# Cisco's Consequences for Caremark

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# Abstract

The United States Supreme Court recently undermined efforts to punish corporate human rights violations and to prevent them in its recent decision in Cisco Systems, Inc. v. Doe I, holding that "courts may not create new causes of action for violations of international law" under the Alien Tort Statute (ATS). This decision is correctly understood as a major blow to future human rights litigation. What is less obvious is that it also endangers corporate governance. By weakening the legal risks that human rights litigation poses to corporations, the Court's decision simultaneously weakened the Caremark doctrine's potential to prevent human rights abuses by improving the governance of human rights. Caremark relies on legal and other risks to elevate issues before a corporate board – risks that the Court's ruling weakens. By doing so, it influences whether Delaware courts will recognize the oversight of human rights as part of the fiduciary duties of corporate directors and officers. Without this recognition, corporate management may have little legal incentive to improve their governance of human rights, making it all that much more likely that corporate human rights violations will occur. That is the full impact of Cisco. It endangers the project of improving corporate human rights practices through both human rights litigation and corporate litigation. The former punishes; the latter prevents. Cisco threatens both.



Keywords: Caremark, ESG, corporate governance, corporate human rights abuses, human rights litigation, United States Supreme Court



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# *Cisco*'s Consequences for *Caremark*

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## Introduction

The United States Supreme Court recently undermined efforts to punish corporate human rights violations and to prevent them in its recent decision in *Cisco Systems, Inc. v. Doe I*, holding that "courts may not create new causes of action for violations of international law" under the Alien Tort Statute (ATS).[1] This decision is correctly understood as a major blow to future human rights litigation. What is less obvious is that it also endangers corporate governance. By weakening the legal risks that human rights litigation poses to corporations, the Court's decision simultaneously weakened the *Caremark* doctrine's potential to prevent human rights abuses by improving the governance of human rights. *Caremark* relies on legal and other risks to elevate issues before a corporate board – risks that the Court's ruling weakens. By doing so, it influences whether Delaware courts will recognize the oversight of human rights as part of the fiduciary duties of corporate directors and officers. Without this recognition, corporate management may have little legal incentive to improve their governance of human rights, making it all that much more likely that corporate human rights violations will occur. *That* is the full impact of *Cisco*. It endangers the project of improving corporate human rights practices through both human rights litigation *and* corporate litigation. The former punishes; the latter prevents. *Cisco* threatens both.

The *Cisco* lawsuit was brought by the Falun Gong spiritual movement against Cisco for aiding and abetting the Chinese Communist Party (CCP) in repressing the Falun Gong members through torture, forced labor, crimes against humanity and other violations of international law.[2] The plaintiffs alleged that Cisco aided and abetted the CCP by selling the latter a software called the "Golden Shield" that was used by the CCP against the Falun Gong.[3] The plaintiffs relied on the Alien Tort Statute[4] to hold Cisco accountable for its alleged violations of international law. In dismissing the lawsuit, Justice Amy Coney Barrett recognized the devastation that the Court's holding will inflict by writing "we close the door that *Sosa* cracked."[5]

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1 *Cisco Sys., Inc. v. Doe I*, No. 24-856, slip op. at 1 (U.S. June 23, 2026).

2 *Id.* at 6.

3 Brief for Respondents in Opposition at 3–4, *Cisco Systems, Inc. v. Doe I*, No. 24-856 (U.S. Apr. 21, 2025).

4 The Alien Tort Statute provides that "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2024).

5 *Cisco*, slip op. at 1.

