Articles

Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?

VIRGINIA HARPER HO*

In recent years, a number of international and cross-sectoral initiatives have attempted to respond to the human rights impacts of corporations. Foremost among these is the United Nations' 2008 “Protect, Respect, and Remedy” Framework and its Guiding Principles on Business and Human Rights, adopted in March, 2011. The Framework is noteworthy, in part, because it considers the potential intersections of corporate law and human rights. Conventional wisdom, however, maintains that corporate law is largely irrelevant to questions of human rights. It is generally viewed to be enabling, rather than prescriptive, and concerned with private contracting rather than the public interest. From a practical standpoint, human rights impacts often involve conduct by remote affiliates and business partners of vast multinational corporate organizations. Corporate law, in contrast, governs the “internal affairs” of discrete legal entities.

* Associate Professor, University of Kansas School of Law. The author wishes to acknowledge the helpful insights of David Millon, Joan Heminway, Erika George, Andrew Johnston, Lou Mulligan, Verity Winship, and Stephen Ware, as well as attendees at a panel on “Corporate Law and Human Rights” at the 2012 Law & Society Annual Conference, the 2012 Junior Faculty Workshop sponsored by the School of Law of Washington University in St. Louis, and a faculty forum at the University of Arizona James E. Rogers College of Law. This project was supported by a faculty research grant from the University of Kansas School of Law.
within a given jurisdiction, each protected by a limited liability shield. Questions of global corporate accountability for human rights practices have therefore been viewed as beyond its reach.

This Article challenges this accepted wisdom by exploring the extent to which corporate law reaches the multinational enterprise. It argues that, notwithstanding the centrality of entity-level principles within corporate law, some dimensions of corporate law in fact extend across the formal internal legal boundaries of the multinational corporation. Although corporate law enforcement mechanisms do not offer direct remedies for victims of human rights violations, corporate law is nonetheless an integral part of the emerging institutional infrastructure supporting the human rights responsibilities of corporations.
DOES CORPORATE LAW REACH HUMAN RIGHTS?

ii. The Duty to Obey the Law and the Contours of Good Faith........................................155
iii. The Duty of Oversight: Intersections of Care and Loyalty...........................................156

3. Disclosure Obligations Under State Law.................161

4. The Common Law of Agency and Corporate Networks.........................................................162

D. Remedies and the Reach of Corporate Law...............166

E. Delaware’s Competitors........................................169

CONCLUSION ..................................................................................................................171

INTRODUCTION

Human rights matter to modern corporations. Judging from the docket of the Supreme Court in recent terms, the to-do list of the Securities and Exchange Commission (SEC), and the proliferation of voluntary commitments, codes, and

1. See, e.g., Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), aff’d 133 S. Ct. 1659 (2013) (affirming the Second Circuit’s dismissal of claims under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2006)). Kiobel was initially argued with Mohamad v. Rajoub, 634 F.3d 604 (D.C. Cir. 2011), aff’d sub nom. Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012) (holding that only a natural person, and not a corporation, can be held liable under the Torture Victim Protection Act (TVPA), § 1 et seq., 28 U.S.C. § 1350 note); Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011), cert. granted, 133 S. Ct. 1995 (Apr. 22, 2013) (No. 11-965) (appealing a ruling in a case arising under the ATCA and the TVPA that jurisdiction over a wholly-owned California subsidiary conferred personal jurisdiction over its German parent).


3. Under Sections 1502 to 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, the SEC has enacted controversial rules requiring firms in certain extractive industries to report the origin of minerals obtained in the Democratic Republic of Congo or adjoining conflict zones, to provide periodic reporting on mine safety, and to disclose payments to governments.
reports generated or adopted by corporations themselves, corporations are increasingly being held to account for the human rights impact of their operations. However, conventional wisdom on the purpose and scope of corporate law maintains that corporate law is largely irrelevant to such questions. Corporate law is generally viewed to be enabling rather than prescriptive, concerned with private contracting rather than the public interest, and emphasizing formalism rather than substantive standards of conduct. Moreover, enforcement mechanisms designed to protect shareholders do not offer direct remedies for victims of human rights violations.

From a fundamental practical standpoint, however, the reasons for corporate law’s supposed irrelevance have less to do with corporate theory than the transformation of the modern corporate form. At its core, state corporate law governs the formation and "in-
ternal affairs” of discrete legal entities, each with limited liability. It says little about the corporate group as an economic enterprise, the internal “contracts” between parent corporations and their affiliates that form the corporate group, or even the boundaries of the corporate enterprise. Corporate law is also subject to the same jurisdictional rules that limit the extraterritorial application of domestic law generally, as well as principles of federalism and interstate comity that bound its application within the United States.

Yet the corporations at the forefront of human rights debates are multinational enterprises (MNEs) composed of tens or hundreds of business entities linked by equity ties. They have an even greater reach when contractual relationships and other non-equity business ties are taken into account. At the same time, the human rights impact of developed country MNEs are typically felt in developing countries; they are often directly traceable only to remote subsidiaries of the MNE or to third parties with whom these host country affiliates do business. Questions of global corporate accountability for human rights practices would seem therefore to simply lie beyond the reach of corporate law.

This Article challenges this view by examining how standard corporate law doctrines apply to the MNE. It argues that, notwith-

9. See infra Part II.B (on the internal affairs doctrine).
11. See infra Part II.A (discussing jurisdictional principles).
standing fundamental jurisdictional limits and the centrality of entity-level principles within corporate law, corporate law in fact offers tools that have the potential to transcend the formal internal boundaries of an MNE and reach across an entire economic enterprise. Key among these are agency principles and common law fiduciary duties.\textsuperscript{15} These corporate governance concepts also lie at the core of corporations’ fundamental responsibility to respect human rights, as recently articulated in the United Nations’ 2008 “Protect, Respect, and Remedy” Framework (the Framework) and its 2011 Guiding Principles on Business and Human Rights.\textsuperscript{16}

In addition, although the content of human rights norms is established under international law, their enforcement is primarily a matter of domestic law.\textsuperscript{17} National legislation and domestic enforcement mechanisms are therefore critical to the protection of human rights. To be sure, in the United States and other jurisdictions worldwide, the primary legal underpinning for the responsibilities of business to respect human rights is found in common law tort and contract, and in criminal law, in addition to firms’ compliance obligations under environmental, labor, and anti-bribery laws and other regulatory regimes. Federal securities law is also emerging as a source of corporate obligations with regard to human rights.\textsuperscript{18}

This Article argues that, despite its limits, corporate law is in fact an integral part of the emerging institutional infrastructure supporting the human rights responsibilities of corporations. It is the primary source of law establishing the obligations of the individuals who wield the most power within corporations and by extension within MNEs. It also sets the ground rules that preserve board autonomy and authority, yet create space for shareholder voice. Both play an important role in encouraging greater corporate commitment

\begin{itemize}
  \item \textsuperscript{15} See infra Part II.
  \item \textsuperscript{17} See infra Part I (surveying international human rights standards).
  \item \textsuperscript{18} See infra Part II.E (discussing disclosure rules relating to human rights).
\end{itemize}
to human rights and access to remedies for victims of human rights violations. Corporate law thus offers an important starting point for examining the difficult questions of how companies should fulfill their responsibilities with regard to their human rights impact and considering how far this responsibility extends.

Working from the basic principles established by the Framework, this Article considers the unacknowledged enterprise-wide reach of state corporate law as a vehicle for promoting companies’ responsibility to respect human rights. By linking corporate law principles to evolving human rights standards, this Article contributes to the extant literature on the public dimensions of corporate law and to emerging scholarship on the operationalization of the corporate responsibility to respect human rights. It also identifies key parallels between core corporate governance principles and evolving international human rights law as it applies to the corporation.

Part I surveys emerging international standards for the role of business in human rights. Its focus is the Framework, which recognizes the corporate responsibility to respect human rights and, where appropriate, to provide access to meaningful remedies to victims of human rights abuses. It also considers identified challenges in applying that framework to MNEs and operationalizing the Framework’s core corporate commitment to ongoing human rights due diligence.

Part II analyzes those aspects of state corporate law that intersect with the corporate responsibility to respect human rights. Although these principles apply directly at the entity level, they indirectly reach

across the corporate enterprise. Part II concludes by considering the potential contribution of corporate law principles to the advancement of human rights practices internationally and to the crucial question of remedies. The analysis takes into account the comparative advantage of corporate law vis-à-vis its key competitors, most obviously federal securities law.

I. EVOLVING STANDARDS FOR THE HUMAN RIGHTS RESPONSIBILITIES OF BUSINESS

International law obligates nation-states to protect human rights. 20 Although individuals now enjoy human rights and are increasingly subject to indirect obligations under international law, 21 the status of corporations as international legal persons bearing legal


21. See JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY 72-74 (1st ed. 2006) (noting that traditionally, individuals and other legal entities were regarded as "objects" or beneficiaries of international law, but their rights could only be enforced by states). Human rights treaties now provide that "obligations are owed directly to individuals and often provide for direct access for individuals to international mechanisms." SHAW, supra note 20, at 885–86. See generally Jacob Katz Cogan, The Regulatory Turn in International Law, 52 HARV. INT'L L. J. 322 (2011) (observing the emergence of indirect private duties under international law).
rights and obligations remains contested. On the one hand, bilateral and multilateral treaties acknowledge the rights of legal entities to certain protections under international law. On the other hand, human rights have generally been understood as being possessed by natural persons, and international human rights instruments do not explicitly apply to corporations at the present time.

However, there is growing recognition that transnational corporations may in fact be subject to direct obligations with regard to human rights under international law. For example, corporations

22. See, e.g., SHAW, supra note 20, at 225 ("[T]he question of the international personality of transnational corporations remains an open one."). States have historically been understood to be the sole subjects of international law. Id. at 176–77; ZERK, supra note 21, at 72–76 (surveying the state of the law on the international legal personality of non-state actors).


25. For example, the non-binding Universal Declaration of Human Rights applies to governments and “other organs of society.” Peter Muchlinski, Corporate Social Responsibility and International Law: The Case of Human Rights and Multinational Enterprises, in THE NEW CORPORATE ACCOUNTABILITY 431, 440 (Doreen McBarnet et al. eds., 2009) (citing the Declaration as evidence of corporations’ human rights responsibilities). See also ZERK, supra note 21, at 28 ("It is widely accepted by now that direct human rights obligations of corporations are at least a theoretical possibility. . ."); John H. Knox, The Ruggie Rules: Applying Human Rights Law to Corporations, in THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION, supra note 19, at 51, 69–77 (examining authorities on the scope of a potential duty to refrain from violating human rights norms). This debate was at the core of the Kiobel case. See Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).
have for many years been subject to civil liability in the United States under the Alien Tort Claims Act (ATCA) for violations of human rights, such as torture and genocide, that have been recognized as rising to the level of customary international law.26 Indeed, in its recent opinion in Kiobel v. Royal Dutch Petroleum Co., the Supreme Court implied that corporations and other legal entities can be held liable for human rights violations under customary international law.27

As the Kiobel case illustrates, human rights are articulated under international law but enforced under national law and by specialized human rights tribunals.28 Although the Supreme Court tightly curtailed the availability of the ATCA in its recent decision in the Kiobel case, the Court did not bar its application to corporate entities or alter the scope of claims that may be brought under the ATCA.29

Under international law, sovereign states have jurisdiction only over business entities formed or headquartered in their jurisdiction.30 Core principles of sovereignty and territoriality also generally require that domestic tort, contract, and regulatory law be enforced only within the territory of each state.31 The Supreme Court has now taken pains in several cases, beginning with Morrison v. National Australian Bank Ltd., and most recently in Kiobel, to emphasize the presumption against extraterritoriality of federal statutes and the need

aff'd 133 S. Ct. 1659 (2013).


27. Although the decision upheld the ruling of the Second Circuit, which had rested its judgment on grounds that corporations could not be defendants in civil disputes as a matter of customary international law, the Court did not affirm on those grounds, despite granting certiorari to answer the question. Kiobel, 133 S. Ct. at 1660. The Court’s implicit acceptance of the application of the ATCA to corporations is in contrast to the TVPA, which the Court has held, based on its language, applies only to individual, not corporate, defendants. See Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1707–08 (2012).

28. See Kiobel, 621 F.3d at 147 (“[I]nternational law . . . leave[s] remedial questions [for violations of international law] to [nation] States.”). Some international human rights treaties provide for direct access by individuals to international tribunals, such as the European Court of Human Rights. See Shaw, supra note 20, at 885–86, 324–66 (introducing the European Court of Human Rights, the Inter-American Court of Human Rights, other regional tribunals, and their jurisprudence).

29. See Kiobel, 133 S. Ct. at 1669 (stating that mere corporate presence will not be sufficient to displace the presumption against extraterritoriality).


31. See generally Muchlinski, supra note 12.
for some link to either conduct or effects in the United States. Beyond obligations that may be asserted under international law, legal remedies for human rights violations therefore depend upon the limited extraterritorial application of the domestic law of the parent corporation(s)’ home jurisdiction(s) and the domestic law of the host jurisdiction where the entities most directly responsible for human rights impacts are located. However, as explained further in Part II(A) below, neither home nor host state law alone is adequate to reach the MNE as a whole.

