The Human Rights Obligations of Corporate Directors

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I am grateful for feedback from the participants of the National Business Law Scholars Conference, ASIL Midyear Forum, Singapore Management University School of Law faculty workshop, the University of Chicago legal scholarship seminar, and the Intesa Sanpaolo Business Law and Regulation Conference ("Directors' responsibilities in a time of change"). I am especially grateful to Afra Afsharipour, Tinu Adediran, Frank Partnoy, Dan Puchniak, and Anne Tucker for their generous and detailed comments.

Abstract

Corporate directors and officers substantially influence how well—or poorly—a corporation addresses human rights risks. But their involvement is often hidden or misunderstood, despite the reality that many corporate human rights abuses occur because of explicit choices made by their leadership that, on many occasions, inevitably lead to human rights violations. The failure to understand their role in past corporate human rights violations leads to ineffective strategies to prevent future ones as leading international, regional, and domestic laws and norms on business and human rights inadequately address the corporate governance gaps that facilitate human rights violations. This Article identifies the critical role that corporate boards and officers play in human rights violations committed by their corporations. It introduces a four-part typology that categorizes the different executive choices at the root of many of the most infamous corporate human rights violations today and in the recent past. These abuses arose from decisions made by the corporate directors and officers: Some neglected their oversight responsibilities; others approved deals with entities known to violate human rights; and still others created and endorsed business models that depend on exploiting human rights. By understanding these choices and their consequences, senior management and their legal counsel can better understand the root causes of corporate human rights abuses and identify blind spots in their governance practices. This Article also explains that corporate law and governance play a crucial role in addressing human rights violations. Courts, victims, and advocates cannot rely exclusively on human rights law to prevent corporate human rights violations. Instead, the root of the problem may be within corporate law and the governance decisions of the board of directors and officers. This Article explains that corporate directors and officers should prioritize human rights within their corporations for three important reasons that are derived from corporate law: legal liability for breaching fiduciary duties (Delaware driver); shareholder investigations and activism (shareholder driver); and converging expectations on good governance driven by foreign legislators, multinational corporations, international organizations, and multilateral executive coordination (global drivers). Each of these contributions can improve both the prevention of corporate human rights abuses and accountability for it should it occur.

Keywords: Human rights due diligence, human rights risks, board governance

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This Article also explains that corporate law and governance play a crucial role in addressing human rights violations. Courts, victims, and advocates cannot rely exclusively on human rights law to prevent corporate human rights violations. Instead, the root of the problem may be within corporate law and the governance decisions of the board of directors and officers. This Article explains that corporate directors and officers should prioritize human rights within their corporations for three important reasons that are derived from corporate law: legal liability for breaching fiduciary duties (*Delaware driver*); shareholder investigations and activism (*shareholder driver*); and converging expectations on good governance driven by foreign legislators, multinational corporations, international organizations, and multilateral executive coordination (*global drivers*). Each of these contributions can improve both the prevention of corporate human rights abuses and accountability for it should it occur.

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INTRODUCTION

The corporate board of directors is special. It is the supervisory body within the corporation that is tasked with overseeing its business and affairs.[1] These important functions empower the board to influence how well or how poorly their corporations prevent, address, and mitigate human rights violations. Therefore, a corporation's violation of human rights raises the question: *What responsibility did the board of directors have to stop it?*

This question is presently before the Delaware Court of Chancery in a case involving human rights violations against migrant workers in Qatar in connection with the 2022 Federation Internationale de Football Association World Cup ("World Cup").[2] According to media sources, over 6,000 migrant workers died in Qatar after it was awarded the World Cup.[3] In 2023, a group of migrant workers filed a lawsuit in federal court in the United States against the corporation that was responsible for overseeing construction projects for the World Cup in Qatar: Jacobs Solutions, a U.S. corporation incorporated in Delaware with headquarters in Texas.[4] The plaintiffs allege that Jacobs Solutions "knowingly benefitted from participation in ventures they knew or should have known relied on trafficked and forced labor" in violation of the U.S. Trafficking Victims Protection Reauthorization Act (TVPRA).[5]

A year later, a shareholder of the same corporation sued its directors and officers for breaches of fiduciary duties arising from *their* failure to establish and monitor an effective human rights due diligence system within the corporation:

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1 *See, e.g.*, A.B.A., CORPORATE DIRECTOR'S GUIDEBOOK 75 BUS. LAW. 2741, 2753 (7th ed. 2020) ("A director fulfills his or her responsibility through two primary board functions: decision making and oversight."); DEL. CODE. ANN. tit. 8 § 141 (a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."); MODEL BUS. CORP. ACT § 8.01 official comment (2025) ("At least for public corporations, the board's responsibilities generally include oversight of the following: business performance, plans and strategy; management's assessment of major risks to which the corporation is or may be exposed; the performance and compensation of executive officers; policies and practices to foster the corporation's compliance with law and ethical conduct; management's preparation of the corporation's financial statements; management's design and assessment of effectiveness of the corporation's internal controls; plans for the succession of the chief executive officer and other executive officers; the composition of the board and of board committees; and whether the corporation has information and reporting systems in place to provide directors with appropriate information in a timely manner.").

2 Complaint, Wirral Borough Council v. Priya Abani, No. 2024-0431 (Del. Ch. Apr. 24, 2024).

3 Pete Pattison & Scott Simon. *6,500 migrant workers have died in Qatar since World Cup awarded*, GUARDIAN, https://www.npr.org/2021/02/27/972056906/report-reveals-more-than-6-500-migrant-workers-have-died-in-qatars-world-cup-pre (Feb. 23, 2021) ("More than 6,500 migrant workers from India, Pakistan, Nepal, Bangladesh[,] and Sri Lanka have died in Qatar since it won the right to host the World Cup [ten] years ago . . . .").

4 Complaint at 11, F.C. v. Jacobs Solutions Inc., , No. 1:23-cv-02660, (D. Colo. Oct. 12, 2023) ("Plaintiffs are Filipino construction workers who were trafficked to Qatar and whose coerced labor was used for construction project ventures, in which Defendants participated, for the 2022 FIFA World Cup in Qatar, i.e., the World Cup Construction Venture.").

5 *Id.* at 3.

"[T]he action involves a rare but shocking 'information-systems claim,' or 'prong-one *Caremark* claim,' where the Board and Company officers in bad faith failed to establish a reporting system for oversight of operations that resulted in *thousands of deaths on Jacobs' watch*."[6]

This is not an isolated example. Other shareholders have filed lawsuits against boards of directors and corporate officers when their corporations are involved in human rights violations, including against the management of Chiquita Brands International (alleging violations of fiduciary duties for financing terrorism in Colombia)[7]; Tahoe Resources, Inc. (alleging violations of securities laws for failing to disclose that valuable mining license was acquired without prior consultation with Xinca indigenous people)[8]; and Facebook (alleging violations of fiduciary duties for approving business model that exploited personal user information).[9] Shareholders have also used their information rights under Delaware law to investigate the board's role in human rights violations perpetrated by Walmart[10] and Hershey,[11] among others. Each of these shareholder lawsuits alleges that corporate directors and officers governed corporations that violated one or more internationally recognized human rights, such as the right to freedom from forced labor, torture, extrajudicial killing and genocide; right to privacy; and the right to health, among other rights. These human rights are recognized in core international principles and agreements, including the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

This Article examines two central issues presented by these cases: (1) How are boards of directors involved in the human rights violations committed by their corporations, and (2) Why should corporate boards include human rights oversight in their governance practices? While this Article focuses on the fiduciary duties of corporate boards, the analysis articulated here also apply to corporate officers, whose managerial roles make them critical actors in preventing and addressing human rights harms.

It may be surprising to learn that both questions currently have unsatisfactory answers in policy and practice.[12] On the one hand, shareholders

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6 Complaint, *supra* note 2, at 7.

7 Verified Consolidated Shareholder Derivative Complaint, In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., No. 08-01916 (S.D. Fla. Sept. 11, 2008).

8 Class Action Complaint for Violation of the Federal Securities Laws, Sanders v. Tahoe Resources Inc., No. 2:18-cv-01041 (D. Nev. June 08, 2018).

9 Second Amended Verified Stockholder Derivative Complaint, Sbriglio v. Zuckerberg, No. 2018-0307 (Del. Ch. Aug. 6, 2021).

10 Verified Complaint Under 8 Del. C. § 220 to Compel Inspection of Books and Records, Amalgated Bank v. Wal-Mart Stores, No. 11699 (Del. Ch. Nov. 10, 2015).

11 Verified Complaint Pursuant to 8 Del. C. § 220 to Compel Inspection of Books and Records, Louisiana Mun. Police Emps.' Ret. Sys. v. Hershey Company, No. 7996- (Del. Ch. Nov. 1, 2012).

12 In contrast, corporate law scholars have advocated for broader oversight of human rights. *See, e.g.*, Cynthia Williams & John Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?* 74 U. CIN. L. REV. 75, 87–94 (2005); David Hess, *The Management and Oversight of Human Rights Due Diligence*, 58 AM. BUS. L.J. 751, 785–95 (2020); Faith Stevelman, *Global Finance, Multinationals and Human Rights: With Commentary on Backer's Critique of the 2008 Report by John Ruggie*, 9 SANTA CLARA J. INT'L L. 101, 127–35 (2011); Jena Martin, *Business and Human Rights:*

have investigated corporate boards for their involvement in human rights abuses, even litigating against some.[13] On the other hand, the corporate board of directors receives very little attention in laws and policies designed to improve the human rights practices of corporations and other business organizations. The United Nations Guiding Principles on Business and Human Rights ("UN Guiding Principles") does not provide guidance on board oversight of human rights, including allocation of oversight duties, reporting, and qualifications of directors.[14] The proposed international treaty on business and human rights similarly fails to address it.[15] U.S. governmental guidance on corporate human rights due diligence generally neglects the duties of the board.[16] While many countries now mandate corporate social responsibility, their legislators have not done the same for board oversight of human rights.[17] Last year, the European Union approved the Corporate Sustainability Due Diligence Directive (CSDDD) that imposes human rights and environmental due diligence requirements on many corporations operating in the European Union, including U.S. corporations.[18] But the Directive excluded two provisions on the duties of the board of directors. The first provision proposed that corporate directors should incorporate sustainability concerns into their decision-making as part of their duty of care.[19] The second provision would have imposed a duty on corporate directors to establish and oversee environmental and human rights due diligence for their companies.[20] Neither of these provisions made it into the final text of the Directive.[21]

What's the Board Got to Do With It? 2013 U. ILL. L. REV. 959, 985–98 (2013); William Moon, *Transnational Corporate Law Litigation*, 74 DUKE L.J. 902, (2025).

13 *See* notes __-__, *infra*, and accompanying text.

14 Special Representative of U.N. Secretary-General 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*, U.N. Human Rights Council, U.N. Doc. A/HRC/17/31, annex (Mar. 21, 2011) [hereinafter "UN Guiding Principles"].

15 U.N. Human Rights Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises* ((July 2023), www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwgtranscorp/session9/igwg-9th-updated-draft-lbi-clean.pdf.

16 Advisory from the U.S. Dep't of State, Xinjiang Supply Chain Business Advisory 3 (July 12, 2021).

17 *See* notes __-__, *infra*, and accompanying text.

18 Jon McGowan, *EU Gives Final Approval To Corporate Sustainability Due Diligence Law*, FORBES (May 24, 2024); Luca Enriques, Matteo Gatti & Roy Shapira, *How the EU's Sustainability Due Diligence Directive Could Reshape Corporate America*, 78 STANFORD L. REVIEW, 241, 256-57 (describing three categories of U.S. companies that fall within the scope of the CSDDD: U.S. businesses with significant EU business; U.S. parent companies of EU subsidiaries with significant revenue; and "[U.S.] companies in the supply chain of a foreign company subject to the Directive").

19 European Commission, *Proposal for a Directive on Corporate Sustainability Due Diligence and Amending Directive* at art. 25, COM (2022) 71 final (Feb. 23, 2022).

20 *Id*. art. 26.

21 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, 2024 O.J. (L).

This neglect of the corporate board is even illustrated by the United States Supreme Court. In *Nestlé v. Doe*, the Court considered a human rights lawsuit against Nestlé by plaintiffs who had been trafficked as children from Mali to the Ivory Coast to engage in slave labor on cocoa plantations.[22] The Court held that the relevant conduct occurred outside the United States and declined to apply the Alien Tort Statute (ATS) extraterritorially.[23] This is a somewhat surprising conclusion given the nature of allegations raised by the victims, including:

- "Every major operational decision regarding Nestlé's U.S. business, including the sourcing and supervision of its cocoa supply chain in the Ivory Coast, is made or approved by Nestlé USA's executives in the United States."[24]
- "Petitioner disseminates this on-the-ground reporting to U.S. offices so U.S.-based decisionmakers can assess what actions take place in the Ivory Coast."[25]

Despite these executive decisions, the Court downplayed their significance: "Because making 'operational decisions' is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct"; instead, "plaintiffs must allege more domestic conduct than general corporate activity."[26] The Court's erroneous conclusions are driven by a misunderstanding of the relationship between human rights committed abroad and board decision-making at home. The Court's label of "general corporate activity" forgives too much by masking the decisions that Nestlé's executives likely made regarding the corporation's business model, strategy, and sourcing that led to the human rights abuses in the Ivory Coast.

This Article makes two important contributions that should hopefully lead scholars, corporate executives, corporate counsel, human rights lawyers, prosecutors, and judges to re-evaluate the role of the corporate board in human rights violations. *First*, it introduces a four-part typology that classifies the different ways in which corporate boards facilitate human rights abuses committed by their corporations. The truth is that not all corporate boards violate human rights in the same ways. To prevent corporate human rights abuses requires first understanding their causal roots and the role of the corporate board and senior officers. *Second*, this Article explains that corporate directors and senior officers should ensure that their corporations comply with internationally recognized human rights because of three important drivers: the

22 Nestlé U.S.A., Inc. v. John Doe, 593 U.S. 628 (2021).

23 William S. Dodge & Oona A. Hathaway, *Answering the Supreme Court's Call for Guidance on the Alien Tort Statute*, JUST SEC. (June 3, 2022) (emphasis added).

24 Respondent's Brief at 4, Nestlé U.S.A., Inc. v. John Doe, 593 U.S. 628 (2020) (No. 19-416).

25 Respondent's Brief in Opposition at 5, Cargill, Inc. v. John Doe, 593 U.S. 628 (2019) (No. 19-453).

26 *Nestlé*, 593 U.S. at 634.

prospect of legal liability for a breach of fiduciary duties under Delaware law (*Delaware driver*); the actions of corporate shareholders to investigate corporate human rights misconduct and to demand governance reforms (*shareholder driver*); and the globalization of fiduciary duties led by national legislators, industry participants, international organizations, and executive agencies that requires that corporate directors consider foreign and international developments in performing their duties (*global drivers*).

Each of these contributions can improve both the prevention of corporate human rights abuses and accountability for it—should it occur. This Article's typology improves the prevention of corporate human rights abuses by identifying gaps in corporate governance that need reform. By knowing what failed in the past, directors and their corporate counsel can avoid these errors in the future. The typology's purpose is to dispel two popular myths that have historically excused the actions of corporate boards. One is that lower-level employees are primarily responsible for the decisions that lead to human rights abuses. The second is that the corporate board had no other choice but to take the action that they did. Neither is true.

The typology classifies board involvement into four categories: failed board oversight of human rights due diligence (*Type I*); board approval of financing agreements with human rights violators (*Type II*); board approval of revenue-sharing agreements with human rights violators (*Type III*); and board development and approval of company business model dependent upon the commission of human rights abuses (*Type IV*).