That open door has been essential to victims of human rights abuses who relied upon ATS to achieve justice.[6] The ATS is an old statute that received new life when it was successfully invoked in *Filartiga v. Pena-Irala* against a former Inspector General of Police in Paraguay who plaintiffs alleged had tortured and killed their family member in retaliation for his father's political activities and beliefs.[7] The U.S. Court of Appeals for the Second Circuit wrote the words that has served as a drumbeat for human rights advocates in the forty years since: "In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. . . . the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."[8]

The ATS has gone to the Supreme Court five times since those words were written. Each time, it leaves the Court more diminished until last week when it was extinguished – reduced to nothing more than its eighteenth-century formulation. But almost all these Supreme Court cases share a common and disturbing pattern: they seek to hold multinational corporations liable for their human rights violations. The ATS has been invoked against Arab Bank,[9] Royal Dutch Petroleum,[10] Nestle[11] and, more recently, Cisco because these cases involve *corporate conduct* that allegedly violate international law. Its audience was no longer restricted to State actors but also included corporate actors: senior executives, general counsel, compliance specialists, corporate attorneys, and shareholder who also monitored ATS to evaluate the risks that it posed to their corporation. ATS had the potential to evolve into a complementary lever of corporate governance that could cajole corporate management into complying with international law. But the Court's decision makes this less likely when it effectively eliminated the legal threat that human rights litigation poses to corporations.

This Essay examines the implications of *Cisco* beyond human rights litigation to explain its effects on corporate law and the *Caremark* doctrine and concludes by identifying why directors should continue to oversee human rights after *Cisco*.

## I. HUMAN RIGHTS LITIGATION ENABLES CORPORATE LITIGATION

Human rights litigation is one tool to achieve corporate accountability; corporate litigation is another. Before the Delaware Court of Chancery, another multinational corporation is accused of committing human rights abuses

6 *See, e.g.*, David J. Scheffer, The Supreme Court's Cisco Ruling Clears the Way for U.S. Tech to Aid Repression Abroad, COUNCIL ON FOREIGN RELATIONS (June 30, 2026), https://www.cfr.org/articles/the-supreme-courts-cisco-ruling-clears-the-way-for-u-s-tech-to-aid-repression-abroad ("[The Court] rendered the ATS a toothless relic that corporations may ignore in direct or complicit violation of universally accepted international norms, including prohibitions of genocide, crimes against humanity, torture, war crimes, and aggression.").

7 *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

8 *Id.* at 890.

9 *Jesner v. Arab Bank*, 584 U.S. 241 (2018).

10 *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

11 *Nestlé USA, Inc. v. Doe*, 593 U. S. 628 (2021).

abroad.[12] But, unlike most ATS cases, the lawsuit is not brought by one of corporation's victims or their loved ones. It is brought by a shareholder. And, unlike ATS cases, it does not seek to hold the corporation liable for violating international law. Instead, it seeks to hold its executives liable for breaching their fiduciary duties by failing to ensure their corporation's compliance with international law. The difference in plaintiffs, causes of action, and remedies may lead us to treat these as very different lawsuits concerned with separate matters. The former is a classic human rights lawsuit. The latter is about the fiduciary duties owed by corporate directors and officers. But this case has the potential to achieve what ATS could not, even if it were not currently dead. The Delaware lawsuit can change corporate governance practices, thereby preventing human rights abuses before they occur. But *Cisco* potentially destroys this too.

The corporate law doctrine that connects fiduciary duties to human rights law is *Caremark* under which 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."[13] In the Delaware case, the shareholder alleges that the executives failed the first prong by failing to have in place any reporting or information system that could alert them to violations of human rights, thereby breaching their fiduciary duties.[14]

The viability of this fiduciary claim depends on whether failing to monitor human rights exposes the corporation to meaningful risks, including legal, financial, and reputational risks. *Cisco* threatens that risk calculus. By narrowing avenues for corporate accountability, *Cisco* reduces the legal risks that corporations encounter from committing human right abuses. This not only makes it more difficult to *punish* corporations under human rights law but also complicates *preventing* human rights abuses through improved corporate governance.