There is, however, widespread recognition that MNEs and other large corporations occupy a place of influence in the global economy and even in the formation of international law and policy that is analogous to the role of the nation-state. Recognizing the profound positive and negative human rights impacts of business, considerable effort has been expended by various international bodies in recent years to establish “soft law” standards that might clarify the role of the corporation in upholding or promoting human rights. These include the Global Compact, the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, the International Labor Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the OECD Principles of Corporate Governance, the Draft Norms on Responsibilities for Transnational Corporations and Other Business Enterprises with Regard to Human Rights, and the United Nations Commission on Transnational Corporations (UNCTAD) Draft Code of Conduct. Although these instruments

32. Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869 (2010), followed by Kiobel, 133 S. Ct. at 1661 (“When a statute gives no clear indication of an extraterritorial application, it has none.”). Under Kiobel, tort claims brought in the United States under the ATS for violations of customary international law must “touch and concern the territory of the United States... with sufficient force to displace the presumption against extraterritorial application.” Id. at 1669.

33. See ZERK, supra note 21, at 145–46 (discussing the limitations of international law, home state law, and host state law); David Kinley & Junko Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, 44 Va. J. Int’l L. 931, 939 (2004) (identifying a key role for the extraterritorial application of domestic law).

34. See generally STEPHEN TULLY, CORPORATIONS AND INTERNATIONAL LAWMAKING (2007) (assessing the influence of corporations on international law).

35. See generally ZERK, supra note 21, at 243–97 (surveying international “soft” law instruments and other corporate social responsibility standards). Self-regulation and pressure from international NGOs supplement formal regulatory sources. See MUCHLINSKI, supra note 12, at 112–21 (describing “sites of regulation” of multinationals).

are non-binding, they are an important source of convergence around
global "best practices." The most recent effort to establish universal
standards for corporate conduct in the area of human rights is the
United Nations’ "Protect-Respect-Remedy" Framework adopted in
2008.37

A. The United Nations’ Protect, Respect, and Remedy Framework

Many of the predecessors of the Framework, including most
recently the abortive U.N. Human Rights Norms, attracted consider-
able opposition from the global business community for their failure
to adequately distinguish the role of nation-states from the role of
business and for the sweeping, yet loosely articulated, obligations
they imposed on companies.38 In 2005, following the rejection of the
Norms by the U.N. Human Rights Commission, the United Nations
charged Professor John Ruggie as the Special Representative of the
Secretary General (SRSG) on the Issue of Human Rights and Trans-
national Corporations and Other Business Enterprises. His mandate
was to develop a regulatory framework to strengthen the human
rights performance of business.39

The result was the three-pillar “Protect, Respect, and Reme-

---

38. See, e.g., David Kinley, Justine Nolan & Natalie Zerial, 'The Norms are Dead! Long Live the Norms!' The Politics Behind the UN Human Rights Norms for Corporations, in THE NEW CORPORATE ACCOUNTABILITY, supra note 4, at 459–75. The authors quote SRSG Ruggie’s description of the Norms, which were intended to articulate binding and enforceable human rights obligations, as a “train wreck.” Id. at 459 & n.3.
39. On the history and content of the U.N. Framework and related documents, see Backer, supra note 19, at 45–50. A comprehensive synopsis of the Ruggie project and related commentary on its evolution and impact is also contained in Mares, ed., supra note 19.
DOES CORPORATE LA W REACH HUMAN RIGHTS?

Framework and its Guiding Principles, which were unanimously endorsed by the U.N. Human Rights Council in 2008 and 2011, respectively. Under the Framework, nation-states have the obligation to protect human rights, business enterprises have the responsibility to respect human rights, and both should work to ensure greater access to effective judicial and non-judicial remedies for victims of human rights abuses. Although access to remedies falls primarily within the state duty to protect against human rights abuse, business enterprises are urged to establish operational-level grievance mechanisms to ensure more effective monitoring of human rights impacts and to quickly respond to adverse human rights impacts.

One of the major contributions of the Framework is that it distinguishes the responsibilities of corporate and state actors. The SRSG recognized that if the two are not distinguished, states might fail to protect human rights because of an expectation that business would fill the gap. In contrast to the obligation of nation-states to protect human rights, companies' responsibility to respect human rights is in essence to “do no harm.” Companies can fulfill this basic responsibility by (i) implementing “policies and processes [on human rights] appropriate to their size and circumstance” that are embedded throughout the enterprise; (ii) conducting human rights due diligence; and (iii) providing for or cooperating in remediation processes if they have caused or contributed to adverse human rights

40. SRSG 2008 Framework Report, supra note 14; Guiding Principles, supra note 16.
41. SRSG 2008 Framework Report, supra note 14, ¶¶ 9, 18; see also Guiding Principles, supra note 16, ¶ 25 (state’s obligation to ensure access to effective remedies), 26 (state-based judicial remedies), 27 (non-judicial, state-based remedies).
43. See SRSG 2008 Framework Report, supra note 14, ¶ 18; Guiding Principles, supra note 16, see also Muchlinski, supra note 25, at 440 (“it is clear that corporate actors will not carry the same responsibilities as states” to advance human rights).
44. U.N. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Clarifying the Concepts of “Sphere of Influence” and “Complicity”, ¶ 14, U.N. Doc. A/HRC/8/16 (May 15, 2008) [hereinafter Clarifying Concepts] (by John Ruggie) (“A Government can deliberately fail to perform its duties in the hope or expectation that a company will yield to social pressures to promote or fulfill certain rights.”).
46. Guiding Principles, supra note 16, ¶¶ 15–16 (further specifying the content and implementation process that should be adopted).
47. Clarifying Concepts, supra note 44, ¶ 3. The Guiding Principles further detail the objectives and extent of due diligence, which is intended to be ongoing. Guiding Principles, supra note 16, ¶¶ 15, 17–21.
impacts.\textsuperscript{48}

Due diligence is the core component of the obligation to respect, and is defined as an ongoing "process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it."\textsuperscript{49} It is intended to ensure legal compliance and minimize the risk of human rights harms occurring either as the direct result of corporate activities or indirectly, through the complicity of the firm in harms caused by others.\textsuperscript{50} Accordingly, firms are subject both to affirmative commitments to actively prevent and mitigate human rights impact, as well as negative commitments to avoid causing harm.\textsuperscript{51}

However, the Framework also addresses another challenge to formulating the human rights responsibilities of corporations—the question of \textit{which} rights must be recognized. This issue has proven problematic, since the scope and universality of human rights remain contested.\textsuperscript{52} If all of the human rights potentially impacted by corporate behavior were translated into binding regulations, their potential range would indeed be quite broad.\textsuperscript{53} Recognizing this reality, the SRSG rejected any attempt to identify particular rights for which companies might be held accountable. Instead, the Framework maintains that "companies should consider all such rights," placing priority on those each enterprise identifies as most likely to be affected by its operations.\textsuperscript{54}

\textsuperscript{48} Guiding Principles, \textit{supra} note 16, ¶ 15, 22.

\textsuperscript{49} Clarifying Concepts, \textit{supra} note 44, ¶ 3; see also Guiding Principles, \textit{supra} note 16, ¶ 17(c) ("[human rights due diligence s]hould be ongoing.").

\textsuperscript{50} Id. ¶ 3, 4, 26–34.


\textsuperscript{52} See JANET DINE, COMPANIES, INTERNATIONAL TRADE AND HUMAN RIGHTS 167 (2005) (considering the application of human rights law to corporations and barriers to corporate accountability for human rights violations).

\textsuperscript{53} For example, the U.N. Human Rights Norms identified five categories of rights: (i) those that cover "traditional" civil and political human rights, such as the security of persons from genocide and rights to freedom of thought; (ii) economic, social, and cultural rights, such as rights to health and adequate housing; (iii) collective rights, such as the right of development; (iv) obligations to observe human rights in connection with third-party security personnel; (v) and ethical principles of fairness. MUCHLINSKI, \textit{supra} note 12, at 518–24.

\textsuperscript{54} SRSG 2008 Framework Report, \textit{supra} note 14, ¶ 52.
B. Operationalizing Respect for Human Rights in Multinational Enterprises

A key challenge to clarifying and operationalizing the MNE responsibility to respect human rights is that relatively few alleged human rights violations by MNEs are caused directly by an entity based in the United States or another developed economy. It is more common for the U.S. parent or controlling corporation to face potential liability for its complicity in human rights harms proximately caused by affiliates or business partners located in the developing world where legal protections for local communities may be weak.55

As defined in the Framework documents, "complicity" can encompass active aiding and abetting of human rights harms as well as omissions, such as the knowing failure to adequately monitor business partners or prevent and remedy harms caused by affiliates or third parties, including state actors.56 The Framework rejected a definition of complicity that would include passive silence or mere receipt of a benefit from human rights abuse without knowledge.57

The broad scope of the responsibility to respect raises difficult questions about the extent of MNEs' human rights commitment and, in particular, the due diligence requirement. Further work is needed to clarify its outer limits and the extent to which the requirement is embedded in law or goes beyond it.58 However, the Framework documents make clear that due diligence necessitates enterprise-wide monitoring across all jurisdictions in which an MNE does business and includes not only an assessment of the companies' actual and potential human rights impacts, but also analysis of the local business context and its relationships with business partners.59

---

55. Cases under the Alien Tort Statute are prime examples. See generally Chimène I. Keitner, Conceptualizing Complicity in Alien Tort Cases, 60 Hastings L.J. 61 (2008).

56. See Mares, Limits of Corporate Responsibilities, supra note 19, at 1204–12 (discussing the legal standards for complicity in relation to the Framework principles); Clarifying Concepts, supra note 44, ¶¶ 26–72 (defining complicity as "the indirect involvement of companies in human rights abuses"). The Framework explicitly adopts the lower "knowledge" standard rather than a requirement of "purpose." See Clarifying Concepts, supra note 44, ¶ 30 ("[C]omplicity means that a company knowingly contributed to another's abuse of human rights.").


58. A useful starting point is Mares, Limits of Corporate Responsibilities, supra note 19, and Radu Mares, Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights, in THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION 169 (Radu Mares ed., 2012). See also infra Part II.

One concept that has informed current understandings of the scope of human rights due diligence is the notion of a company's "sphere of influence" which derives from the first two principles of the United Nations' Global Compact. The Global Compact is a self-regulatory initiative whose signatories commit to uphold a list of ten principles of responsible business practice, including respect for human rights "within their sphere of influence." Principle 1 states that signatories will "support and respect the protection of internationally proclaimed human rights," while Principle 2 commits them to ensure that their own corporations are not complicit in human rights abuses. The "sphere of influence" concept maps various company stakeholders onto a series of concentric circles reflecting the need for companies to influence these stakeholders toward respect for human rights. It has been criticized for its ambiguity and for implying that companies must act whenever they have influence, even encroaching on the obligations of states to protect human rights.

Part of the SRSG's mandate was to clarify the implications of such concepts as "complicity" and "sphere of influence." In the resulting report, he concluded that [the] sphere of influence conflates two very different meanings of influence: one is impact, where the company's activities or relationships are causing human rights harm; the other is whatever leverage a company may have over actors that are causing human rights harm. The first falls squarely within the responsibility to respect; the second may only do so in particular circumstances [that constitute complicity with those who

61. Id. The sphere of influence concept is currently part of the Preamble of the Ten Principles, but was originally part of the first principle.
63. Id. ¶ 14 (critiquing the blurring of state and business roles). Other limitations of the "sphere of influence" concept identified by the SRSG include (i) its failure to differentiate stakeholders whom the company might influence from those it might harm; (ii) its implication that political, contractual, economic, or geographic proximity defined the scope of responsibility; and (iii) its narrowing of responsibility to circumstances in which companies exercised control or had directly caused harm. Id. ¶¶ 10–18.
DOES CORPORATE LAW REACH HUMAN RIGHTS?

cause harm]. 65
The SRSG therefore rejected the concept of “sphere of influence” and the notion that companies must always exercise leverage over third parties with whom they have influence. Instead, he emphasized that companies must “avoid causing or contributing to adverse human rights impacts” directly and should “[seek] to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by business relationships, even if they have not contributed to these impacts.” 66 By identifying due diligence processes as the key to fulfilling these responsibilities, the Framework operationalizes the core principles in terms of governance and oversight processes that are much more familiar to businesses, and indeed are already required for most major multinationals under the securities laws. 67

The Framework and its Guiding Principles follow earlier initiatives on business and human rights by approaching companies not at the entity level but instead as global corporate organizations. 68 For example, the Guiding Principles recommend that human rights policies be adopted at the “most senior level of responsibility of the business enterprise,” and that human rights due diligence be incorporated within broader enterprise risk-management systems. 69 It also anticipates the need for companies to see their responsibility to respect human rights as going beyond the bounds of the enterprise (i.e. formally affiliated entities) to reach extended networks of third parties, such as “business partners, suppliers, State agencies, and other non-State actors.” 70

Many of these contractual relationships will lie beyond the formal legal bounds of the corporate enterprise and therefore only indirectly within the purview of corporate law. In some of these cases, as discussed below, agency principles that undergird corporate law may apply, in addition to contract, tort, or administrative law principles. Regardless, operationalizing the Framework must begin from an understanding of the nature of the global corporate enterprise itself, and looking at corporate law in a leading jurisdiction—in this case, the state of Delaware—is a necessary first step.

