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Global Finance, Business and Human Rights

Faith Stevelman

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With Commentary on Backer's Views on The 2008, Protect-Respect-Remedy Framework Presented to the United Nations Human Rights Council

Faith Stevelman¹

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Introduction

I comment on the project of promoting heightened corporate responsibility in the area of human rights from the perspective of a scholar of corporate and securities law and, merely, a novice in the field of human rights law.² The disparity itself sheds light on the difficulty of the project embraced in the United Nations' Human Rights Council's reports on business and human rights.³ To succeed, the project must unite professionals from many different areas and viewpoints, including business leaders, heads of nongovernmental organizations, politicians (governments), human rights activists, lawyers and academics. And in the latter category are scholars of international law, human rights, labor law, environmental law and corporate and securities law. These "factions" come to the enterprise with remarkably different objectives, incentives, professional training and ways of viewing in the world. John Ruggie, as the Special Representative to the Secretary General ("SRSG") on Business and Human Rights (reporting to the Human Rights Council) would have a daunting task before him were it only to achieve some of

¹ Professor of Law, New York Law School; Director Center on Business Law & Policy. This article is dedicated to my mother Barbara Reider Stevelman, who even in her seventies, is the most intellectually curious person I know; and to my father, who in his forty years as a physician, cared for everyone with equal dignity.

² My only previous writing in the field is Faith Stevelman, *Globalization and Corporate Social Responsibility...* NYLS L Rev 2009

³ For citations to any of the "famous" projects/working papers in the area and the institutions themselves: these can easily be culled out of Larry Cata Backer's paper, which lists them comprehensively in his footnotes.

consensus on businesses' roles and responsibilities in these area. To go beyond, to endeavor to establish and operationalize a framework for promoting businesses' attentiveness to human rights compliance, illuminates the project's daring. If the stakes were not so high, the enterprise would seem foolhardy.

I cannot speak of the schism that exists between senior business leaders and human rights activists first hand.⁴ But it isn't difficult to imagine the flash points in such conversations. Although the SRSB consultation I attended (which focused on the problem of remedies) gave me a feeling for many of the different viewpoints and actors which have had input into the reports (from 2005 to 2009)⁵; my own professional space is the academy. And within this academic community, for example, business law scholars and the vanguard academics in human rights law rarely cross paths.⁶ These are distinct scholarly communities separated, with rare exception, by deep intellectual and methodologic schisms. Put most simply, for the past few decades, business law scholars have been concerned principally with streamlining law to facilitate optimal market transacting.⁷ As scholars, they have mostly lived with the luxury (or fallacy) of taking basic law and order for granted. (Is it really true that Alan Greenspan actually questioned the need for meaningful legal prohibitions on fraud?⁸)

Human rights internationalists, to the contrary, have been deeply invested in creating some viable tissue of global ordering in law. In international human rights law, the opposite of law is disorder and violence. Hobbes' "nasty, brutish and short" is a reality immediately around the corner.⁹ In corporate and securities law, in contrast, the counter-factual of law has been construed as "efficiency," – or even

⁴⁴ Remarkably, the Ruggie information gathering process has revealed widespread concern for human rights compliance among business leaders, as exemplified by [... see examples he provides in 2008 report]

⁵ I attended the consultation in Boston in fall 2008 (sponsored by the Kennedy School of Government and Oxfam) that addressed remedies and their appropriate for a.

⁶ Scholars in international and human rights law have moved into the economic realm; business law scholars have been slower to move in the other direction. For an example of the former, see e.g. Robert Howse & Ruti Teitel, *Beyond the Divide: The Covenant on Economic, Society & Cultural Rights & the World Trade Organization*,

⁷⁷ For one of the seminal treatments of this line of thinking see Frank Easterbrook & Daniel Fischel, *The Economic structure of Corporate Law* (19____).

⁸ In a fascinating story first printed in *Stanford Magazine*, former head of the Commodity Futures Trading Commission Brooksley E. Born recounts her 1996 lunch with Alan Greenspan during which he told her "Well, you probably will always believe there should be laws against fraud, and I don't think there is any need for a law against fraud," she recalls. Greenspan, Born says, believed the market would take care of itself.