The human rights abuses at the center of the Delaware lawsuit arise from the deaths of over six thousand migrant workers in Qatar following Federation Internationale de Football Association's (FIFA) decision to award the 2022 World Cup to the country.[15] Qatar subsequently awarded CH2M Hill Inc. a contract to oversee the construction required for the 2022 World Cup and Jacobs Solutions, the defendant corporation, subsequently acquired CH2M Hill

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12 Complaint, Wirral Borough Council v. Priya Abani, No. 2024-0431 (Del. Ch. Apr. 24, 2024).
13 Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).
14 Complaint, Wirral Borough Council v. Abani, 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."(emph. removed)).
15 *Id.* at 6.

Inc.[16] This transaction immediately raises red flags for anyone familiar with corporate human rights abuses: FIFA has a notorious past with human rights.[17] Qatar has been repeatedly criticized for its own human rights record.[18] The FIFA construction projects relied heavily on migrant workers who are highly vulnerable to human rights violations. And the company Jacobs Solutions acquired – CH2M Hill – was criticized for its human rights practices.[19]

Each of these facts is a blazing red alert warning corporate management about the very real possibility of human rights abuses for these construction projects. But perhaps corporate directors would not pick up on these signs as they are rarely experts in human rights. That is likely why the Business & Human Rights Resource Centre contacted the management of Jacobs Solutions to alert them to the human rights risks and inquire about the human rights due diligence processes that the corporation had in place to prevent, mitigate, and address these risks.[20]

The United Nations Guiding Principles on Business and Human Rights (UNGPs) provides a global standard for human rights due diligence and requires a "process [that] should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[21]

In its human rights policy, Jacobs Solutions states that it performs human rights due diligence.[22] The shareholder tested the truth of these claims by submitting a Section 220 request under Delaware law to inspect the "books and records" of Jacobs Solutions to evaluate the strength of the company's due diligence practices.[23] Shareholders frequently use a 220 demand to investigate their claims prior to filing a lawsuit. Here, the shareholder claimed that the board of Jacobs Solutions produced little to no evidence that it was monitoring human rights or implementing adequate due diligence processes.[24] The lack of demonstrable board governance of human rights led the stockholder to file a *Caremark* prong one claim against the directors for:

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16 *Id.* at 5.

17 *See, e.g.,* Amnesty International, A LEGACY IN JEOPARDY: CONTINUING ABUSES OF MIGRANT WORKERS IN QATAR ONE YEAR AFTER THE WORLD CUP (2023), https://www.amnesty.org/en/documents/mde22/7384/2023/en/?utm_source=chatgpt.com.

18 Complaint, Wirral Borough Council v. Abani, at 4 ("[T]he United States government, nongovernment organizations ("NGOs"), and the media widely condemned this omnipresent labor system in Qatar.").

19 *Id.* at 27.

20 *Id.* at 27-28.

21 Office of the U.N. High Comm'r for Hum. Rts., Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework princ. 17, at 17–19 (2011).

22 The company's Human Rights Policy states: "We conduct due diligence to avoid complicity in human rights abuses, and we seek to avoid causing or contributing to adverse human rights impacts through our own activities and business relationships." Jacobs Solutions Inc., Human Rights Policy (last visited July 3, 2026), https://www.jacobs.com/policies/human-rights-policy.

23 Complaint, Wirral Borough Council v. Abani, at 47-49.

24 *Id.* at 61-62 ("Despite having repeatedly and publicly acknowledged the importance of preventing human rights abuses, its so-called commitment to respecting human rights, and its obligation to monitor for potential human rights abuses, the Company produced not one document evidencing that the Board or any Board committee ever implemented any reporting system concerning the rampant human rights abuses occurring under their noses.").

