perma.cc/FV37-NLNZ>] (“The lenders have been driven to act partly by concerns about their reputation following lobbying by pressure groups such as Greenpeace Several global and regional banks have signed up to the Roundtable on Sustainable Palm Oil, a global industry body that certifies palm oil companies for sustainability. The banks, which provide a range of services from lending to trade finance and cash management, have cut ties with clients who have not signed up to the RSPO.”); CITI, RSPO ANNUAL COMMUNICATION OF PROGRESS (2021) (reporting Citi’s policy requiring that all of its palm oil clients are RSPO members and have a plan for certification); CREDIT SUISSE AG, RSPO ANNUAL COMMUNICATION OF PROGRESS (2021) (reporting a similar policy by Credit Suisse).

138. RSPO, PRINCIPLES AND CRITERIA FOR THE PRODUCTION OF SUSTAINABLE PALM OIL 115–31 (2018).

139. See, e.g., AMNESTY INTERNATIONAL, *supra* note 132, at 10; GREENPEACE, *supra* note 134, at 3.

140. See, e.g., Press Release, World Wildlife Fund, WWF’s Position on the Adopted 2018 RSPO Principles and Criteria (Nov. 15, 2018), https://wwf.panda.org/wwf_news/?337932/WWFs-position-on-the-proposed-adoption-of-the-2018-RSPO-Principles-and-Criteria [<https://perma.cc/9SGC-D32P>] (“WWF sees the new P&C as a significant step forward in addressing the weaknesses in the previous version of the P&C and believes it now represents an essential tool that can help companies achieve their commitments to palm oil that is free of deforestation, expansion on peat, exploitation and the use of fire.”). *But see* Press Release, Greenpeace, Joint NGO Statement on Failure of RSPO to Meet the Demands of Global Climate Crisis (Nov. 6, 2019), <https://www.greenpeace.org/southeastasia/press/3337/joint-ngo-statement-on-failure-of-rspo-to-meet-the-demands-of-global-climate-crisis> [<https://perma.cc/C2ED-XNAE>] (expressing concerns that RSPO members are not abiding by the RSPO Principles and Criteria).

141. See, e.g., ERIKA GEORGE, INCORPORATING RIGHTS STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY 155–88 (2021) (describing rankings produced by civil

For example, access to health is recognized as a human right in the Universal Declaration of Human Rights and core international human rights agreements.¹⁴² In a report to the U.N. General Assembly, the Special Rapporteur on the Right to Health provided human rights guidelines for pharmaceutical companies in relation to access to medicines.¹⁴³ The guidelines recognized that the human rights responsibilities of pharmaceutical companies required adequate governance of access to medicine issues, including a publicly available policy on access to medicines; direct board-level responsibility and accountability for that policy; clear management systems, “including quantitative targets, to implement and monitor its access-to-medicines policy”; annual reporting; and “an effective, transparent, accessible and independent monitoring and accountability mechanism.”¹⁴⁴

The Access to Medicines Index (“ATMI”) incorporates many of these governance criteria in its methodology for evaluating the access to medicines practices of the pharmaceutical sector.¹⁴⁵ ATMI “evaluates and compares 20 of the world’s leading research-based pharmaceutical companies according to their effort to improve access to medicine in [low and middle-income countries].”¹⁴⁶ The ATMI provides an individual scorecard for each company on the factors that led to its rank and identifies specific improvements that it can make.

Eli Lilly was criticized for poor governance of access to medicine, specifically for its failure to disclose information “related to responsible promotional practices” and its lack of “access-related incentives for its senior executives and in-country and regional managers.”¹⁴⁷ It was also criticized for its lack of an access planning framework and relatively small priority

society actors to compare corporate compliance with international law norms on conflict minerals, human rights, and access to medicine, among others).

142. Special Rapporteur on the Right to Health, International Standards on the Right to Physical and Mental Health, <https://www.ohchr.org/en/special-procedures/sr-health/international-standards-right-physical-and-mental-health> [https://perma.cc/N6PF-TZ3Z] (last visited Apr. 3, 2024).

143. Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, The Right to Health, U.N. Doc. A/63/263 (2008).

144. *Id.* at 18–19.

145. See ACCESS TO MEDICINE FOUNDATION, ACCESS TO MEDICINE INDEX 2022: METHODOLOGY 14, 28–29 (2022) (explaining governance indicators GA1–GA5).

146. *Id.* at 5.

147. *Id.* at 180.

pipeline, and for not disclosing access strategies for its products.¹⁴⁸ In contrast, GlaxoSmithKline (“GSK”) and Johnson & Johnson scored higher on the index for incentivizing their CEOs, senior executives, and regional managers to achieve its access to medicine goals, and, in GSK’s case, direct board-level responsibility for access to medicine strategy.¹⁴⁹ According to ATMI, these corporations also have large priority pipelines with robust access planning and capacity building.¹⁵⁰ According to GSK’s 2022 annual report, it includes both access to healthcare and global health among its six ESG focus areas, which “address what is most material to our business and the issues that matter to our stakeholders.”¹⁵¹ GSK supports these goals with internal corporate Key Performance Indicators (“KPI”), external monitoring by ATMI and others, and by assigning responsibility for progress towards these goals to the GSK Leadership Team with oversight by the Corporate Responsibility Committee of GSK’s board of directors.¹⁵²

H. *Industry Organizations*

Industry coalitions can also serve as important intermediaries that make international law applicable to their members. The Responsible Business Alliance (“RBA”) is “composed of more than 230 electronics, retail, auto and toy companies with combined annual revenue greater than \$7.7 trillion, directly employing over 6 million people.”¹⁵³ Beyond its core membership, “thousands of companies that are Tier 1 suppliers to those members are required to implement the RBA Code of Conduct.”¹⁵⁴

148. *Id.*

149. *Id.* at 188, 192.

150. *Id.*

151. *GSK Annual Report 2022*, GSK 42 (2022).

152. *Id.* The charter of GSK’s Corporate Responsibility Committee states that the committee has oversight of “GSK’s responsible business approach and ESG strategy, performance and reporting which reflect the most important issues for responsible and sustainable business growth,” including views and interests of the Company’s internal and external stakeholders, enterprise risks within scope of this committee’s expertise and responsibility, and “advising the Remuneration Committee on the integration of ESG performance into the Company’s Remuneration policy.” GSK Corporate Responsibility Committee, Terms of Reference, <https://www.gsk.com/media/10758/terms-of-reference-corporate-responsibility-committee.pdf> [<https://perma.cc/9D96-8CCD>] (last updated Dec. 12, 2023).

153. *Members*, RESPONSIBLE BUS. ALL., <https://www.responsiblebusiness.org/about/members> [<https://perma.cc/84ZZ-XB4Q>] (last visited Mar. 28, 2024).

154. *Id.*

The Code of Conduct of the RBA states that “[i]n alignment with the UN Guiding Principles on Business and Human Rights, the provisions in this Code are derived from and respect internationally recognized standards including the ILO Declaration on Fundamental Principles and Rights at Work and the UN Universal Declaration of Human Rights.”¹⁵⁵ The purpose of the code is to “establish[] standards to ensure that working conditions in the electronics industry, or industries in which electronics are a key component, and its supply chains are safe, that workers are treated with respect and dignity, and that business operations are environmentally responsible and conducted ethically.”¹⁵⁶ In order to become a participant of the RBA and adopt the code, “a business shall declare its support for the Code and actively pursue conformance to the Code and its standards in accordance with a management system as herein.”¹⁵⁷

Ipieca, or the International Petroleum Industry Environmental Conservation Association, is the “global oil and gas association for advancing environmental and social performance across the energy transition.”¹⁵⁸ It has three classes of members: international and national oil and gas companies; international, regional, and national associations addressing environmental or social impacts of industry activity; and those companies providing services “in connection with exploration, production, treatment, storage, or transportation of oil and gas.”¹⁵⁹ All members must agree to abide by Ipieca’s principles in order to maintain active membership.¹⁶⁰ Many of these principles actively incorporate international law norms,

155. RESPONSIBLE BUS. ALL., RESPONSIBLE BUSINESS ALLIANCE CODE OF CONDUCT 1 (2021).

156. *Id.*

157. *Id.* One such member is Nvidia Corporation, whose human rights policy states the following: “We endorse internationally recognized human rights principles, including the United Nations Global Compact (UNGC), the United Nations Guiding Principles (UNGP), the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Core Conventions of the International Labour Organization (ILO), the ILO Declaration on Fundamental Principles and Rights at Work, and we follow the laws of the countries in which we operate.” NVIDIA, HUMAN RIGHTS POLICY (2022). As an RBA member, Nvidia also requires that its suppliers comply with the RBA Code of Conduct. *Id.* at 2.

