

Are there any specific recommendations to States, businesses (including investors), civil society, UN bodies and National Human Rights Institutions that would assist in ensuring that investors act compatibly with the UNGPs?

We are making this submission dated 12 October 2023 on behalf of the Transnational Justice Clinic, hosted at the Centre for Human Rights and Legal Pluralism at McGill University Faculty of Law.

Under the Guiding Principles on Business and Human Rights (UNGPs), States have a duty to protect against human rights abuses by businesses within their jurisdiction.¹ States can encourage UNGP-compatible investment decisions by shifting their legal norms from shareholder to stakeholder primacy. Our submission points to legislative and regulatory recommendations to foster this transition. These proposals aim to give investors additional flexibility to factor ESG into their decisions, notably by encouraging states to expand the fiduciary duty of directors and officers to include the long-term interests of the corporation and its stakeholders. Robust implementation of Human Rights Due Diligence mandates would also enable complementary accountability mechanisms. States may further incentivize compliance by limiting investor exposure to shareholder lawsuits and providing appropriate tax incentives. Finally, our submission stresses that investors need not wait for these legislative and regulatory recommendations to be implemented. Under the UNGPs, investors have a responsibility to respect human rights and to address any adverse impacts they are involved in. As such, they may adopt a number of good practices and further drive compliance.

Towards Stakeholder Primacy

To fulfill their international obligations, States must ensure that their laws and policies “do not constrain but enable business respect for human rights.”² State norms that lead corporations to prioritize shareholder wealth over all other concerns are incompatible with this principle.

Shareholder primacy gears corporate decision-making towards maximizing shareholder wealth. On the other hand, stakeholder primacy considers a broader range of actors in determining corporations’ interests. This emerging approach aims to facilitate the prevention of human rights harms as well as climate-related risks.³

¹ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York/Geneva: UN, 2011), at 3 (Principle 1) [OHCHR, *Guiding Principles*].

² *Ibid* at 4 (Principle 3(b)).

³ Barnali Choudhury, “Corporate Law’s Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough” (2023) 8:2 *Bus & Human Rights J* 180 at 192; Peer Zumbansen, ed, *Sustainable Transformation of Business and Finance: A Democratic Challenge in An Age of Climate Change and Artificial Intelligence* (Montreal: McGill University, 2023), at 38.

Traditional understandings of investors' fiduciary duty promote shareholder primacy by equating a corporation's interests with those of its shareholders.⁴ A growing body of evidence undermines the notion that sound investments must favour short-term shareholder value over all other interests. This is what some authors call the "business case" for social and environmental corporate purpose.⁵

However, the business case alone does not do enough to promote compliance with the UNGPs. Indeed, a fiduciary duty confined to shareholders' interests may not allow investors to meaningfully account for other considerations. If investment decisions that account for social and environmental concerns are less profitable in the short term, they may still be challenged as a breach of investors' fiduciary duty.⁶ It is crucial that evolutions in the legal infrastructure of corporations be part of the effort to promote the UNGPs.

Expanding the Fiduciary Duty

States can encourage sustainable, UNGP-compliant investments by broadening their legal definitions of the fiduciary duty. This expansion would align with the international community's calls on the private sector to help address global concerns.⁷ Consequently, States should adapt their laws to accommodate corporations' societal responsibility and better shift investor activity towards corporate sustainability.

The fiduciary duty of directors and officers should encompass the interests of a wider array of stakeholders, alongside those of shareholders. Legislative action in this direction can contribute to the prevention of both environmental and human rights harms, in alignment with the UNGPs.⁸ Broader fiduciary considerations should incentivize or – in some cases – require institutional investors to place the social and environmental interests of their beneficiaries above portfolio returns.⁹

⁴ Iseoluwa Akintunde & Richard Janda, *Bringing Corporate Purpose into the Mainstream: Directions for Canadian Law* (Montreal: David Suzuki Foundation, 2023), at 25–26.

⁵ *Ibid* at 22–23; Zumbansen, *supra* note 3 at 11; John F Sherman III, *Human Rights Due Diligence and Corporate Governance* (Cambridge, MA: Harvard Kennedy School, 2021), at 18–19; Lisa M. Fairfax, "Empowering Diversity Ambition: Brummer and Strine's Duty and Diversity Makes the Legal and Business Case for Doing More, Doing Good, and Doing Well", 75 *Vanderbilt Law Review* 131-155 (2022). Fairfax, Lisa M, "Empowering Diversity Ambition: Brummer and Strine's *Duty and Diversity* Makes the Legal and Business Case for Doing More, Doing Good, and Doing Well" (2022) 75 *Vand L Rev* 131.