> [F]ail[ing] to implement and monitor a [b]oard-level system of oversight to ensure compliance with: (i) federal human trafficking laws; (ii) health, safety, and environmental standards, as mandated by regulatory, 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.[25]

The success of this fiduciary claim depends on the viability of human rights litigation, even if only partially. Jacobs Solutions is currently defending itself against both corporate litigation, in Delaware, and human rights litigation, in Colorado, under the Trafficking Victims Protection Reauthorization Act ("TVPRA").[26] The corporate lawsuit relies on the human rights lawsuit to argue that "[t]his action also involves a *Massey* claim, given the fiduciaries' conscious decision to prioritize profits over legal compliance."[27] A *Massey* claim relates to failures to comply with positive law.

ATS was the mechanism that converted aspirational global norms into a matter of legal compliance for corporate executives and their counsel. The ATS transformed violations of international law into potential *Massey* claims because, by violating global norms, corporate actors faced potential legal liability under it before U.S. courts. The U.S. Chamber of Commerce, joined by other business organizations, argued as *amicus curiae* in *Cisco* that ATS litigation imposes substantial legal and reputational costs on U.S. companies.[28] They argue that "[e]ven if claims are ultimately unsuccessful, discovery multiplies the costs and extends the length of proceedings."[29] They also recognize that "because ATS claims seek to hold corporate defendants liable for grave international law violations, such as human rights abuses, defendants suffer substantial reputational damages simply by being named as defendants in these cases."[30] The result is that "these reputational harms can be difficult to remedy, even if the claims are ultimately dismissed."[31] Chevron Corporation, Dole, IBM, and Merck also filed as *amicus curiae*, arguing that "[t]he uncertainty over whether *Sosa* permits recognition of new ATS claims thus significantly burdens corporations like *amici* that have operations or affiliates overseas, particularly in developing

25 Complaint, Wirral Borough Council v. Abani, at 66.

26 First Amended Complaint, F.C. v. Jacobs Solutions Inc., No. 1:23-cv-02660-MEH (D. Colo. Mar. 18, 2024).

27 Complaint, Wirral Borough Council v. Abani, at 7.

28 Brief for the Chamber of Commerce of the United States of America, Business Roundtable, National Association of Manufacturers, and TechNet as Amici Curiae Supporting Petitioners at 3, *Cisco Systems, Inc. v. Doe I*, No. 24-856 (U.S. Mar. 13, 2025)("These suits frequently result in costly and protracted litigation (spanning nearly 15 years in Petitioners' case), imposing substantial legal and reputational costs on U.S. companies that do business abroad.").

29 *Id.* at 16.

30 *Id.* at 18.

31 *Id.*

countries."[32] They argued that ATS claims should be restricted to the original eighteenth century torts,[33] which is the outcome the Court ultimately reached.[34]

By their own admissions, the industry *amicus curiae* admit that ATS was never toothless even if it was rarely successful in court. Even unsuccessful lawsuits imposed significant legal and reputational costs that may motivate companies to adopt better human rights policies and processes. Scholars argue that "after ExxonMobil and Chevron were sued for their complicity in human rights violations in Indonesia and Nigeria, respectively, both corporations started introducing human rights policies and other CSR measures during or shortly after the legal proceedings."[35] In a study of fifty-five human rights litigation cases (involving forty corporations), they find that defendant corporations adopted various human rights due diligence steps, including a human rights policy, human rights training, and audits.[36] And it was not just the defendants who did so. Peer companies also took similar steps, possibly out of fear of similar litigation or because these human rights due diligence measures started to become industry standards for good practices.[37] The power of ATS litigation was not limited to judicial victories in court. Instead, it had the power to transform the boardroom and other corporate loci of decision-making to improve human rights oversight, policies, and practices. ATS did not only punish corporate human rights abuses. It potentially prevented new ones.

We cannot know how strong or weak its preventive effect. But this effect was potentially bolstered by another doctrine, *Caremark*, that transforms issues of international law violations into matters of fiduciary duties. Like ATS, *Caremark* claims are rarely successful in court but they can encourage corporations to invest in compliance efforts and improve board governance. Backed by *Caremark*, ATS litigation could have exerted more significant pressure on corporations to improve their human rights practices.