158. IPIECA, <https://www.ipieca.org> [<https://perma.cc/V58E-2AKJ>] (last visited Mar. 28, 2024).

159. *Id.*

160. *Ipieca Principles*, IPIECA, <https://www.ipieca.org/membership/ipieca-principles> [<https://perma.cc/D2A6-UCNW>] (last visited Mar. 28, 2024).

including human rights.¹⁶¹ For example, Ipieca members must support the Paris Agreement by advancing emissions reductions and innovation and enabling adoption of low carbon products and solutions.¹⁶² They are also expected to support the U.N. Guiding Principles on Business and Human Rights by promoting “the health, wellbeing and social inclusion of workforces and local communities” and by “contribut[ing] to the social and economic development of host communities and countries.”¹⁶³ Members are also expected to support the U.N. Convention for Biological Diversity by “manag[ing] operational impacts on the natural environment and ecosystem services” and the 2030 Agenda for Sustainable Development by “[i]ntegrat[ing] sustainability across activities, increase[ing] transparency and engag[ing] with key stakeholders.”¹⁶⁴ Ipieca encourages members to implement these principles through the provision of practical guidance and working groups.¹⁶⁵

I. Multi-Stakeholder Initiatives

Multi-stakeholder initiatives (“MSIs”) “are collaborations between businesses, civil society and other stakeholders that seek to address issues of mutual concern, including human rights and sustainability.”¹⁶⁶ MSIs may “facilitate dialogue across stakeholder groups, foster cross-sector engagement, or develop and apply standards for corporate or government conduct.”¹⁶⁷ Some of the most well-known MSIs include Fair Labor Association, Forest Stewardship Council, International Code of Conduct for Private Security Providers, Better Cotton Initiative, Rainforest Alliance, Roundtable on Sustainable Palm Oil, and UN Global Compact.¹⁶⁸ These organizations can fulfill important roles in enforcing international law against corporations because they can set standards that reflect international law norms, monitor corporations’ compliance with those standards, and sanction them for non-compliance.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *What Are MSIs?*, MSI INTEGRITY, <https://www.msi-integrity.org/what-are-msis> [<https://perma.cc/HFM4-NBWC>] (last visited Mar. 28, 2024).

167. *Id.*

168. *The MSI Database*, MSI INTEGRITY, <https://msi-database.org/database> [<https://perma.cc/S264-6FCP>] (last visited Mar. 28, 2024).

For example, the Swiss government, in coordination with the United States and the United Kingdom, collaborated on a multi-stakeholder initiative with civil society and private security companies and organizations, culminating in the International Code of Conduct for Private Security Service Providers (the “Code”) in 2010.¹⁶⁹ The Code builds upon the Montreux Document,¹⁷⁰ the UNGPs, and other international law norms to prohibit the use of force by private security providers (subject to exceptions); torture or other cruel, inhuman or degrading treatment or punishment; sexual exploitation, abuse or gender-based violence; human trafficking; slavery, forced or compulsory labor; and the worst forms of child labor.¹⁷¹ As Professor Laura Dickinson writes, “[t]his is significant because the treaties from which these principles are derived are often ambiguous about their applicability to nongovernmental actors.”¹⁷² The Code “fills important gaps in international law without the need for a long and laborious treaty-revision process”¹⁷³ because companies can commit to these principles by signing on to the Code.¹⁷⁴

However, scholars and civil society organizations have criticized MSIs for failing to adopt a rights holder-centric focus in norm-setting,¹⁷⁵ relying

169. Interestingly, Professor Dickinson notes that “private clients of security firms—often large, multinational corporations such as those in the extractive industries—were mostly absent from the process.” Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 EMORY L.J. 417, 433 (2013); see also *id.* at 448 (“[O]ne key stakeholder group that does not yet have a clear seat at the table in the regime is the group of corporations, such as those in the extraction industries, that regularly employ private security contractors. These corporations do not have a role in the regime comparable to the three primary stakeholder groups. Nevertheless, the Charter does provide that the Board may adopt rules to grant ‘observer status’ to other stakeholder groups, and specifically mentions ‘non-state clients’ as one such group.”) (citations omitted).

170. INT’L COMM. OF THE RED CROSS, THE MONTREUX DOCUMENT ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT (2009).

171. *The Code: The International Code of Conduct for Private Security Service Providers*, ICOCA, <https://icoca.ch/the-code> [<https://perma.cc/SE8X-BURP>] (last visited Mar. 28, 2024).

172. Dickinson, *supra* note 169, at 421.

173. *Id.*

174. *Id.*

175. See MSI INTEGRITY, NOT FIT-FOR-PURPOSE: THE GRAND EXPERIMENT OF MULTI-STAKEHOLDER INITIATIVES IN CORPORATE ACCOUNTABILITY, HUMAN RIGHTS AND GLOBAL GOVERNANCE 12 (2020) (“MSIs sometimes create standards that are too weak to ensure that the underlying issue is actually being addressed. This

on professional auditors who may lack localized knowledge,¹⁷⁶ and relying on market consequences to incentivize compliance instead of legal enforceability.¹⁷⁷ For example, a study by MSI Integrity found that only thirteen percent of MSIs examined included affected populations in their primary decisionmaking body.¹⁷⁸ These failings have led MSI Integrity to conclude that “MSIs are not effective tools for holding corporations accountable for abuses, protecting rights holders against human rights violations, or providing survivors and victims with access to remedy.”¹⁷⁹ Instead, MSIs succeed as fora for “learning, dialogue, and trust-building between corporations and other stakeholders.”¹⁸⁰

J. NGOs

NGOs can encourage companies to comply with human rights in at least four ways: *litigation, education and awareness raising, representation, and monitoring*. First, NGOs use litigation to hold companies accountable for violating human rights in their operations. For example, in December 2019, an international advocacy group filed a lawsuit against a number of technology corporations for “knowingly benefiting from and aiding and abetting the cruel and brutal use of young children in Democratic Republic of Congo (“DRC”) to mine cobalt, a key component of every rechargeable lithium-ion battery used in the electronic devices these companies manufacture.”¹⁸¹

tends to happen through: (1) setting standards that are weaker than international human rights norms or are otherwise regressive; (2) using ambiguous language; (3) relying on processes that lack sufficient detail or rigor to ensure they lead to the protection of rights; (4) making key standards ‘optional’; and (5) only applying to selective aspects of a business operation or supply chain.”) (emphasis omitted).

176. See Brinks et al., *supra* note 18, at 26.

177. See MSI INTEGRITY, *supra* note 175, at 14 (“Almost a third of MSIs do not have a grievance mechanism, and therefore, do not provide individuals or communities with the ability to seek remedy for rights violations. . . . Of those MSIs with grievance mechanisms, nearly all of their complaints procedures fail to meet internationally recognized criteria for effective access to remedy.”); Brinks et al., *supra* note 18, at 30–31.

178. MSI INTEGRITY, *supra* note 175, at 3.

179. *Id.* at 4. According to MSI Integrity, the two primary challenges that have limited MSIs’ capacity to protect rights are that “MSIs are not rights holder-centric” and that “MSIs have not fundamentally restricted corporate power or addressed the power imbalances that drive abuse.” *Id.* at 5.