While the lawsuit against Jacobs Solutions falls within the Type I category, the infamous example of Chiquita Brands International typifies Type II misconduct and illustrates why these myths are wrong. Chiquita is incorporated in New Jersey and headquartered in Cincinnati, Ohio. Its wholly owned subsidiary in Colombia—its most profitable venture—made payments to a right-wing paramilitary group, the Autodefensas Unidas de Colombia (AUC), in order to conduct business in places where Chiquita acquired banana plantations or hoped to do so.[27] According to the U.S. Department of Justice, "[n]o later than September 2000, Chiquita's senior executives knew that the corporation was paying the AUC and that the AUC was a violent, paramilitary organization."[28] Moreover, "Chiquita's payments to the AUC were reviewed and approved by senior executives of the corporation, including high-ranking officers, directors and employees."[29] The board of directors were aware of these arrangements because "[a] senior Chiquita officer had described these new procedures to Chiquita's Audit Committee on April 23, 2002."[30] As stated in a shareholder derivative action against Chiquita's board of directors and officers, "[t]his is not a case of low-level, rogue employees in a far-off subsidiary making improper payments which were concealed from—and thus not discovered by—

27 *Id.*

28 Press Release, U.S. Dep't of Justice, Chiquita Brands Int'l Pleads Guilty to Making Payments to a Designated Terrorist Org. & Agrees to Pay $25 Million Fine (Mar. 19, 2007).

29 *Id.*

30 *Id.*

senior executives or the directors of the Company, or its auditors."[31] Instead, "[t]hese payments were known to the top corporate officers and Board of Directors, to Chiquita's in-house General Counsel and to Chiquita's outside auditors and lawyers who all were aware the payments were being made and falsely misaccounted for in Chiquita's records to conceal their true nature."[32]

The typology also challenges the second myth by explaining that corporate boards choose to enter into agreements with human rights violators in order to secure economic gain by eliminating or undercutting their competitors in order to increase their market share. Lafarge's corporate board went so far as to establish a revenue sharing agreement with Islamic State of Iraq and al-Sham (ISIS) seven days after the terrorist organization's publicized attacks on the Yazidi population in northern Iraq.[33] Lafarge's conduct typifies Type III executive misconduct, which relates to board approval of revenue-sharing agreements with human rights violators.[34] According to the U.S. Department of Justice, Lafarge's executives were primarily motivated by economic considerations.[35] Specifically, Lafarge's executives "intentionally structured their agreements with ISIS to compensate the terrorist organization based on the amount of cement that [the local subsidiary] was able to sell—effectively, a revenue-sharing agreement—to incentivize the terrorist group to act in [the local subsidiary's] economic interest."[36] Lafarge's executives also used the company's relationship with terrorist groups to increase Lafarge's market share by expecting ISIS to take action against Lafarge's competitors.[37]

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[31] Complaint, City of Philadelphia Pub. Emplys. Ret. Sys. v. Aguirre, No. 07-cv-851 (S.D. Ohio Oct. 12, 2007).

[32] *Id.*

[33] Amended Complaint at 8, Murad v. Lafarge S.A., No. 1:23-cv-09186 (E.D.N.Y. Aug. 1, 2024)

[34] *See* Sabrina Souza & Zoe Sottile, *Amal Clooney Is Representing Over 400 Plaintiffs in Lawsuit Seeking 'Accountability for Genocide Against Yazidis*,' CNN (Dec. 17, 2023); *see also* Tassilo Hummel, *Lafarge Can be Charged With 'Complicity in Crimes Against Humanity', French Court Says*, REUTERS (Jan. 16, 2024).

[35] Press Release, U.S. Dep't of Justice, Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations (Oct. 18, 2022) ("As Lafarge executives made clear in contemporaneous emails, their motives were primarily economic. LCS executives purchased raw materials needed to manufacture cement from ISIS-controlled suppliers; paid monthly 'donations' to armed groups, including ISIS and ANF, so that employees, customers and suppliers could traverse checkpoints controlled by the armed groups on roads around the Jalabiyeh Cement Plant; and eventually[,] agreed to make payments to ISIS based on the volume of cement that LCS sold to its customers, which Lafarge and LCS executives likened to paying 'taxes.'").

[36] *Id.*

[37] It was not only LaFarge's executives who are implicated in this case. In 2015, LaFarge was purchased by another company whose executives failed to conduct either pre- or post-acquisition due diligence of LaFarge's subsidiary's operations in Syria. Unsurprisingly, Lafarge's executives did not disclose their payments to ISIS and ANF during pre-acquisition diligence meetings. As stated by Deputy Attorney General Lisa O. Monaco, "'[t]his case sends the clear message to all companies, but especially those operating in high-risk environments, to invest in robust compliance programs, pay vigilant attention to national security compliance risks, and conduct careful due diligence in mergers and acquisitions." *Id.*

The final category of board misconduct relates to its key responsibilities for strategic development.[38] Under a Type IV violation, corporate boards contribute to human rights violations by developing and approving business models that breach human rights.[39] In 2023, Vice Chancellor Laster of the Delaware Court of Chancery denied Facebook's motion to dismiss a shareholder derivative lawsuit claiming that the company's directors and officers violated their fiduciary duties by creating a business model that breached a 2012 Federal Trade Commission Consent Order ("the 2012 Consent Order").[40] The lawsuit focuses on the legal liability of Facebook's leadership for developing a business model that violates human rights—specifically, Facebook users' personal data.[41] The shareholder complaint details how executives recognized that Facebook's revenue growth was plateauing and began relying on the mass monetization of personal user data to sustain future profits.[42]

This typology is valuable for three key audiences: *corporate directors*, who can view these examples as warnings; *corporate counsel*, who can better advise their clients on decisions that may involve human rights risks; and *prosecutors, regulators, NGOs, shareholders, and others* seeking to hold directors accountable for corporate human rights violations. The typology can guide these groups in creating more targeted incentives to prevent board involvement in human rights violations and in tailoring sanctions to the nature of the wrongdoing. The typology also reveal the importance of diversified strategies in improving the human rights practices of corporations. For example, one may wonder what value there is in the two different lawsuits filed against Jacobs Solutions; after all, why isn't the first one, filed by the victims, sufficient? As recognized by legal scholars, litigation brought by victims of corporate human rights abuses rarely lead to significant monetary damages.[43] Therefore, there is little probability that these lawsuits can lead to

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[38] *See, e.g.*, A.B.A., CORPORATE DIRECTOR'S GUIDEBOOK 75 BUS. LAW. 2741, 2755 (7th ed. 2020) ("The board should also serve as an advisor to management, providing ongoing direction and guidance in formulating and reviewing the strategic plan. In all its actions, the board should give significant consideration to, among other things, the corporation's strategy, including its financial and business objectives; its physical and management capacities; its competitive environment; and its risk profile and tolerance.").

[39] *See* M. Scott Barnard, Douglas A. Rappaport, Jacqueline Yecies & Matthew V. Lloyd, *Just Right: Delaware Court of Chancery Adopts 'Goldilocks' Approach to Accrual of* Red-Flag *Caremark Claims*, AKIN: ALERTS (Mar. 3, 2023) ("A claim for breach of fiduciary duty against directors or officers based on a failure of oversight or intervention despite various 'red flags' showing improper conduct is commonly referred to as a '*Caremark* claim,' . . . . A related theory of fiduciary liability that overlaps significantly with a *Caremark* claim is sometimes independently recognized as a '*Massey* claim,' . . . . A *Massey* claim differs from a *Caremark* claim in that it concerns an intentional decision to prioritize profits over legal compliance. Both theories of relief are [different types of claims for] breach of fiduciary duty. . . ."), https://www.akingump.com/en/insights/alerts/just-right-delaware-court-of-chancery-adopts-goldilocks-approach-to-accrual-of-red-flag-caremark-claims.

[40] Randall Chase, *Delaware Judge Refuses to Dismiss Facebook Shareholder Suit Over User Data Privacy Breaches*, ASSOCIATED PRESS (May 10, 2023) (reporting on Vice Chancellor Laster's oral ruling).

[41] Second Amended Verified Stockholder Derivative Complaint, *supra* note 9, at 73.

[42] *Id.*

[43] *See* Christopher Ewell, Oona A. Hathaway & Ellen Nohle, *Has the Alien Tort Statute Made a Difference? A Historical, Empirical, and Normative Assessment*, 107 CORN. L. REV. 1205, 1247 (2022);

preventative strategies going forward—at the defendant corporation or its peers.[44] However, the *shareholder lawsuit* against Jacobs Solutions requests different remedies that are aimed at reforming board governance, which may prevent future violations.[45] This difference in remedies highlights the importance of corporate law for achieving the objectives of human rights law.

Corporate law also illuminates the specific ways in which corporate boards can improve the human rights practices of their corporations. As a start, corporate boards should oversee human rights as part of their risk management function. Corporate activities that lead to human rights violations can pose risks to the businesses involved. These risks include reputational damage from media coverage of the incident and its aftermath; litigation risk from victims, consumers, and civil society organizations seeking legal remedies; and regulatory risk as government bodies may be pressured to enact legislative changes in response to corporate misconduct. It is the responsibility of the board to manage these risks. Consequently, to fulfill their duties to the corporation, boards should oversee the company's human rights policies and practices. Corporate boards can also promote human rights through strategic planning that offers important opportunities for the board to consider how human rights compliance can align with overall corporate purpose and mission.[46]

But just because the corporate board *can* prevent human rights abuses does not mean that it will do so. This Article explains that corporate directors and senior officers should prioritize human rights policies and practices within their corporations because of three important drivers. *First*, they may breach their fiduciary duties if they fail to do so. The question over the human rights obligations of corporate directors is currently before the Delaware Court of Chancery.[47] The shareholder plaintiff alleges that the directors and officers breached their fiduciary oversight duties by failing to ensure their corporation's compliance with both U.S. law and international law that prohibits the use of forced labor.[48] These allegations fall well within the precedents established by *In re Caremark*,[49] *Stone v. Ritter*[50] and, more recently, *Marchand v. Barnhill*.[51]

Judith Schrempf-Stirling & Florian Wettstein, *Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations' Human Rights Policies*, 145 J. BUS. ETHICS 545, 548 (2017).

[44] *But see* Schrempf-Stirling & Wettstein, *supra* note 43, at 549 (describing preventative strategies adopted by non-defendant corporations).

[45] Enriques, Gatti & Shapira, *supra* note 18, at 278-79 ("When it comes to oversight duty cases, indirect deterrence effects are often more important than the direct deterrence effects of imposing legal sanctions. . . . Still, even the early stages of the litigation process – from [pre-filing] discovery battles to motions to dismiss – affect behavior through at least three conduits: []expected settlement value[s], changes in legal advice, and reputational fallouts.").

[46] *But see* Martin, *supra* note 12, at 990 ("Many corporations may have difficulty incorporating a strategy that includes human rights. This struggle is not unique to this area, [rather] it is more emblematic of the difficulty corporations have in shifting from a tangible asset perspective to a perspective that includes, within its viewpoint, intangible assets such as skills, talents, and societal reputation.").

[47] Complaint, *supra* note 2, at 35. , .

[48] *Id.*

[49] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

[50] Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[51] Marchand v. Barnhill, 212 A.3d 805, 823 (Del. 2019) ("Although *Caremark* may not require as much as some commentators wish, it does require that a board make a good faith effort to put

Specifically, the shareholder plaintiff alleges that the directors of Jacobs Solutions failed to establish any board-level oversight of human rights despite the (a) reality that both U.S law and international law prohibits the use of forced labor that occurred in Qatar under Jacobs Solutions's watch, and (b) the "red and yellow" flags that should have alerted the corporate board to the human rights risks in Qatar.[52] As pled, the absence of board monitoring and oversight is especially significant given the multiple warnings that should have alerted the directors to Jacobs Solutions's non-compliance with human trafficking laws. For example, international news coverage highlighted labor violations faced by migrant workers in Qatar;[53] the company Jacobs Solutions acquired was criticized for its human rights practices in Qatar;[54] and the Business & Human Rights Resource Centre reached out to the chair of Jacobs Solutions's board to inform them of potential human rights risks and inquire about the board's oversight mechanisms.[55] The Delaware Court of Chancery may therefore rule in plaintiff's favor, thereby raising the potential for legal liability for corporate directors who fail to oversee the human rights practices of their corporations.

Second, shareholders have been active in investigating board involvement in human rights abuses and proposing corporate governance reforms to improve oversight over human rights. For example, in 2024, shareholders submitted a proposal to Amazon requesting "a new committee of independent directors on Artificial Intelligence (AI) to address human rights risks associated with the development and deployment of AI systems."[56] This is not an isolated request or a particularly new one. This pattern of shareholder activism spans companies like Alphabet, Citigroup, Meta, Disney, SunTrust, and Loblaw, with calls for either new board committees or revised charters for existing ones to better handle human rights issues.[57] Shareholders have not been shy about using their rights to investigate board oversight of human rights, propose that the board include new directors with expertise in human rights, and inquire about the scope, nature and effectiveness of board oversight over human rights. Boards must be prepared to respond to this shift in shareholder expectations by proactively adopting stronger governance practices and ensuring human rights are fully integrated into their corporate strategies.

Finally, global trends contribute to shared expectations of corporate governance over human rights. While these trends originate internationally, they reverberate within U.S. boardrooms. Four different types of actors and organizations drive this convergence of corporate governance norms: *national legislators*, *individual corporations*, *international organizations*, and *executive policymakers*. While these developments do not offer a one-size-fits-all solution, they

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in place a reasonable system of monitoring and reporting about the corporation's central compliance risks.").

52 Complaint, *supra* note 2, at 35–36.

53 Complaint, *supra* note 2, at 35.

54 Complaint, *supra* note 2, at 36.

55 Complaint, *supra* note 2, at 36.

56 INTERFAITH CTR. ON COR. RESP., ICCR'S 2024 PROXY RESOLUTIONS & VOTING GUIDE 200 (2024).

57 *See* notes __-__, *infra*, and accompanying text.

collectively signal a shift in corporate governance norms that increasingly demand attention to human rights. As these expectations grow, corporate directors must stay vigilant to mitigate the legal, reputational, and financial risks associated with failing to meet these evolving standards.

Section I introduces the typology of board involvement in corporate human rights abuses. It begins by discussing illustrative examples of how boards have become involved in corporate human rights violations. Some boards contribute to human rights violations through failed oversight; others approve contracts with known human rights violators; and others develop and authorize business models that depend on the violation of human rights. Despite these failures, Part B explains that corporate boards have the potential to enhance their corporations' human rights policies, practices, and performance.

Sections II-IV provide three different reasons for why corporate boards should oversee human rights effectively. Section II explains that corporate directors may confront legal liability for breaching their fiduciary obligations if they fail to oversee human rights (*Delaware driver*). Section III explores the different strategies that shareholders have used to investigate board oversight of human rights and to recommend reforms (*shareholder driver*). Finally, Section IV explains how national legislators, individual corporations, international organizations, and executive policymakers are developing norms on board governance that should guide the policies and practices of corporate boards over human rights (*global drivers*).

I. BOARD INVOLVEMENT IN CORPORATE HUMAN RIGHTS ABUSES

This Section explains the many ways that corporate boards and senior offciers are involved in the human rights violations committed by the corporations they govern. Part A draws upon publicly available plea agreements, shareholder litigation documents and media coverage to develop a typology that classifies board involvement in corporate human rights violations into four categories: failed board oversight of human rights due diligence (*Type I*); board approval of financing agreements with human rights violators (*Type II*); board approval of revenue-sharing agreements with human rights violators (*Type III*); and board development and approval of company business model dependent upon the commission of human rights abuses (*Type IV*).

While these categories may overlap, they help to identify the distinct ways that corporate boards become involved in corporate human rights abuses. This typology is useful for three distinct audiences: directors, who may use these examples as cautionary tales; corporate counsel, who can better advise their director clients on the types of decisions that implicate human rights risks; and prosecutors, regulators, NGOs, shareholders, and others who seek to hold directors accountable when their corporations commit human rights abuses. The typology can help these parties to develop more precise incentives, tailored to discourage director involvement in particular acts, and to fashion sanctions appropriate to the type of wrongdoing. For example, a Type I violation may demand a different penalty compared to Type III or Type IV.

Despite these failures, Part B explains that corporate boards have the potential to improve the human rights policies, practices, and performance of their corporations—should they wish to do so.

A. *The Failures of Corporate Boards to Protect Human Rights: A Framework for Classifying Board Involvement*

This Article defines "human rights" as those identified in the International Bill of Human Rights, which consist of the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR).[58] These international agreements and principles recognize as human rights the right to freedom from forced labor, torture, extrajudicial killing, and genocide; right to privacy; and right to health, among other rights. The boards of directors discussed below are alleged to have violated one or more of these rights.