But *Caremark* claims typically survive dismissal when directors allegedly ignore violations of positive law.[38] The Food & Drug Administration regulates Blue Bell Creameries.[39] The FAA regulates Boeing. The boards of both these companies had failed to ensure their corporation's compliance with the

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32 Brief for Chevron Corp., International Business Machines Corp., Merck & Co., Inc., Dole plc, and Dole Food Co. as Amici Curiae Supporting Petitioners at 2 *Cisco Systems, Inc. v. Doe I*, No. 24-856 (U.S. Mar. 13, 2025).

33 *Id.* at 21 ("The time has come for this Court to close the door on *Sosa*'s speculation that there may be some new ATS claim that courts can recognize despite the separation-of-powers and foreign-affairs concerns. As in *Jesner,* the Court should apply the principles of its *Bivens* precedents and limit the ATS to the three Founding-era offenses identified in Sosa. [] Cabining the ATS to the violation of safe conducts, infringement of the rights of ambassadors, and piracy would give effect to the statute with arguable grounding in the actions and intent of the First Congress.").

34 *Cisco*, slip op. at 12.

35 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).

36 *Id.*

37 *See id.*

38 Sarah Runnells Martin & Dakota Eckenrode, *Caremark Developments: Business Risk Versus Massey Claims*, Skadden (June 2024), https://www.skadden.com/insights/publications/2024/06/insights-the-delaware-edition/caremark-developments (last visited July 3, 2026)

39 *Marchand v. Barnhill*, 212 A.3d 805, 810 (Del. 2019).

regulations set by these federal agencies.[40] The *Caremark* case against Facebook made history by going to trial but its underlying claim asserted that the board knowingly violated a Federal Trade Commission Consent Order.[41]

Without the ATS, what positive law do corporate human rights abuses violate? Perhaps the TVPRA can fulfill that role. The human rights litigation against Jacobs Solutions neither relies on the ATS nor the TVPA, the statutes at issue in *Cisco*.[42] So perhaps it will prove successful where *Cisco* failed. But the federal courts in Colorado have already diminished even the TVPRA as an avenue for corporate liability.[43] Without legal risks, it may prove challenging for any shareholder to assert a *Caremark* claim against corporate directors and officers for failing to monitor and oversee human rights. Human rights litigation also created reputational risks to corporations who were named as defendants. But both these legal and reputational risks diminish as ATS litigation diminishes. In arguing against ATS litigation, the Chamber of Commerce argued that the "costs imposed on U.S. companies in terms of resources that litigation diverts from research and development and other productive activities."[44] The question is whether U.S. companies will now divert resources to the prevention of future human rights abuses without the risk of litigation, whether originating in human rights law or corporate law.

## II. WHY BOARDS SHOULD STILL OVERSEE HUMAN RIGHTS POST-*CISCO*

Even if legal risks diminish, corporate boards should still oversee human rights because of continued shareholder activism on human rights governance; evolving global expectations of good corporate governance; and to fulfill their risk management and strategic development functions.

Shareholders continue to scrutinize board oversight of human rights. Sometimes they want more information on whether companies even have a human rights policy. But their inquiries increasingly concern the existence, quality, and effectiveness of human rights due diligence processes and the board's oversight of the same. For example, one of Alphabet's shareholders submitted a proposal requesting that Alphabet amend the charter of an existing board committee—Audit and Compliance Committee—to provide better

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40 *Marchand v. Barnhill*, 212 A.3d at 822; *In re The Boeing Co. Derivative Litig.*, 2021 BL 337478, at *27 (Del. Ch. Sept. 07, 2021); *see also* Tammi S. Etheridge & Carliss Chatman, *Federalizing Caremark*, 70 UCLA L. REV. 908 (2023).