180. *Id.* at 4.

181. Class Complaint for Injunctive Relief and Damages at 1, *Doe v. Apple, Inc.*, No. 1:19-cv-03737 (D.D.C. Dec. 16, 2019).

Second, NGOs participate in education and awareness campaigns on a range of issues concerning corporate conduct. Professor Virginia Haufler explains how NGOs Human Rights Watch, Global Witness, Partnership Africa Canada (“PAC”), and Oxfam, among others, provided investigative reports and led efforts to understand the role of resources—specifically, diamonds—in fueling conflict in Angola and Sierra Leone.¹⁸² These efforts helped to raise public awareness of connections between business practices and armed conflict and to introduce these issues into political debates in consumer states.¹⁸³ Professor Haufler writes that the participating NGOs “provid[ed] leverage against the industry, lobb[ie]d major producer and consumer governments and provid[ed] ideational support for the idea of a certification regime.”¹⁸⁴ In another example, Professors Abram Chayes and Antonia Handler Chayes explain how the Civil Liberties Organization undertook fact-finding that resulted in a report on conditions in Nigerian prisons. Following publication, a number of policy changes were introduced in the prisons relating to food allowances, access to doctors, and overall budget; thousands of prisoners also received amnesty.¹⁸⁵

Third, NGOs participate in the creation of international institutions that are designed to improve human rights practices globally.¹⁸⁶ In the context of conflict diamonds, Professor Haufler explains that two NGOs, PAC and Global Witness, participated in the negotiations that created the Kimberley Process, an international certification scheme for diamonds.¹⁸⁷ Professors Chayes and Chayes explain that the NGO Centre for International Environmental Law (“CIEL”) assisted small island states in world climate negotiations, including attending the negotiations as advisors, providing briefings to the participants, “prepar[ing] a draft treaty to be tabled at the first negotiating session”¹⁸⁸ and “draft[ing] changes

182. Virginia Haufler, *Orchestrating Peace? Civil War, Conflict Minerals and the United Nations Security Council*, in INTERNATIONAL ORGANIZATIONS AS ORCHESTRATORS 214, 223 (Kenneth Abbott et al. eds., 2015).

183. *Id.*

184. *Id.* at 224.

185. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 254 (1995).

186. However, business organizations have taken advantage of NGO access to introduce their own interests into international law-making. Durkee, *supra* note 4, at 229.

187. Haufler, *supra* note 182, at 228.

188. CHAYES & CHAYES, *supra* note 185, at 261.

in the negotiating texts for use by members of [the Association of Small Island States].”¹⁸⁹

Fourth, NGOs supplement the governance functions of intergovernmental organizations by providing monitoring and data on state compliance with a number of international agreements.¹⁹⁰ Among their various functions, Professors Chayes and Chayes explain that NGOs serve as “independent sources of information and data that can be used by the regime”; “help to check and verify party reporting”; “provide the basic evaluation and assessment of party performance”; provide technical assistance to states to assist with participation in lawmaking and subsequent compliance; “perform mediating and facilitating services”; and engage in public shaming and exposure.¹⁹¹ For example, Professor Xinyuan Dai explains how the International Whaling Commission not only monitors state compliance by collecting governmental reports, but also “utilizes the voluntary efforts of wildlife groups to check and report on the comings and goings of whaling vessels.”¹⁹² Similarly, Professor Dai explains how the Committee on the Elimination of Discrimination Against Women monitors state compliance by collecting and monitoring government reports while also relying on feedback from women’s rights groups at its review meetings.¹⁹³ Not all NGOs provide these functions. Those who do so do not do so all the time. Instead, Professor Dai explains that NGOs perform these functions when they have informational advantages over resource-constrained Intergovernmental Organizations (“IGOs”).¹⁹⁴

189. *Id.*

190. *Id.* at 164 (“Human rights organizations have been particularly active in producing information to challenge reports filed by parties to human rights treaties. Indeed, one of the principal activities of these organizations is to provide information to the various supervisory committees established under human rights conventions, against which they can evaluate the national reports submitted in accordance with those treaties.”).

191. *Id.* at 251.

192. Dai, *supra* note 18, at 139, 142.

193. *Id.*

194. *Id.* at 145–47 (explaining that goal divergence between states and IGOs determines the extent to which the latter is resource constrained, which may lead it to turn to non-state actors as informational intermediaries, should they be available); *see also* Xinyuan Dai, *Information Systems in Treaty Regimes*, 54 *WORLD POL.* 405, 414 (2002) (“[T]he existence of noncompliance victims as low-cost monitors partially shapes the choice of monitoring arrangements made by states concerned with efficiency.”).

Table 1: Stakeholder Enforcement Strategies

Actor	Mechanism	Incentive	Examples
States	Enforcement	Legal Sanction	<ul style="list-style-type: none"> • <i>Mandatory Human Rights Information Disclosure</i>: California • <i>Mandatory Human Rights Due Diligence</i>: Germany • <i>Import/Export Regulations</i>: WROs, Uyghur Forced Labor Prevention Act
Consumers	Boycott Litigation	Market Pressure Legal Sanction	<ul style="list-style-type: none"> • <i>Consumer Boycotts</i>: Multiple • <i>Consumer Lawsuits</i>: Hodsdon v. Mars
Employees	Activism	Recruitment Costs Retention Costs Reputational Sanction	<ul style="list-style-type: none"> • <i>Employee Walkouts</i>: Wayfair, Google • <i>Open Letters</i>: Microsoft, Google
Investors	Shareholder Resolutions Shareholder Settlements	Reputational Sanction	<ul style="list-style-type: none"> • <i>Shareholder Proposals</i>: Starbucks • <i>Shareholder Agreements</i>: Kraft Heinz
D&O Insurers	Policy Provisions	Risk Management	<ul style="list-style-type: none"> • <i>Monitoring Risk Governance</i>: Climate Risk Governance
Financial Institutions	Conditions of Financing	Financial Incentive	<ul style="list-style-type: none"> • <i>Mandatory Certifications by MSIs</i>: RSPO
Benchmarking Organizations	Industry Rankings Issue Rankings	Reputational Benefit/ Sanction	<ul style="list-style-type: none"> • <i>Industry Rankings</i>: Access to Medicines Index
Industry Organizations	Code of Conduct Assessments	Reputational Benefit	<ul style="list-style-type: none"> • <i>Industry Organizations</i>: RBA, IPIECA
Multi-Stakeholder Initiatives	Code of Conduct Monitoring Certification	Reputational Benefit	<ul style="list-style-type: none"> • <i>MSIs</i>: ICoCA
NGOs	Litigation Education Monitoring Representation	Legal Sanction Reputational Risk	<ul style="list-style-type: none"> • <i>Ngo Lawsuits</i>: Doe v. Apple • <i>Ngo Education</i>: conflict diamonds, prison conditions • <i>Ngo Monitoring</i>: Multiple • <i>Ngo Representation</i>: Kimberley Process, world climate negotiations

III. WHAT IS THE RELATIONSHIP BETWEEN THE DIFFERENT TYPES OF ENFORCEMENT PERFORMED BY STAKEHOLDERS?

As discussed in Part I.C., stakeholder influence may result from three attributes: power, legitimacy, and urgency.¹⁹⁵ A stakeholder's influence depends on whether it possesses one, two or all of these attributes. The importance of these three attributes explains why the success of one stakeholder's actions may depend on the actions of another.

But not all stakeholder enforcement is the same. A variety of stakeholders employ a broad range of strategies to influence corporations, and they do so with different objectives in mind. But all of these enforcement strategies seek to change the (i) preferences of corporate actors to comply with international law, (ii) preferences of other corporate stakeholders to enforce international law, or both. The interaction of different stakeholder enforcement strategies can be classified as *predicative enforcement*, *facilitative enforcement*, *direct enforcement*, and *amplified enforcement*.