II. CORPORATE LAW AND HUMAN RIGHTS: AN ENTERPRISE PERSPECTIVE

The functions of corporate law are, broadly speaking, two-fold: (i) to define the corporate form; and (ii) to mitigate costly agency conflicts among the participants in this enterprise. With regard to the first, the fact that corporate law defines the corporation and permits the formation of corporate groups, and that these features contribute to some of the regulatory challenges presented by the MNE are sufficient cause to examine what corporate law has to say on the subject of human rights. The second function of corporate law, establishing governance rules that mediate agency conflicts, is also directly linked to the operationalization of corporate human rights responsibilities since it implicates questions of the nature and purpose of the corporation in society that lie at the heart of longstanding debates within corporate law. As Janet Dine has noted, "[o]nce it is possible to identify expectations with which companies can be expected to comply, a vital step in making them effective is to marry the concept of corporate governance with these expectations." She notes further that a key limitation of corporate codes of conduct and other voluntary accountability mechanisms has been the failure of their proponents to articulate how implementation might impact existing governance rules that in the United States, at least, are oriented toward shareholder wealth maximization.

71. See infra Part II (discussing agency law and fiduciary duties).
73. See Harper Ho, supra note 7, at 71–77 (tracing this debate).
74. DINE, supra note 52, at 234.
75. Id. (noting that those charged with focusing on decision-making processes within firms "appear to be inhabiting a different planet" from those drawing up voluntary
In developing the Framework, the SRSG made an investigation of the impact of corporate and securities law on human rights an explicit part of carrying out his mandate, commissioning local analyses by forty leading law firms worldwide. He concluded that corporate and securities law and human rights "are often viewed as distinct legal and policy spheres," and that there is a general "lack of clarity within corporate and securities law regarding ... what companies or their officers are required [and permitted] to do regarding human rights." He then emphasized the important role of corporate law in requiring or facilitating companies' consideration of their human rights impacts as part of the state's duty to protect human rights.

At a general level, then, corporate and securities laws are clearly relevant to questions of human rights. But assessing whether corporate law can reach human rights as a source of meaningful standards, incentives, and remedies involves at least a two-prong analysis. First, can entity-oriented corporate law reach the corporate group as an enterprise? And second, do corporate law remedies incentivize firms to respect human rights and compensate victims of human rights abuses? This Part takes up these questions.

Of course, corporate law in the United States may be broadly understood to encompass not only state corporate law, but also federal securities law and governance rules imposed within the listing standards of the securities exchanges. These are discussed in Part II.E below. However, the focus here is on those elements of state corporate law in Delaware that address the corporate group, the relationships among the entities that constitute it, and the duties of the individual directors and officers through whom these entities act, or bear on the responsibilities of the corporate group and its constituent entities to respect human rights. This analysis focuses on Delaware law, not because of any normative judgment about the preeminence of Delaware as a global or even national standard, but because of Delaware's broad influence within the United States as home to half of all U.S. public companies and over sixty percent of Fortune 500

77. Id. at 1.
78. Id. at 5–6.
corporations. Delaware corporate law also exercises a significant influence on courts and legislatures in other jurisdictions.

A. Defining Multinational Corporate Groups

At the outset, it is important to consider what is meant by the multinational as a complex enterprise or corporate group. Corporate groups dominate the global economy, yet the corporate group does not exist as a separate form of legal entity governed by its own body of law in the United States. Instead, state corporate law establishes the primary characteristics of the corporate form that make possible the formation of corporate groups—separate legal personality, the ability of one corporation to own shares in another, and limited liability. Therefore, the formal legal boundaries of the corporate group are established primarily by the corporate law of the jurisdictions of incorporation of its constituent entities and by each entity's corporate charter.

1. Legal Personality and Corporate Rights and Duties

As a matter of corporate law, each legal entity that forms the corporate group enjoys separate legal personhood, and the separate legal identity of corporate entities serves as a foundation of the notion that corporations are bearers of legal rights and duties. Although theoretical understandings of the corporation have varied over time, constitutional jurisprudence in the United States has long recognized the applicability of many fundamental rights, including those articulated in the Bill of Rights, to legal as well as natural persons. Northwestern University Press.


80. Both European Union and German law recognize the corporate group as a distinct entity form. See Janet Dine, The Governance of Corporate Groups 57–59 (2000) (describing EU approaches as well as the German “Konzernrecht” as a contractual group).

81. Harper Ho, supra note 10, at 899. Section 123 of the Delaware General Corporation Law (DGCL) expressly confers upon the corporation the power to own, and to vote, shares of other entities.

82. See generally Harper Ho, supra note 10 (surveying dominant theories of the corporation and extending them to the corporate group); Wood & Scharffs, supra note 23, at 540–45 (connecting theories of corporate personhood to recognition of corporations as bearers of rights and duties with regard to human rights).

merous regulatory regimes, as well as the common law, confer rights and duties upon corporations, many of which intersect with human rights. Federal statutes are in fact presumed to extend to both legal and natural persons in the absence of contrary congressional intent. In some of these contexts, such as First Amendment speech rights, the courts have explicitly extended notions of legal personhood to the corporate group as an enterprise, although this remains the exception rather than the rule.

2. Corporate Group Structures

The typical corporate group includes one or more parent corporations that hold a majority or controlling equity interest in one or more subsidiaries, which together function as a single economic enterprise, often with a common public identity. Regardless of how the boundaries of the corporate group are defined, each subsidiary within the corporate group enjoys separate legal personality from its shareholder parent. Kenneth Ayotte and Henry Hansmann have linked the ubiquity of the corporate group in part to this feature. They note that the separate legal identity of subsidiaries under common control offers the simplest way to isolate or “bundle” the contracts that constitute the subsidiary, which facilitates their transferability and therefore liquidity for the parent company. The decision to form a subsidiary as opposed to an internal division within the corporation is also typically driven by tax, regulatory, or managerial factors.

Accordingly, the legal structure of the group says little about

84. See Wood & Scharffs, supra note 23, at 553–64 (surveying federal, state, and municipal statutory sources of human rights duties).
85. See 1 U.S.C. § 1 (2006) (defining “person” as used in federal statutes to include corporations and other business organizations).
86. See Harper Ho, supra note 10, at 885–91 (surveying varying conceptions of the corporate group).
87. Phillip I. Blumberg, The Transformation of Modern Corporation Law: The Law of Corporate Groups, 37 CONN. L. REV. 605, 606 (2005). Tax considerations will often drive the corporate group’s actual structure, in particular, the placement of pass-through entities; the corporate group therefore typically includes both corporate and non-corporate entities.
88. Because subsidiary structures reduce risk, they also increase the parent company’s incentive to make valuable investments in the firm. On these and other benefits, see generally Kenneth Ayotte & Henry Hansmann, Legal Entities as Transferable Bundles of Contracts, 111 MICH. L. REV. 715 (2013).
89. This reality has also been acknowledged by the Supreme Court. See Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 772–73 (1984).
the economic organization of the enterprise or actual decision-making authority within the group. In an equity-based corporate group, one or more parent entities generally exercise control of subsidiaries through voting control, which often, but not always, corresponds to the parent entity’s financial stake. The parent(s) also exercise direct or indirect control of subsidiary management through operational integration, overlapping directors and officers, or contractual means. A significant equity stake in a higher-tier subsidiary may be enough to convey effective control over lower-tier subsidiaries, which may be wholly owned or partially owned by the parent.

A broader view of the corporate group would include key contractual relationships, such as joint ventures, strategic alliances, or even franchising and other independent contracting relationships. As the OECD has observed, “[m]ultinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organizational forms. Strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise.” Corporate groups are therefore increasingly understood as corporate networks that include “heterarchical” cooperative and lateral relationships, rather than hierarchical structures that align more closely with control-based legal forms. Under the Framework, the MNE’s responsibility to respect human rights extends to these “core” business partners as well.

The Delaware General Corporation Law (DGCL) nowhere defines the “corporate group” or the “corporate enterprise” for any purpose, although it does define “parent” and “subsidiary” corporations. In general, very few of the statutory provisions of the DGCL

90. DINE, supra note 80, at 41.
92. Harper Ho, supra note 10, at 887; see also MUCHLINSKI, supra note 12, at 51–77; Scott, supra note 91, at 291 (describing the corporate group as a network).
94. See MUCHLINSKI, supra note 12, at 47–51 (discussing the shift from hierarchical to heterarchical structures and the emergence of corporate networks).
95. See DEL. CODE ANN. tit. 8, § 253 (2012) (merger and consolidation); see also id. at
apply specifically to the corporate group. Instead, much of the DGCL is devoted to establishing mandatory and default rules for the formation, governance, and continued operation of the corporation as a discrete legal entity.

Delaware courts do frequently consider the relationships between related entities in the context of transactions involving controlling shareholders. However, there the definition of control developed by the courts requires some level of equity ownership. Accordingly, as a matter of corporate law, Delaware adopts a more limited notion of the corporate group that does not include contractual non-equity relationships, nor does it distinguish in any way heterarchical from hierarchical control structures. Instead, the dominant conception of the corporate group that emerges from the caselaw is generally limited to equity-based relationships between two or more entities, at least one of which exercises effective control over the other.

3. Limited Liability and the Corporate Group

The third feature of the corporate form that is a key building block for the modern multinational is limited liability. Limited liability is key to the corporate group’s observed efficiency as an econom-

§ 271(c) (defining assets of a “subsidiary” to include those of “any entity wholly-owned and controlled, directly or indirectly by the corporation, . . . [including] without limitation, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, and/or statutory trusts”).

96. Exceptions include Del. Code Ann. tit. 8, § 253 (2012), which governs certain mergers of parent and subsidiary corporations, and the definition of “interested directors”; id. § 144 (adopting a functional test for interested contracts and transactions that includes those “between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest”). Hence, the two entities need not be affiliates linked by equity ties.

97. Many of these include what are generically referred to as “corporate formalities,” such as rules regarding the conduct of meetings, the election of directors, and procedures for filing and amendment of the corporate charter, which necessarily apply at the entity level. See, e.g., DGCL Subch. I (formation); Subch. III (registered office and agent); Subch. VII (meetings and voting); Subch. X (asset sales, dissolution, and winding up).

98. See Kahn v. Lynch Commc’n Sys., Inc., 638 A.2d 1110, 1113–14 (Del. 1994) (defining “control” to include majority ownership of the corporation’s voting rights as well as the “actual control” of the business and affairs of the corporation by a less than majority shareholder). Potential to control is not sufficient. See Williamson v. Cox Commc’n, Inc., No. Civ.A. 1663-N, 2006 WL 1586375 (Del. Ch. Mar. 27, 2006) (concluding that board veto power held by a shareholder but never exercised did not constitute “actual control” but was a factor supporting a conclusion that the shareholder was in fact “controlling”).

ic organization, yet it is at the same time (and for the same reasons) the most significant obstacle to MNE accountability for human rights impacts.

Because each company within the corporate group is a distinct legal entity, corporations can structure their subsidiaries and allocate their assets so as to reduce the parent company's (and the group's) exposure to liability as well as to shield subsidiaries from risk created by other affiliates' operations. Such asset partitioning within the corporate group enables creditors to serve as specialized monitors of particular assets (including subsidiaries and/or their respective assets) within the corporate group against which they have a claim without the added costs of monitoring the entire enterprise, reducing the cost of debt capital to subsidiaries. Because corporate groups can allocate and isolate risk across the organization, they can also pursue risky investments without jeopardizing other business units. This permits diversification of business operations across multiple jurisdictions and even across multiple industries to an extent that would be impossible in the absence of intra-firm limited liability shields that protect the parent shareholder's assets from claims by subsidiary creditors.

A key critique of limited liability is that it encourages excessive levels of risk-taking that can result in harm to third parties. It is also widely recognized that the efficiency-based rationales described above are most compelling with respect to the claims of contract creditors but do not justify limited liability in tort where third parties who are unable to protect themselves ex ante are injured as a result of corporate negligence. Concerns about the risk-shifting

---

100. See, e.g., OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985) (observing that internal markets arise within corporate groups when internal organization of production is less costly than coordinating transactions through external markets).

101. See DAVID MILMAN, NATIONAL CORPORATE LAW IN A GLOBALISED MARKET 62–63 (2009); see also EASTERBROOK & FISCHEL, supra note 5, at 40–62 (surveying the basic rationales for limited liability).

102. See EASTERBROOK & FISCHEL, supra note 5, at 57.

103. See Armour et al., supra note 72, at 9–11 (explaining justifications for limited liability); Phillip I. Blumberg, Limited Liability and Corporate Groups, 11 J. CORP. L. 573, 611–23 (1985–86) (same).

104. See EASTERBROOK & FISCHEL, supra note 5, at 40–62 (presenting the basic rationales for limited liability).

105. See Blumberg, supra note 103, at 620.

106. For this reason, Hansmann and Kraakman, among others, have advocated unlimited liability within corporate groups, at least for companies with constituent firms in
effects of limited liability are therefore particularly strong in this context, but are difficult to address without stripping the corporate group of the advantages limited liability confers.\textsuperscript{107}

The primary exception to limited liability as a matter of corporate law that can be used to hold entities at higher levels of the organization to account for the human rights impact of their subsidiaries is veil-piercing doctrine.\textsuperscript{108} Under the common law of veil-piercing, courts are asked to disregard the separate legal identity of a corporation in order to attribute liability in tort or contract to the corporation's shareholders, which includes a direct parent.