41 Second Amended Verified Stockholder Derivative Complaint ¶¶ 330–32, *In re Facebook, Inc. Derivative Litigation*, C.A. No. 2018-0307-JTL (Del. Ch. Jan. 22, 2021).

42 First Amended Complaint, F.C. v. Jacobs Solutions Inc., No. 1:23-cv-02660-MEH (D. Colo. Mar. 18, 2024).

43 William S. Dodge, *Court Allows Claims of Forced Labor to Build World Cup Stadiums*, TRANSNATIONAL LITIGATION BLOG (July 30, 2025), https://tlblog.org/court-allows-claims-of-forced-labor-to-build-world-cup-stadiums/ ("Judge Chung dismissed some of the defendants for lack of personal jurisdiction and some of the claims as impermissibly extraterritorial. But critically, he allowed claims for benefiting from forced labor under § 1589(b) to move forward against some defendants.").

44 Chamber Amicus Brief, *supra* note 28, at 18.

oversight over AI and human rights.[45] An Amazon shareholder requested the creation of a brand new board committee "on Artificial Intelligence [] to address human rights risks associated with the development and deployment of AI systems."[46]

While neither of these proposals were approved,[47] shareholders obtained some success in changing the scope of committee charters to address human rights. 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."[48] 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."[49] Board governance of human rights will likely remain a topic of shareholder engagement through dialogue, activism, and even litigation – as the Delaware case demonstrates. While *Cisco* may reduce the likelihood of the latter, it does not eliminate the former.

U.S. law is not the only source of potential legal liability for corporate actors that violate human rights. The European Union adopted the Corporate Sustainability Due Diligence Directive that "establishes a corporate due diligence duty for the very large companies" and requires that they "identify and address actual and potential adverse human rights and environmental impacts in their own operations, those of their subsidiaries and in their chains of activities.[50] South Africa introduced legislation requiring certain companies to create a social and ethics committee[51] that must consist of three directors or prescribed officers tasked with monitoring corporate performance in several areas (including the environment, good corporate citizenship, and labor) and must report to

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45 *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, detect, monitor, and actively manage such exposures." *Audit Committee*, ALPHABET, https://abc.xyz/investor/board-and-governance/acc/ [web.archive.org/web/20250908162454/https://abc.xyz/investor/board-and-governance/acc/] (last visited Nov. 11, 2025).

46 *Id.* at 200.

47 Alphabet, Inc., Current Report (Form 8-K)citigroup(June 7, 2024), https://abc.xyz/assets/bb/9e/6edb74c225a65859e42261ae4b11/4d03d29b576032a603b6e429d17f8f1a.pdf [perma.cc/8D2F-4LML]; Amazon.Com, Inc., Current Report (Form 8-K) (May 22, 2024), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/069df373-8bf7-45d8-adf9-769a48cebbff.pdf [perma.cc/C7KJ-PQ26].

48 INTERFAITH CTR. ON COR. RESP. ICCR'S 2019 PROXY RESOLUTIONS AND VOTING GUIDE 180 (2019).

49 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 [perma.cc/6TQU-FPH4] (emphasis added).

50 Corporate Sustainability Due Diligence**,** European Commission, https://commission.europa.eu/topics/business-and-industry/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en.

51 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).

shareholders on the same.[52] Indian corporate law tasks boards with ensuring that companies spend at least two percent of their net average profits (on a three-year basis) on corporate social responsibility activities.[53] Additionally, the Indian Companies Act 2013 Act mandates that corporate social responsibility is a board function with certain governance and operational requirements.[54]

Many corporations that operate in the United States also operate in these and other jurisdictions that are shaping corporate governance expectations on human rights, specifically, and corporate social responsibility, generally. Change can originate there if not at home. It would be a mistake to believe that the U.S. Supreme Court or Delaware courts have the final word on corporate governance of human rights – even if their actions make it more challenging to hold corporate actors liable here. Many corporations operate globally so it is important that they pay attention to these emerging global norms on what constitutes good corporate governance practices. These developments do not only suggest that boards should undertake effective human rights governance. Instead, they suggest something more powerful: effective corporate governance must include oversight over human rights.