It is important to identify these distinctions in order to recognize the different ways in which stakeholders participate in the enforcement of international law. This typology also clarifies how the actions of one or more stakeholders can change the preferences of another stakeholder to enforce international law. The result is both encouraging and humbling: Corporate stakeholders are active in the enforcement of international law, but their success is not ensured nor their participation guaranteed. It is therefore important to recognize these interactions in order to retain a balanced hope.

A. *Predicative Enforcement*

Predicative enforcement occurs when a stakeholder engages in conduct that creates the conditions for another stakeholder to enforce international law. The first stakeholder does so by (i) creating an incentive for another stakeholder to act, or (ii) undertaking action that makes it more likely that another stakeholder will be successful in engaging the company.

A classic example of predicative enforcement is illustrated by the stakeholder actions that shareholders reference in their proposals to corporate management. The shareholder proposal is a form of direct engagement that often relies on the antecedent action taken by other stakeholders. For example, when shareholders submit human rights proposals to corporations, they often highlight the ways that poor human rights practices

195. See, e.g., Mitchell et al., *supra* note 52, at 854.

can expose the corporation to litigation, regulatory, operational, and reputational risks. These risks can prove important in convincing other shareholders to support the proposal or persuade the corporation's management to acquiesce. While the success of the proposal may depend on these risks, the shareholder proponent did not create them. Instead, they rely on *other stakeholders* to make the case for why corporate practices should change.

For example, certain shareholders submitted a human rights proposal requesting a report on how Hershey's policies and practices will "put the company on course to eradicate child labor in all forms from the company's West African cocoa supply chain by 2025."¹⁹⁶ The shareholders defended their request by explaining that:

Failure to eradicate child labor exposes Hershey and its investors to financial, legal, systemic, and reputational risks. In 2021, a lawsuit filed on behalf of former child slaves alleged Hershey knowingly profited from the illegal and systematic use of child labor In October 2021, Hershey and the Rainforest Alliance were sued for false and deceptive marketing of chocolate products labeled as "sustainably" or "responsibly produced."¹⁹⁷

The shareholder proposal did not create the reputational, legal, financial, and systemic risks that the shareholders reference in their request. Instead, these risks were created by the plaintiffs in the lawsuits filed against Hershey. These lawsuits may not prove successful in a court of law. However, their effects extend beyond the courtroom and into annual general meetings, where shareholders rely on these legal developments to evaluate whether corporations need to change practices. It is therefore useful to take a broader lens when evaluating the value and success of these lawsuits that may not appear to go anywhere but serve as predicative enforcement in a stakeholder process. While courts may dismiss these lawsuits, they receive new life in these private meetings, where they serve as fuel for a different battle with different weapons.

In another example, the Corporate Human Rights Benchmark ("CHRB") ranked Kraft Heinz as a poor performer on human rights—even in an industry that fails to impress on its human rights practices:

196. *End Child Labor in Cocoa Production 2022—The Hershey Company*, INV. ADVOC. FOR SOC. JUST. (2022), <https://iasj.org/wp-content/uploads/Hershey-2022-Shareholder-Proposal-FINAL.pdf> [<https://perma.cc/8J3Y-DQ5T>].

197. *Id.* at 1–2.

food services.¹⁹⁸ Following its ranking, shareholders submitted a proposal to Kraft Heinz requesting that the company publish a human rights impact assessment “examining the actual and potential impacts of one or more high risk products sold by Kraft Heinz.”¹⁹⁹ The shareholders referenced rankings and analyses produced by Know the Chain and CHRB to identify specific human rights risks and argued that “[p]ublic scrutiny is intensifying reputational risks for food products companies.”²⁰⁰ They referenced media reports by the *New York Times*, *Wall Street Journal*, and *CNN* relating to significant labor abuses in the supply chains for palm oil, tomatoes, and shrimp.²⁰¹ The rankings produced by CHRB and Know the Chain, as well as the media reports, served as predicative enforcement for the shareholder proposal, allowing the shareholders to strengthen their case.²⁰²

A corporation’s competitors can also play a predicative enforcement role. The shareholder proposal to Kraft Heinz compared its practices to those of its competitors: “Leading companies like Coca-Cola and Nestlé have published [human rights impact assessments (“HRIAs”)] on high-risk food products in their supply chains.”²⁰³ The shareholders therefore requested that Kraft Heinz do the same.²⁰⁴ The shareholders ultimately withdrew the proposal in exchange for Kraft Heinz’s commitment “to conducting a HRIA consistent with the UN Guiding Principles on Business and Human Rights.”²⁰⁵ Interestingly, the CHRB ranking played a role once again in setting the standard that the shareholders

198. See WORLD BENCHMARKING ALL., CORPORATE HUMAN RIGHTS BENCHMARK: 2020 KEY FINDINGS 22 (2020) (noting particularly poor performance on human rights due diligence).

199. *Shareholders Request That The Kraft Heinz Company Publish Human Rights Impact Assessment*, SEVENTH GENERATION INTERFAITH (2021), <https://seventhgenerationinterfaith.org/wp-content/uploads/2021/01/kraft-heinz-2021-agm-hria-resolution.pdf> [<https://perma.cc/Q7XP-5UX5>].

200. *Id.*

201. *Id.*

202. It is also worth noting that shareholder proposals can, in turn, serve as predicative enforcement for other actions undertaken by stakeholders.

203. *Id.*

204. *Id.*

205. Press Release, Interfaith Center on Corporate Responsibility, Investors Commend Kraft Heinz for Efforts to Advance Human Rights Due Diligence Throughout Its Supply Chain (May 5, 2021), <https://www.iccr.org/investors-commend-kraft-heinz-efforts-advance-human-rights-due-diligence-throughout-its-supply-chain> [<https://perma.cc/TJ4K-XT5A>].

expected from Kraft Heinz when they agreed to withdraw the proposal: “We would like to see the company dramatically improve its Corporate Human Rights Benchmark score and become a leader among its peers in respecting human rights.”²⁰⁶

Even predicative enforcement has its own predicates. The benchmarking reports that shareholders reference in their proposals are often based on publicly available information that a company is legally obligated to disclose. For example, Know the Chain and CHRB perform human rights rankings and analyses of many of the most well-known companies.²⁰⁷ But these rankings are based on the disclosures that the companies share as required by the California Transparency in Supply Chains Act and the U.K. Modern Slavery Act.²⁰⁸ These laws forced these corporations to share information that they might not otherwise share.²⁰⁹ As such, two layers of predicative enforcement enabled shareholders to directly engage companies on their human rights practices.

Figure 1: Functions of Predicative Enforcement



Predicative enforcement is important because not all stakeholders have influence over a corporation. A given stakeholder’s characteristics might make it more or less likely that a corporation will listen to that stakeholder’s demands. Through predicative enforcement, stakeholders can compensate for their own shortcomings by relying on the attributes of others.

B. Facilitative Enforcement

Facilitative enforcement occurs when a stakeholder refuses to take action that might otherwise disrupt the process of stakeholder enforcement that is performed by others. It is distinguishable by its absence

206. *Id.*

207. *Id.*

208. See BUS. & HUM. RTS. RES. CTR., FTSE 100 & THE UK MODERN SLAVERY ACT: FROM DISCLOSURE TO ACTION 12, 24 (2018).

209. See CAL. CIV. CODE § 1714.43; Modern Slavery Act 2015 (U.K.); *Modern Slavery Act 2018* (Austl.).

rather than action or, more generously, its explicit non-interference with the stakeholder enforcement performed by others. While similar to predicative enforcement, it is distinguishable because it does not create the inputs that feed into a subsequent phase of stakeholder action. Instead, it is characterized by a refusal to interfere in the stakeholder chain reaction that is otherwise taking place.