However, for victims of human rights abuses, limited liability within the corporate group can present significant obstacles to obtaining tort-based remedies from the ultimate parent(s) of the corporate group. Courts have elected to "pierce the corporate veil" and reach the assets of a corporate parent only in exceptional circumstances involving abuse of the corporate form where the separation between the corporation and its shareholders produces inequitable results.\textsuperscript{109} In this analysis, functional control by a parent corporation over its subsidiary that may cause a court to view the subsidiary as the parent's "alter ego" depends upon the degree of financial, personnel, and administrative integration within the group, and whether the entities adopt a common public persona.\textsuperscript{110} Further factors include a failure to observe corporate formalities, which is rare in the context of corporate groups.\textsuperscript{111}

What will generally not be sufficient is to show that the parent and subsidiary have overlapping or identical directors and offic-
ers, which is common in large firms. Courts have also generally rejected arguments for extending enterprise-wide liability horizontally across multiple affiliates of a common shareholder. Finally, where torts are proximately caused by foreign affiliates within a corporate group that includes intermediate holding companies, veil-piercing arguments must prevail at each level in order to pierce the limited liability shield to the intermediate shareholder and only then, on similar grounds, to the parent corporation.

For these reasons, veil-piercing represents only a narrow exception to the fundamental entity focus of corporate law and is of limited use to victims of human rights harms. If the limited liability shield stands, claimants in human rights cases against MNEs must ground their tort claims either on theories of direct liability, such as aiding and abetting, negligent oversight, or direct authorization of the conduct in question, or on indirect liability based on agency principles. In other words, they must allege that harms are proximately caused or facilitated by a U.S. entity within the MNE. These types of claims, and the corporate law principles that inform such cases, are discussed further in Parts II.C and D below.

4. The Regulatory Challenge of the Corporate Group

The potential for corporate conduct to impinge on human rights is but one example of a broader regulatory challenge posed by the multinational firm. The sources of this challenge are by now well-known and, as the preceding discussion suggests, they are not in fact unique to MNEs. In fact, they can be observed at the level of a single entity, since they are rooted in the core attributes of the corporate form—namely, the grant of limited liability and the separate legal personality of the corporation and its owners. These defining features contribute directly to the efficiency of the corporate form, but they also facilitate the externalization of risk from the corporation and its shareholders to creditors and other stakeholders. Within the corporate group, both the efficiencies and risk-shifting effects of the corporate form are multiplied, and the negative side-effects of the corporate group structure cannot be eliminated without eliminating the corporate group itself.

---

113. See Bainbridge, supra note 109, at 506–14.
115. See generally id.
Although legislators may wish to constrain some of the negative effects of the corporate form or corporate operations more broadly, the firm's ability to choose the jurisdiction of incorporation and therefore the law to which it is subject also limits the power of any one jurisdiction to impose tighter limits without losing the inter-jurisdictional competition for corporate chartering domestically or corporate investment internationally. Moreover, once the firm expands abroad, no single sovereign can extend the reach of its laws to the entire corporate group.

For MNEs and their affiliates who elect to do business in the United States, Delaware remains the preeminent jurisdiction in the competition for state charters. However, the human rights implications of its dominance in corporate law are ambiguous. On the one hand, Delaware is widely recognized as a management-friendly jurisdiction and, conversely, relatively unwilling to expand shareholder power. This may suggest a less supportive environment for shareholder activism to remedy human rights violations. At the same time, Delaware's recent jurisprudence has also underscored the centrality of shareholder wealth maximization, which may be interpreted as antagonistic to the human rights commitments of Delaware corporations. On the other hand, as Part II.C explores, the shareholder wealth maximization norm and human rights commitments may in fact align, since clear attention to human rights issues can lower MNEs' liability exposure and promote a global business strategy.

---

116. The incorporation doctrine provides that persons forming incorporations can choose to incorporate in any state, regardless of whether the company conducts its operations elsewhere. See, e.g., Del. Code Ann. tit. 8, §§ 101(a), 102(a)(2) (2013); Model Bus. Corp. Act § 3.02(10) (2010); see also Armour et al., supra note 72, at 23 (citing corporations' ability to select different jurisdictions' laws as an example of the enabling nature of corporate law). Under the internal affairs doctrine, selecting the jurisdiction of incorporation also selects the state law that will govern corporate affairs. See Model Bus. Corp. Act § 15.05 cmt. (2010); Restatement (Second) of Conflict of Laws § 302 (1969).


118. Supra note 79.


120. See, e.g., Ebay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2012); see also infra Part II.C.2 (discussing fiduciary duties).
Delaware's managerialist bent also gives firm leadership greater autonomy as a practical matter to consider human rights and other stakeholder impacts in decision-making and goal-setting. The following section considers the jurisdictional reach of state corporate law as it applies to the human rights impacts of Delaware-based multinationals and their affiliates.

B. Corporate Law's Jurisdictional Bounds

At the risk of stating the obvious, Delaware law cannot directly reach a non-Delaware affiliate within the corporate group. Consistent with the nationality principle articulated in *Barcelona Traction*,121 domestic corporate law applies primarily to entities incorporated in the jurisdiction and the principle of corporate separateness limits its extraterritorial application to other affiliates within the enterprise.122 This plays out in procedure as well; for example, it is well-established that service of process on a local subsidiary does not normally amount to service on the foreign parent company.123 However, by the same principle, Delaware law applies to Delaware parent corporations and to Delaware-incorporated holding companies, which may have direct or indirect control over the group's foreign affiliates, as well as to subsidiaries incorporated in Delaware.

In addition, courts may exercise personal jurisdiction over a foreign parent company that is not resident in the jurisdiction consistent with constitutional due process where the parent so controls the acts of a subsidiary in the jurisdiction that the subsidiary can be considered the parent's "alter ego" or its agent.124 The "alter ego" test resembles the standards set in the veil-piercing context.125 The

---

121. *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 42 (Feb. 1970) (holding as a matter of international law that corporate nationality is determined by the corporation's place of incorporation or the place of its registered office).


123. MUCHLINSKI, supra note 12, at 142.


125. As the court reiterated in *Daimler*, "[t]he two prongs of the 'alter ego' test are... (1) [a] unity of interest and ownership [such] that the separate personalities of the two entities no longer exist and (2) that failure to disregard their separate identities would result
agency test essentially asks if the subsidiary can be considered a "manifestation of the parent's presence" in the state. 126 Interestingly, the \textit{Daimler} case, now on appeal to the Supreme Court from the Ninth Circuit, applies these tests in a case seeking to hold DaimlerChrysler, a German corporation, responsible for human rights abuses committed by its wholly owned Argentinian subsidiary. 127

Most critically, under the internal affairs doctrine, Delaware law governs all claims arising from the fiduciary duties of directors and officers of any entity within the corporate structure that is itself incorporated or headquartered in Delaware. The internal affairs doctrine is "a dominant and overarching choice of law principle," 128 which confers upon the state of incorporation jurisdiction to decide matters "peculiar to corporations, that is, those activities concerning the relationships [among or between] the corporation, its directors, officers and shareholders." 129 It is grounded on an interest in preventing such relationships from being governed by multiple jurisdictions. 130 Core fiduciary duties, as well as the authority to sue deriv-
tively on behalf of the corporation to enforce those duties, fall within the ambit of "internal affairs."\textsuperscript{131} In addition, Delaware courts may exercise personal jurisdiction over nonresident directors, trustees, officers, or members of other governing bodies of a Delaware corporation by serving process on the corporation's registered agent in Delaware.\textsuperscript{132} By reaching directors, officers, and governance matters pertaining to Delaware entities within or at the helm of the corporate group, Delaware law can indirectly reach many aspects of the corporate group at the enterprise level—some of which, as discussed below, have implications for human rights.

Delaware corporate law and related agency law principles, discussed below, are also relevant to tort claims that could be raised in the state on the basis of human rights violations. Whether Delaware would have jurisdiction to consider such claims in the first place would be determined at the outset by the reach of Delaware's long-arm statute. Like that of many other states, Delaware's long-arm statute provides a basis for personal jurisdiction in Delaware over all persons (foreign or domestic) who directly or indirectly cause "tortious injury in [Delaware] by an act or omission in [the] State."\textsuperscript{133} In \textit{AIG}, the Delaware Supreme Court recognized that financial injuries to a firm are suffered by the firm "wherever it is present."\textsuperscript{134} Thus, Delaware law would apply when material financial harm to a Delaware corporation is caused by human rights violations that could be linked to acts or omissions committed in Delaware.

Presumably, cases where a Delaware entity causes tortious human rights impacts in Delaware itself, perhaps relating to operating entities with labor or environmental impacts, are rare. However, fraud or misrepresentation, as well as breach of fiduciary duty, committed either by a foreign or a Delaware entity or their directors or officers, could provide the requisite conduct within the state. Indeed, cases alleging a breach of oversight duty, like many discussed in

\begin{thebibliography}{99}
\bibitem{131} Sagarra Inversiones, 34 A.3d at 1082.
\bibitem{132} \textsc{Del. Code Ann.} tit. 10, § 3114 (2013). In the federal courts, the "fiduciary-shield" doctrine typically shields from personal jurisdiction individuals whose only contacts with the forum are their corporate positions. \textit{See} \textsc{Wright et al.}, \textit{supra} note 122, at § 1069.4 & n.20.
\bibitem{133} \textsc{Del. Code Ann.} tit. 10, § 3104(c)(3) (2013) (emphasis added).
\bibitem{134} \textit{See, e.g., In re Am'. Int'l. Grp. Inc.}, 965 A.2d 763, 820 (Del. Ch. 2009).
\end{thebibliography}
Subpart C below, are often brought derivatively by shareholders in the wake of regulatory enforcement action or litigation, whether in the United States or abroad, that results in material liability to the corporation.

Of course, human rights violations due to acts or omissions outside the state, such as those caused by a non-Delaware affiliate or its directors or officers, that allegedly harms the (Delaware) parent or headquarters would not be covered by this statute and would generally be adjudicated under the law of the state or foreign jurisdiction where those acts were committed. Nonetheless, Delaware courts could also exercise general jurisdiction over a Delaware parent or subsidiary for acts or omissions within the state that caused tortious human rights impacts elsewhere. In each case, the entity's liability would depend on an examination of the conduct of individuals authorized to act on its behalf, questions which would be determined under agency principles, and the corporation's basic governing documents and therefore, directly or indirectly, by corporate law.

C. Extending Entity Law to the Corporate Group

As the internal affairs doctrine suggests, the primary matters addressed by corporate law that have implications for the corporate group concern internal agency conflicts within the firm and the need to create incentive structures and monitoring mechanisms to address such conflicts. Corporate law concerns itself with three agency problems: (i) conflicts between owners and managers; (ii) conflicts between majority and minority shareholders; and (iii) conflicts between the firm itself and external stakeholders. Although these internal agency conflicts would appear to be quite distant from human rights concerns, intersections are in fact readily apparent, and again, Delaware law concerning the internal governance of the firm can indirectly reach the corporate group when applied to Delaware parents.

---

135. Under the Restatement (Second) of Conflicts of Laws, factors to be weighed in determining whether state courts should exercise jurisdiction include: the place of incorporation, the location of a corporation's headquarters, and the policy interests of those states. See Restatement (Second) of Conflicts of Law § 145(2) (1971) (factors to be weighed in tort claims) §§ 145(6), 188(2) (factors to be weighed in breach of contract actions).

136. Int'l Shoe Co. v. Wash., 326 U.S. 310, 318 (1945) (holding that "continuous" and "substantial" contacts with the forum justify suit on causes of action unrelated to the contacts with the forum).

137. See Armour at al., supra note 72, at 33, 35-53 (defining agency conflicts).

138. Id.
and subsidiaries.

First, all corporations must address agency costs arising from the misalignment between the interests of shareholders and managers. The literature tends to emphasize how the self-interested behavior of management can result in shirking or opportunism, which can reduce value to the firm; however, these agency costs potentially impact not only shareholders, but also creditors, employees, and other corporate constituencies.\textsuperscript{139} The solutions offered in corporate law are (i) the imposition of fiduciary duties toward the corporation and its shareholders that can be enforced through derivative litigation, (ii) the power of shareholders to elect and remove directors, and (iii) the power of the board of directors to appoint and remove senior executives of the corporation and to monitor their performance.\textsuperscript{140} Within the corporate group, similar agency costs arise at each level of the organizational structure as the parent seeks to align the interests of subsidiary corporations and their managers with its own, using these same tools.\textsuperscript{141} If the parent of the corporate group understands the potential material impact of respect for human rights and broader legal compliance on its financial performance, it can use internal controls, management systems, and other processes to communicate those priorities across the organization and incentivize subsidiary managers accordingly.

The second agency conflict—conflicts between controlling and minority shareholders—bears a less obvious connection to human rights. The harms at issue here are typically the risk of potential oppression of the minority shareholders by the majority. In the corporate group, resolution of these majority-minority shareholder conflicts takes primacy where the subsidiary is not wholly controlled but where there is a controlling shareholder or shareholder class.\textsuperscript{142} On the one hand, the presence of a controlling shareholder reduces the separation of ownership and control, mitigating some of the effects of managerial self-interest. Where the controlling shareholder values respect for human rights, for example, it has the power to focus subsid-

\textsuperscript{139} Id. The effect of managerial slack, however, on stakeholder interests is complex. Evidence from recent studies suggests that greater managerial slack allows for greater positive stakeholder impacts while less managerial slack reduces it. See generally Punit Arora & Ravi Dharwadkar, Corporate Governance and Corporate Social Responsibility (CSR): The Moderating Roles of Attainment Discrepancy and Organizational Slack, 19 CORP. GOV.: INT'L REV. 136 (2011).

\textsuperscript{140} See Armour et al., supra note 72, at 33, 35–53.

\textsuperscript{141} Of course, within the corporate group, power over directors and other management personnel at controlled subsidiaries is the most obvious tool. See infra Part II.C.2.