⁶ Zumbansen, *supra* note 3 at 37.

⁷ United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, 2022, UN Doc A/70/1 GA Res 2022 at paras 39, 60. See also Akintunde & Janda, *supra* note 4 at 15.

⁸ Choudhury, *supra* note 3 at 191.

⁹ Frederick Alexander et al, *From Shareholder Primacy to Stakeholder Capitalism: A Policy Agenda for Systems Change* (Philadelphia: B Lab & The Shareholder Commons, 2020) at 10.

From Shareholder to Company Interests

Several States have amended their corporate law to make room for the consideration of stakeholder issues. However, the drafting of these provisions may limit their beneficial effects on UNGP compliance.¹⁰ For example, fiduciary duty regulations in the United Kingdom now obligate directors to account for stakeholder interests, but still designate shareholders as the ultimate beneficiaries. The result is that directors' acts, including investment decisions, may consider broader interests only for the benefit of shareholders.¹¹

Other States have gone further by obligating directors to prioritize "the best interests of the company". In Canada, for instance, directors owe a duty to the corporation, and not only its shareholders. Canadian corporate law further empowers directors and officers to consider multiple stakeholder interests in their decisions, including workers and the environment.¹²

This broadened fiduciary duty requires directors to safeguard the long-term viability of the corporation even if this conflicts with maximizing shareholder wealth. Such a move away from shareholder primacy may therefore incentivize decisions, including investments, that account for a broader range of social and environmental interests.¹³

Limits of Investor Discretion

While welcoming these changes, scholars have cautioned against confining stakeholder primacy to a discretionary status.¹⁴ Indeed, Canadian law allows directors the flexibility to consider adverse environmental and social impacts, but also to ignore them if doing so does not contravene other legal requirements.

Some authors therefore recommend that States mandate, rather than simply allow, consideration of long-term stakeholder impacts.¹⁵ This more ambitious model forms the basis for the European Union's proposed Directive on corporate sustainability due diligence.¹⁶ A firmer approach could help to incentivize environmentally and socially responsible investments. However, it also comes with political drawbacks due to opposition by corporate actors, as evidenced by the lengthy negotiation process surrounding the EU Directive¹⁷.

¹⁰ Choudhury, *supra* note 3 at 193

¹¹ *Ibid* at 192.

¹² *Canadian Business Corporations Act*, RSC 1985, c C-44, ss 122(1.1). See also Zumbansen, *supra* note 3 at 38; Akintunde & Janda, *supra* note 4 at 26-27.

¹³ *Ibid* at 193; Alexander et al, *supra* note 9 at 10.

¹⁴ Akintunde & Janda, *supra* note 4 at 26-27.

¹⁵ Sherman, *supra* note 5 at 23; Alexander et al, *supra* note 9 at 25.

¹⁶ EC, *Proposal for a Directive 2019/1937 of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive*, COM/2022/71. See also Choudhury, *supra* note 3 at 193; Sherman, *supra* note 5 at 23.

¹⁷ Sherman, *supra* note 5 at 23; Choudhury, *supra* note 3 at 194.

Human Rights Due Diligence and Accountability

While amendments to the fiduciary duty target high-level corporate governance, enhanced due diligence requirements can foster alignment with the UNGPs in a wider range of investment decisions¹⁸. HRDD provides guidance to businesses in fulfilling their responsibility to prevent human rights abuses.¹⁹ Authors and case law suggest that HRDD helps to address environmental and governance concerns in addition to social factors.²⁰ Effective directives can achieve these goals through the inclusion of stakeholder perspectives, performance monitoring, and public disclosures.²¹ As in the climate context, regulatory and public disclosure requirements lead to increased accountability and informed investment decisions.²² As States implement HRDD regulations, they thus have an opportunity to encourage or mandate transparency by corporate actors, as prescribed by the UNGPs²³.

Importantly, HRDD are just one of several tools to address business-related adverse human rights impacts. They complement and reinforce, but are no substitute for, structural corporate governance reforms and fiduciary duty initiatives²⁴.