In the shareholder context, the Division of Corporation Finance of the Securities and Exchange Commission plays a facilitative role. A corporation can exclude a shareholder proposal from its proxy materials by filing a “no-action request” with the Division, arguing that there is a basis for excluding the proposal under Rule 14a-8.²¹⁰ One basis for exclusion is Rule 14a-8(i)(7), which permits a corporation to exclude a proposal if it “deals with a matter relating to the company’s ordinary business operations.”²¹¹ “The purpose of the exception is ‘to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.’”²¹²

On some occasions, the Division disagrees with the corporation, thereby playing a facilitative role by permitting the shareholder proposal to proceed to a vote or potential settlement. For example, in 2021, the Division denied Moderna’s request to exclude a shareholder proposal related to access to medicine that was submitted by Oxfam America and

210. Nicholas P. Pellicani et al., *Shareholder Proposals Under Rule 14a-8: Practical Guidance for Proxy Season*, DEBEVOISE & PLIMPTON (Dec. 14, 2022), https://www.debevoise.com/-/media/files/insights/publications/2022/12/14_shareholder-proposals-under-exchange-act-rule.pdf?rev=1b91dab2619b48c1a4434d1f4c90e60b [https://perma.cc/9FPW-WKHG].

211. 17 C.F.R. § 240.14a-8(i)(7) (2024).

212. SEC Staff Legal Bulletin No. 14L (CF), U.S. SEC. & EXCH. COMM’N (Nov. 3, 2021), https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals#_ftn1 [https://perma.cc/X6GE-9XD9] (quoting Release No. 34-40018 (May 21, 1998)).

Domini Impact Equity Fund.²¹³ Moderna sought to exclude the proposal on the basis of Rule 14a-8(i)(7).²¹⁴ However, the Division disagreed.²¹⁵

On other occasions, the Division declined to play a facilitative role by agreeing with the corporation that there is a basis for excluding the proposal. In 2021, a shareholder submitted a proposal at Chevron that requested that the board commission an independent third-party report “analyzing how Chevron’s policies, practices, and the impacts of its business, perpetuate racial injustice and inflict harm on communities of color in the United States.”²¹⁶ The proposal also stated that the report should “[a]lign with the UN Guiding Principles on Business and Human Rights to identify, assess, prevent, mitigate, and remedy human rights impacts.”²¹⁷ Relying on Rule 14a-8(i)(7), Chevron sought to exclude the proposal,²¹⁸ and the Division agreed.²¹⁹

As such, the impact of predicative and direct enforcement depends on facilitative enforcement that may or may not occur.

213. Moderna, Inc., SEC Staff No-Action Letter, 2022 No-Act. LEXIS 141 (Feb. 8, 2022). Oxfam America and Domini Impact Equity Fund had submitted a proposal to Moderna’s board requesting that it commission a third-party report “analyzing the feasibility of promptly transferring intellectual property and technical knowledge (“know-how”) to facilitate the production of COVID-19 vaccine doses by additional qualified manufacturers located in low- and middle-income countries, as defined by the World Bank.” *Id.*

214. Letter from Moderna, Inc. and Lillian Brown, Partner, Wilmer Cutler Pickering Hale & Dorr LLP, to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm’n 4 (Dec. 17, 2021), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2022/oxfammoderna020822-14a8.pdf> [<https://perma.cc/E3EU-RFMP>]. Moderna argued that “[m]anaging the development, production and distribution of particular products requires complex and extensive analysis that is not appropriate for shareholders and should be left to management.” *Id.* at 5.

215. See Moderna, Inc., *supra* note 213 (“We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal transcends ordinary business matters and does not seek to micromanage the Company.”).

216. The Sisters of St. Francis of Phil., *Environmental Justice & Racial Equity Analysis: Chevron, 2021*, INV. ADVOC. FOR SOC. JUST. (2021), <https://iasj.org/wp-content/uploads/Chevron-Proposal-2021-FINAL.docx.pdf> [<https://perma.cc/92VD-2T7U>].

217. *Id.*

218. Letter from Chevron Corp. and Elizabeth A. Ising, Partner, Gibson, Dunn & Crutcher, to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm’n 3 (Jan. 18, 2021), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/stfrancischevron011821-14a8-incoming.pdf> [<https://perma.cc/QAW5-UC3S>].

219. *Shareholder Proposal No-Action Responses*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/shareholder-proposal-no-action-responses-2020-2021.htm> [<https://perma.cc/HV6B-NCYT>] (last visited July 18, 2021).

Figure 2: Functions of Predicative, Direct, and Facilitative Enforcement



C. *Direct Enforcement*

On some occasions, stakeholders may engage directly with a company without involvement from other stakeholders. In the example above, direct engagement is performed by shareholders who submit their proposals to a company’s management for inclusion in the company’s proxy materials; raise issues directly with management to influence reform; and negotiate with management to withdraw a shareholder proposal in exchange for management’s commitment to make requested changes. This is the most recognizable form of engagement because the chain of causation is short; it is easy to identify the actor, mechanism, and corporate response.

D. *Amplified Enforcement*

Amplified enforcement refers to stakeholder action that magnifies the impact of action taken by other stakeholders. Some actions may have limited impact in the absence of amplification efforts by other stakeholders. A classic example of amplification enforcement is performed by the news media. As discussed above, an important incentive for corporate compliance is reputational risk. The media plays an important amplification role in influencing the magnitude of that risk for a corporation.²²⁰ First, it publicizes the actions of other stakeholders who undertake predicative or direct enforcement against corporations. For example, national news sources frequently report on human rights reports and rankings produced by NGOs, shareholder engagement demanding improved human rights practices, and company responses to such pressure.²²¹ By doing so,

220. Cf. David Kreitmeir, Nathan Lane & Paul A. Raschky, *The Value of Names: Civil Society, Information, and Governing Multinationals on the Global Periphery* 20 (June 23, 2022) (unpublished manuscript) (on file with author) (“[I]ncreased media attention for an assassination event leads to more negative publicity and a higher chance of public backlash against the resource company tied to the assassination.”).

221. See, e.g., Liz Alderman, *French Company to Face Charges of Complicity in Human Rights Violations*, N.Y. TIMES (May 18, 2022), <https://www.nytimes.com/2022/05/18/business/lafarge-human-rights-violations.html>; Ana Swanson & Ivan Penn, *Solar Supply*

the news media influences the issues that are discussed regarding that company.

Second, the media influences a corporation's reputation by hosting forums in which they enable "firms and stakeholders [to] debate what constitutes a good firm."²²² They fulfill this function by actively soliciting views from different constituencies: "They will ask a firm to respond to a stakeholder evaluation or ask a stakeholder to respond to a firm action or statement. One evaluation may lead to a competing or even a supporting evaluation by another source."²²³

Third, the media also uses its "agenda-setting" function to influence the risks that a corporation encounters because of its poor performance on human rights. The agenda-setting function involves "the day-to-day selection and display of news by journalists, [which] focuses the public's attention and influences its perceptions."²²⁴ The media's coverage of human rights violations influences the public agenda because the "prominence of elements in the news influences the prominence of those elements among the public."²²⁵ The media engages in agenda-setting through important cues, including the frequency and length of coverage, which the public uses to determine the issues and corporations that most warrant their attention.²²⁶ It also supplies a filter by which the public associates a company with a set of attributes.²²⁷

A corporation's reputation may be particularly vulnerable following a crisis, such as those brought about by direct or facilitative enforcement

Chain Grows More Opaque Amid Human Rights Concerns, N.Y. TIMES (Aug. 1, 2023), <https://www.nytimes.com/2023/08/01/business/economy/solar-xinjiang-china-report.html>; Emily Flitter, *Ruger Shareholders Vote for a Study of Gunmaker's Impact on Human Rights*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/06/01/business/ruger-shareholders-vote.html>.

222. David L. Deephouse, *Media Reputation as a Strategic Resource: An Integration of Mass Communication and Resource-Based Theories*, 26 J. MGMT. 1091, 1093, 1097 (2000).

223. *Id.* at 1098.

224. Craig E. Carroll & Maxwell McCombs, *Agenda-Setting Effects of Business News on the Public's Images and Opinions About Major Corporations*, 6 CORP. REPUTATION REV. 36, 36 (2003).