\textsuperscript{142} DINE, supra note 80, at 80.
Does Corporate Law Reach Human Rights?

The final type of agency conflict, and the one of most relevance in the wholly owned corporate group, is the potential abuse by shareholders of the corporate form to engage in fraudulent or inequitable asset partitioning to the disadvantage of creditors and other stakeholders, including employees or local communities in the developing world that may suffer from human rights abuses. The tension between the firm's legitimate interest in isolating risks within limited liability entities and the interests of external stakeholders creates the potential for the firm to disregard its human rights impacts in order to generate greater (short-term) profits. As Armour, Hansmaan, and Kraakman explain, "[h]ere the difficulty is in ensuring that the firm, as agent, does not behave opportunistically toward these various other principals—such as by expropriating creditors, exploiting workers, or misleading consumers." The challenge is enhanced when there are multiple shareholder and stakeholder groups with heterogeneous preferences and disparate goals, and where some of the firm's stakeholders are only indirect stakeholders of the Delaware entity.

The state duty to protect human rights by enacting appropriate substantive regulations is the primary source of protection for stakeholders impacted by corporate human rights practices. Veil-piercing doctrine offers another solution to these conflicts, as do other state creditor protection doctrines. However, corporate law, with its fo-

143. See infra Part II.C.4, note 175.
144. Armour et al., supra note 72, at 36.
145. Id. at 36–37.
146. These include equitable subordination of the parent or other controlling shareholder claims to those of creditors. See Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1939) (applying the doctrine to claims against the Deep Rock Oil Co.). Substantive consolidation, the doctrine of deepening insolvency, and fraudulent conveyance law are other sources. On substantive consolidation, see William J. Carney, Corporate Finance: Principles and Practice 470–71 (2005) ("Where there is a unified operation of a parent and subsidiary corporations, courts may ignore the separate legal entities and treat all corporations as part of a single debtor."). See also Del. Code Ann. tit. 6, § 1301(4)–(7) (2013). But see Trenwick Am. Lit. Trust v. Ernst & Young, L.L.P., 906 A.2d 168 (Del. Ch. 2006) (rejecting deepening insolvency doctrine in Delaware as a state law remedy for harm caused by the fraudulent and concealed incurrence of debt). Applying to creditors within the reach of U.S. law, they are less useful in the human rights context, unless perhaps to
cus on the agency conflicts outlined above, has developed rules that not only permit boards of directors to take stakeholder interests into account but also encourage corporate management to attend to human rights impacts. The following discussion considers these tools and concludes by considering the challenge of remedies.

1. Board Discretion and Stakeholder Interests

The dominant strand of corporate law scholarship maintains that protecting non-shareholder stakeholders, whether employees or human rights victims, is best left to other bodies of law and to contract.147 The Delaware Supreme Court also recently emphasized in the case of eBay Domestic Holdings, Inc. v. Newmark, that the corporate form cannot be used solely for nonprofit purposes.148 Beyond this, however, the broad discretion afforded to corporate boards of directors under the business judgment rule allows them, with only limited exceptions,149 to consider stakeholder interests150 and even to sacrifice corporate profits in the interests of non-shareholders.151

Corporate law therefore permits, though it does not mandate,
positive investments to prevent and mitigate human rights impacts even at the cost of short-term profits. This principle is bolstered by existing statutory authority in Delaware for firms to make charitable contributions in the interest of non-shareholder stakeholders. Even though human rights commitments under the Framework do not require companies to proactively advance human rights, corporate philanthropy or other profit-reducing expenditures will not cause a firm’s board to be in breach of fiduciary duties, which are discussed more fully below.

In a corporate group composed in part of Delaware entities or led by a Delaware parent, the Delaware corporations’ stakeholders arguably include not only their own stakeholders, but also those of foreign affiliates who contribute to the success of the corporate group as a whole. Accordingly, human rights impacts on such stakeholders, particularly when they create liability risks to the parent or the MNE as a whole, may properly be taken into account by those entities within the MNE that are governed by Delaware law.

2. Fiduciary Duties

Under the Framework, the corporate responsibility to respect human rights is defined in terms that closely parallel the common law duties of care and loyalty that apply to corporate directors and officers. Indeed, some commentators have argued that director and officer fiduciary duties in fact require them to monitor and respond to human rights risks across the corporate enterprise because of the recognized financial, legal, and reputational consequences of a failure to do so. Of interest for present purposes is that even though fiduciary duties require such monitoring and response, they are subject to only legal constraints.

152. See Del. Code Ann. tit. 8, § 122(9) (2012). See, e.g., Kahn v. Sullivan, 594 A.2d 48, 63 (Del. 1991) (interpreting the Delaware statute to be limited only by a reasonableness test). Again, the only legal constraints are remedies for waste, which is limited to the theoretical “unconscionable cases where directors irrationally squander or give away corporate assets.” Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000).

153. The DGCL does not contain provisions regarding fiduciary duties, in contrast to the Model Business Corporation Act. Cf. Model Bus. Corp. Act § 8.30(a) (1979) (requiring each director to “act in good faith and in a manner the director reasonably believes to be in the best interest of the corporation”). Directors and officers have equivalent fiduciary duties under the DGCL. See Gantler v. Stephens, 965 A.2d 695 (Del. 2009) (citing Guth v. Loft, 5 A.2d 503, 510 (Del. 1939)).

ary duties under Delaware law apply only to Delaware entities, they are the primary area of Delaware law beyond veil-piercing jurisprudence that has enterprise-wide reach. How far these duties reach across global corporate organizations has not been fully addressed by the courts, nor have they given guidance as to which entities, if any, within the corporate group owe duties to the corporate group itself as an economic enterprise.155

At present, Delaware law appears to assume a traditional corporate hierarchy under which parent entities and their boards of directors are best positioned to consider the human rights impacts and broader interests of the enterprise as a whole. In Delaware, wholly owned subsidiaries cannot easily perform this function without the direction of their parent shareholder, since they are deemed to owe fiduciary duties only to the parent and the parents’ shareholders, not to any lower-tier subsidiaries in the corporate hierarchy or to other constituencies of the controlled firm, such as creditors or employees.156 In fact, because the Supreme Court has held that such subsidiaries and their parents have a “complete unity of interests,”157 suits claiming a breach of fiduciary duty by the directors or officers of a wholly owned subsidiary can be brought by the shareholders of the parent corporation in a “double-derivative” suit in recognition of the parent’s control over the subsidiary’s management.158

155. This is perhaps not surprising, as the corporate group has no formal legal identity and corporate law is solidly entity-focused. However, it is not inevitable given the economic realities of the corporate group and the wide range of regulatory regimes that approach the corporate group as a unitary enterprise. See Phillip Blumberg, The Increasing Recognition of Entity Principles in Determining Parent and Subsidiary Corporation Liabilities, 28 CONN. L. REV. 295, 307–26 (1996) (surveying the expansion of enterprise concepts across various regulatory arenas).

156. Andarko Petroleum Corp. v. Panhandle Eastern Corp., 545 A.2d 1171, 1174 (1988) (“[I]n a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.” (citing Sinclair Oil Corporation v. Levien, 280 A.2d 717, 720 (Del. 1971))). See also Trenwick Am Lit. Trust v. Ernst & Young, 906 A.2d 168, 200 (Del. Ch. 2006) (citing the same passage).

157. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984) (“A parent and its wholly owned subsidiary have a complete unity of interests. Their . . . general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.”). The same is of course true for unincorporated divisions. Id. at 770 (“the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor”).

158. “Double-derivative” suits give “a shareholder of a parent corporation [standing to] bring suit derivatively to enforce the claim of a wholly owned corporate subsidiary, where the subsidiary and its controlling parent wrongfully refuse to enforce the subsidiary’s claim directly.” Sagarr Inversiones, S.L. v. Cementos Portland Valderrivas, S.A., 34 A.3d
Consequently, an argument can be made that as a matter of Delaware law, a wholly owned U.S. subsidiary of, for example, a Chinese (or French) parent that, hypothetically, does not prioritize human rights issues, would owe fiduciary duties solely to the foreign parent and would not be permitted to consider its own interests, the interests of affiliates below it in a chain of ownership, or the human rights impacts of the firm on its own stakeholders. On the other hand, the fiduciary duties of management at both the subsidiary and holding company parent levels to advance the “best interests” of the parent arguably require both to consider stakeholder impacts at the subsidiary level, particularly those that present material liability risks to the parent or the MNE as a whole. Still, as a practical matter, whether a wholly owned subsidiary’s strategy will emphasize respect for human rights, value creation, or sound management will undoubtedly be strongly influenced by its parent.

Non-wholly-owned subsidiaries generally have greater autonomy to independently advance human rights, and since Delaware law has not imposed on non-wholly owned subsidiaries fiduciary duties to the parent shareholder, fiduciary duties in these entities continue to run to the subsidiary “corporation and its shareholders.” Of course, dominant and controlling shareholders can ensure the alignment of subsidiaries’ interests with their own through voting and managerial control, and the extent of the parent’s commitment to respect human rights will still have deep repercussions across the corporate enterprise. That said, respect for human rights is increasingly recognized as a contributing factor to long-term shareholder value for the parent and may in fact be part and parcel of fiduciary duties for all Delaware subsidiaries, as the following discussion shows.

1074, 1079 (Del. 2011). The extension of shareholder enforcement rights down the chain of ownership is justified by “the parent’s ability to ‘enforce [the subsidiary’s] claim by the direct exercise of [the parent’s] 100 percent control’ of the subsidiary.” Id. at 1080 (quoting Lambrecht v. O’Neal, 3 A.3d 277, 288–91 (Del. 2010)).


a. The Duty of Care

In determining whether a company causes or is complicit in human rights abuses, the Framework’s due diligence standard focuses on the exercise of reasonable care in the decision-making process, which tracks closely with Delaware’s standards for the duty of care. The definition of “reasonableness” is interpreted with reference to legal standards of care, as well as firm- and industry-specific standards. Core corporate governance rules are therefore essential to its implementation.

Although it is not defined by statute in Delaware, the duty of care has been interpreted as the avoidance of “gross negligence.” Under the business judgment rule, a court will not generally second-guess business decisions of the board as long as the directors acted on an informed basis, in good faith, and in the honest belief that the action was in the best interests of the corporation. Judicial oversight is therefore limited to the decision-making process rather than its result. Most companies’ charters also include indemnification and exculpation provisions permitted under the DGCL that shield directors (and in the case of indemnification, officers) from liability for breach of the duty of care so long as they acted in good faith; the availability of insurance makes actual out-of-pocket liability a remote possibility in nearly all cases.

Although these mechanisms render the duty of care essential-

163. Liability can only be imposed if the business judgment rule’s presumption is rebutted, which requires evidence of bad faith, a breach of the duty of loyalty, or gross negligence. Smith, 488 A.2d at 858.
164. Aronson, 473 A.2d at 812.
165. See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985) (A court will “not substitute its views for those of [a corporation’s] board if the latter’s decision can be attributed to any rational business purpose.”).
166. DEL. CODE ANN. tit. 8, § 102(b)(7) (2012) (precluding director exculpation for “acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law”), § 145(h) (providing for indemnification so long as the indemnitee “acted in good faith and in a manner the person reasonably believed to be in the best interests of the corporation”). A company may provide directors and officers liability insurance in circumstances that fall beyond what it could legally indemnify for. DEL. CODE ANN. tit. 8, § 145(g) (2012).
ly unenforceable as a practical matter,\textsuperscript{167} the duty of care retains its force as an aspirational standard. Moreover, as Melvin Eisenberg and Gordon Smith have each observed, the bifurcation between the standard of conduct of the duty of care and the low standard of liability—irrationality—is actually beneficial from a policy standpoint.\textsuperscript{168} The low risk of legal sanction for breach encourages directors and officers to serve and to take risks that are essential to business success without regard to potential personal liability.\textsuperscript{169} At the same time, the gap between the standard of conduct and the standard of liability, as well as the ambiguity surrounding the liability standard itself, can keep directors guessing rather than letting them rely on a lax liability rule.\textsuperscript{170} From this perspective, the duty of care therefore supports the Framework commitment for management to exercise due care in selecting the company’s business partners and considering human rights risks as part of ongoing decision-making.

In addition, the “best interests” prong of the business judgment rule interjects a loyalty analysis into the standard and permits judicial scrutiny of decision-making that is tainted by a conflict of interest or other breach of the duty of loyalty. Delaware courts have not yet clarified whether the “best interests of the corporation” should be understood to refer to the interests of the corporate enterprise as a whole, or, as suggested earlier, perhaps the interests of all constituencies of the Delaware entity or of affiliates in which it holds a controlling interest. However, general principles regarding the “corporation” as the primary beneficiary of fiduciary duties could support either interpretation.

\textbf{b. The Duty of Loyalty}

The nature of the corporate group as a complex organization

\begin{flushright}
\textsuperscript{167} See, e.g., Hillary A. Sale, Delaware's Good Faith, 89 Cornell L. Rev. 456 (2004) (surveying director fiduciary duties and evolving conceptions of good faith); Franklin A. Gevurtz, Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield, 35 U.C. Davis L. Rev. 645 (2002) (arguing that the expansive scope of board discretion makes fiduciary duties weak and ineffectual).


\textsuperscript{169} Williams & Conley, supra note 154, at 92.