Safe Harbour Provisions

In order to ensure that businesses effectively implement new legal mandates, States may supplement them with appropriate protections. In the environmental context, “safe harbour” rules can reassure investors that disclosure of and divestment from carbon-intensive assets do not breach the fiduciary duty.²⁵ Additional protection against potential shareholder lawsuits can thus further incentivize institutional investors to transition their portfolios to greener assets.²⁶ However, States should avoid using safe harbour protections to immunize corporations against legal claims of involvement in human rights abuses. While adherence to HRDD requirements may form part of an investor’s defence against such claims, safe harbour immunity risks providing a perverse incentive for adherence to the letter rather than the spirit of human rights protections.²⁷

¹⁸ As provided for in the UNGPs, see OHCHR, *Guiding Principles* at 17–24 (Principles 17–21).

¹⁹ United Nations Office of the High Commissioner for Human Rights, “Mandatory Human Rights Due Diligence (mHRDD)”, (September 2022), online: <www.ohchr.org/en/business-and-human-rights/mandatory-human-rights-due-diligence-mhrdd>.

²⁰ Sherman, *supra* note 5 at 11, 16.

²¹ Sherman, *supra* note 5 at 3–4.

²² Zumbansen, *supra* note 3 at 39–41.

²³ OHCHR, *Guiding Principles* at 4 (Principle 3(d)), 23–24 (Principle 21).

²⁴ Choudhury, *supra* note 3 at 180.

²⁵ See e.g. the recently proposed rules by the United States Securities and Exchange Commission, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 17 CFR § 210, 229, 232, 239, and 249 (21 March 2022).

²⁶ Zumbansen, *supra* note 3 at 39.

²⁷ Sherman, *supra* note 5 at 23–24.

Tax Incentives

States can also facilitate divestment from assets that carry risks of human rights abuses through targeted tax incentives. While such measures are often associated with the promotion of green investments,²⁸ they could also further compliance with the UNGPs. Tax credits, deductions, and exemptions can mitigate financial risks associated with the transition away from potentially harmful investments.

The Role of Investors

Finally, while this submission has emphasized recommendations directed toward States, investors need not wait for these legislative or regulatory changes to happen. Under the UNGPs, the three pillars from the “protect, respect, and remedy” framework are mutually independent and complementary.²⁹ The fact that States have a legally binding duty to protect against human rights abuses does therefore not relieve businesses from their *independent* responsibility to respect human rights, i.e. they should act with due diligence to avoid infringing on the rights of others and address adverse impacts with which they are involved.³⁰

Until mandatory due diligence laws and other recommended regulatory changes take effective shape, this responsibility to respect human rights will continue to play out in a context of “institutionalized voluntarism.”³¹ While courts, in a move beyond voluntarism, have found that corporations can be held liable for adverse human rights impacts, these decisions remain the exception to the rule.³² There is, of course, much room for improvement. Nonetheless, progress is being made, and the voluntary practice of businesses and investors can prove to be a driver of faster change.

Institutional investors especially possess unique characteristics which can influence compliance with the UNGPs.³³ Existing initiatives such as the Investor Alliance for Human Rights and the Principles for Responsible Investment (PRI) are encouraging developments and

²⁸ Zumbansen, *supra* note 3 at 41.

²⁹ UN HRC, “Protect, Respect and Remedy: A Framework for Business and Human Rights” *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, John Ruggie (7 April 2008) UN Doc A/HRC/8/5, para 9.

³⁰ Andrew Clapham, ‘Non-State Actors’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, *International Human Rights Law* (3rd edn, OUP 2018) 568.

³¹ Peter Muchlinski, “The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights” (2021) 6:2 *Business and Human Rights J* 212 at 219-222.

³² See e.g. *Nevsun Resources Ltd v Araya*, 2020 SCC 15 paras 112-114; *Vereniging Milieudefensie and others v Royal Dutch Shell PLC*, District Court of the Hague, 26 May 2021, C/09/571932 / HA ZA 19-379, para 4.4.13.

³³ See OECD, *Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises* (2017) at 49; United Nations, “The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises” (16 July 2018) UN Doc A/73/163.

helpful pointers toward what constitutes good practice.³⁴ To continue these trends, and to incentivize other businesses (including investors) to comply with the UNGPs, institutional investors should: (1) adopt a policy commitment to respect human rights and embed this commitment in their governance framework, management systems, and investment activities; (2) implement due diligence and responsible investment practices by identifying actual and potential adverse human rights impacts and preventing or mitigating these identified impacts; and (3) provide or enable access to remedy.