225. *Id.* at 36–37; *see also* Timothy G. Pollock & Violina P. Rindova, *Media Legitimation Effects in the Market for Initial Public Offerings*, 46 ACAD. MGMT. J. 631, 632 (2003) ("Therefore, in performing its functions of informing, highlighting, and framing, the media presents market participants with information that affects impression formation and the legitimation of firms.").

226. *See* Carroll & McCombs, *supra* note 224, at 37.

227. *See id.* at 41.

of human rights by NGOs, government actors, or shareholders. The media plays an amplification enforcement role by framing how the public *views* the crisis. Not all crises are equally dangerous to a corporation. Crisis management scholarship identifies initial crisis responsibility as a significant factor determining the reputational threat an organization confronts during a crisis situation.²²⁸ Initial crisis responsibility is a function of “how much stakeholders believe organizational actions caused the crisis.”²²⁹ The greater the attribution of responsibility, the greater the threat to the organization’s reputation.²³⁰

Attributions of responsibility vary based on the type of crisis a stakeholder believes occurred. There are three types of crisis with corresponding levels of blame attribution: victim cluster, accidental cluster, and preventable cluster.²³¹ In a victim cluster, the corporation is viewed as another victim of the crisis and, perhaps understandably, this crisis type involves the lowest attribution of responsibility and mildest reputational threat to the corporation.²³² The reputational threat grows as the public increasingly attributes the crisis to the corporation. In the preventable cluster, stakeholders believe that the “organization knowingly placed people at risk, took inappropriate actions or violated a law/regulation”; this crisis is associated with the most severe reputational threats and the strongest attributions of responsibility for the crisis.²³³ While a corporation’s reputational risk changes with the crisis type, these types are not a given but instead depend on the frames through which the public perceives the events.²³⁴ These frames “stress certain facts or values making

228. See W. Timothy Coombs, *Protecting Organization Reputations During a Crisis: The Development and Application of Situational Crisis Communication Theory*, 10 CORP. REPUTATION REV. 163, 166 (2007) (listing the other two factors as crisis history and prior relational reputation); W. Timothy Coombs, *An Analytic Framework for Crisis Situations: Better Responses from a Better Understanding of the Situation*, 10 J. PUB. RELS. RSCH. 177, 182 (1998) (“Two dimensions seem to explain basic crisis attributions: external control and personal control/locus of causality. External control is the degree to which external agents could control the crisis event. Personal control/locus of causality is the degree to which the organization itself could control the crisis event.”); *id.* at 187 (finding that “[c]risis types near to the high endpoint of greater personal control elicit stronger perceptions of crisis responsibility than those crisis types near the low end”).

229. Coombs, *Protecting Organization Reputations*, *supra* note 228, at 166.

230. See *id.*

231. See *id.* at 168.

232. See *id.*

233. See *id.*

234. See *id.* at 167.

them salient when individuals make decisions.”²³⁵ The public often relies on frames produced by the media to make judgments on the type of crisis that occurred.²³⁶

Figure 3: Functions of Predicative, Direct, Facilitative, and Amplified Enforcement



V. INCENTIVES: WHY DO CORPORATIONS OBEY INTERNATIONAL LAW?

Why do corporate managers comply with international law? The short answer is that legal risk is only a part of the story. In reality, it may prove too weak a stick to push corporate actors into compliance because it is absent, infrequently used, or too light.

Instead, the power of stakeholder mechanisms is that they create additional risks that corporations confront when they violate international law. These risks may not automatically arise from the violation itself. Instead, stakeholders create these risks through their actions. Human rights rankings, NGO reports, consumer boycotts, employee activism, and other stakeholder conduct do not pose legal liability for a company, but can create other types of risks. *Stakeholder mechanisms convert a corporation's violation of international law into reputational, strategic, and operational risks that incentivize corporate actors to comply with international law.*

The Committee of Sponsoring Organizations of the Treadway Commission (“COSO”) defines a *risk* as “the possibility that an event will occur and adversely affect the achievement of objectives.”²³⁷ Risks are associated with the key business objectives to which they relate. For example, “[r]isks are categorized as *operational* when specific goals are operational in nature, driving effective and efficient use of the company’s

235. *Id.*

236. *See id.* at 171.

237. COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM’N., ENTERPRISE RISK MANAGEMENT—INTEGRATED FRAMEWORK: EXECUTIVE SUMMARY 16 (2004).

resources.”²³⁸ Examples of operational risk include business interruption risks such as natural disasters, safety violations, or other events that disrupt the functioning of the company or its assets. *Strategic risks* are those that “relate to high-level goals, aligned with and supporting the Company’s mission and business objectives.”²³⁹ In contrast, “[r]isks are categorized as financial when the goals relate to providing reliable, accurate reporting to investors and stakeholders.”²⁴⁰ Finally, “[r]isks are categorized as Legal and Compliance for goals that relate to compliance with applicable laws and regulations.”²⁴¹ The clearest examples of *compliance risk* are when corporations violate laws or regulations, subjecting them or their managers to legal sanctions.

It is also worth discussing an additional risk that poses challenges for so many companies today—especially in the age of social media: *reputational risk*, which is “the risk to earnings or capital arising from negative public opinion.”²⁴² Reputational risk “affects the institution’s ability to establish new relationships or services, or continue servicing existing relationships.”²⁴³ A key human rights issue in the life sciences industry is access to medicine.²⁴⁴ In their Form 10-Ks, many leading life sciences companies recognize the reputational risks they face if they fail to comply with this human right. Pfizer acknowledged that “[g]overnmental authorities, non-governmental organizations, customers, investors, employees, and other stakeholders are increasingly sensitive to ESG matters, *such as equitable access to medicines and vaccines . . .*”²⁴⁵ More

238. JOHN SIDWELL & PETER HLAVNICKA, ENHANCED ENTERPRISE RISK MANAGEMENT 22 (2022) (emphasis omitted).

239. *Id.*; see also Mark L. Frigo & Richard J. Anderson, *Strategic Risk Management: A Foundation for Improving Enterprise Risk Management and Governance*, 22 J. CORP. ACCT. & FIN. 81, 83 (2011) (“*Strategic risks* are those risks that are most consequential to the organization’s ability to execute its strategies and achieve its business objectives.”).

240. SIDWELL & HLAVNICKA, *supra* note 238 (emphasis omitted).

241. *Id.* (emphasis omitted).

242. OFF. OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP’T OF TREAS., NEWS RELEASE 1996-2, CATEGORIES OF RISK (1996), <https://www.occ.treas.gov/news-issuances/news-releases/1996/nr-occ-1996-2a.pdf> [<https://perma.cc/ZPE6-GHCC>].

243. *Id.*

244. Special Rapporteur on the Right to Health, *International Standards on the Right to Physical and Mental Health*, UNITED NATIONS, <https://www.ohchr.org/en/special-procedures/sr-health/international-standards-right-physical-and-mental-health> [<https://perma.cc/N6PF-TZ3Z>] (last visited Apr. 3, 2024).

245. Pfizer Inc., Annual Report (Form 10-K) 22 (Feb. 23, 2023) (“While we strive to improve our ESG performance and meet our voluntary goals, if we do not meet,

broadly, Eli Lilly acknowledges that “we are subject to increased negative attention from the media, stockholders, activists, and other stakeholders on climate change, social, and sustainability matters. The perception that we have failed to act in a socially responsible manner, whether or not valid, results in adverse publicity that can negatively affect our business and reputation, as well as result in increased scrutiny from legislators and regulatory authorities.”²⁴⁶ Additionally, its disclosure states that “[i]f we fail to achieve, are perceived to have failed or been delayed in achieving, or improperly report our progress toward achieving these goals and commitments, it could negatively affect our reputation or investor confidence, and expose us to enforcement actions and litigation.”²⁴⁷

The power of stakeholders is not limited to informing corporate management of the risks they confront if they do not comply with international law. *Stakeholders also create those risks.* In the example discussed in Part I, NGOs file lawsuits against corporations for violating international human rights norms. Those lawsuits may pose some level of legal risk but the action by NGOs informs the strategies of shareholders who engage with corporate actors through submitting proposals, negotiating agreements, or other strategies. These shareholder actions create subsequent reputational risks for corporations that are further magnified by media coverage of the actions of the NGOs and shareholders. Similarly, CHRB and other organizations produce rankings that may impose some level of reputational risk on corporations, but this risk grows when NGOs, shareholders, and other groups use those rankings to engage separately with corporate actors. Collectively, the actions of these stakeholders create sanctions where there were none. The international legal order may not punish the violations of corporate actors. But these stakeholders take actions that impose legal, reputational, and possibly financial consequences for violating international law.²⁴⁸

A company can manage these risks through an enterprise risk management system (“ERM”) that John Sherman explains as a process “focused on the identification and assessment of strategic risks to the organization,

or are perceived not to meet, our goals or other stakeholder expectations in key ESG areas, we risk negative stakeholder reaction, including from proxy advisory services, as well as damage to our brand and reputation, reduced demand for our products or other negative impacts on our business and operations.”) (emphasis added).