\textsuperscript{170} Id. See also Darian M. Ibrahim, Individual or Collective Liability for Corporate Directors?, 93 Iowa L. Rev. 929, 968–69 (2007) (observing the benefits of ambiguity regarding related rules in the loyalty context).
\end{flushright}
composed of separate legal entities also implicates the duty of loyalty, aspects of which have direct bearing on the human rights obligations of the corporation. At base, the duty of loyalty requires the fiduciary to act in the best interests of the corporation without self-dealing and to disclose the nature of any conflict of interest or opportunity that may confer a financial benefit upon the fiduciary that is unavailable to other shareholders or to the corporation.\footnote{171}

Because conflicts of interest may give rise to management opportunism at the expense of the corporation and its shareholders, decisions where such conflicts are present are not shielded by the business judgment rule. Rather, such decisions are subjected to heightened scrutiny where the burden is on the defendant to show that the transaction was "entirely fair" unless certain procedural steps are taken to disclose and cleanse the loyalty taint.\footnote{172} Moreover, the duty of loyalty is the fiduciary duty with a tougher bite, since corporate directors cannot be indemnified or exculpated for its breach.\footnote{173} Therefore, as a practical matter, plaintiffs in shareholder derivative actions must raise a loyalty issue to overcome the liability shield conferred by exculpatory charter provisions in order to survive a motion to dismiss. Another feature that toughens the loyalty analysis, as Darien Ibrahim has noted, is that courts deciding cases implicating the duty of loyalty tend to examine the conduct of each director or officer individually in order to assess the fairness of the decision-making process rather than looking at the board’s process collectively, and therefore more deferentially, as is typical in duty of care cases.\footnote{174}

Although litigated most often in cases involving interested transactions that will often be unrelated to the human rights commitments of the firm, the duty of loyalty is relevant in determining the degree of autonomy individual directors and officers have within the corporation, including with regard to human rights issues. It also encompasses the duty of oversight, which sets a floor on the human

\footnote{171}{Guth v. Loft, 5 A.2d 503, 510 (Del. 1939).}

\footnote{172}{Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) ("The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter [relates to the economic terms of the deal that affect stock price]"). In controlling shareholder cases, even if procedural cures such as a vote of the disinterested directors or the minority shareholders are used to cure the loyalty taint, the court still reserves the right to scrutinize the transaction.}

\footnote{173}{DEl. CODE ANN. tit. 8, §§ 102(b)(7), 145(h), 145(g).}

\footnote{174}{See generally Ibrahim, supra note 170.}
rights due diligence obligations of the MNE as a matter of state corporate law.

i. Conflicts of Interest

The duty of loyalty speaks most obviously to the obligations of the parties in "interested transactions," which do not typically raise particular human rights concerns. The first is in the context of corporate transactions involving a parent and subsidiary, including cases involving cash-out or freeze-out mergers of the target's minority shareholders.\(^{175}\) Conflicts of interest may also arise with respect to corporate opportunities that are presented to the subsidiary but which are misappropriated by the parent.\(^{176}\) In both cases, the conflict arises because the parent corporation, as majority or controlling shareholder, and its affiliates stand on both sides of the transaction.

Loyalty issues also arise within the corporate group when two corporations have interlocking directorates or when directors or officers of one corporation serve as directors or officers of another. Even if the overlapping directors and officers have no financial interest in the transaction,\(^{177}\) they are not "independent" of either corporation for which they serve.\(^{178}\) The landmark case, *Weinberger v. UOP*, addressed the duties of fiduciaries with such positional conflicts, holding that:

When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith... and [have] the burden of es-

\(^{175}\) Because such transactions place the parent as controlling shareholder on both sides of the transaction, to the potential detriment of minority shareholders, Delaware courts have held that majority or controlling shareholders owe fiduciary duties to the corporation and its minority shareholders and the transaction is subject to scrutiny under an "entire fairness" test. *See, e.g.*, Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1116 (Del. 1994) (discussing the policy rationales of the "entire fairness" test in parent-subsidiary mergers).

\(^{176}\) *See, e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971) (holding that a holding company and controlling shareholder owed a fiduciary duty to its subsidiary by virtue of its domination of the subsidiary and its receipt of a benefit at the expense of the subsidiary or the minority); Getty Oil Co. v. Skelly Oil Co., 267 A.2d 883 (Del. 1970) (finding no self-dealing by parent corporation of its controlled subsidiary where the parent did not misappropriate a benefit owed to the subsidiary).

\(^{177}\) *See* DEL. CODE ANN. tit. 8, § 144 (2012) (defining an "interested director" as one having a financial interest in the contract or transaction or serving as a director or officer of an entity that is party to the transaction).

\(^{178}\) Due to stock exchange rules requiring independent directors to serve on certain key board committees, many public corporation boards may include only one or two inside directors.
tablishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts . . . . There is no dilution of this obligation where one holds dual or multiple directorships, as in a parent-subsidiary context. Thus, individuals who act in a dual capacity as directors of two corporations, one of whom is parent and the other subsidiary, owe the same duty of good management to both corporations, and in the absence of an independent negotiating structure, or the directors’ total abstention from any participation in the matter, this duty is to be exercised in light of what is best for both companies.179

The level of commitment of a subsidiary and its parent or controlling shareholder to respect human rights may well be aligned. On the other hand, directors or officers of a Delaware subsidiary might wish to adopt policies that respect human rights, but be directed by the company’s parent corporation to operate in a manner that does not respect human rights for the economic benefit of the parent. This is not merely a theoretical possibility—as an entire line of cases under the Alien Tort Claims Act attests, violations of human rights can occur when a subsidiary opts for the cheapest way to resolve conflicts with local communities and other stakeholders.180 If management held dual appointments with both the subsidiary and its parent, this divergence would create a positional conflict.

_Weinberger_ appears to leave to the discretion of the director or officer the decision of how to best serve those dual interests. However, beyond the broader principles concerning conflict of interest transactions and the definition of “interested” and “independent” directors, the Delaware courts have to date given only limited guidance on the fiduciary duties owed by corporate directors and officers who have positional conflicts. In this context, the subsidiary’s management runs the risk of being replaced or of derivative litigation, if they deviate from profit maximization in order to reduce human rights impacts against the wishes of the controlling shareholder.181

---


180. See, e.g., Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), aff’d 133 S. Ct. 1659 (2013) (arising from the use of military force against community activists in Nigeria).

181. Although the case did not involve profit-sacrificing in order to reduce human rights impacts, the Delaware Supreme Court in _Getty Oil Co. v. Skelly Oil Co._ rejected a challenge by minority shareholders to the controlling parent’s draining of needed funds. See _Getty Oil Co. v. Skelly Oil Co._, 267 A.2d 883 (Del. 1970). The case suggests that a
Given the common managerial ties of affiliates in the corporate group, the “tone from the top” has important consequences for human rights commitments across the organization.

ii. The Duty to Obey the Law and the Contours of Good Faith

The corporate responsibility to respect human rights has been defined as a responsibility that is independent of and beyond compliance with national and international law protecting human rights. However, compliance with the laws of the company’s home jurisdiction and those in which it does business certainly establish a baseline for that responsibility. Indeed, under the Guiding Principles to the Framework, companies should not only comply with all applicable laws regarding human rights but should also “treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.” Since many areas of federal regulation apply extraterritorially and on an enterprise-wide basis, the force of basic legal compliance in the area of human rights should not be underestimated. In addition, international law, including the customary international law of human rights, is, of course, federal common law. David Millon has argued persuasively that because “illegal activities are deemed to be beyond the ‘capacity or power’ of the corporation,” they are also ultra vires and can, theoretically at least, be challenged by shareholder litigation for injunctive relief, derivative litigation for damages, enforcement actions by a state attorney general, or actions against the individuals responsible if the corporation is found civil or criminally liable.

controlling parent may be able to exploit a subsidiary in order to maximize profit, which could leave the subsidiary unable to operate in a manner that respects the environment, labor rights, or other human rights.

182. Guiding Principles, supra note 16, ¶ 11. Indeed, the SRSG declined to identify specific human rights that should be respected. See supra note 54 and accompanying text.


185. On the scope of such regulations, see Blumberg supra note 155.


187. Millon, supra note 183, at 189.
In addition, the Delaware Supreme Court has held that knowing approval of illegal conduct by the corporation is a breach of good faith, which is an element of the duty of loyalty. The Delaware Chancery Court has also recently reaffirmed that knowing acquiescence in a violation of law or knowingly causing a corporation to "engage in legally questionable activity" constitutes a breach of the duty of loyalty even where the breach had no observable financial impact on the company. These principles, and the related gloss on good faith provided in the oversight cases discussed below, imply that a Delaware entity's directors and officers who have knowledge of violations of domestic or international human rights law, even if committed or facilitated by a foreign affiliate or agent, and fail to respond are in breach of the duty of loyalty as well. And, as Franklin Gevurtz has noted, these principles "establish some protection of non-shareholder interests through corporate law that shareholders cannot waive."

iii. The Duty of Oversight: Intersections of Care and Loyalty

Of all of the common law doctrines surveyed here, the duty of oversight is one that has the most obvious doctrinal and practical implications for the governance of corporate groups and for their ability to fulfill their responsibility to respect human rights. The duty of oversight is a species of the duty of loyalty, though its roots lie in the duty of care. Unlike the duty of care, which applies to board decision-making, oversight cases arise because of board inaction. Despite its limits, the common law regarding oversight obligations is therefore an essential foundation for the human rights responsibilities of corporations under the Framework, which includes both acts and omissions that produce human rights impacts. It is also directly implicated in calls by regulators, investors, and the public for corpo-
rations to engage in enterprise risk management and to assess the environmental, social, and governance (ESG) risks presented by their operations. The doctrine therefore offers guidance for Delaware firms seeking to identify the minimum legal obligations to engage in human rights due diligence.

The duty of oversight reaches the corporate group by requiring the board of directors to monitor legal compliance by officers and employees across their entire enterprise. Delaware courts recognize that “ordinary business decisions that are made by officers and employees deeper in the interior of the organization, can . . . vitally affect the welfare of the corporation and its ability to achieve its various strategic and financial goals.” The standard of conduct for director oversight established in In re Caremark and its progeny is in fact quite basic—it simply requires a director to “attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists.”

The duty of oversight is less extensive than the due diligence commitment described by the Guiding Principles, in that an assessment of human rights risk under the Guiding Principles should evaluate the risk from the standpoint of potential victims, rather than of the firm itself. At base, however, the Framework’s core human rights due diligence commitments parallel existing due diligence obligations under the duty of oversight and its breach may, in theory at least, render directors liable for losses caused by non-compliance with applicable legal standards.

The Guiding Principles recommend that due diligence policies be adopted at the enterprise-level and that human rights be in-

---

196. Id.
197. Id.
198. Id. at 970. The Foreign Corrupt Practices Act (FCPA) and the Federal Sentencing Guidelines are two regimes that already incentivize companies to adopt an internal compliance system. The FCPA imposes direct reporting requirements. An internal compliance system is a mitigating factor under the Sentencing Guidelines. See generally H. Lowell Brown, The Corporate Director’s Compliance Oversight Responsibility in the Post-Caremark Era, 26 DEL. J. CORP. L. 1 (2001) (discussing Caremark standards in relation to the FCPA reporting requirements and the mitigation standard under the Federal Sentencing Guidelines).
corporated within enterprise risk-management systems. However, as Radu Mares has noted, the Framework does not clearly resolve the question of how far the boundaries of due diligence extend to the firm's business partners. Consistent with the Framework's reasonable care test for complicity in human rights abuses, Caremark, the foundational oversight case, states that directors need not "possess detailed information about all aspects of the operation of the enterprise." Practically speaking, then, the duty of oversight sweeps most broadly when applied to the parent corporation of a corporate group with a hierarchical management structure, or to an intermediate subsidiary that exercises a similar function with respect to lower-tier subsidiaries.

The Framework also does not specify the content of internal monitoring systems. Because the determination of the scope and nature of the corporate compliance system involves board decision-making, in Delaware, critical questions such as the extent of the internal compliance system across the organization, whether human rights risk should be covered, materiality standards for reporting, and other operational details, are all subject to the board's discretion under the business judgment rule. Absent a conflict of interest or evidence of bad faith, directors cannot be subject to personal liability under the standard of liability established in Caremark and Stone v. Ritter if they deem the compliance system to be reasonable and adequate.

Because of the need to give boards autonomy to manage their business and because shareholders are not as well-positioned to appreciate the operational aspects of internal compliance systems as management, judicial scrutiny in duty of oversight cases is also among the most deferential in the law of fiduciary duties. Howev-
er, the high liability bar set by the case law is actually consistent with the Framework's knowledge-based test for complicity in human rights abuses. In Stone, the Delaware Supreme Court reaffirmed the Caremark liability rule that "only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability." A failure of the company's internal controls "in one discrete instance of serious wrongdoing" by subordinates within the organization would not be sufficient to establish directors' knowledge of the deficiencies of existing internal compliance and monitoring systems. If a reporting or information system exists, liability will attach only if the directors ignore "red flags" or "consciously fail to monitor or oversee [the system's] operations thus disabling themselves from being informed of risks or problems requiring their attention."

Applied to the human rights context, liability for breach of oversight duty cannot be based on a single incident of human rights abuses, no matter how egregious, although, as noted above, a single incident could still be challenged as a violation of either local or international law. To establish a claim for breach of oversight duty, a plaintiff must provide evidence of conscious disregard for a known fiduciary duty as evidence of a lack of good faith, which Stone clarified is a subsidiary element of the duty of loyalty.