Not all corporate boards facilitate human rights violations in similar ways. Some boards contribute to their corporations' commission of human rights abuses through *oversight failure* (Type I): the board did not directly order the commission of human rights violations but failed to ensure that their entities complied with its own human rights policies and those established by domestic and international law. Other boards *actively facilitate* the commission of human rights violations: they either fund known violators (Type II); enter into agreements that the board knows or should know will result in human rights violations (Type III); or develop and approve business models that depend on the commission of human rights violations (Type IV). The examples below illustrate each type of involvement. While the nature of board involvement differs, each example demonstrates how board action (or inaction) contributed to the human rights violations suffered by migrant workers in Qatar; civilian populations in Colombia; the Yazidi population in northern Iraq; and Facebook users around the world.

1. Type I - Failed Oversight: *Wirral Borough Council v. Abani et. al.*

An example of failed board oversight is currently being litigated before the Delaware Court of Chancery. In *Wirral Borough Council v. Abani et. al.*, a U.K. stockholder filed a derivative lawsuit against the directors and officers of Jacobs Solutions—a company incorporated in Delaware with its headquarters in Dallas, Texas.[59] The plaintiff alleged that the defendant directors and officers breached their fiduciary duties by "fail[ing] to implement and monitor a Board-level system of oversight to ensure compliance with: (i) federal human trafficking laws; (ii) health, safety, and environmental standards, as mandated by regulatory,

[58] *International Bill of Human Rights*, U.N. OHCHR, https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights.
[59] Complaint, *supra* note 2, at 9.

contractual, and client requirements; (iii) Jacobs's Human Rights Policy, Code of Conduct, Supplier Code of Conduct, and BeyondZero worker safety program; and (iv) internationally proclaimed human rights."[60]

The lawsuit centers on the deaths of over 6,000 migrant workers in Qatar following Federation Internationale de Football Association's (FIFA) decision to award the 2022 World Cup to the country.[61] Qatar subsequently awarded CH2M Hill Inc. a contract to oversee the construction required for the 2022 World Cup.[62] In 2017, Jacobs Solutions acquired CH2M Hill Inc. in one of the largest transactions in the engineering sector.[63] Following the transaction, the Business & Human Rights Resource Centre contacted the board of directors of Jacobs Solutions to alert them to the risks of human rights abuses in connection with the World Cup project.[64] The Centre also inquired about the due diligence processes that the board had in place to prevent, mitigate and address these risks.[65] According to the plaintiff, the chairman of the board only supplied a cursory response despite notice of the human rights risks associated with the use of migrant labor under the *kafala* system in Qatar.[66]

In this example, the board contributed to human rights violations by failing to establish a monitoring system for human rights compliance despite being on notice of the very real possibility of grave human risks given the nature of the *kafala* system; NGO scrutiny of Qatar's human rights record; and concerns over the human rights practices of the company that Jacobs Solutions acquired—CH2M Hill.[67]

2. Type II - Board Approval of Financing to Human Rights Violators: *In re: Chiquita Brands International, Inc.*

Chiquita Brands International ("Chiquita") is incorporated in New Jersey and headquartered in Cincinnati, Ohio. Its wholly owned subsidiary in Colombia—its most profitable venture—made payments to a right-wing

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[60] Complaint, *supra* note 2, at 66. .
[61] Complaint, *supra* note 2, at 6.
[62] Complaint, *supra* note 2, at 26. The shareholder derivative lawsuit was filed a year after victims of Jacobs Solutions' misconduct filed a federal lawsuit against Jacobs Solutions for the harms the victims' suffered. The legal pleadings in the first lawsuit provide additional details regarding the facts alleged in the shareholder derivative lawsuit. Complaint, *Jacobs Solutions*, *supra* note 4, at 6. ("In 2012[,] 2012 CH2M was hired to be the Programme Management Consultant 'to ensure the successful delivery' of the 2022 FIFA World Cup in Qatar by managing the massive construction projects necessary to host the event. Pursuant to that construction management contract, CH2M was tasked with overseeing coordination with Qatari government agencies—all controlled by the Qatari regime—on large infrastructure projects, including the construction of nine new stadiums and the upgrade of three existing ones.").
[63] Complaint, , *supra* note 2, at 26.
[64] Complaint, *supra* note 2, at 27.
[65] Complaint, *supra* note 2, at 27.
[66] Complaint, *supra* note 2, at 3. ("Under the *kafala* system-which is a legal framework developed and adopted throughout the Middle East-the state gives individuals and businesses permits to 'sponsor' worker visas and employ foreign labor. In practice, this system binds workers to their sponsors and allows for shocking labor exploitation.").
[67] Complaint, *supra* note 2, at 4–6.

paramilitary group, the Autodefensas Unidas de Colombia (AUC), in order to conduct business in places where Chiquita acquired banana plantations or hoped to do so.[68] Families of the victims of AUC filed lawsuits against Chiquita, its officers, directors, and employees for actions that violated both United States and international law, including: terrorism and material support for terrorism; war crimes; genocide; crimes against humanity; extrajudicial killing; torture; wrongful death; battery; and negligence.[69] Plaintiffs alleged that AUC and Chiquita were co-conspirators who served mutual interests that included securing Chiquita's economic interests through forcible seizure of lands, destruction of labor opposition groups and the elimination of competition in the banana growing industry.[70]

What is particularly significant about this case is the role of Chiquita's board of directors and senior executives in perpetuating its financing of terrorism. According to the plea agreement Chiquita entered into with the U.S. Department of Justice,[71] Chiquita made over 100 payments to AUC totaling $1.7 million and these "payments to the AUC were reviewed and approved by senior executives of the corporation, to include high-ranking officers, directors, and employees."[72] Moreover, "[n]o later than in or about September 2000, defendant Chiquita's senior executives knew that the corporation was paying the AUC and that the AUC was a violent, paramilitary organization. . . ."[73] Officers and even a director knew that Chiquita was paying the AUC; some even established new procedures to effectuate such payments.[74]

There are a few features of this narrative that are particularly startling for a corporate attorney: In-house counsel performed an internal investigation into the payments to AUC and their findings were discussed at a meeting of the audit committee of the board of directors in 2000.[75] Two years later, Chiquita paid AUC using new procedures established by senior executives that were discussed at a meeting of the audit committee in 2002.[76] Finally, in 2003, senior executives contacted outside counsel about their payments to AUC, which they knew at

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[68] Third Amended Complaint at 154, *In re* Chiquita Brands Int'l, Inc. Alien Tort Statute & Shareholder Derivative *Litig.*, (S.D. Fla. June 6, 2008) ("The AUC's primary method was terrorism against individuals or communities. To this end, the AUC routinely engaged in death threats, extrajudicial killings, massacres, torture[s], rape[s], kidnapping[s], forced disappearances, and looting[s]. The AUC periodically engaged in direct combat with armed guerilla forces, but the vast majority of its victims were civilians targeted by a policy of political and social cleansing,[] typically rural workers, trade unionists, community activists, human rights defenders, leftist politicians, judicial investigators[,] and inhabitants of small towns in contested rural areas.").

[69] *Id.* at 198–214.

[70] *Id.* at 193.

[71] Letter from Jeffrey A. Taylor, U.S. Att'y for the D.C., to Eric H. Holder, Jr. Esq., Counsel for Chiquita Brands Int'l (Mar. 6, 2007); United States v. Chiquita Brands Int'l, Inc., No. 07-055 (D.D.C. 2007); Third Amended Complaint, *supra* note 68 at 180.

[72] Factual Proffer at 5, United States v. Chiquita Brands I'l, Inc., No. 07-055 (D.D.C. 2007); Third Amended Complaint, *supra* note 68, at 181.

[73] Factual Proffer, *supra* note 72, at 5.

[74] *Id.* at ¶ 25.

[75] *Id.* at ¶ 22.

[76] *Id.* at ¶ 26.

that point had been designated as a foreign terrorist organization by the United States Secretary of State.[77] Outside counsel advised the senior executives that such payments were illegal and must stop immediately but the payments continued.[78] Shortly thereafter, the full board of directors was informed that Chiquita was making payments to an organization designated as a foreign terrorist organization.[79] The board agreed to disclose to the Department of Justice (DOJ); senior executives met with representatives of DOJ who informed them that these payments were illegal and had to stop.[80] These executives subsequently informed the audit committee of the meeting, representing that there had been "'[n]o conclusion on continuing payments.'"[81] Chiquita continued to make payments to the AUC for almost another full year.[82]

Following the plea agreement, shareholders of Chiquita filed a shareholder derivative lawsuit against several directors and senior officers of Chiquita alleging violations of their fiduciary duties.[83] The shareholder plaintiffs alleged that "[w]hen the DOJ threatened the Chiquita Defendants and Chiquita with criminal prosecution, the Chiquita Defendants abused their continuing control of Chiquita by causing it to plead guilty and pay a huge fine in return for a promise from the government not to prosecute the Chiquita executives involved in the illegal conduct, thus damaging the Company to protect themselves and their allies and friends."[84] The derivative action was consolidated with other claims against Chiquita before the United States Court for the Southern District of Florida.

3. Type III - Board Approval of Revenue Sharing Agreement with Human Rights Violators: *Murad et al v. Lafarge S.A. et al.*

The United States has designated both Islamic State of Iraq and al-Sham (ISIS) and al-Nusrah Front (ANF) as foreign terrorist organizations.[85] In 2014,

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[77] *Id.* at ¶ 55.
[78] *Id.* at ¶ 56.
[79] *Id.* at ¶ 59.
[80] *Id.* at ¶¶ 59, 62.
[81] *Id.* at ¶ 63.
[82] *Id.* at ¶¶ 64–87.
[83] Verified Consolidated Shareholder Derivative Complaint, *supra* note 7, at 36. ("The Annual Reports to Chiquita shareholders set forth below were each false and misleading for failing to disclose the existence and circumvention of, and/or material weakness in, Chiquita's internal financial and accounting and disclosure controls, Chiquita's other improper activities in Colombia, the Chiquita Defendants' ultra vires conduct, Chiquita's unethical conduct and that the primary reason for Chiquita's apparent progress in its business and objectives and its better performance was the improper, unethical and ultra vires conduct which could not continue indefinitely.").
[84] Verified Consolidated Shareholder Derivative Complaint, *supra* note 7, at 61. Per the plea agreement, the board of directors agreed to pay a $25 million fine; Chiquita made almost $50 million between 2001-2004 from its Colombian banana operations. Letter from Jeffrey A. Taylor, U.S. Att'y for D.C., to Eric H. Holder, Jr. Esq., Counsel for Chiquita Brands Int'l (Mar. 6, 2007), United States of America v. Chiquita Brands Int'l, Inc., No. 07-055 (D.D.C. 2007), App. to Third Am. Complaint, In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig. (S.D. Fla. June 6, 2008).
[85] Amended Complaint, *supra* note 33, at 4.

ISIS attacked Yazidi villages in northern Iraq and killed, displaced, and kidnapped thousands of Yazidi men and women, among other human rights abuses.[86] Yazidi victims filed a lawsuit against Lafarge and its subsidiary for providing material support to ISIS in violation of the Anti-Terrorism Act.[87] According to the complaint, "[i]n the midst of the horrors being inflicted on the Yazidis, Lafarge entered into a formal long-term revenue-sharing agreement with ISIS."[88] Moreover, two days after the attack on the Yazidis, an intermediary to ISIS sent Lafarge's Executive Vice President of Operations a proposed draft of the revenue-sharing agreement between ISIS and Lafarge's Syrian subsidiary "with terms that would give ISIS a fixed percentage of the profits from Lafarge's cement sales."[89] The complaint also states the day after the UN Security Council condemned ISIS's attacks on minority populations that the same executive confirmed the agreement by Lafarge and its subsidiary "to share 10 percent of Lafarge's profits with ISIS in return for ISIS's agreement to stop importation of or tax competitors' cement."[90]

Many of the facts incorporated into the civil complaint are based upon the statement of facts that accompanied the 2022 plea agreement that Lafarge and its Syrian subsidiary (LCS) entered into with the U.S. Department of Justice for providing material support to both of these terrorist organizations.[91] According to this statement, executives of the both the parent company and its Syrian subsidiary authorized payments to both designated terrorist organizations in order to protect its employees and to ensure continued operations over its Syrian cement plant amidst the Syrian civil war.[92] Similar to the board of Chiquita, Lafarge's executives paid the terrorist organizations to ensure economic advantages in the region. Specifically, the plea agreement documents the nature of revenue-sharing agreement between Lafarge and these terrorist organizations that were approved by Lafarge's senior executive leadership. While Lafarge made the payments through intermediaries, the plea agreement documented agreements between Lafarge's Syrian subsidiary and ISIS. One agreement "reflects that LCS agreed to pay ISIS based on the amount of cement that it sold" and this agreement "on ISIS letterhead, was between ISIS and LCS" and "provided that ISIS would assess trucks 400 Syrian pounds[] for each transported ton of cement and, in exchange, ISIS would ensure the safety and free access of the trucks to the cement plant."[93] Another agreement on ISIS letterhead "provided that LCS would purchase pozzolana—a type of volcanic

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[86] Amended Complaint, *supra* note 33, at 6 ("ISIS's attack on Sinjar and other Yazidi areas in the summer of 2014 forced approximately 400,000 Yazidis to flee for their lives.").
[87] *See generally id.*
[88] Amended Complaint, *supra* note 33, at 8. .
[89] Amended Complaint, *supra* note 33, at 9.
[90] Amended Complaint, *supra* note 33, at 9.
[91] Plea Agreement, United States v. Lafarge S.A & Lafarge Cement Syria S.A., No. 22-CR-444 (E.D.N.Y. Oct. 18, 2022).
[92] Attachment A, Statement of Facts at 6, *Lafarge S.A & Lafarge Cement Syria S.A.*, No. 22-CR-444. .
[93] *Id.* at 13.

ash used to create blended cement—from ISIS for 1,300 Syrian pounds per ton."[94]

Additionally, Lafarge's Syrian operations faced competition from cement imports from Turkey that were offered at cheaper prices and therefore, limited the prices that Lafarge could charge for its own cement.[95] The plea agreement detailed communications between Lafarge executives and its intermediaries over the possibility that ISIS might block Turkish imports completely or levy fees on Turkish cement that were equal to or higher than those imposed on Lafarge such that it would reduce the competitiveness of Turkish cement.[96] Lafarge and its subsidiary undertook negotiations with ISIS through one or more intermediaries. One executive instructed its intermediary "that if ISIS wanted more money from LCS, it should reduce LCS's competition so that LCS could raise its prices"; the intermediary responded "that ISIS was prepared to stop importation of Turkish cement upon consummation of an agreement."[97] Moreover, "[a]fter entering into the revenue-sharing agreement with ISIS, Lafarge executives involved in the negotiations with ISIS updated Lafarge's Executive Committee" and "[n]otes of Lafarge's August 27, 2014 Executive Committee meeting reflect that Executive 2 highlighted ISIS's agreement to impose costs on imported Turkish cement that were equal to the costs imposed on LCS."[98] According to the committee notes, the chief executive officer and chairman of Lafarge's board of directors "responded that 'we have to make sure that what we do is risk free (also vis-a-vis the U.S.).'"[99]

4. Type IV – Board Development of Business Model Built Upon Human Rights Violations: *In re Facebook Shareholder Derivative Privacy Litigation*

Boards also contribute to corporate human rights violations by developing business models that depend on the commission of such violations to succeed.[100] That is precisely the charge levelled at the senior leadership of Facebook. One of the board's core functions is strategic development: the board

[94] *Id.* at 20.
[95] *Id.* at 29–30.
[96] *Id.* at 33 (explaining that one intermediary "regularly updated executives from LAFARGE and LCS about the progress of negotiations and received frequent reminders from them to eliminate any direct reference to 'Lafarge' from documents, to discount prices to LCS 's customers based on the customers' payments to ISIS, and to obtain ISIS 's agreement to tax Turkish cement imports to allow LCS to increase the price of its cement.").
[97] *Id.* at 34.
[98] *Id.* at 40.
[99] *Id.* (the quotation refers to this statement as issued by Executive 6 who is earlier identified in the Statement of Facts as Lafarge's CEO and chairman of the board of directors.)
[100] Benjamin A. Smyth & Stephanie H. Dallaire, *Delaware Court of Chancery Addresses Issue of First Impression Regarding Timeliness of 'Red Flag' Claims*, MCCARTER & ENGLISH ALERT (May 25, 2023) ("A *Massey* Claim 'combines an initial wrongful act with the ongoing continuation of that act.' The initial wrongful act underlying a *Massey* Claim is more prominent and serious, according to the Court, because the plaintiff must allege that the defendants made a specific decision to pursue profit over legal compliance. However, the wrongful act does not end at that time. Rather, the ongoing violation continues as the company pursues the illegal strategy, and the fiduciaries can decide to stop the illegal business plan at any point and take corrective action.").

reviews, evaluates, and approves strategic choices of the corporation that can implicate the human rights of others. Facebook's shareholders now allege that the board violated its fiduciary duties by developing a business model that violated the privacy rights of its users and exposed the company to regulatory scrutiny, significant monetary fines and reputational damage.