246. Eli Lilly & Co., Annual Report (Form 10-K) 33 (Feb. 22, 2023).

247. *Id.*

248. *See supra* Part II.

which if not properly identified and managed, will prevent the organization from achieving its core goals.”²⁴⁹ The ERM process begins with management identifying its strategy and the various risks associated with its strategic objective and goals.²⁵⁰ ERM is not about eliminating all of these risks but understanding what those risks are and how much risk the management is willing to undertake in pursuing its strategic objectives.²⁵¹

According to COSO’s revised 2017 framework, ERM consists of five key components: *governance and culture, strategy and objective-setting, performance, review and revision, and information, communication, and reporting.*²⁵² Each of these components is associated with several key principles. For example, the performance component involves identifying risk, assessing severity of risk, prioritizing risk, implementing risk responses, and developing portfolio view.²⁵³ The discrete steps involve contacting personnel to identify potential risks in each of these categories (strategic, operational,

249. John F. Sherman, *Human Rights Due Diligence and Corporate Governance*, in A GUIDE TO HUMAN RIGHTS DUE DILIGENCE FOR LAWYERS 141–74 (Corinne Lewis & Constance Z. Wagner eds., 2023); see also SIDWELL & HLAVNICKA, *supra* note 238, at 3 (explaining that ERM “is a process, effected by an entity’s board of directors, management and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives”); Frigo & Anderson, *supra* note 239, at 82 (“ERM seeks to strategically consider the interactive effects of various risk events with the goal of balancing an enterprise’s portfolio of risks to be within the stakeholders’ appetite for risk.”); Kyleen Prewett & Andy Terry, *COSO’s Updated Enterprise Risk Management Framework: A Quest For Depth And Clarity*, 29 J. CORP. ACCT. & FIN. 16, 17 (2018) (“Rather than managing separate risks individually in ‘silos’ ERM takes a portfolio or coordinated approach to risk and recognizes that many risks are correlated.”); Johanna Sax & Torben Juul Andersen, *Making Risk Management Strategic: Integrating Enterprise Risk Management with Strategic Planning*, 16 EUR. MGMT. REV. 719, 720 (2018) (“ERM represents an integrated approach where all risks are analyzed in aggregation across the entire organization including those risks for which probability, timing and impact can be hard to predict such as the risk inherent in strategic decisions.”).

250. SIDWELL & HLAVNICKA, *supra* note 238, at 7.

251. *Id.*

252. COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM’N, ENTERPRISE RISK MANAGEMENT: APPLYING ENTERPRISE RISK MANAGEMENT TO ENVIRONMENTAL, SOCIAL AND GOVERNANCE-RELATED RISKS 7 (2018).

253. *Id.*; ROBERT R. MOELLER, COSO ENTERPRISE RISK MANAGEMENT: ESTABLISHING EFFECTIVE GOVERNANCE, RISK, AND COMPLIANCE PROCESSES 32 (2011) (“Whether using COSO ERM or older, traditional risk assessment processes, there is always a need to identify and understand the various risks facing an enterprise, to assess those risks in terms of their cost or impact and probability, to develop responses

legal, financial, and reputational); assessing the impact and likelihood of each risk; reporting these risks to executive leadership and board of directors (audit committee); and developing a risk response.²⁵⁴ At the assessment stage, ERM managers gauge the “financial impact of the risk should the event happen”²⁵⁵ (*impact*) and “the expected chance that the risk will occur”²⁵⁶ (*likelihood*). According to Professor Robert Moeller, “[t]he idea is not to just list every possible risk but to identify those that might impact operations, with some level of probability, within a reasonable time period.”²⁵⁷ At the “heat-mapping stage,” managers plot risks on a heatmap based on the severity of impact, likelihood of impact, and speed of onset and/or opt to assign each risk a particular risk score.²⁵⁸ This process allows managers to identify the highest risks or primary risks.²⁵⁹

What is important for international law enforcement is that each of these risks is then assigned a risk response: *avoid* (exit or eliminate risk), *transfer* (to a third party), *mitigate* (reduce the risk), or *accept* (no action).²⁶⁰ These risk response strategies are critical to ensuring that corporations comply with international law. Specifically, *stakeholder action can change the risks associated with violating international law*. Even more importantly, *these changed risks can also change the assigned risk response*. By converting the violation of international law into legal, reputational, strategic, and financial risks, stakeholders can motivate corporate managers to change their underlying practices that lead to violations of international law. While avoidance may be a preferable approach, companies may be reluctant to do so if they have incurred upfront investment costs and their business

in the event of a risk occurrence, and to develop documentation procedures to describe what happened as well as appropriate corrective actions going forward.”).

254. SIDWELL & HLAVNICKA, *supra* note 238, at 33.

255. *Id.* at 43.

256. *Id.*

257. MOELLER, *supra* note 253, at 33.

258. *Id.* at 38–39; SIDWELL & HLAVNICKA, *supra* note 238, at 45–46. *But see* MARK S. BEASLEY & BRUCE C. BRANSON, THE STATE OF RISK OVERSIGHT: AN OVERVIEW OF ENTERPRISE RISK MANAGEMENT PRACTICES 41 (2022) (“Less than half of the full sample provides explicit guidelines or measures to business unit leaders on how to assess the probability and impact of a risk event. . . . [But] about two-thirds of the largest organizations, public companies, and financial services organizations provide explicit guidelines or measures to business unit leaders for them to use when assessing risk probabilities and impact.”).

259. MOELLER, *supra* note 253, at 41–42.

260. SIDWELL & HLAVNICKA, *supra* note 238, at 42–43.

is not impacted.²⁶¹ However, Professor Moeller warns that “[i]f the enterprise had been involved in some area in the past with unfavorable consequences, this may be a good way to avoid the risk again.”²⁶²

Stakeholders may also prove more successful when they frame international law compliance in ways that relate to a corporation’s organizational identity or strategic priorities. Many life sciences companies have embraced various core principles of the United Nations Sustainable Development Goals (“SDGs”) because they align with their organizational mission and identity. Pfizer has publicly committed to SDG Goal 3, on “Good Health and Well-Being” because, according to Pfizer, “[t]he achievement of Goal 3 is critical to both our business and societal mission, and we use the health targets to guide the creation, implementation and measurement of our many partnerships and initiatives to improve global public health.”²⁶³ The SDGs provide specific targets that are associated with each development goal.²⁶⁴ Due to the alignment of SDG Goal 3 with Pfizer’s identity and mission as a life sciences company, it has incorporated specific SDG Goal 3 targets into its business strategy and implemented programs intended to progress towards those targets.²⁶⁵ Similarly, Johnson & Johnson has also publicly committed to SDG Goal 3 and other SDGs “where the Company’s unique constellation of strengths can help create sustainable and scalable impact.”²⁶⁶

261. MOELLER, *supra* note 253, at 74.

262. *Id.*

263. *How Pfizer Supports Good Health and Well-Being*, PFIZER (Feb. 17, 2024), https://www.pfizer.com/sites/default/files/investors/financial_reports/annual_reports/2018/our-culture-our-purpose/our-purpose/sustainable-development-goals/index.html [<https://perma.cc/4ZU4-UBG4>] (last visited Apr. 3, 2024).