Some may challenge the idea of converging global norms on corporate governance regarding human rights. They may point to increased geopolitical tensions, heightened uncertainty, and ideological splits among societies, national and global. In this age, it is tempting to state that there is not much on which we can agree – even human rights. Even if true, we have not revised our opinions on the functions of the corporate board. On that, we can all agree. It is the supervisory body of the corporation tasked with two key responsibilities: risk management and strategic development. Boards must oversee human rights to fulfil these two responsibilities. Corporate boards fail to live up to their risk management function when they ignore the ways their decisions can violate the human rights of others – and how those violations can pose future risks to the corporation, even if not legal. For example, numerous public companies have board committees addressing "sustainability" or "public policy."[55] These committees reflect two truths. First, a series of issues – including but not limited to human rights – are now a matter of board governance. Second, boards care about these issues because their stakeholders care: consumers, employees, lenders, etc. These committees are proof that boards recognize the reputational risks of disappointing their stakeholders when it comes to issues that the latter

52 *Id.*

53 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 103 (Jean J. du Plessis *et. al.* eds. 2018).

54 *Id.* at 13.

55 Microsoft Corp., Environmental, Social, and Public Policy Committee Charter, Microsoft Investor Relations, https://www.microsoft.com/en-us/investor/corporate-governance/policies ("The Environmental, Social, and Public Policy Committee assists the Board of Directors in overseeing the Company's key non-financial regulatory risks that may have a material impact on the company and especially its ability to sustain trust with customers, employees, and the public. This includes policies and programs and related risks that concern environmental sustainability, the social and public policy impacts of technology including privacy, digital safety, and responsible artificial intelligence, and legal, regulatory, and compliance matters relating to competition / antitrust, trade, and national security.").

care about. The problem is that a board committee is not enough. It does not satisfy human rights due diligence on its own but it is a place to start. A successful *Caremark* claim against Jacobs Solutions might motivate boards to take the extra steps beyond staffing a committee. But they should also do so to manage their relationships with stakeholders as these committees recognize.

Corporations also abuse their role in strategic development when they approve business models built upon human rights violations. Some business models cannot be redeemed; by their very operation, they will violate human rights. That is not an outcome that can be mitigated through enhanced monitoring and audits. Instead, it is built into the very design of the business model. Corporate boards that opt for these business models play a pivotal role in facilitating the human rights abuses that their corporations inevitably commit.

Recognizing corporate human rights abuses as governance failures leads to several important consequences. First, it clarifies that corporate human rights practices are not separate from issues of corporate governance but are instead products of governance failures. As such, they potentially signal the existence of broader governance failures at the corporations that commit human rights abuses. Many recent corporate human rights abuses can be traced to poor governance decisions at the board level. As such, these incidents signal not isolated lapses but broader deficiencies in oversight, risk management, and accountability within the corporation. Their prevention therefore depends on governance reforms, particularly those that strengthen board engagement with human rights risks.

Second, and related, it challenges the notion that human rights governance—often grouped within environmental, social, and governance ("ESG") frameworks—is separate from core discussions of what constitutes good governance; rather, effective oversight of human rights is integral to it. Under this view, a corporation that is governed well is one that systematically identifies, assesses, and manages its human rights risks. This means that oversight of human rights is not only of importance to those who care about human rights but also those who care about good governance.

## CONCLUSION

*Cisco* will go down in history as the case that destroyed the Alien Tort Statute. But its damage extends beyond the ATS. By eliminating its legal bite, the Court's ruling also alters the legal risk environment that informs corporate governance. *Cisco* diminishes one mechanism that encouraged such oversight. But boards should continue to oversee human rights because of evolving global regulation, shareholder expectations, and risk management. Let us hope that is enough.

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