At the same time, recent efforts by the Delaware courts to further narrow the oversight doctrine to cases involving legal, rather than business risk, should not present a barrier to most human rights cases. In Trenwick America Litigation Trust v. Ernst & Young, de-

---


210. The Delaware courts have not detailed what types of practices might constitute red flags. On this issue, see generally Nees, supra note 206.

211. Stone, 911 A.2d at 370.

212. Id.
decided by the Delaware Chancery Court in 2006, claims were brought by shareholders against a holding company, its operating subsidiaries, and certain directors of these entities alleging that the defendants had adopted a poor global risk strategy that allowed the U.S. subsidiary to guarantee all of its affiliates’ debt, leading ultimately to the bankruptcy of the parent holding company and the Delaware subsidiary over U.S. operations. Relying on the business judgment rule, the court dismissed the claims.\textsuperscript{213} The Delaware Chancery Court was similarly skeptical of allegations of ineffective enterprise-wide risk management in \textit{In re Citigroup}, decided in the wake of the financial crisis.\textsuperscript{214} There the court dismissed claims that Citigroup’s directors and officers had breached their duty of oversight for failing to mitigate “excessive” business risk that resulted in catastrophic losses to shareholders during the subprime mortgage crisis.\textsuperscript{215} The decision reaffirmed the strength of the business judgment rule as a shield against claims alleging director failure to adequately oversee risk management or mitigate potentially high-impact business risks.\textsuperscript{216}

However, human rights impacts not only present business risks but also clear legal risks to companies. Indeed, human rights abuses will often violate local civil and criminal laws in the host country, domestic regulations in the home country, and, potentially, international law as well. Contrasting \textit{Citigroup} with \textit{AIG},\textsuperscript{217} decided the same month as \textit{Citigroup}, clearly illustrates that if defendant directors and officers are directly engaged in illegal conduct or have actual knowledge of deficiencies in the corporation’s internal compliance system that they fail to correct, human rights violations can give rise to liability as a matter of Delaware corporate law. In \textit{AIG}, the Delaware Chancery Court upheld \textit{Caremark} claims on a motion to dismiss where the plaintiffs had alleged actual knowledge and, indeed, direct involvement by the defendants in orchestrating corporate fraud. Because the fraud’s success depended upon the known failure of reporting systems, plaintiffs were able to meet their initial burden

\textsuperscript{213} Trenwick Am Lit. Trust v. Ernst & Young, 906 A.2d 168 (Del. Ch. 2006).

\textsuperscript{214} See \textit{In re Citigroup Inc. S’holder Deriv. Litig.}, 964 A.2d 106, 122 (2009). In that case, \textit{Citigroup} had utilized special purpose vehicles to isolate risky assets, but the cumulative loss in value of those assets caused catastrophic losses for Citigroup on a consolidated basis.

\textsuperscript{215} \textit{Id.} at 121–31 (interpreting and applying the standard for oversight liability set forth in \textit{In re Caremark Int’l Inc. Deriv. Litig.}, 698 A.2d 959 (Del. Ch. 1996)).

\textsuperscript{216} \textit{In re Citigroup}, 964 A.2d at 106.

Does Corporate Law Reach Human Rights?

to establish bad faith as required in oversight cases.\textsuperscript{218}

Notwithstanding the tough pleadings standards plaintiffs confront in oversight cases, the fact that oversight cases must be reviewed from the standpoint of good faith and loyalty rather than care heightens the potential for the doctrine to be used in cases involving violations of domestic and international human rights law. Since any breach would not be covered by corporate exculpatory provisions, they also raise the possibility of individual director liability, which may motivate greater attention by corporate boards to monitoring obligations. In addition, the doctrine compels corporations to respond quickly to "red flags" rather than ignore crises once deemed to be far enough away that they could be easily ignored. This standard supports the Framework’s emphasis on ongoing due diligence, since corporate boards must ensure that their compliance systems keep up with constantly changing local investment environments and the emergence of new information about legal risks.\textsuperscript{219} The broad range of potential human rights impacts and the rapidity of information exchange make the oversight standards imposed by state corporate law an important legal underpinning supporting the Framework’s goals.

3. Disclosure Obligations Under State Law

Notwithstanding the jurisdictional limits of Delaware law, the human rights impacts of non-Delaware affiliates and the MNE as an enterprise also come into the purview of Delaware boards of directors because of rising investor, consumer, and regulator focus on human rights practices and the prospect of litigation in multiple jurisdictions challenging human rights violations.\textsuperscript{220} Labor relations and environmental impacts, in particular, have the potential to produce material firm-level or even systemic risks that are attracting investor attention.\textsuperscript{221} Although state corporate law does not itself include a mechanism for these issues to be brought before corporate boards, federal law permits precatory shareholder proposals on human rights to be submitted to a shareholder vote under Rule 14a-8 of the Securi-

\textsuperscript{218} Id.

\textsuperscript{219} The recent Bangladeshi factory collapse is a clear example of an area of legal and business risk that major MNEs in the apparel industry had not previously accounted for. See, e.g., Julfikar Ali Mank, et al., \textit{Western Firms Feel Pressure as Toll Rises in Bangladesh}, N.Y. TIMES, Apr. 25, 2013, at A1.

\textsuperscript{220} See Harper Ho, supra note 7, at 94–98.

\textsuperscript{221} See id. at 94–95.
ties Exchange Act of 1934.\textsuperscript{222}

In the event that investors use this federal mechanism to propose that the board of directors of a Delaware corporation take action to monitor or reduce enterprise-wide human rights impacts, Delaware law requires corporate boards to communicate honestly to shareholders at all times, and includes an obligation to ensure that shareholders receive accurate and adequate disclosures of all material information necessary to facilitate their vote.\textsuperscript{223} Therefore, as a matter of state law, the company must ensure that any disclosures required under federal securities laws that pertain to human rights issues are accurate and complete. The Delaware Supreme Court has held that these disclosure obligations are not an independent duty, but rather are part of the general fiduciary duties of care and loyalty.\textsuperscript{224} State disclosure rules therefore complement federal rules as a tool for encouraging greater transparency around corporate human rights impacts.

4. The Common Law of Agency and Corporate Networks

Thus far the discussion has emphasized the application of Delaware law to Delaware entities and the fact that Delaware defines the corporate group using concepts of control that are generally equity-based. However, modern MNEs are not limited to equity-based structures but rather include networks of entities linked by less-than-controlling equity stakes or by contractual relationships.\textsuperscript{225} Extended supply chains and other business relationships with third parties increase the risk of human rights impacts in which the MNE may be implicated. Can Delaware reach the corporate network? The answer lies in agency law.

Agency law is of particular utility in considering the responsibility of a Delaware-based corporation for the human rights impacts of third-party business partners or remote affiliates, regardless of their legal form. An agency relationship is a fiduciary relationship, and once established, provides a means of attributing the negligence or other tortious conduct of the agent to its principal, that is, the enti-


\textsuperscript{224} Malone, 722 A.2d at 10–11.

\textsuperscript{225} See supra Part II.A.2 (explaining corporate group structures).
ty for whom it is authorized to act.\textsuperscript{226} Agency law is the foundation of modern corporate law, and where corporate codes are silent, it provides an essential gap-filling role. Moreover, under the alternative entity statutes of Delaware and most other states, agency law applies to the limited liability entities, as well as corporations, of which the MNE is composed.\textsuperscript{227}

A court applying agency principles may attribute the actions of a subsidiary or unrelated third-party, wherever situated, to its parent or principal where the subsidiary or other entity has authority to act on the parent/principal’s behalf and at its direction.\textsuperscript{228} A finding that a subsidiary is the agent of its parent can also provide grounds for asserting jurisdiction over a foreign parent.\textsuperscript{229} An agency relationship does not result from mere ownership within the corporate group.\textsuperscript{230} However, the subsidiary will be deemed an agent of the parent where the parent manifests a desire for the subsidiary to act on the parent’s behalf, the subsidiary consents to act, the parent has the right to exercise control with respect to matters entrusted to the subsidiary, and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary’s Board of Directors.\textsuperscript{231}

For example, in \textit{In re Matter of Oil Spill by the Amoco Cadiz}, decided by the Seventh Circuit, the parent corporation was found to be directly negligent in establishing the subsidiary’s operations and not ensuring proper safety, maintenance, and environmental management of its ships by the subsidiary.\textsuperscript{232} These breaches of the parent’s duty of care as a matter of tort law were held to have caused damage when a tanker ran aground, causing an oil spill.\textsuperscript{233} In other cases, the parent has been found to be directly liable in tort on an

\begin{itemize}
\item \textsuperscript{226} \textit{Restatement (Third) of Agency} §§ 1.01, 7.03, 7.08 (2006).
\item \textsuperscript{227} \textit{See, e.g.}, Del. LLC Act § 18–1104 (2013) (stating that “in any case not provided for in this chapter, the rules of law and equity . . . shall govern”).
\item \textsuperscript{228} \textit{Chrysler Corp. v. Chaplake Holdings, Ltd.}, 822 A.2d 1024, 1035 (Del. 2003).
\item \textsuperscript{229} \textit{See also supra} notes 124–127 and accompanying text (describing the “alter ego” and “agency” tests for asserting jurisdiction over a foreign parent on the basis of its subsidiary’s contacts with the forum).
\item \textsuperscript{230} \textit{Motorsport Eng’g, Inc. v. Maserati SPA}, 316 F.3d 26, 30 (1st Cir. 2002); \textit{Manchester Equip. Co. v. American Way & Moving Co.}, 60 F. Supp. 2d 3, 7 (E.D.N.Y. 1999); \textit{Cellini v. Harcourt Brace & Co.}, 51 F. Supp. 2d 1028, 1034 (S.D. Cal. 1999).
\item \textsuperscript{231} \textit{Transamerica Leasing, Inc. v. La Republica de Venezuela}, 200 F.3d 843, 849 (D.C. Cir. 2000); \textit{Chrysler Corp. v. Chaplake Holdings, Ltd.}, 822 A.2d 1024, 1035 (Del. 2003).
\item \textsuperscript{232} \textit{954 F.2d 1279, 1303} (7th Cir. 1992).
\item \textsuperscript{233} \textit{Id.}.
\end{itemize}
agency theory when the subsidiary followed the parent’s instructions on production management, resulting in harm. \(^{234}\) When applying agency theory, the court focuses its inquiry on the arrangements between the affiliates in the corporate group, the authority given in the arrangements, and the relevance of the arrangements to the plaintiff’s claim. \(^{235}\)

As noted earlier, the mere presence of overlapping management is not enough to support piercing the corporate veil and attributing liability for an affiliate’s conduct to its shareholder parent. \(^{236}\) However, the conduct of directors and officers with overlapping responsibility to different affiliates within the MNE may result in the direct liability of the parent even if the conditions for veil-piercing are not met. As the Bestfoods case illustrates, the question of whether harms are proximately caused or facilitated by an MNE parent can turn on the authority and legal duties of corporate management, which are core concerns of agency law and by extension, of corporate law.

In *United States v. Bestfoods*, the core question in the case was whether the parent corporation could be held liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) for environmental violations committed by its subsidiary. At issue was whether the directors and officers who served simultaneously for both the parent and the subsidiary were acting on the parent’s behalf in authorizing the conduct in question. The Supreme Court held that the parent could be held liable under CERCLA for its own violations if it directly operated the facility (the “actual control” test), regardless of its lack of control over the subsidiary. However, in order for the government to show that the parent was in fact a “direct operator,” it would have to overcome the presumption that the overlapping directors and officers were “wearing their ‘subsidiary hats’” when acting for the subsidiary. \(^{237}\) On the facts of the case, the Supreme Court concluded that the presumption had not been overcome. However, the case clearly demonstrates the centrality of agency law as a base for the attribution of lia-

---


\(^{235}\) Chrysler Corp. v. Chaplake Holdings, Ltd., 822 A.2d 1024, 1035 (Del. 2003) (citations omitted).

\(^{236}\) On this limitation, see *supra* note 112 and accompanying text.

\(^{237}\) *Bestfoods*, 524 U.S. at 69–70.
bility among affiliates.

Agency law also provides a basis of direct liability for negligence of the authorizing entity or principal in hiring, training, or supervising the entity that serves as its agent. For example, in Amoco Cadiz, the parent’s negligence with regard to training of the subsidiary’s ship crew gave rise to liability. Claims for harm caused by third-party security personnel, as in the Kiobel case, might therefore be raised as a claim in tort not only for breach of a duty owed by the affiliate but also potentially by its immediate or ultimate parent for failure to provide appropriate guidelines for the supervision and training of such personnel or for its own negligence in failing to regularly monitor the affiliates and their third-party agents. Agency liability can also be based on a theory of strict liability, as in the case of employers’ liability for employees’ torts.

As Judge Posner noted in Boima Flomo v. Firestone, decided pre-Kiobel in the Seventh Circuit under the Alien Tort Claims Act, one of the persistent challenges with applying agency law to the MNE is the question of how far down the ownership chain the authority and control necessary to establish an agency relationship can be shown. Posner observed that rules establishing the liability of a principal, such as an employer, for the acts of its agent are intended to motivate greater monitoring of the agent, and are needed because the employee or other agent is likely to be judgment proof and therefore unresponsive to tort sanctions. However, he noted further that “[t]he theory attenuates when the employees include local residents of Third World countries…. American corporations that have branches in backward or disordered countries may be incapable of preventing abuses of workers in those countries by their employees.”