264. U.N. SDG 3 is accompanied by specific targets such as “[b]y 2030, reduce the global maternal mortality ratio to less than 70 per 100,000 live births” and “[b]y 2030, end the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases and combat hepatitis, water-borne diseases and other communicable diseases.” U.N. Development Programme, Goal 3 Good Health & Well-Being, <https://www.undp.org/sustainable-development-goals/good-health> [<https://perma.cc/ZX2K-U23D>].

265. *How Pfizer Supports Good Health and Well-Being*, *supra* note 263.

266. *Position on Supporting the United Nations Sustainable Development Goals*, JOHNSON & JOHNSON 2 (May 2022), <https://www.jnj.com/about-jnj/policies-and-positions/our-position-on-supporting-the-united-nations-sustainable-development-goals> [<https://perma.cc/TS7T-BELM>].

VI. WHICH INTERNATIONAL LAW NORMS DO STAKEHOLDERS ENFORCE?

It is tempting to identify international law enforcement only when the act or dispute involves an alleged violation of explicitly identifiable international human rights norms. But the examples in Part I highlight the non-obvious ways in which international law is at work when the dispute concerns the breach of norms in contract law, negligence law, corporate law, and consumer protection statutes. There may be a temptation to disqualify this latter category *as* international law enforcement. But these types of enforcement still advance international law institutions even if the dispute or engagement is about another field of law. For example, victims of human rights abuses in World War II have brought lawsuits against the Japanese government and Japanese corporations using a variety of tort law claims.²⁶⁷ Professor Tim Webster explains that while the plaintiffs received monetary damages, “these victories do not endorse principles such as human rights, or rule of law, as advocates may desire.”²⁶⁸

But it is important to recognize the functions that these cases do fulfill. Specifically, the litigation in non-international law fields focuses attention on the root causes of the conduct that led to the violations of human rights. For example, legislators around the world are grappling with how best to deter corporations from using forced labor, worst forms of child labor, human trafficking, and modern slavery in their supply chains. Many NGOs and government agencies have explained that a corporation’s contractual practices can contribute to the risks of one or more of these abuses occurring.²⁶⁹ That is why the American Bar Association developed a set of Model Contract Clauses that explicitly reform the contractual clauses that can create the risks of human rights abuses.²⁷⁰ By doing so, these various actors recognize the close nexus between contract

267. Timothy Webster, *Discursive Justice: Interpreting World War II Litigation in Japan*, 58 VA. J. INT’L L. 161 (2018).

268. *Id.*

269. NIKOLAUS HAMMER ET AL., *NEW INDUSTRY ON A SKEWED PLAYING FIELD: SUPPLY CHAIN RELATIONS AND WORKING CONDITIONS IN UK GARMENT MANUFACTURING* 22–25 (2015).

270. *See* AM. BAR ASS’N, *MODEL CONTRACT CLAUSES VERSION 2.0 AND THE RESPONSIBLE BUYER CODE: EXECUTIVE SUMMARY*, https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/model-contract-executive-summary.pdf [<https://perma.cc/VC6N-SVMM>].

design and violations of human rights, and the importance of reforming the former to prevent the latter.

Contracts are a very different kind of institution compared to international agreements or customary international law. Even if a plaintiff prevails on an international claim—which is unlikely—it is not a given that the defendant corporation would change its contractual practices. This is for three reasons. First, courts may not order contractual reform as a remedy for a number of reasons, including the parties' or court's failure to recognize the connection between the contract design and the plaintiff's injuries. Second, the remedy that they do award is insufficient to motivate a defendant to change its business model or contractual practices. Third, corporate managers do not understand the connection between contract design and the resulting human rights abuses, and the lawsuit has failed to educate them on the connection. As a result, the vindication of international human rights may fail to deter the defendant corporation, or its peers, from engaging in the practices that led to the abuse.

That is why it is important to view litigation of international human rights as a multi-pronged strategy with separate lawsuits attacking the different contributing factors that led to the abuse. One important prong is corporate governance. In the U.S. Supreme Court's decision in *Nestlé USA, Inc. v. Doe*, the Court held in favor of the defendant corporations because “[n]early all the conduct [plaintiffs] say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast”; instead, plaintiffs allege only “general corporate activity—like decisionmaking” in the United States.²⁷¹

In analyzing the Court's decision, Professor Elizabeth Pollman writes “to look at the lowest rung of corporate activity—agents on the ground—and dismiss the decisionmaking at the top as insignificant turns the ordinary understanding of corporate activity on its head.”²⁷² While “tools and cash might have a tangible presence in a location, that does not make the decisionmaking that got them there any less important.”²⁷³ Professor Pollman argues that “[i]f ‘general corporate decisionmaking’ in the United States is not enough, and financing and training farmers in Ivory Coast is outside of reach, it would seem the Court has set up a nearly

271. *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021).

272. Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 243 (2021).

273. *Id.*

insuperable standard for ATS claims that does not cohere with general corporate understandings of the significance of board decisionmaking and oversight responsibility.”²⁷⁴

Preventing human rights abuses requires reforming board governance of human rights issues, including its contributing factors.²⁷⁵ These structural changes may fall outside the remedies available for human rights litigation against corporations. This limitation raises the possibility that the tools by which to change a corporate board are not found in an international law institution but within corporate law and the oversight duties of the board. Litigating the violation of an international treaty or custom may or may not motivate a corporate board to change. Instead, litigating a human rights violation as a breach of a director’s duty may create broader and permanent structural change within corporate boards.²⁷⁶ That is why the litigation of non-international law institutions is an important part of the overall strategy for enforcing human rights against corporations.

CONCLUSION

International law has suffered from an enforcement problem. This Article contributes to both the diagnosis of the challenge and its solution by recognizing the various ways that both state and non-state actors encourage corporate actors to comply with international law. Corporate stakeholders—consumers, employees, insurers, financial institutions, investors, industry organizations, and NGOs, among others—provide important incentives for corporate actors to comply with international law. Such incentives include: employee recruitment and retention; NGO monitoring and reporting; investor proposals and agreements; benchmarking rankings and analyses; financing policies; and industry organizations’ codes of conduct and assessments. Not all these stakeholder actions perform similar functions. Instead, their individual acts can be classified as one of the following: predicative, facilitative, direct, and amplification.

274. *Id.* at 256; *see also id.* at 254 (“Nestlé provides an example, with the Court’s ruling and reasoning diminishing the central corporate activity of board decisionmaking.”).

275. *See, e.g.,* Tricia Olsen et al., *Human Rights in the Oil and Gas Industry: When Are Policies and Practices Enough to Prevent Abuse?*, 66 *BUS. & SOC’Y* 1512, 1540 (2021) (finding that corporate governance of ESG issues, including allocation of explicit responsibility at board level, can decrease the likelihood of human rights abuse by a corporation).

276. *See Moon, supra* note 124.

Enforcement results from the aggregate effect of these individual contributions. As such, this Article explains how the actions of corporate stakeholders change the preferences of corporate actors to comply with international law *and* the incentives of other corporate stakeholders to enforce international law.

It also provides insight on when stakeholder enforcement may succeed and when it may fail. Corporate managers are more likely to abide by international law when there are sanctions for violating it. These sanctions may not be legal in nature and may not originate from a state actor. Instead, the value of stakeholder enforcement is that it creates sanctions when the international legal order otherwise fails to provide one. Stakeholder enforcement creates legal, reputational, financial, strategic and other risks for corporations. In response, corporate managers may assign a particular risk response to the underlying action that violates international law and creates these risks. Alternatively, stakeholders create opportunities for international law enforcement to advance a corporation's organizational identity or strategic objectives. By doing so, stakeholders augment the architecture of international institutions that detect and punish violations of international law.