Within these steps, there are several recommendations that seem crucial to us. First, investors should exercise and build “leverage” through their own investment decisions, their stewardship of investees’ due diligence, and their dialogues with stakeholders and policymakers.³⁵ For example, investors could promote compliance with the UNGPs through direct communication, proxy voting, and/or participation in stakeholder platforms and litigations. Second, if investors are unable to exercise their leverage and there is no prospect for improvement, they should consider responsible divestment. Investors should prioritize divesting from carbon-intensive projects and reallocate those resources toward green projects.³⁶ Alternatively, investors could consider a “tilting” strategy where they move away from “brown” industries while holding shares in selected lead-firms that take appropriate ESG action and attract other firms to follow. Finally, investors should formally and publicly disclose how they manage their investments and due diligence efforts.³⁷ This creates a framework of transparency which is crucial for stakeholders and policymakers to assess the progress of sustainable finance portfolios and to hold investors to account when not complying with the UNGPs. Moreover, disclosure and transparency incentivize investees to properly measure their own actions and helps investors to fulfil their fiduciary duties by providing beneficiaries with accurate information.

³⁴ Investor Alliance for Human Rights, “Investor Toolkit on Human Rights” (19 May 2020), online: <<https://investorsforhumanrights.org/investor-toolkit-human-rights>>; PRI, “Why and How Investors Should Act on Human Rights” (2020), online: <<https://www.unpri.org/download?ac=11953>>.

³⁵ UN Doc A/73/163, *supra* note X, paras 85-91.

³⁶ Zumbansen, *supra* note 3, at 40.

³⁷ Zumbansen, *supra* note 3, at 40.

Bibliography

Legislation

Canadian Business Corporations Act, RSC 1985, c C-44.

Case Law

Nevsun Resources Ltd v Araya, 2020 SCC 5.

Vereniging Milieudefensie and others v Royal Dutch Shell PLC, District Court of the Hague, Judgment of 26 May 2021, C/09/571932 / HA ZA 19-379.

International Documents

Investor Alliance for Human Rights, “Investor Toolkit on Human Rights” (19 May 2020), online: <<https://investorsforhumanrights.org/investor-toolkit-human-rights>>.

OECD, *Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises* (2017), online: <<https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>>

Principles for Responsible Investment, “Why and How Investors Should Act on Human Rights” (2020), online: <<https://www.unpri.org/download?ac=11953>>.

United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, 2022, UN Doc A/70/1 GA Res 2022.

United Nations, “The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises” (16 July 2018) UN Doc A/73/163.

United Nations Human Rights Council, “Protect, Respect and Remedy: A Framework for Business and Human Rights” *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, John Ruggie (7 April 2008) UN Doc A/HRC/8/5.

United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (New York/Geneva: UN, 2011).

Secondary Sources

Akintunde, Iseoluwa & Richard Janda, *Bringing Corporate Purpose into the Mainstream: Directions for Canadian Law* (Montreal: David Suzuki Foundation, 2023).

Alexander, Frederick et al, *From Shareholder Primacy to Stakeholder Capitalism: A Policy Agenda for Systems Change* (Philadelphia: B Lab & The Shareholder Commons, 2020).

Choudhury, Barnali, “Corporate Law’s Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough” (2023) 8:2 *Bus & Human Rights J* 180.

Clapham, Andrew, “Non-State Actors” in Moeckli, Daniel, Shah, Sangeetha & Sivakumaran, Sandesh, eds, *International Human Rights Law* (3rd edn, Oxford: OUP, 2018) 568.

Fairfax, Lisa M, “Empowering Diversity Ambition: Brummer and Strine’s *Duty and Diversity* Makes the Legal and Business Case for Doing More, Doing Good, and Doing Well” (2022) 75 *Vand L Rev* 131.

Muchlinski, Peter, “The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights” (2021) 6:2 *Business and Human Rights J* 212.

Sherman III, John F, *Human Rights Due Diligence and Corporate Governance* (Cambridge, MA: Harvard Kennedy School, 2021).

United Nations Office of the High Commissioner for Human Rights, “Mandatory Human Rights Due Diligence (mHRDD)”, (September 2022), online: <www.ohchr.org/en/business-and-human-rights/mandatory-human-rights-due-diligence-mhrdd>.

Zumbansen, Peer, ed, *Sustainable Transformation of Business and Finance: A Democratic Challenge in An Age of Climate Change and Artificial Intelligence* (Montreal: McGill University, 2023).

Foreign sources

EC, *Proposal for a Directive 2019/1937 of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive*, COM/2022/71.

Securities and Exchange Commission, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 17 CFR § 210, 229, 232, 239, and 249 (proposed rules: 21 March 2022).