In 2023, Vice Chancellor Laster denied Facebook's motion to dismiss a shareholder derivative lawsuit alleging that Facebook's directors and officers violated their fiduciary duties by developing a business model that explicitly violated the terms of a 2012 Federal Commission Consent Order ("the 2012 Consent Order").[101] This lawsuit is notable because it is about the legal liability of the board and its officers for developing a business model that violates human rights—specifically, Facebook users' personal data. In the nearly 400-page complaint, plaintiff shareholders document how Facebook executives had realized that "Facebook had reached, or was about to reach an endpoint with respect to its ability to continue to grow revenue based on Facebook's value as a distribution platform."[102] The consequence was that executives "explicitly premised Facebook's future profitability on its ability to monetize the only resource Facebook could continue to generate, and share, at scale and in ever-increasing quantities: personal user information."[103] Plaintiffs allege that "Facebook, under the control of the Board, made the choice to expand sharing of personal user information to Platform Applications defiance of the 2012 Consent Order," a choice that "included sharing core identifying demographic information (e.g., user birthdates, gender, location, Friend lists, likes, Facebook User ID), the ability to read a user's mailbox and messages, and open access to the personal user information of all Friends of a given user."[104]

This board decision led to significant consequences for both Facebook and its users that was amply demonstrated by the public scandal over Cambridge Analytica.[105] According to the shareholder complaint, "Cambridge Analytica's use of personal user information was the destined consequence of the Individual Defendants' platform business plans, which were premised on the open sharing

101 In re Facebook, Inc. Consol. Deriv. Litig., C.A. No. 2018-0307-JTL (Del. Ch. May 10, 2023) (transcript) (Laster, V.C.) at 12; ("The data sharing practices that violated the 2012 consent order were a core part of Facebook's business model."); *see also* Randall Chase, *Delaware Judge Refuses to Dismiss Facebook Shareholder Suit over User Data Privacy Breaches*, ASSOC. PRESS (May 10, 2023) https://apnews.com/article/facebook-zuckerberg-privacy-lawsuit-shareholders-d8663ed12d5cd18bb086a10700ff5eb6(reporting on Vice Chancellor Laster's oral ruling).

102 Second Amended Verified Stockholder Derivative Complaint, *supra* note 9, at 73.

103 Second Amended Verified Stockholder Derivative Complaint, *supra* note 9, at 73.

104 Second Amended Verified Stockholder Derivative Complaint, *supra* note 9, at 73.; *see also* Second Amended Verified Stockholder Derivative Complaint, *supra* note 9,. at 7 ("The 2012 Consent Order resolved claims that Facebook had previously violated user privacy by sharing of personal user data with third parties without proper authorization.").

105 Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N. Y. TIMES, https://www.proquest.com/docview/2021522379?accountid=14509&sourcetype=Blogs,%20Podcasts,%20&%20Websites (Apr. 4, 2018)("The Times reported that in 2014 contractors and employees of Cambridge Analytica, eager to sell psychological profiles of American voters to political campaigns, acquired the private Facebook data of tens of millions of users — the largest known leak in Facebook history.").

of personal user information in the spirit of 'full reciprocity' and through agreements with its Platform Application partners, with or without user knowledge or consent, in violation of the 2012 Consent Order."[106]

Citing documents obtained through a Section 220 demand, plaintiffs alleged that the "[b]oard had virtually no oversight of the foregoing practices despite their knowledge that they had set forth a policy of sharing of personal user information with third parties."[107] As they stated, this failure violated the terms of the 2012 Consent Order that required that the board ensure that Facebook "obtain[] users' affirmative consent before sharing their information."[108] Many of these allegations concern a failure of board oversight. But the Facebook board's failures is made more egregious because they developed and approved a strategy that they knew or should have known would violate the privacy rights of their users and then turned a blind eye to the consequences. As alleged, the board was responsible for the cause of the underlying problem but then failed to exercise any oversight over the implementation of the business model they approved.[109]

B. *The Potential of the Corporate Board to Prevent and Address Human Rights Abuses*

Despite the failures discussed above, the corporate board has the potential to prevent and address human rights abuses because of the key functions that it serves—risk management[110] and overall strategy[111]—that are critical to ensuring that a corporation does not violate human rights.

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[106] Second Amended Verified Stockholder Derivative Complaint, *supra* note 9, at 10 , ; *see also* Second Amended Verified Stockholder Derivative Complaint, *supra* note 9, at 8 ("Implementation of the Individual Defendants' information sharing business model was referred to internally as "full reciprocity" because Facebook received the personal user information generated through Platform Applications, and then granted those third-party app developers access to all the information on the platform."').

[107] Second Amended Verified Stockholder Derivative Complaint, *supra* note 9, at 11–12.

[108] Second Amended Verified Stockholder Derivative Complaint, *supra* note 9, at 11.

[109] Second Amended Verified Stockholder Derivative Complaint, *supra* note 9, at 211. ("[B]efore the Cambridge Analytica scandal became front page news, Facebook's Board provided virtually no oversight into whether the Company had sufficient policies in place to protect the privacy of its users' personal information, while Facebook's core business plans were implemented and violated the 2012 Consent Order.").

[110] Virginia Harper Ho, *Board Duties: Monitoring, Risk Management and Compliance,* COMPARATIVE CORPORATE GOVERNANCE 242, 245 (2021) ("There is also a broad agreement across jurisdictions about the basic obligation of corporate boards to monitor corporate legal compliance, to oversee risk management policies and procedures and internal financial controls, and to set corporate strategy."); Martin, *supra* note 12 at 974–77 (discussing the board's role in risk management); BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 38 (2016) ("Establishing a company's risk appetite and culture, and overseeing its risk management, including internal control, are of major importance for boards and are closely related to corporate strategy.").

[111] *See, e.g.*, FINANCIAL REPORTING COUNCIL, U.K. CORPORATE GOVERNANCE CODE (2024), §1(B)("The board should establish the company's purpose, values and strategy, and satisfy itself that these and its culture are all aligned."); Business Roundtable, BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 7 (2016) ("The board should have meaningful input into the company's long-term strategy from development through execution, should approve

First, the board should oversee human rights as part of their risk management function. A corporation's activities create the risks of human rights violations *to people*, but these violations also create *risks for the businesses* that commit them, including *reputational risk* arising from media coverage over the incident and subsequent developments; *litigation risk* created by victims, consumers, and civil society organizations that file lawsuits to seek remedies for violations; *regulatory risk* created by government actors that may feel pressured to respond to publicized corporate wrongdoing with legislative changes.[112] It is the board's responsibility to manage these risks. Therefore, to fulfill their duties to the corporation, corporate boards must oversee the human rights policies and practices of the corporations they govern.

Many corporate boards have recognized that they must oversee human rights as part of their risk management function. They have created "sustainability" or "public policy" committees to monitor the risks associated with human rights and other issues, such as climate change, privacy, and diversity, among others.[113] Additionally, enterprise risk management is among the functions of the board.[114] The United Nation Guiding Principles on Business and Human Rights ("UN Guiding Principles") clarify that human rights due diligence can be incorporated within a broader enterprise risk management system so long as these processes account for risks to victims and not to the business exclusively.[115] The board is therefore well suited to incorporate human rights due diligence within risk management processes.[116]

Second, the UN Guiding Principles recommend incorporating human rights due diligence early in business decision-making to prevent decisions that could potentially harm external parties.[117] Strategic planning can offer boards opportunities to consider how human rights compliance can align with overall

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the company's strategic plans and should regularly evaluate implementation of the plans that are designed to create long-term value.").

112 Stevelman, *supra* note 12, at 125.

113 *See* notes ___-___, *infra*, and accompanying text.

114 Harper Ho, *supra* note 111, at 246 ("While ERM frameworks emphasize the role of the CEO, CFO, and corporate risk officers in implementing risk management processes, ERM also depends on and facilitates the oversight role of the corporate board and internal and external auditors.").

115 Ruggie, UN Guiding Principles, *supra* note 12, at 16 ("Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders."); *but see* Martin, *supra* note 12, at 989 ("The problem comes when the law treats a board's decision-making process for human rights evaluation in the same way that it would treat the evaluative process for a merger or some other structural change.").

116 *But see* Martin, *supra* note 12, at 991 (discussing the challenges with incorporating human rights assessments into enterprise risk management, including obtaining information from jurisdictions with weak governance).

117 Commentaries to Principles 17 and 18 provides that human rights due diligence "should be initiated as early as possible in the development of a new activity or relationship" and "assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship." Ruggie, UN Guiding Principles, *supra* note 12, at 16.

corporate purpose and mission, thereby providing another set of drivers—aside from risk—that can improve corporate policies and practices on human rights.[118]

Third, human rights due diligence does not work unless it is supported by influential internal actors within the corporation. The Office of the United Nations High Commissioner for Human Rights warned that "[a]s with any other risk, the enterprise needs to allocate the necessary internal capacity in order to manage it effectively"[119] and personnel responsible for human rights due diligence "have sufficient influence within the organization."[120] The board is of paramount importance within a corporation; their support of human rights due diligence and associated processes can make the difference in whether a corporation abides by its responsibility to respect human rights or is among the many corporations that routinely violate human rights.

But just because the corporate board *can* prevent human rights abuses does not mean that it will do so. Directors may ignore the risks of human rights violations or even implement policies and practices that they know (or should know) will result in human rights violations. Why should corporate directors live up to their potential to prevent and address human rights risks? The following sections discuss three drivers that could persuade corporate directors to prioritize human rights policies and practices within their corporations.

II. THE DELAWARE DRIVER: *CAREMARK* LIABILITY FOR HUMAN RIGHTS ABUSES?

The first reason that corporate directors and officers may want to prioritize human rights is that they can be held legally liable if they do not. This theory is now being tested as practice before the Delaware Court of Chancery in *Wirral Borough Council v. Abani et. al.* in which the shareholder plaintiff alleged that the directors' and officers' failed oversight of their organization's human rights practices constituted "a rare but shocking 'information-systems claim,' or 'prong-one *Caremark* claim,' where the Board and Company officers in bad faith failed to establish a reporting system for oversight of operations that resulted in thousands of deaths on Jacobs's watch."[121] This Section analyzes the prospects for this plaintiff and similarly situated shareholders to succeed on a *Caremark* claim.[122]

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[118] *But see* Martin, *supra* note 12, at 990 ("Many corporations may have difficulty incorporating a strategy that includes human rights. This struggle is not unique to this area, rather it is more emblematic of the difficulty corporations have in shifting from a tangible asset perspective to a perspective that includes, within its viewpoint, intangible assets such as skills, talents, and societal reputation.").

[119] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE 33–34 (2012).

[120] *Id.*

[121] Complaint, *supra* note 2, at 7.

[122] The plaintiffs also alleged a *Massey* claim "given the fiduciaries' conscious decision to prioritize profits over legal compliance."' Complaint, *supra* note 2, at 7.

In re Caremark[123] and its subsequent cases explained that "[w]here directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith."[124] *Stone v. Ritter* explained that directors can be subject to this oversight liability if they failed either of these two prongs: "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[125] As pled, the plaintiff shareholder seeks to hold the directors and officers of Jacobs Solutions liable because they failed prong one of the *Caremark* test: a failure to establish a reporting system for oversight of operations that resulted in the human rights violations committed by Jacobs Solutions, the corporation.

As emphasized in recent Delaware case law, directors are faulted when they fail to establish reporting systems that would ensure that their corporations comply with legal requirements imposed by state or federal law.[126] The recent case of *Marchand v. Barnhill* is particularly instructive because it provides guidance on when Delaware courts will allow a derivative suit to survive a motion to dismiss when it alleges a failure of *Caremark* prong one. In *Marchand v. Barnhill*, a stockholder alleged that the directors of Blue Bell Creameries breached their

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123 *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996); Marchand v. Barnhill, 212 A.3d 805, 823 (Del. 2019) ("Although *Caremark* may not require as much as some commentators wish, it does require that a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks. In Blue Bell's case, food safety was essential and mission critical.").

124 Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006); *see also Marchand*, 212 A.3d at 820–21 (Del. 2019) ("Under *Caremark* and Stone v. Ritter, a director must make a good faith effort to oversee the company's operations. . . . Failing to make that good faith effort breaches the duty of loyalty and can expose a director to liability. In other words, for a plaintiff to prevail on a Caremark claim, the plaintiff must show that a fiduciary acted in bad faith—'the state of mind traditionally used to define the mindset of a disloyal director.'. . . .Bad faith is established, under *Caremark*, when "the directors [completely] fail[] to implement any reporting or information system or controls[,] or . . . having implemented such a system or controls, consciously fail. . . to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.'. . . . In short, to satisfy their duty of loyalty, directors must make a good faith effort to implement an oversight system and then monitor it.").

125 *Stone*, 911 A.2d at 370.

126 *Marchand*, 212 A.3d at 810 ("As a U.S. food manufacturer, Blue Bell operates in a heavily regulated industry. . . . Not only is Blue Bell subject to federal regulations, but it must also adhere to various state regulations"); *In re* Clovis Oncology, Inc. Derivative Litig., 2019 BL 373697, at *11 (Del. Ch. Oct. 01, 2019) ("But, as fiduciaries, corporate managers must be informed of, and oversee compliance with, the regulatory environments in which their businesses operate. . . . As *Marchand* makes clear, when a company operates in an environment where externally imposed regulations govern its 'mission critical' operations, the board's oversight function must be more rigorously exercised"); Teamsters Local 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816-SG, 2020 BL 320972, at *1 (Del. Ch. Aug. 24, 2020) ("Such a pleading must allege with particularity facts which imply that the directors utterly failed to provide a corporate reporting system to permit board-level review of compliance with law, or that the directors were provided sufficient notice of corporate non-compliance with law such that their failure to remediate amounts to bad faith.").

fiduciary duties when the company suffered from a *listeria* outbreak that resulted in the deaths of three individuals, a product recall, operational disruptions, and layoffs, among other consequences.[127] The plaintiff stockholder alleged a failure of prong one of *Caremark* because the "board had no committee overseeing food safety, no full board-level process to address food safety issues, and no protocol by which the board was expected to be advised of food safety reports and developments."[128] In reversing the Delaware Court of Chancery's dismissal of the case, the Supreme Court of Delaware emphasized that Blue Bell was a monoline company and its fortune depended on one product: ice cream.[129] It is therefore unavoidable that one of Blue Bell's central compliance issues relates to food safety of that sole product.[130] The court noted that "Blue Bell operates in a heavily regulated industry," and is subject to both federal and state regulations. It therefore concluded that the "complaint supports an inference that no system of board-level compliance monitoring and reporting existed at Blue Bell."[131] Critically, the court explained that "[w]hen a plaintiff can plead an inference that a board has undertaken no efforts to make sure it is informed of a compliance issue intrinsically critical to the company's business operation, then that supports an inference that the board has not made the good faith effort that *Caremark* requires."[132]

Similarly, the stockholder plaintiff in *Wirral Borough Council* alleges that the directors and officers failed to ensure that the corporation complied with federal human trafficking laws, among other laws, agreements, and policies.[133] This is significant because Jacobs Solutions confronts potential legal liability under the Trafficking Victims Protection Reauthorization Act (TVPRA) in a separate lawsuit filed in federal court in Colorado.[134] In the derivative action against Jacobs Solutions, the shareholder plaintiff relied on the TVPRA claim to explain how "[t]he Company faces severe financial consequences for its role in the World Cup Project, as well as untold reputational harm."[135] Therefore, one could find that Jacobs Solutions was subject to the TVPRA's legal requirements and that the directors and officers breached their fiduciary duties by failing to oversee compliance with the TVPRA.