While this may be true as a matter of practical reality, courts have the power to recognize and enforce agency relationships through a chain of authority. Because the authority of the agent must

238. See Restatement (Third) of Agency §§ 7.03–7.06 (2006) (providing that a principal is subject to direct liability to a third party harmed by the agent’s conduct if the principal is negligent in “selecting, supervising, or otherwise controlling the agent,” or delegates a duty to use care in protecting persons or property from harm to an agent who fails to do so).

239. See 954 F.2d 1279 (7th Cir. 1992).


242. Id. at 1020.

243. Id.
be clearly demonstrated, agency law is unlikely to result in the attribution of responsibility for human rights harms to the ultimate parent of a corporate group in many cases in which harm occurs. However, agency law provides a basis for reaching remote affiliates and hierarchical corporate organizations in such cases in a way that does not rest on direct equity ties between one entity as the principal and another entity that acts as its agent. Agency law thus supports core liability rules under tort law, in particular, the law of negligence, that provide a powerful resource for allocating liability for human rights abuses by corporate actors. It therefore offers a starting point to consider how the responsibility to respect human rights might extend within a corporate enterprise beyond the level of the remote affiliates and third parties that are most likely to be the direct perpetrators of human rights abuses.

D. Remedies and the Reach of Corporate Law

Under the Framework, the responsibility to respect human rights includes not only a commitment to preventing and mitigating human rights harms, but also to “provid[ing] for or cooperat[ing] in . . . remediation” of adverse human rights impacts which the company has caused or contributed to. Beyond these cases, business enterprises do not have an obligation to provide access to remedies. The Guiding Principles urge firms to provide operational level grievance mechanisms, yet the Framework places the primary responsibility on states to afford access to legal and extra-legal remedies for human rights impacts. At present, few mechanisms for incentivizing corporate attention to human rights adequately reach the corporate enterprise and also provide direct remedies to victims. In this context, corporate law can work in tandem with regulatory regimes, including securities regulation, domestically and abroad as part of an overlapping web of influences on the MNE and as a source of potential remedies that, even if limited in practice, can incentivize corporate actors in support of human rights commitments.

244. See Mares, Limits of Corporate Responsibilities, supra note 19.
246. Id. ¶ 22.
248. Litigation under the Alien Tort Claims Act is perhaps an exception, but such cases are procedurally and substantively challenging for plaintiffs, particularly in the wake of Kiobel.
A primary challenge to effective remedies is the legal separation of the entities that form the corporate group or network. In addition, principles of federalism and comity demand that state corporate law not extend extraterritorially nor encroach upon the jurisdiction of sister states. However, as discussed above, many corporate law doctrines already span the economic enterprise indirectly through the application of the internal affairs doctrine and the basic obligation of domestic corporations to comply with the law. Although parent-level governance rules in an MNE’s home jurisdiction may seem inadequate to address human rights impacts, evidence from the regulatory enforcement of anti-bribery legislation and federal disclosure laws suggest that it can in fact be quite effective in indirectly reaching the broader corporate enterprise. Regulatory scholarship has also shown that multiple, diffuse incentive structures, which can derive in part from corporate law, are more effective than any single tool in shaping behavior. The indirect application of entity-based governance principles to reach the enterprise reduces the likelihood that the extraterritorial effects of these corporate law rules will pose problems under principles of comity and existing private international law doctrines.

Although corporate law offers no direct remedies to victims of human rights abuses, direct and derivative shareholder litigation is available to enforce fiduciary duties and offers the most obvious corporate law tool to incentivize enterprise-wide human rights due diligence. Shareholders with access to information regarding ongoing violations of law could also urge the board to address the issue or seek injunctive relief from the court. Of course, any legal action must be framed in terms of harm to a Delaware entity. Whether an

249. See Mares, Core Company, supra note 58, at 173 (referring to the separate legal identity of limited liability entities within the MNE as the “elephant in the room.”).

250. See Zerk, supra note 21, at 286–87 (citing the 1997 OECD Convention as “a good example of coordinated ‘parent-based’ regulation by capital-exporting home states.”).


253. In a derivative action, standing rules also require the plaintiff to own shares in the
action based on alleged harm to the corporate group could be brought in Delaware against a Delaware subsidiary is an issue that has not yet been addressed by the courts.

Shareholder litigation alleging breach of fiduciary duty related to human rights impacts would typically arise primarily when the firm is threatened by litigation or regulatory enforcement relating to underlying human rights violations in the United States or abroad. However, for large MNEs, the potential exposure is real and the threat of shareholder litigation can give corporate directors a further motivation to take such risks seriously. Shareholder litigation related to the 2010 BP oil spill offers a case in point. In the wake of the BP disaster, fiduciary duty claims were brought derivatively against BP Plc’s directors and officers, in addition to securities fraud claims, other civil claims, and regulatory actions against the company.254

The BP case demonstrates how the potential for shareholder litigation around environmental and other human rights impacts can encourage corporate boards to view them as material, perhaps even in contexts when the potential legal liability would otherwise not be economically material to the corporation.

Shareholder activism beyond litigation is another key tool to urge companies to prevent and address their human rights impacts. Investors have actively engaged corporate boards around human rights violations (witness the anti-apartheid investor movements) and are also increasingly willing to advocate for greater attention to non-financial risks through the shareholder proposal mechanism and other means.255 Given the potential for shareholder activism around human rights matters, corporate law’s voting rules and governance formalities, which lay the ground rules for shareholder engagement, are therefore another critical piece of access to remedies, even though they are not intended to create specific procedures or remedies for

---


255. See Harper Ho, supra note 7, at 93–95 (detailing examples of shareholder activism around non-financial risks).
harms to corporate stakeholders.

Finally, the common law of fiduciary duties also has considerable power *ex ante* because of its normative and communicative effect even though in practice its enforcement *ex post* is widely seen as a weak sword.\(^{256}\) Edward Rock observed similar principles at work in Delaware’s jurisprudence on management buyouts in the 1980s, and Jonathan Lipson has done so more recently in the area of creditor rights.\(^{257}\) Lipson explains the caselaw as evidence of “expressive” judging by the Delaware courts—in other words, the courts expend considerable effort to give “sermons” or warnings to corporate actors about the bounds of acceptable conduct, even if they lack “teeth” or otherwise have little instrumental effect.\(^{258}\) To the extent that the Delaware courts continue to speak about the critical role of the duty of oversight and place it within the scope of the duty of loyalty, where judges can exercise some scrutiny, corporate law can lend support to the enterprise-wide due diligence commitments contemplated by the Framework.

**E. Delaware’s Competitors**

Admittedly, in the search for concrete tools to operationalize corporate respect for human rights, corporate law faces stiff competition. Certainly, various bodies of regulatory law in both home and host states are a primary source of restraint on corporations; some of these reach extraterritorially.\(^{259}\) Private ordering, including MNEs’ voluntary participation in multi-stakeholder initiatives around human rights, such as the Global Compact, voluntary sustainability report-

---

\(^{256}\) The communicative force of corporate fiduciary law is widely recognized. *See*, e.g., Lyman Johnson & Robert Ricca, *Reality Check on Officer Liability*, 67 BUS. LAW. 73, at 91–92 (citation omitted); Williams & Conley, *supra* note 154, at 88–92.

\(^{257}\) *See* Jonathan C. Lipson, *The Expressive Function of Directors’ Duties to Creditors*, 12 STAN. J.L. BUS. & FN. 224 (2007) (citing Edward Rock for the view that these “sermons” were intended to “generate in the first instance the legal standards of conduct (which influence the development of the social norms of directors, officers, and lawyers),” *id.* at 264, and observing that the Delaware courts have rarely treated directors as fiduciaries for creditors but have frequently gone to great lengths to discuss these duties as if they were binding). Board fiduciary duties to creditors appear to now be curtailed as a matter of doctrine. N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007), aff’d No. Civ.A. 1456-N, 2006 WL 2588971 (Del. Ch. Sept. 1, 2006).

\(^{258}\) *See* Lipson, *supra* note 257, at 262–65 (describing these opinions as “exhortations to good behavior not necessarily tethered to meaningful instrumental consequences.”).

\(^{259}\) *See* Blumberg, *supra* note 155 (surveying federal and state statutory and common law). On the extraterritorial reach of regulatory law, see generally Avi-Yonah, *supra* note 252.
ing, and other forms of self-regulation are also recognized as critical drivers of corporate human rights commitments that transcend the internal legal boundaries of the corporate group.

Most obvious, however, are federal securities regulation and, to a lesser extent, stock exchange listing rules. Federal securities law's influence on corporate governance has overtaken or even outstripped Delaware, to the point that, in the view of some, we have witnessed a wholesale federalization of corporate law.\textsuperscript{260} Securities regulation and in particular new disclosure rules enacted under the Dodd-Frank Act apply to public reporting companies and respond directly to a range of specific human rights concerns. These include disclosures on: the scope and structure of board regulation of risk oversight; the link between executive compensation and risk; the origin of conflict minerals; mine safety; payments to governments by resource extraction issuers; and certain activities covered under the federal Iran sanctions program.\textsuperscript{261} The SEC has interpreted existing disclosure rules to encompass climate change risks and possibly other environmental and social risks that may fall within the purview of human rights.\textsuperscript{262} Because securities regulation reaches the enterprise on a consolidated basis, it reaches farther across the economic enterprise of a multinational than most other bodies of regulation. Federal disclosure rules also require firms to implement reporting systems and internal controls that intersect with global enterprise risk management systems. Disclosure therefore represents a powerful intersection of external regulation and internal self-regulation that is enterprise-wide in scope and a potential driver of human rights due diligence.

The shareholder proposal mechanism, part of the federal proxy rules, has also been widely used by shareholders to encourage greater attention by corporate boards to human rights impacts.\textsuperscript{263} In recent years, shareholders have proposed, for example, that compa-

\begin{flushleft}
\textsuperscript{260} See Mark J. Roe, \textit{Delaware's Competition}, 117 \textit{Harv. L. Rev.} 588, 596–600 (2003) (discussing federal regulators and the courts as the "federal behemoth" in corporate law). Indeed, in the recent battles over proxy access, Delaware law only escaped being displaced by federal rulemaking when the federal version was struck down in court.


\textsuperscript{262} See Commission Guidance, supra note 2, at 6290–97 (identifying relevant regulations that should incorporate climate change disclosures, including in particular, Management’s Discussion and Analysis (MD&A)).

\textsuperscript{263} 17 C.F.R. § 240.14a-8 (2011).
\end{flushleft}
nies publish sustainability reports, disinvest from the Sudan, and report to shareholders on the human rights impacts of their operations. Although shareholder proposals are not binding on corporate boards, some have garnered significant levels of shareholder support. Finally, stock exchange listing rules require companies to adopt codes of ethics and create audit or risk committees; their mission encompasses risk oversight that could theoretically reach human rights impacts or at least the threat of liability for human rights abuses abroad.

Without question, federal regulation and securities law in particular wield enormous influence on global firms—moreover, they do so on an enterprise-wide basis. However, these rules do not operate to the exclusion of corporate law. Changes in regulatory law, for example, are part and parcel of the fundamental obligation of corporations to comply with the law and automatically alter the playing field for all U.S.-based (and some foreign) firms. Similarly, as federal disclosure rules toughen, the oversight obligations of public firms under corporate law become automatically more rigorous and expansive in scope. Federal regulation and state corporate law are therefore often mutually reinforcing. State corporate law is also critical because federal disclosure rules and related enforcement mechanisms do not extend fully to privately held firms, regardless of their size and scale. Instead of seeing corporate law as impotent in the area of human rights, then, it should be recognized as a body of law that sets the "rules of the game" for MNEs in a way that not only makes them the contributors to global markets that they are but that can also help encourage accountability to their shareholders and to stakeholders worldwide.

**CONCLUSION**

Globalization and the rise of the multinational have contributed to the declining influence of the sovereign state and weakened the limits of domestic law generally as a regulatory tool. Given its entity-level focus and the limits of shareholder-oriented remedies as a response to human rights harms, state corporate law would seem an odd place to look for evidence to the contrary. Here, however, exam-

---


265. *Id.*

ining the intersection between state corporate law and the corporate responsibility to respect human rights has revealed the internal governance of the multinational to be a potentially expansive space for advancing human rights commitments across the global enterprise. Corporate law is therefore of clear relevance to any consideration of the legal and extra-legal parameters of the Framework commitments.

Fiduciary duties and agency principles, in particular, have the potential to incentivize firms to engage in the prevention, monitoring, and mitigation of their human rights impacts and those of their business partners, through the exercise of due diligence. Long-standing board-centric governance rules in Delaware also give boards autonomy to consider stakeholder impacts across the corporate enterprise, while shareholder-centric enforcement mechanisms serve at once to hold boards accountable for generating long-term shareholder value and to create avenues for shareholder advocacy around human rights issues. The Framework itself draws on these familiar concepts, raising the potential for this unique multi-stakeholder initiative to succeed where prior efforts to improve corporate accountability for human rights impacts have failed.

Corporate law might also usefully be developed in ways that better support firms' human rights commitments on an enterprise-wide basis. For example, Delaware courts might signal their willingness to impose oversight liability where human rights violations abroad constitute compliance "red flags." In an appropriate case, they might also clarify that enterprise-wide legal compliance encompasses compliance with the law of foreign jurisdictions where affiliates under the oversight of the Delaware entity operate. They might develop doctrines that establish a parent company or headquarters as having fiduciary duties that extend to the corporate enterprise as a whole. However, even if corporate law fails to develop in any of these directions, it remains the case that corporate law in its present form reaches the MNE and forms part of the foundation of its global human rights commitments.