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127 *Marchand*, 212 A.3d at 807.
128 *Id.* at 809.
129 *Id.*
130 *Id.*
131 *Id.* at 822.
132 *Id.*
133 Complaint, *supra* note 2, at 2. ("This is a case about a company that participates in an industry highly susceptible to labor abuses and with operations in a region of the world infamous for human rights violations. Yet, this company had zero systems in place to allow its directors and officers to monitor the company's compliance with human trafficking and labor exploitation law, let alone human rights norms and the company's own publicized policies and procedures.").
134 Complaint, *supra* note 2, at 32 ("The Federal Action plaintiffs alleged that they suffered severe physical
injuries and mental trauma from these abuses, and they seek monetary damages under the Trafficking Victims Protection Reauthorization Act (as defined above, the "TVPRA"). The Federal Action plaintiffs alleged that Jacobs and CH2M trafficked them and forced them to work in violation of 18 U.S.C. § 1589 and 18 U.S.C. § 1590, and that they are liable pursuant to 18 U.S.C. § 1595(a).").
135 Complaint, *supra* note 2, at 8.

This conclusion is particularly strong when one considers the utter failure to establish any board-level oversight despite the "red and yellow" flags that should have put the board of Jacobs Solutions on alert of potential compliance issues.[136] Specifically, as in *Marchand v. Barnhill*,[137] the stockholder plaintiff in *Wirral Borough Council* submitted a Section 220 demand to Jacobs Solutions and used the lack of documentation in response to substantiate the allegations of a failure of *Caremark* prong one.[138] As pled, this absence is particularly telling given the various warnings that should have put the directors on notice of Jacobs Solutions's lack of compliance with human trafficking laws. For example, the international news media exposed the labor violations experienced by migrant workers in Qatar;[139] the company that Jacobs Solutions acquired had knowledge of human rights practices in Qatar;[140] and the Business & Human Rights Resource Centre contacted the chair of Jacobs Solutions's board to inform them of potential human rights risks and to inquire about the oversight mechanisms that the board had in place.[141]

Moreover, the Supreme Court of Delaware was not convinced that directors can satisfy their *Caremark* oversight duties by pointing to some efforts of the corporation to comply with legal requirements. In *Marchand v. Barnhill*, the directors defended themselves by explaining that the corporation had provided their employees with food safety manuals; commissioned audits; and had its facilities inspected by government actors.[142] Similarly, the board of directors of Jacobs Solutions may try and defend themselves by pointing to their human rights policies, training manuals and past history of audits – if they exist.[143] Even so, the Supreme Court of Delaware was fairly clear that this is not good enough: "The mundane reality that Blue Bell is in a highly regulated industry and

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136 *See* Marchand v. Barnhill, 212 A.3d 805, 811 (identifying the various red and yellow flags that should have placed defendants on notice of food safety issues at Blue Bell's plants); *id.* at 812 ("Despite management's knowledge of the growing problem, the complaint alleges that this information never made its way to the board, and the board continued to be uninformed about (and thus unaware of) the problem.").

137 *Id.* at 822 ("Here, the plaintiff did as our law encourages and sought out books and records about the extent of board-level compliance efforts at Blue Bell regarding what has to be one of the most central issues at the company: whether it is ensuring that the only product it makes—ice cream—is safe to eat.").

138 Complaint, *supra* note 2, at 47 ("The documents produced in response to the Demand undermine Jacobs's purported commitment to respecting human rights and make evident that the Company lacked any information systems or controls sufficient to report human rights abuses to the Board.").

139 *Id.* at 35 ("Jacobs and CH2M were plainly aware of the human rights abuses in Qatar under the kafala system. As detailed above, these abuses were widely covered by the media, the U.S. government, and NGOs.").

140 *Id.* at 36.

141 *Id.* at 35 ("[T]he BHRRC Letter specifically raised the issue of Qatar's miserable track record on human rights violations to Jacobs and Demetriou shortly after the Company acquired CH2M in February 2018 and pointedly asked Jacobs to explain the measures it had in place to ensure compliance with standards of human rights within Jacobs's supply chain and on the projects it managed.").

142 Marchand v. Barnhill, 212 A.3d 805, 822–23 (Del. 2019).

143 Complaint, *Wirral Borough Council*, *supra* note 139, at 42–46 (discussing Jacobs Solutions's human rights policy, supplier code of conduct and auditing commitments).

complied with some of the applicable regulations does not foreclose any pleading-stage inference that the directors' lack of attentiveness rose to the level of bad faith indifference required to state a *Caremark* claim."[144] The "mundane reality" of some compliance does not absolve directors because these types of corporate compliance do not involve the board of directors; that is the critical gap in compliance that the board of directors in Marchand—like the board of directors of Jacobs Solutions—cannot show.[145]

III. THE SHAREHOLDER DRIVER: SHAREHOLDER ACTIVISM REGARDING BOARD OVERSIGHT OVER HUMAN RIGHTS

A. Shareholder Section 220 Demands for Books and Records

Delaware law permits shareholders of Delaware corporations to request access to corporate books and records under Section 220 of the Delaware General Corporation Law ("Section 220").[146] Shareholders can use Section 220 to investigate a board's role in facilitating human rights violations, which may subsequently lead to the same shareholders filing a lawsuit against the corporate board.[147] For example, in *Wirral Borough Council v. Abani*, the plaintiff used a Section 220 demand to obtain information about Jacobs Solutions's board's oversight of labor and human rights in connection with the 2022 World Cup prior to filing the shareholder lawsuit.[148] The Section 220 demand requested board and senior management materials pertaining to several aspects of board oversight of human rights, such as: "actual or alleged labor exploitation and/or human rights abuses"; "[d]ue diligence into the Qatar World Cup construction projections in connection with the 2017 acquisition of CH2M"; "Jacobs's and/or CH2M's policies and procedures concerning the use of foreign labor"; "[g]overnment, regulatory, or non-profit investigations into Jacobs's and/or CH2M's hiring practices in Qatar"; and "use of the *kafala* system."[149] The plaintiff used the board's production of documents (or lack thereof) to substantiate their allegations of breaches of fiduciary duties.[150]

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144 *Marchand*, 212 A.3d at 823.

145 *Id.* ("But the fact that Blue Bell nominally complied with FDA regulations does not imply that the board implemented a system to monitor food safety at the board level. . . . Indeed, these types of routine regulatory requirements, although important, are not typically directed at the board.").

146 DEL. CODE ANN. tit. 8, § 220 (2021).

147 Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1872 (2021) ("[A] shareholder who wishes to successfully plead a failure-of-oversight claim has to effectively utilize her inspection rights prior to filing. A diligent use of shareholder's inspection rights can yield internal documents that link the board to the trauma, indicating that directors either knew about the problem but did nothing to stop it, or completely ignored a critical issue.").

148 Letter from Jeroen van Kwawegen to Joanne Caruso (Nov. 15, 2023); Exhibit 1 to Complaint, *supra* note 2.

149 *Id.* at 4.

150 Complaint, *supra* note 2, at 6–7. , ("Yet, in response to Plaintiff's Demand, Jacobs produced zero documents demonstrating Board-level reporting concerning the Company's compliance (or lack thereof) with (i) human trafficking and labor exploitation laws, (ii) human rights norms, or (iii) its Code of Conduct, Supplier Code of Conduct, Human Rights Policy, or BeyondZero

Shareholders have also relied on Section 220 demands to investigate the quality of board governance of human rights in the wake of publicized human rights crises involving their corporations. Such investigations may or may not result in a shareholder lawsuit, but any public disclosure of the information obtained can subject the corporate board and its individual directors to reputational damage . Professor Roy Shapira argues that pre-filing investigations have the potential to change board governance through market deterrence. Section 220 can unleash reputational sanctions on corporate boards by revealing new information that is perceived as credible by a broad group of stakeholders and that attributes the misconduct to systemic failures that create the risk of recurrence.[151] One may hope that the possibility of future disclosure through Section 220 will motivate corporate directors to improve the quality of their human rights compliance out of a fear that their inattention to such issues may be subsequently revealed with legal and reputational consequences for the individual directors and the corporations they govern.[152]

For example, the 2013 collapse of Rana Plaza in Bangladesh killed over 1,100 individuals and injured over 2,500 more individuals.[153] This tragedy garnered worldwide attention and shone a spotlight on the U.S. companies that sourced their products from factories at Rana Plaza. One of those companies was Walmart. In *Amalgated Bank v. Wal-Mart Stores*, a plaintiff-shareholder of Walmart filed a lawsuit to access Walmart's corporate books and records to investigate the board's oversight of human rights at Rana Plaza.[154] The plaintiff alleged that the board had plenty of notice of the safety risks at Rana Plaza and other supplier sites in Bangladesh.[155] The plaintiff further alleged that "[s]ince the Bangladesh incidents, the Company's Board of Directors ("Board") and management have continued to expose the Company to reputational and legal risks by failing to ensure proper compliance within the Company's global supply chain."[156] The plaintiff demanded records and documents of Walmart that concerned the quality of its board governance of human rights, such as board minutes of meetings and other documentation relating to: the collapse of Rana Plaza; foreign suppliers and labor conditions at their sites; results of ethical

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worker safety program, in connection with the World Cup Project or any other of its operations. Indeed, the Board still does not appear to receive any reporting on these scores.").

151 Shapira, *supra* note 148, at 1883–84.

152 Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 CARDOZO L. REV. 1949, 1982 (2021) ("Importantly, the law firms' memos advised boards to start working harder on implementing and conducting periodic reviews of a well-integrated legal compliance program, as well as maintaining a better paper trail, making sure that the board minutes demonstrate that the board received appropriate information about the key issues the company faces."). This public revelation may prove a problem when the production of documents is subject to confidentiality; however, Professor Shapira argues that this information may still see the light of day when it is attached to public filings in subsequent shareholder litigation or is referenced in judicial opinions on the 220 demand. *Id.* at 1988.

153 *The Rana Plaza Disaster Ten Years on: What Has Changed?*,Int'l Labour Org.: InfoStories (Apr. 2023), https://webapps.ilo.org/infostories/en-GB/Stories/Country-Focus/rana-plaza.

154 Verified Complaint Under 8 Del. C. § 220 To Compel Inspection of Books and Records, Amalgated Bank v. Wal-Mart Stores, No. 11699 (Del. Ch. Nov. 10, 2015).

155 *See id.* at 5.

156 *Id.* at 2.

sourcing audits and other audits of factories in Walmart's global supply chain; and "[e]xecutive performance and compensation incentives relating to compliance or supply chain metrics," among other topics.[157] A dearth of documentation on these issues has the potential to intensify the reputational cost that Walmart suffered in the wake of the collapse. It can also find new targets of the reputational sanction: Walmart's board of directors. By doing so, the Section 220 demand opens up the possibility of attributing blame to both organizational (Walmart) and individual (director) targets. This dual-targeting may prove essential in changing the incentives of the board regarding its quality of oversight.[158]

In yet another example, the Louisiana Municipal Police Employees' Retirement System (LAMPERS) brought a lawsuit against The Hershey Company when the latter denied LAMPERS's Section 220 demand to access corporate books and records relating to the board's oversight of child labor and forced labor in its cocoa supply chains in West Africa.[159] The plaintiff expressed concerns over the Hershey board's oversight of labor violations in the cocoa supply chains that could expose the company to legal risks for violating both U.S. law and foreign law.[160] In addition, the plaintiff highlighted how the publicized concerns over child labor in the cocoa supply chain also exposes Hershey to significant reputational risks, especially among key customer bases such as parents and school teachers who sought reassurances that Hershey's chocolate products were not sourced with illegal labor.[161] In its Section 220 demand, the plaintiff requested documents relevant to board oversight over human rights, including "[a]ny evidence of child labor, forced labor, or trafficking within the Company's supply chain" or "[t]he compliance of Hershey with any regulations or laws relating to child labor, forced labor, or trafficking within the Company's supply chain."[162]

B. Shareholder Proposals Regarding Board Composition: Director Expertise

A board is only as good as those who serve on it. Corporate boards may benefit from including directors with expertise in human rights risk assessments, mitigation, and remediation. However, corporate boards continue to lack expertise on human rights issues—a fact that has not gone unnoticed by shareholders. Shareholders are using their rights under Rule 14a-8[163] to submit

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157 *Id.* at 17.

158 Shapira, *supra* note 148, at 1886 ("*Caremark*-type investigations yield information that is highly 'reputation-relevant.' The emphasis on finding bad faith indications translates into unearthing information on who knew what when – information that is considered in the reputation literature as highly indicative of the company's future behavior. Such bad faith indications can therefore be determinative of stakeholders' decisions to continue doing business with the company or not, that is, determinative of the size of the reputational fallout.").

159 Louisiana Municipal Police Employees' Retirement System v. The Hershey Company, No. 7996, 2013 WL 6120439, at *2 (Del. Ch. Nov. 8, 2012).

160 *Id.* at ¶¶ 22, 49.

161 *Id.* at ¶ 30.

162 *Id.* at ¶ 55.

163 17 CFR § 240.14a-8 (2025).

shareholder proposals regarding the scope, nature, and quality of board governance of human rights.

In 2019, shareholders submitted a proposal to Motorola requesting that its Nominating Committee nominate at least one candidate who "has a high level of human rights expertise and experience in human rights matters relevant to Company production and supply chain, related risks, and is widely recognized in business and human rights communities as such."[164] The shareholder proponent justified their requests by explaining that "[h]uman rights expertise at both management and board levels is critical to industrials companies' success because of significant issues associated with their operations"[165] and such an expert "would help ensure that the highest levels of attention are focused on developing human rights standards for new projects."[166]

In 2020, CoreCivic—the largest private prison company—received a request that it amend its criteria for board membership to include human rights expertise.[167] In the same year, shareholder proponent Arjuna Capital submitted proposals to Alphabet, Facebook, and Twitter concerning the nomination of human rights experts to their corporate boards.[168] The shareholder explained that such board expertise was necessary "to assess risk and develop strategy to avoid causing or contributing to widespread violations of human or civil rights, such as supporting genocide, hate campaigns, or violence."[169] It renewed its proposal to these companies in subsequent years.[170]

Despite these requests, a cursory glance at the boards of these corporations does not suggest that much has changed. These boards continue to be dominated by former and current CEOs, chief financial officers, industry experts, and directors who serve on other corporate boards.[171] This means that

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164 INTERFAITH CTR. ON CORP. RESP., ICCR's 2020 PROXY RESOLUTIONS AND VOTING GUIDE 176 (2019).

165 *Id.*

166 *Id.*

167 INTERFAITH CTR. ON CORP. RESP., ICCR'S 2020 PROXY RESOLUTIONS AND VOTING GUIDE 178 (2020) ("RESOLVED that shareholders of CoreCivic, Inc. ('CoreCivic' or the 'Company') urge the Board of Directors (the 'Board') to amend the 'Board Membership Criteria' section of the Company's Corporate Governance Guidelines to add human rights expertise to the factors the Nominating and Governance Committee (the 'Committee') and/ or Board takes into account when evaluating persons for nomination or renomination to stand for election as directors.").

168 Heidi Welsh & Michael Passoff, Proxy Preview 2020, at 61 (2020). In its proposal to Facebook, the proponent "request[ed] that Facebook's Board of Directors nominate for the next Board election at least one candidate who: has a high level of human and/or civil rights expertise and experience and is widely recognized as such, as reasonably determined by Facebook's Board," and will qualify as an independent director. Facebook, Inc., Definitive Proxy Statement Pursuant to Section14(a) of the Securities Exchange Act of 1934 (DEF 14A), at 73 (Apr. 10, 2020).

169 Facebook, Inc., Definitive Proxy Statement Pursuant to Section14(a) of the Securities Exchange Act of 1934 (DEF 14A), at 73 (Apr. 10, 2020).

170 Heidi Welsh & Michael Passoff, Proxy Preview 2022, at 76 (2022); Arjuna Capital, Shareholder Proposals, https://arjuna-capital.com/reports/2021/12/14/shareholder-proposals.

171 *See, e.g.*, *Our Leadership,* MOTOROLA SOLS., https://www.motorolasolutions.com/newsroom/leadership.html#id-17750552451 (last

boards may fail in their ability to understand, prevent, and address human rights risks so long as they exclude directors with expertise on these issues.

The lack of director expertise in human rights is particularly surprising given the trend towards "specialist directors."[172] While corporate boards traditionally prioritized those with expertise in finance and accounting, legal, leadership, and marketing, Professors Yaron Nili and Roy Shapira observe that corporations are now including directors with different areas of expertise, such as cybersecurity, climate, and diversity.[173] Their study finds that S&P 500 corporations significantly increased the number of directors with expertise in cyber, safety, ESG, and diversity issues between 2016–2022.[174] They report that the number of directors with general environmental, social, and governance ("ESG") expertise rose from 51 in 2016 to 1,049 in 2022.[175] They identify four advantages to including corporate directors with such specialized expertise: "enhancing boards' ability to analyze ESG issues"; "allowing boards to switch from a reactive to a proactive mode"; alleviating biases of organizational decision-making; and "providing better channels of communication with stakeholders."[176] According to Professors Nili and Shapira, corporate boards change in response to pressure from shareholders and regulators.[177] One might hope that these incentives may lead boards to evaluate their criteria for board membership and to include future directors with adequate expertise in human rights.

C. *Shareholder Proposals Regarding Board Committees: Delegated Oversight Responsibilities*

Shareholders have also submitted proposals regarding the allocation of board oversight responsibility for human rights issues. Boards may opt to delegate oversight to one of their board committees. One reason for this is to

visited Nov. 9, 2025) (listing former chief financial officers, former and current chief executive officers, corporate directors on other boards, and expert on artificial intelligence, among others); *Leadership and Governance*, META, https://investor.fb.com/leadership-and-governance/ (last visited Nov. 9, 2025) (listing former chief financial officers, former and current chief executive officers, corporate directors on other boards, and former ambassador, among others).

172 Yaron Nili & Roy Shapira, *Specialist Directors*, 41 YALE J. ON REG. 651, 661 (2024).

173 *Id.* at 11. *But see* Milhaupt, *infra* note 218, at 19 ("[W]hile the number and percentage of independent directors with international experience is significant and increasing steadily, the number of independent directors with experience in government or the military – presumably valuable training ground for skills directly relevant to the oversight of geopolitical risk – is modest and declining.").

174 Nili & Shapira, *supra* note 173, at 21.

175 Nili & Shapira, *supra* note 173, at 21 Professors Nili and Shapira explain that not all of these increases are due to the addition of new specialist directors to corporate boards. Instead, some of the increases in number of specialist directors could be due to corporations disclosing such expertise for the first time or directors identifying themselves with such skills. Nili & Shapira, *supra* note 173, at at 22–26.

176 Nili & Shapira, *supra* note 173, at at 26.

177 Nili & Shapira, *supra* note 173, at at 12.

assign oversight to directors who possess the greatest expertise on the issue.[178] Another reason is that the many demands placed on boards may necessitate the efficient division of labor.[179] Standard board committees are Audit, Nominating (and Governance), and Compensation committees.[180] Many corporations have now added board committees on "Sustainability" or "Public Policy" that oversee social issues, including human rights.[181]

Corporate boards structure this oversight in one of two ways: they can delegate this oversight to a standard committee (such as Audit or Nominating and Governance committees) or establish a separate committee for this purpose. Professor Lisa Fairfax found that the majority of companies with board-level oversight of ESG chose the former approach with "63% locat[ing] most, if not all, of the ESG oversight function in their Nominating and Governance Committee,"[182] while Alphabet allocated oversight over ESG to its Audit Committee.[183] The other companies with board oversight over ESG chose to delegate that oversight function to a separate stand-alone committee with varying names reflecting this purpose.[184] Professor Fairfax found that some companies chose to split the oversight of ESG between more than one committee, but that the majority preferred to allocate this responsibility to the Nominating and Governance Committee.[185]

The responsibilities of board committees are governed by the committee charter, which often necessitate periodic reports to the board committee and from the committee to the entire board.[186] Professor Fairfax's study revealed that the charters for these board committees can vary widely with some identifying broad ESG topics and others specifically delineating a long list of issues that the board committee would oversee.[187] The study further revealed

[178] Philip Stiles, *Board Committees*, *in* The Oxford Handbook of Corporate Governance 177, 179 (Mike Wright, Donald S. Siegel, Kevin Keasey, & Igor Filatotchev eds., 2013) ("Regarding expertise, the rise of board committees has emphasized the idea of the professionalization and specialization of directors").

[179] Stevelman, *supra* note 12, at 128 (discussing the challenges of boards becoming tasked with many functions but populated by directors with primary professional obligations elsewhere).

[180] Stiles, *supra* note 179, at 178–79 ("A certain number of board committees are required by law or regulation . . . audit, remuneration, and nomination").

[181] *See, e.g.*, THE COCA-COLA COMPANY, CORPORATE GOVERNANCE AND SUSTAINABILITY COMMITTEE CHARTER 3 (n.d.), https://investors.coca-colacompany.com/_assets/_c1fded7d4362c4f27d8891f224cd4bf3/cocacolacompany/db/870/10107/file/Corporate_Governance_and_Sustainability_Committee_Charter%2C_October_17%2C_2024.pdf ("The Committee will review the Company's sustainability programs and goals and the Company's progress toward achieving those goals, particularly in the Company's key focus areas of water leadership; total beverage portfolio; packaging; climate; people and communities; and sustainable agriculture."). Professor Lisa Fairfax conducted a survey of the top 50 companies in the Fortune 100 and found that "86% of such companies currently have a board-level committee or committees responsible for oversight over ESG." Fairfax, *supra* note __, at 375.

[182] Fairfax, *supra* note __, at 375.

[183] Fairfax, *supra* note __, at 375.

[184] Fairfax, *supra* note __, at 375.

[185] Fairfax, *supra* note __, at 376.

[186] Fairfax, *supra* note __, at 390.

[187] Fairfax, *supra* note __, at 378.

that only 23% of these committee charters specifically identified human rights, in contrast to climate change (81%), political/lobbying (60%), and diversity (39%).[188]

This is a problem for two reasons. First, it shows that even committees with board oversight over ESG issues generally neglect to identify human rights as one of these issues, decreasing the likelihood that the relevant board committee will exercise appropriate levels of oversight over it. For example, Walmart assigns oversight for human rights to the Nominating and Governance Committee on its corporate board.[189] But the *committee's charter* does not list human rights within its mandate.[190] Walmart charges other committees with "oversight of salient human rights issues and mitigating human rights impacts," such as the Audit Committee and the Compensation and Management Development Committee.[191] However, none of these board committees explicitly reference human rights in their charter's mission or mandate.[192]

Second, it is also a problem when human rights *are* identified in a board committee's charter because it is frequently one among many issues on a long list for board oversight. Consider the charter of Microsoft's Environmental, Social and Public Policy Committee that tasks the committee with responsibility for reviewing and providing guidance to the board and management on climate change, and environmental sustainability; competition and antitrust; privacy; trade; digital safety; responsible artificial intelligence; accessibility; human rights; and responsible sourcing.[193] There are a few immediate concerns with such an approach. One challenge is identifying directors who have expertise on such a range of different issues and can exercise appropriate oversight. Another concern is the quality, breadth, and comprehensiveness of reporting to and from the committee on such a long list of issues. The fear is that one or more of these

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[188] Fairfax, *supra* note __, at 378.

[189] *Human Rights*, WALMART, https://corporate.walmart.com/purpose/esgreport/social/human-rights (last visited Aug. 27, 2025) ("The Walmart Inc. Board of Directors and Board committees actively oversee and monitor the management of the most significant human rights issues relevant to our company. The Nominating and Governance Committee of the Board is responsible for overseeing Walmart's environmental, social, and governance agenda, including our overall approach to human rights, and receives updates on these initiatives from Walmart's Chief Sustainability Officer.")

[190] The charter states that the committee's authority and responsibilities include reviewing and advising management Walmart's "social, community and sustainability initiatives . . . including those related to climate change" and "legislative affairs and public policy engagement strategy." WALMART INC., NOMINATING AND GOVERNANCE COMMITTEE CHARTER 3–4 (n.d.), https://s201.q4cdn.com/262069030/files/doc_governance/CommitteeCharters/2023/04/legal-10614502-v1-wmt_ngc_charter_4_11_23.pdf.

[191] WALMART, supra note 190.

[192] WALMART INC., AUDIT COMMITTEE CHARTER (n.d.), https://s201.q4cdn.com/262069030/files/doc_governance/CommitteeCharters/2023/04/legal-10614491-v1-wmt_audit_committee_charter_4_11_2023_.pdf; WALMART INC., COMPENSATION AND MANAGEMENT DEVELOPMENT COMMITTEE CHARTER (n.d.), https://s201.q4cdn.com/262069030/files/doc_governance/CommitteeCharters/CMDC_charter_current_as_of_April_2022.pdf.

[193] MICROSOFT CORP., ENVIRONMENTAL, SOCIAL, AND PUBLIC POLICY COMMITTEE CHARTER 2 (n.d.), https://www.dealpointdata.com/corp/pdf/2147364677_120570887.pdf.

topics may be neglected or receive less than adequate attention from the committee and, by extension, the board.

Third, it is important that any board committee overseeing human rights consist of directors who also sit on other board committees that are important for a corporation's human rights compliance. For example, Nike has a Corporate Responsibility, Sustainability and Governance Committee whose mandate is replete with references to oversight for human rights.[194] However, none of its three directors sit on any of the other board committees of Nike.[195] This is a lost opportunity to ensure alignment between the work of the Corporate Responsibility, Sustainability and Governance Committee, which oversees human rights, and the Audit Committee, which oversees compliance, or the Compensation Committee, which oversees executive pay. Specifically, the latter committees could ensure that human rights priorities are incorporated within compliance processes and compensation decisions—two factors that can improve the human rights practices of corporations.

To address these concerns, shareholders have requested that corporate boards include committees with oversight responsibilities for human rights. Between 2019–2024, shareholders have submitted at least nine proposals relating to board oversight of human rights by requesting the creation of a new board committee on human rights or amendment to the charter of an existing one to cover human rights.

Year	Company	Request
2019	Amazon	Establish a Societal Risk Oversight Committee[196]
2019	Citigroup	Amend charter of Nomination, Governance, and Public Affairs Committee "to explicitly require fiduciary oversight by the committee on matters affecting human rights"[197]
2019	SunTrust	Establish a Board Committee on Human Rights[198]
2020	Loblaw	"[E]nhance the mandate of the Risk and Compliance Committee to assign it with specific responsibility for human rights risk assessment, mitigation and prevention, as well as policy formulation and adoption"[199]
2020	Alphabet	Establish a Human Rights Risk

[194] For example, the committee's purpose includes "review[ing] and evaluat[ing] the Company's significant strategies, activities, policies, investments and programs regarding corporate purpose, including corporate responsibility, sustainability, human rights, global community and social impact, and diversity and inclusion" and "provid[ing] oversight of management's efforts to ensure that the Company's dedication to sustainability (including environmental and supply chain sustainability and human rights) is reflected in its business operations." Charter of the *Corporate Responsibility, Sustainability and Governance Committee, Under Board Charters*, NIKE, https://investors.nike.com/investors/corporate-governance/?toggle=committee-charters#board-com-chart (last visited Nov. 10, 2025).

[195] *Board Committee Assignments*, Under *Corporate Governance*, NIKE, https://investors.nike.com/investors/corporate-governance/?toggle=committee-assignments (last visited Nov. 10, 2025).

[196] INTERFAITH CTR. ON COR. RESP., ICCR's 2019 PROXY RESOLUTIONS AND VOTING GUIDE 67 (2019).

[197] *Id.* at 180.

[198] *Id.* at 175.

[199] INTERFAITH CTR. ON COR. RESP., supra note 165, at 164.

		Oversight Committee[200]
2020	Facebook	Board oversight over human rights, including reporting on board-level expertise and responsibilities for advising and managing civil and human rights risks[201]
2021	Disney	Request that the board "strengthen board oversight of workforce equity issues by assigning responsibility for oversight to an existing or new board committee"[202]
2022	Facebook	"Shareholders request the Board commission an independent assessment of the Audit and Risk Oversight Committee's capacities and performance in overseeing company risks to public safety and the public interest and in supporting strategic risk oversight on these issues by the full board."[203]
2023	Alphabet	"Shareholders request the Board commission an independent assessment of the role of its Audit and Compliance Committee in ensuring effective Board oversight, above and beyond legal compliance, of material risks to public well-being from company operations."[204]
2023	Meta	"Shareholders request the Board of Directors (the "Board") of Meta Platforms, Inc. ("Meta") commission an independent review of the role of the Audit and Risk Oversight Committee (the "Committee") in ensuring effective Board oversight of material risks to public well-being from Meta's operations."[205]
2024	Alphabet	"[A]mend the charter of the Audit and Compliance Committee of the Board to add to the committee's 'purpose' section appropriate language which makes it clear that the Committee is responsible for overseeing Alphabet's artificial intelligence activities and ensuring management's comprehensive and complete implementation of its AI Principles."[206]
2024	Amazon	"[A] new committee of independent directors on Artificial Intelligence ("AI") to address human rights risks associated with the development and deployment of AI systems[207]

Table 1: Shareholder proposals regarding board oversight of human rights 2019-2024

In 2024, both Alphabet and Amazon received shareholder proposals requesting greater oversight on human rights and artificial intelligence (AI). The shareholder proponents had different ideas for how to accomplish that objective. Trillium Asset Management requested that Alphabet amend the charter of an existing board committee—Audit and Compliance Committee—to provide better oversight over AI and human rights.[208] It requested that

[200] INTERFAITH CTR. ON COR. RESP., *supra* note 165, at 163.
[201] INTERFAITH CTR. ON COR. RESP., *supra* note 165, at 164. at 162.
[202] INTERFAITH CTR. ON COR. RESP., supra note 165, at 164. at 93.
[203] INTERFAITH CTR. ON COR. RESP., supra note 165, at 164. at 216.
[204] INTERFAITH CTR. ON COR. RESP., ICCR's 2023 PROXY RESOLUTIONS AND VOTING GUIDE 209 (2023).
[205] *Id.* at 210.
[206] *Id.* at 201.
[207] *Id.* at 200.
[208] *Id.* at 201. According to its current charter, the committee's purpose includes "[r]eview[ing] and discuss[ing] with management Alphabet's major risk exposures, including financial, operational, data privacy and security, competition, legal, regulatory, compliance, civil and human rights, sustainability, and reputational risks, and the steps Alphabet takes to prevent,

Alphabet's board amend the committee's charter so that its purpose includes "appropriate language which makes it clear that the Committee is responsible for overseeing Alphabet's artificial intelligence activities and ensuring management's comprehensive and complete implementation of its AI Principles."[209] In contrast, AFL-CIO submitted a proposal to Amazon requesting the creation of a brand new board committee "on Artificial Intelligence ("AI") to address human rights risks associated with the development and deployment of AI systems."[210] The shareholders requested that the "committee charter shall authorize the committee to meet with employees, customers, suppliers, and other relevant stakeholders at the discretion of the committee, and to retain independent consultants and experts as needed."[211] Neither of these proposals were approved.[212]

On other occasions, shareholders have had some success in changing the scope of committee charters. For example, shareholders requested that Citigroup amend the charter of its Nomination, Governance, and Public Affairs Committee "to explicitly require fiduciary oversight by the committee on matters affecting human rights."[213] Its committee charter now identifies its responsibilities to include "[o]versee[ing], receiv[ing] reports from and advis[ing] management on ESG matters, including but not limited to, the Company's policies and programs pertaining to environmental sustainability, climate change, *human rights*, and community investment."[214] Shareholders had also requested that Loblaws "enhance the mandate of the Risk and Compliance Committee to assign it with specific responsibility for human rights risk assessment, mitigation and prevention, as well as policy formulation and adoption."[215] Its charter states that the committee will assist the board in overseeing "the Company's environmental, social and governance (ESG) initiatives, including those with respect to corporate social responsibility matters, responsible and ethical sourcing, and *human rights* matters."[216]

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detect, monitor, and actively manage such exposures." *Audit Committee*, ALPHABET, https://abc.xyz/investor/board-and-governance/acc/ (last visited Nov. 11, 2025).

209 INTERFAITH CTR. ON COR. RESP., ICCR'S 2024 PROXY RESOL. & VOTING GUIDE 201 (2024).

210 *Id.* at 200.

211 *Id.*

212 ALPHABET, INC., (Form 8-K), https://abc.xyz/assets/bb/9e/6edb74c225a65859e42261ae4b11/4d03d29b576032a603b6e429d17f8f1a.pdf.; Amazon.Com, Inc., Current Report (Form 10-K) (May 22, 2024), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/069df373-8bf7-45d8-adf9-769a48cebbff.pdf.

213 INTERFAITH CTR. ON CORP. RESP., *supra* note 197, at 180.

214 CITIGROUP INC., NOMINATION, GOVERNANCE AND PUBLIC AFFAIRS COMMITTEE CHARTER 1 (Feb. 15, 2024), https://www.citigroup.com/rcs/citigpa/storage/public/NGPA-Charter-February-15-2024.pdf. (emphasis added).

215 INTERFAITH CTR. ON CORP. RESP., *supra* note 165, at 164.

216 LOBLAW COS. LTD., Mandate of the Risk and Compliance Committee 1 (May 2, 2023) (emphasis added). The charter states that the committee will assist board in overseeing "the Company's environmental, social and governance (ESG) initiatives, including those with respect to corporate social responsibility matters, responsible and ethical sourcing, and human rights matters." *Id.* at 1. The charter also states that the committee will oversee Loblaw's compliance

IV. THE GLOBAL DRIVERS: THE GLOBALIZATION OF FIDUCIARY DUTIES

As discussed above, Delaware law may obligate corporate directors to implement and monitor internal systems for human rights due diligence. However, even if the Delaware Court of Chancery decides otherwise in *Wirral Borough Council v. Abani,* corporate directors should still pay attention to human rights risks because of developments outside of Delaware.[217] This Section explains that four different types of actors and organizations are developing corporate governance norms on human rights that may soon apply to directors of U.S. corporations. First, *national legislators* in many countries have mandated that corporate boards take particular steps to protect human rights, specifically, or implement corporate social responsibility or sustainability, generally. Second, *corporate* actors may voluntarily abide by foreign corporate governance norms even when those norms do not bind the entire corporate group. They do this to reduce legal uncertainty and maintain economic efficiency; the result is that the foreign law is given global effect throughout the corporation at the enterprise level. Third, *international organizations* play a role in developing and clarifying corporate governance norms. These norms can have an influential role on expectations of the board. Finally, *executive policymakers* use foreign policy to encourage a convergence of expectations on corporate governance of human rights. The consequence is that directors and officers may need to oversee human rights even if Delaware law does not require it.

A. Convergence Led by National Legislators

Legislators from countries around the world are exploring ways to incorporate human rights into corporate governance. Corporate directors should anticipate that expectations for board oversight of human rights will extend beyond any single jurisdiction. It is, therefore, crucial for corporate

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and ethics functions, including "review[ing] the actions taken by management in order for management to ensure that the Company has high quality systems for implementing the Company's policies with respect to legal and regulatory compliance and ethical conduct, including the Company's Supplier Code of Conduct and Human Rights Statement, such systems to involve appropriate standards, education, supervision and inspection." *Id.* at 2.

[217] *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) ("The basic law of corporate governance-indeed, most of corporate law-has achieved a high degree of uniformity across developed market jurisdictions, and continuing convergence toward a single, standard model is likely."); *id.* at 443 ("There are three principal factors driving consensus on the standard model: the failure of alternative models; the competitive pressures of global commerce; and the shift of interest group influence in favor of an emerging shareholder class."). *But see* Curtis J. Milhaupt, *Corporate Governance in an Era of Geoeconomics* 7 (July 8, 2024) (on file with author) ("The second decade of the twenty-first century revealed the limited shelf life of the End of History for corporate governance. Today, the unifying forces of global markets have been weakened by stress fractures along every major dimension of the world's economic infrastructure – trade, investment, data privacy, technology transfer, and cross-border acquisitions.").

boards to integrate these expectations into their governance practices to prepare for emerging regulations in this area.

For example, European Union (EU) legislators recently explored whether directors have duties to promote sustainability as part of their fiduciary duties. In its proposed draft of the Corporate Sustainability Due Diligence Directive (CSDDD), the European Commission proposed Article 25 titled, "Directors' duty of care," and provided that "Member States shall ensure that, *when fulfilling their duty to act in the best interest of the company*, directors of companies referred to in Article 2(1) *take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences*, including in the short, medium and long term."[218] As evidenced from the text, the proposed provision sought to incorporate sustainability—including human rights—into the decision-making of corporate directors and required that they consider these matters beyond the short term.

This concept of the director's duty of care becomes even more interesting when read in conjunction with another provision that was also proposed by the European Commission. Proposed Article 26 would have required that EU Member States ensure that directors are responsible for putting in place and overseeing the due diligence actions established in the CSDDD.[219] Directors would also be responsible for "tak[ing] steps to adapt the corporate strategy to take into account the actual and potential adverse impacts" identified elsewhere in the CSDDD.[220] The combination of these two provisions created some confusion as to the relationship between the two; however, some commentary suggests that the relationship is one of incorporation so that Article 26 (due diligence requirements) inform Article 25 (the duty of care).[221] This would mean that "having in place a proper due diligence system along the lines of the proposed directive is a factor to take into account when considering whether or not a director has fulfilled the general duty of care envisioned in Article 25 of the proposed directive."[222]

Article 25 was controversial among scholars and practitioners. Proponents argued that the provision was consistent with many EU sustainability initiatives that aim to influence the corporate board, which is crucial in shaping and overseeing corporate strategy.[223] Others criticized such proposals by explaining that its proponents confuse the problem of managerial short-termism with

[218] *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive,* Art. 25, COM (2022) 71 final (Eur. Comm. Draft), *supra* note 19.
[219] *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive,* Art. 26, COM (2022) 71 final (Eur. Comm. Draft), *supra* note 19.
[220] *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive,* Art. 26, COM (2022) 71 final (Eur. Comm. Draft), *supra* note 19.
[221] Mieke Olaerts, *Corporate Sustainability and the Duty of Care of Directors*, 5 ONDERNEMINGSRECHT 277, 280 (2023).
[222] *Id.*
[223] Professor Sjåfjell, *Reforming EU Company Law to Secure the Future of European Business*, UNIV. OSLO FACULTY L. LEGAL STUD. RSCH. PAPER SERIES, No. 2021–05, 14 (2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797685.

separate issues of negative externalities and distributional outcomes.[224] They argued that these are separate issues that policymakers should address through the familiar tool of legislation.[225] Neither Article 25 nor Article 26 were included in the finalized text of the CSDDD. However, legislators in EU Member States may have the option to include these provisions in the national legislation they will adopt to transpose the CSDDD within their national systems so long as it does not violate the maximum harmonisation rule. This means that the policy debate over directors' duties is far from over.

Similar conversations have also occurred in other parts of the world.[226] In Asia, South Korean legislators are considering a mandatory human rights due diligence law—the Bill on Human Rights and Environmental Protection for Sustainable Business Management.[227] It was proposed in 2023 and, if enacted, it would be the first law in Asia to prevent and address adverse human rights and environmental impacts related to business operations.[228] Among its key features, the bill would require "the company chief executive to annually establish a plan for the implementation of human rights environmental due diligence and report it to the board of directors and obtain its approval."[229]

South Korea is not alone. Many other jurisdictions have introduced—or are contemplating—new laws on corporate social responsibility that would potentially include human rights issues. For example, South Africa introduced legislation on corporate social responsibility that requires listed public companies, state-owned enterprises, and "companies that meet the public interest standard" to create a social and ethics committee.[230] This committee must consist of three directors or prescribed officers tasked with monitoring corporate performance in a number of areas (including the environment, good corporate citizenship, and labor) and must report to shareholders on the same.[231] These committees are entrusted with unique powers and can "require any director or prescribed officer to furnish any information or explanation necessary for the performance of the committee's function and to attend any annual shareholder meeting to address any issues related to its function."[232]

Under Indian corporate law, boards are tasked with ensuring that companies spend at least 2% of their net average profits (on a three year basis) on corporate

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224 Mark Roe, Holger Spamann, Jesse Fried & Charles Wang, *The Sustainable Corporate Governance Initiative in Europe*, 38 YALE J. REG. BULL. 133, 136 (2021).
225 *Id.* at 138.
226 *See generally* Barnali Choudhury & Martin Petrin, *Stuck in Neutral? Reforming Corporate Purpose and Fiduciary Duties*, 67 CAN. BUS. L.J. 291 (2023) (discussing legislative corporate law reforms in the United Kingdom and Canada).
227 Antony Crockett & Rebecca Chin, *South Korea Tables Mandatory Human Rights and Environmental Due Diligence Law*, HERBERT SMITH FREEHILLS KRAMER (Sept. 14, 2023), https://tinyurl.com/45pca5v2[permalink].
228 *Id.*
229 *Id.*
230 Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences*, 23 U. PA. J. BUS. L. 429, 447 (2021).
231 *Id.* Professor Li-Wen Lin explains that there has been confusion about whether these are board committees but "[i]n practice, it seems that corporations usually treat it as a board committee composed of a mix of executive and non-executive directors." *Id.* at 448.
232 *Id.* at 447–48.

social responsibility ("CSR") activities; however, this is a "comply or explain" provision that does not sanction a company for falling short on its spending so long as it discloses its CSR activities and explains why it fell short.[233] Additionally, Section 166 of the Indian Companies Act 2013 requires that "directors must 'act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.'"[234] The Act mandates that CSR is a board function with certain governance and operational requirements.[235] The board must establish a board committee (three directors, at least one independent) that develops the company's CSR.[236] The committee should set the amount the company will spend on CSR activities; identify the activities that will receive corporate funding; and monitor implementation of those activities.[237] China[238] and Indonesia[239] have also mandated corporate social responsibility in their corporate laws, but these laws do not say anything explicitly about directors' duties.[240]

As discussed, national legislators have taken different approaches to the corporate governance of human rights. Some have regulated human rights directly while others mandate corporate social responsibility generally. The challenge is that the latter can leave a lot up to individual director discretion. It also creates the risk that a corporation may use its corporate philanthropy to distract the public from the human rights harms that it causes. It is, therefore, important to separate the distinct issues that corporate conduct creates—distributional benefits to society *versus* human rights violations—and to address each directly.

B. *Convergence Led by Industry: The "Brussels Effect" and Enterprise -Level Compliance*

U.S. corporate directors and officers may choose to voluntarily abide by the stricter standards set by the *foreign* laws discussed above, even if Delaware law

233 Afra Afsharipour, *Corporate Social Responsibility and the Corporate Board: Assessing the Indian Experiment in* Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance 13 (Jean J. du Plessis *et. al.* eds. 2018).
234 *Id.* at 12.
235 *Id.* at 13.
236 *Id.*
237 *Id.*
238 Li-Wen Lin, *Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China*, 68 AM. J. COMP. L. 576, 582 (2021) (explaining that Article 5 of the Chinese law provides that "[i]n the course of doing business, a company shall comply with laws and administrative regulations, conform to social morality and business ethics, act in good faith, subject itself to the government and the public supervision, and undertake social responsibility").
239 *Id.* at 578 (explaining that Indonesian corporate law provides that any "company having its business activities in the field of and/or related to natural resources shall be obliged to implement social and environmental responsibilities").
240 In the Chinese context, national courts have adjudicated dozens of cases that concerned the application of the corporate social responsibility provision. In the 169 decisions Professor Lin reviewed, "none of the Chinese court cases involve directors' fiduciary duties." *Id.* at 610.

does not change. This is because they may find that it makes better economical and legal sense to upgrade their global practices to conform to the regulatory requirements of the most stringent jurisdiction.[241]

To understand why they may do so, consider a hypothetical: Alpha is the U.S.-based parent company of a large corporate group consisting of dozens of subsidiaries incorporated and operating in multiple foreign jurisdictions, including Norway. In 2021, Norway introduced its Transparency Law that requires in-scope companies doing business in Norway to conduct human rights due diligence; publish an annual human rights statement; and respond to third party requests for certain types of human rights information.[242] Many U.S. companies fell within the scope of this law because of its broad scope.[243]

This law, therefore, applies to Alpha and any other U.S. entity that satisfies the criteria for in-scope companies. Alpha has two options. Option 1 is *segmentation*: its Norwegian branch will comply with the law but not the rest of the enterprise, including Alpha's other subsidiaries operating outside of Norway. Alpha's Norwegian subsidiaries will have their own compliance procedures to follow that will vary from the compliance requirements of Alpha's other units. Option 2 is *standardization*: Alpha will incorporate the compliance procedures into its enterprise-level risk management framework so that it applies to the entire Alpha corporate group, thereby applying to subsidiaries that would not otherwise come within the Norwegian law.

Under what conditions would Alpha pick one option over the other? Professor Anu Bradford explains that an EU-based standard may become a company's global standard for its enterprise under the "Brussels Effect." Standardization occurs when a company's "production or conduct is non-divisible across different markets."[244] Standardization is more likely to "occur when the benefits of a uniform standard due to scale economies exceed the cost of forgoing lower costs in less regulated markets."[245] Companies opting for standardization also choose the most stringent standard because it will incorporate other standards and ensure compliance across different markets.[246]

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241 ANU BRADFORD, THE BRUSSELS EFFECT (2020).

242 MICHAEL R. LITTENBERG & SAMANTHA ELLIOTT, ROPES & GRAY LLP, NEW NORWEGIAN MANDATORY HUMAN RIGHTS DUE DILIGENCE LAW CREATES OBLIGATIONS FOR U.S.-BASED MULTINATIONALS DOING BUSINESS IN NORWAY 1 (2021), https://www.ropesgray.com/en/insights/alerts/2021/12/new-norwegian-mandatory-human-rights-due-diligence-law-creates-obligations-for-us. Its broad scope applies to "foreign large enterprises" that satisfy two of the following requirements: (a) minimum 50 full-time employees during the fiscal year; (b) balance sheet total of approximately US $4 million, at minimum; or sales revenue of at least approximately US $8 million. *Id.*

243 Its broad scope applies to "foreign large enterprises" that satisfy two of the following requirements: (a) minimum 50 full-time employees during the fiscal year; (b) balance sheet total of approximately US $4 million, at minimum; or sales revenue of at least approximately US $8 million. *Id.*

244 BRADFORD, *supra* note 242, at 54 (defining non-divisibility as the "practice of standardizing – as opposed to customizing – production or business practices across jurisdictions and hence applying a uniform standard to govern the corporation's global conduct.").

245 BRADFORD, *supra* note 242, at 54.

246 BRADFORD, *supra* note 242, at 54. (noting that companies choose the most stringent standards represented by the jurisdiction that is an important market).

According to Professor Bradford, there are three types of non-divisibility that can lead companies to choose a global standard. *Legal non-divisibility* refers to "legal requirements and remedies as drivers of uniform standards" and "typically manifests as a spillover effect that follows from the corporation's compliance with the laws of the most stringent jurisdiction."[247] *Technical non-divisibility* "refers to the difficulty of separating the firm's production or services across multiple markets for technological reasons."[248] Finally, *economic non-divisibility* derives from scale economies that discourage companies from developing different products for different markets: "the scale economies associated with a single global production process therefore often allows the EU to effectively dictate global product standards."[249]

These different drivers for standardization make it more likely that Alpha will pick Option 2 and adhere to one global standard for its production in all markets in which it operates. It is also likely that this standard will adhere to the most stringent human rights law because a common standard must satisfy the most demanding law. As a consequence, Alpha's units—even ones that are not within the scope of the Norwegian law—will nonetheless be obligated to comply with it as a result of standardization across the corporate group. While these compliances choices will vary by company, Ropes & Gray LLP recommends that "[m]ost U.S.-based multinationals have moved to a common enterprise-wide approach to managing human rights and related compliance, or are in the process of doing so."[250]

The choice of standardization is not surprising if we apply Professor Bradford's framework to the Norwegian Act and other foreign laws mandating human rights due diligence. Compliance is unlikely to be legally divisible because "legal risks associated with compliance errors induce companies to adopt internal policies that govern the company's global operations."[251] Standardization is also more attractive based on the monitoring costs of ensuring compliance across the enterprise.[252] Internal policies and procedures also drive standardization, such as the development and use of standard compliance manuals throughout the company and the reliance on standardized contracts.[253] Additionally, what happens in one jurisdiction can have consequences for operations in all the others; a global corporation's stock price,

[247] BRADFORD, *supra* note 242, at 56.
[248] BRADFORD, *supra* note 242, at 57.
[249] BRADFORD, *supra* note 242, at 59.
[250] LITTENBERG & ELLIOTT, *supra* note 243, at 5; *see, e.g.*, NESTLÉ, NESTLÉ'S HUMAN RIGHTS FRAMEWORK AND ROADMAP 5 (2021) ("We have also mainstreamed human rights into 22 policies and procedures across our global business."), https://tinyurl.com/6tcedfrc; Cisco, GLOBAL HUMAN RIGHTS POLICY 3 (Jan. 17, 2024) (explaining that the policy applies to employees, partners, suppliers, and contractors and that Cisco's Business and Human Rights, reporting to Cisco's Chief Legal Officer, "is staffed by business and human rights specialists who partner with teams across Cisco to manage human rights risks across Cisco's global business"), https://tinyurl.com/35n8vhtn.
[251] BRADFORD, *supra* note 242, at 56.
[252] BRADFORD, *supra* note 242, at 57.
[253] BRADFORD, *supra* note 242, at 57.

and reputation generally, may be harmed by the actions of one of its subsidiaries in other jurisdiction.[254]

Similarly, it may prove technically or, alternatively, economically infeasible for Alpha to separate its production or services across multiple markets. Imagine that Alpha sells cocoa and chocolate products to consumers in Norway based on its local branch and operations. Most cocoa is sourced from West Africa.[255] The cocoa supply chain consists of at least the following steps: "[f]armers sell cocoa beans to aggregators, who gather them in volume from multiple regions to sell to traders and exchanges, before they are acquired by processors"[256] and "[g]round beans are then sold to manufacturers, brands, and retailers."[257] It is unlikely that Alpha could create a separate and compliant supply chain for Norwegian consumers while relying on different and non-compliant supply chains for the rest. Large companies already encounter challenges tracing their products through these supply chains, so Alpha is unlikely to know whether the processed cocoa it purchases is produced in the former or latter supply chains. Even if it could do so, it is likely uneconomical and may create further legal risk if cocoa beans from the latter supply chain accidentally wound up in candy bars in Norway. For these reasons, it is unsurprising that large multinational companies that sell chocolate products and other products adopt a global set of policies and procedures to manage their human rights risks.

What does this mean for directors' duties regarding human rights? The open question is whether the Brussels Effect may lead to standardization of *corporate governance* as it has led to the standardization of *corporate compliance*. There are a few possibilities for how this may occur.[258] First, existing EU-based supply chain human rights reporting and due diligence laws already require that human rights statements are signed by one or all board members in order to encourage senior management accountability for human rights.[259] Second, the CSDDD applies to both EU and non-EU companies so long as the latter meets the updated revenue thresholds.[260] This means that the national legislation that EU Member States

[254] BRADFORD, *supra* note 242, at 57.
[255] *See, e.g.*, STATISTA, GLOBAL COCOA BEAN PRODUCTION FROM 2020/21 TO 2023/24, BY COUNTRY https://www.statista.com/statistics/263855/cocoa-bean-production-worldwide-by-region/(reporting that the leading producers of cocoa beans were Cote d'Ivoire, Ghana, Ecuador, Cameroon and Nigeria between 2020-2024).
[256] Sydney Krisanda & Hannah Rojas, *Child Labor in Cocoa Supply Chains: Unveiling the Layers of Human Rights Challenges*, SUSTAINANALYTICS (Mar. 26, 2024) (explaining that Cote d'Ivoire and Ghana produce 60% of the cocoa beans), https://tinyurl.com/jmbtw997.
[257] *Id.*
[258] *See* Enriques, Gatti, and Shapira, *supra* note 18, at 278-82.
[259] LITTENBERG & ELLIOTT, *supra* note 243, at 3 (explaining that the Norwegian Transparency Act requires that reporting entities with an executive board to ensure that the human rights statement is signed by all board members); Modern Slavery Act, (2015) § 54(6)(a) (requiring that "if the organisation is a body corporate other than a limited liability partnership, must be approved by the board of directors (or equivalent management body) and signed by a director (or equivalent)").
[260] *Client Earth & Frank Bold*, SUSTAINABILITY DUE DILIGENCE AFTER THE OMNIBUS: LEGAL IMPLICATIONS FOR THE CSDDD 3-4 (Feb. 2026); *EU Adopts Mandatory Rules on Corporate Sustainability Due Diligence That Will Apply to Many US Companies*, COOLEY (Apr. 24, 2024)(explaining the employee and revenue thresholds for in-scope companies and conforming

will implement to enforce the CSDDD will apply to those U.S. companies that meet the in-scope requirements.[261]

These laws will create a regulated environment for these corporations concerning human rights due diligence and may expose them to a variety of monetary fines if they fail to do so. The imposition of monetary fines abroad by EU regulators can have significant legal implications in Delaware regarding a director's *Caremark* liability, as discussed above. Corporate directors may, therefore, confront *Caremark* liability if they fail to establish and monitor a human rights due diligence system as mandated by these EU laws.[262] Specifically, any fines imposed under these laws can evidence both financial and reputational losses that the corporation has suffered because of the directors' failure to abide by legally mandated human rights due diligence obligations. Such EU enforcement action may prove a real game-changer concerning the fiduciary duties of directors in Delaware.[263] This is particularly likely as Professors Carliss Chatman and Tammi Etheridge have highlighted the ways that agency fact-finding proves critical in ensuring that a *Caremark* case survives a motion to dismiss.[264] The consequence is that a fine imposed by an EU regulator following a factual finding about the corporation's compliance with EU laws may serve as a predicate condition for oversight liability in the United States.[265]

C. Convergence Led by International Organizations: "International Corporate Law"

Professor Mariana Pargendler describes the rise of "international corporate law" that is led by international organizations, such as the International Monetary Fund, World Bank, OECD, and the United Nations, as well as

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that *"[i]t also applies to ultimate parent companies of groups that satisfy the same thresholds on a consolidated group basis"*) (emphasis added).

261 Art. 3(a), CSDDD, *supra* note 19.

262 *See* Enriques, Gatti, and Shapira, *supra* note 18, at 23 (explaining three situations in which the EU's Corporate Sustainability Due Diligence Directive creates legal risks to US executives under *Caremark*: companies that supply products or services to EU governments; companies that claim adherence to environmental and human rights standards; and companies that would suffer significant legal and reputational harms from public crises involving environmental or human rights misconduct).

263 Enriques, Gatti, and Shapira, *supra* note 18, at 23.

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

265 *Id.* at 952 ("Plaintiffs in each of these cases were able to sufficiently allege that corporate officers had acted in bad faith because external agency actions—such as investigations, reports, subpoenas, and other clear violations of agency standards—made them aware of compliance problems that could have been avoided if the corporations had, and the officers utilized, adequate monitoring systems."). *But see* Prevent Regulatory Overreach from Turning Essential Companies into Targets (PROTECT USA) Act of 2025, S. 985, 119th Cong. (2025)("To prohibit entities integral to the national interests of the United States from participating in any foreign sustainability due diligence regulation, including the Corporate Sustainability Due Diligence Directive of the European Union, and for other purposes.").

standard-setters, such as the Basel Committee.[266] Professor Pargendler defines international corporate law as "the body of corporate governance rules and standards produced by international organizations, standard setters, and international agreements."[267]

It is worth distinguishing the differences between international corporate law from the "Brussels Effect" discussed above in Section IV, *supra*. Under the "Brussels Effect," the agent of change is the corporation that changes its practices to conform to a stringent jurisdiction's laws because it is legally, economically, or technically too challenging to separate its practices in that jurisdiction with its practices elsewhere. In contrast, under international corporate law, the agent of change is an international organization or standard-setter that develops principles of corporate governance. Corporate management acquiesces to those principles for a variety of reasons, including as a condition of financing (*financial incentive*); to comply with domestic legislation that has conformed to those international principles (*legal incentive*); or for the reputational benefits that such changes may bring (*reputational incentive*).

Professor Pargendler explains that international corporate law arose to address two problems with domestic corporate law regimes: (a) interjurisdictional externalities that one country's corporate laws may create for another country (such as human rights violations or environmental harms), and (b) nationalist bias that prevents domestic legislators from addressing the roots of those externalities.[268] These problems and constraints led various international actors to identify principles of corporate governance that have proven influential.[269]

Among other actors, Professor Pargendler identifies the efforts of both the OECD and the United Nations to introduce and to clarify corporate governance principles that can reduce interjurisdictional externalities that one country can impose on another by the corporate governance practices that it permits within its borders.[270] She explains how the *OECD Principles on Corporate Governance* addresses systemic risk, emerging in response to the interdependence of national economies on one another and the recognition of the effects of corporate governance practices on how the global economy functions.[271] In contrast, she explains how the United Nations—over a period of decades—convened multi-stakeholder meetings and collaborations to identify best practices that can mitigate or address the harms that corporations and other business enterprises may pose to the environment or human rights.[272] The World Bank also recognized the important of corporate governance for global financial stability

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[266] Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765 (2021).
[267] *Id.* at 1772; *see also id.* at 1774 ("The novelty of ICL does not lie in the transnational diffusion of legal ideas, which has shaped corporate law since its inception, but in the new forms of coordinated and original lawmaking at the international level.").
[268] *Id.* at 1769–70.
[269] *See id.* at 1778–1812 (describing the efforts of the IMF, OECD, World Bank, United Nations, IOSCO, Basel Committee, Financial Stability Board, and the influence of international agreements).
[270] *See id.* at 1781–88, 1794–1804.
[271] *Id.* at 1782.
[272] *Id.* at 1795–1803.

and promoted its corporate governance principles using the leverage it possesses over both countries and corporations.[273]

Professor Pargendler's research identifies important possibilities for how corporate directors' duties may change to include oversight over human rights. First, one or more of these organizations may develop new guidelines to address the role of the corporate board in promoting human rights. The OECD *Guidelines for Multinational Enterprises* aligns with its principles on corporate governance and includes an entire chapter on human rights.[274] Unfortunately, that chapter does not directly address the role of the board; however, the OECD guidance on due diligence does explicitly recognize the important roles of the board and senior management in overseeing due diligence for responsible business conduct.[275] The OECD may, therefore, consider revising its principles on corporate governance to incorporate the insights that it includes in its guidance on due diligence. As discussed in Section ___, *infra*, the United Nations may also consider revising its principles on business and human rights to acknowledge the importance of board oversight on (a) the development of a human rights policy, and (b) establishing and monitoring the various components of a human rights due diligence process. It may even wish to provide guidance on good practices for such board oversight, such as recommendations on the allocation of oversight duties, reporting channels, and the frequency of reporting and communication between the board with internal and external constituents.

Second, international organizations do not have to develop their own norms on corporate governance of human rights; instead, they can use their leverage to promote principles developed by another organization. One can imagine that a group of national regulators, corporate managers, or civil society actors (or some combination of them) could formulate a set of non-binding guidelines on corporate governance of human rights that elaborates on the specific responsibilities of the corporate board. One or more actors within the United Nations could endorse such principles, while the International Finance Corporation or another international organization could make adherence to such principles a condition of financing for corporations. An international organization does not need to fulfil both the *norm development* and *norm promotion* functions. While failing to do so may disqualify its efforts as international corporate law as such, it reduces the work of any one international organization and creates more possibilities for innovation.

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273 *Id.* at 1790.
274 OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT 16, 25 (2023), https://doi.org/10.1787/81f92357-en ("The *Guidelines* recommend that enterprises apply good corporate governance practices drawn from the *G20/OECD Principles of Corporate Governance*
275 OECD, DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT 59 (2018).

D. *Convergence Led by Executive Branches: The Role of Foreign Policy in Defining Corporate Governance*

Corporate directors may also want to incorporate human rights into their governance practices because of foreign policy priorities of the United States and its allies. In 2023, the United States and Japan signed a Memorandum of Cooperation (MOC) that created a Task Force on the promotion of human rights and international labor standards in supply chains.[276] The purpose of the Task Force is to "pursue the shared commitment of the Participants to protect and promote human rights and internationally recognized labor rights in supply chains by sharing information on respective trade policies, laws, guidelines, and, where appropriate, enforcement practices."[277] The Task Force is co-chaired by Japan's Ministry of Economy, Trade and Industry and the Office of the United States Trade Representative.[278] In 2024, this Task Force held its first round of government and stakeholder dialogues and exchanged information on the implementation of human rights supply chain laws, such as the Uyghur Forced Labor Prevention Act, and updates to the Xinjiang Supply Chain Business Advisory, among other topics.[279]

The purpose of this information exchange is for representatives of each government to update each other on their national efforts to promote human rights and internationally recognized labor rights.[280] The information exchange also covers updates on the guidance, laws, and regulations each country introduced to achieve this objective. Such information exchange serves two important purposes. First, it offers a form of accountability to ensure that each country continues to make progress towards the objectives of the MOU. Second, it offers a venue for peer-learning so that representatives from each government can learn from the experiences of their peers in the other, including best practices and lessons learned. These diplomatic efforts sustain interest in human rights due diligence efforts. It can also offer a channel for regulatory strategies—adopted in one jurisdiction—to reach another. For example, one or both of these countries' representatives may consider the importance of director oversight to the MOC's objectives in fostering human rights and labor rights. If so, these ideas on corporate governance can transfer to the other country through the diplomatic channels created through the Task Force and related efforts.

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[276] MEMORANDUM OF COOPERATION ON THE US-JAPAN TASK FORCE ON THE PROMOTION OF HUMAN RIGHTS AND INTERNATIONAL LABOR STANDARDS IN SUPPLY CHAINS 1 (Jan. 6, 2023).
[277] *Id.* at 2.
[278] *Id.* at 3.
[279] Press Release, Office of the U.S. Trade Rep., Readout of First Round of the U.S.-Japan Task Force on the Promotion of Hum. Rts. and Int'l Lab. Standards in Supply Chains (Feb. 14, 2024).
[280] MEMORANDUM OF COOPERATION, *supra* note 277, at 2.

CONCLUSION

Many corporations have vowed to respect human rights but still continue to violate the same. This divergence from commitment and practice is partially due to a failure to understand the different ways that those at the top – corporate directors and officers – tolerate, acquiesce, and even approve decisions that inevitably result in human rights violations. This Article clarifies the frequently obscured role of senior management in corporate human rights violations. It introduces a four-part typology that categorizes the various ways that corporate boards and officers are involved human rights abuses through either failed oversight but also direct approval of financing arrangements, revenue-sharing agreements, and business models that, operationally, cannot avoid violating the human rights of individuals. By exposing these decisions, the typology offers strategies for both diagnosis and prevention of human rights abuses. It alerts corporate counsel and even senior management to potential blind spots in their governance approaches that otherwise can lead them to contribute to human rights violations, even unwittingly. It also aids in deterrence by alerting prosecutors, civil society, and shareholders to the roots of many corporate human rights abuses and the distinct and varying ways that senior management may contribute to those violations. These insights can guide these stakeholders in their future engagement with corporate leaders to address violations in the past and deter those in the future.

By identifying the role of corporate management, this Article demonstrates how corporate human rights violations – at their core – arise from governance decisions. It is therefore unavoidable that corporate governance is an important tool for preventing human rights abuses at the firm level. Additionally, corporate law norms – at home and abroad – are an important complement to international human rights law because it is the former that serves as the bridge for the latter to operate within firms. Finally, corporate law can potentially serve as a tool to hold senior management accountable for corporate human rights abuses. As such, corporate law is an important aspect of achieving the objectives of international norms on human rights when applied to corporations. Specifically, the primary drivers for improved human rights practices are not found within human rights law but come from within corporate law itself relating to fiduciary duties, shareholder activism, and, at times, converging expectations on global expectations for good governance that include respect for human rights.

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