⁹ For an academic treatment of how the project of market development may often, unwittingly, spark greater ethnic or national division see Amy Chua, *World on Fire* and, for a more journalistic account, Naomi Klein, *The Shock Doctrine*.

“liberty,” from a Lockean, market neo-liberal viewpoint.¹⁰ As a result, one’s evaluation of John Ruggie’s “Protect, Respect, Remedy” framework, as detailed in his 2008 report to the Human Rights Council, looks very different depending on which of these camps it’s viewed from, whether the business/markets/efficiency side or the activist/governance/pro-human rights.

To restate from above, the basic working premise outlined in the 2008 Ruggie report is that states have a duty to protect their citizens from human rights abuses; businesses have a duty to respect human rights; and they both can work jointly to establish a variety of remedial frameworks to deal with situations where human rights abuses by business are alleged. Given the belatedness and contingency of modern human rights law, Ruggie’s framework is beyond doubt innovative and brave. Only if we naively anticipated an economically and politically stable, culturally simpatico, “flat-world” of economic transacting might we dismiss the importance of what is being attempted and advanced therein. (Let us not forget that the word “genocide” was coined only in 1943 by Raphael Lemkin, a Polish lawyer and linguist of Jewish descent who narrowly escaped the Holocaust in Europe, but lost 49 relatives therein.¹¹)

For a dozen years after the fall of the Berlin wall, in that one super-power, “end of history” world, such a self-actualizing, relatively stable, global marketplace was imaginable (and imagined).¹² But surely it no longer can be. Russia’s slide into plutocracy provides one cautionary tale of what goes wrong with too little law.¹³ The festering problematics of the Washington consensus in the southern hemisphere provide another.¹⁴ China presents its own unique conundrum. The rise of radical Islam and the attacks of September 11th provide yet another challenge to the west’s liberal, democratic, capitalist tradition and its espoused goals.¹⁵ As Robert Gilpin’s writing illuminates, the study of globalization and global economic

¹⁰ Neo-liberalism is a controversial and loaded term but most simply it implies a reduction in state control to free up (even) market actors to seek their own individual good, in economic terms, as a form of freedom. For a critical reading of the neo-liberal tradition and a contemplation of its plausible impact on the global financial crisis see e.g. **The Revenge of the Market on the Rentiers.: Why Neo-Liberal Reports of the End of History Turned Out to Be Premature**, Jose Gabriel Palma, Univ of Cambridge, available on SSRN

¹¹ For discussion of Lemkin’s work and his legacy in the development of international laws against atrocities see e.g. David Luban, “A Theory of Crimes Against Humanity,” 29 Yale J. Int’l L. 85 (2004).

¹² cite to first Hansmann & Krakmann article “The End of History for Corporate Law” and then their redo in Iowa Law Review; see also Lea Brilmayer, “American Hegemony: Political Morality in a One Superpower World, Yale Univ Press (1996).

¹³ For a superb treatment of the reasons (securities) law matters and how, see Robert Ahdieh, Making Markets: Network Effects & the Role of Law in the Creation of Strong Securities Markets, 76 S. Cal. L. Rev. 277 (2003).

¹⁴ There is a vast literature on the shorfalls of globalization, see inter alia, Joseph Stiglitz, Globalization and its Discontents, ... Saskia Sassen, Globalization

¹⁵For a treatment of this issue see Faith Stelman Kahn, Bombing Markets Subverting the Rule of Law: Enron Financial Fraud and September 11th 2001 Tulane Law Review

effects cannot be divorced from the study of international politics and regional conflicts.¹⁶

Just so, both Ruggie and Backer acknowledge that markets live in larger institutional structures: social, legal and political; and cannot operate apart from them. Given the gaps in governance created by the rapid pace of globalized commerce and finance, there is a clear need to develop new hard and soft law structures to address the potential conflicts between businesses and human rights. Both market transacting and social transacting, ultimately, will come undone without the rule of law.¹⁷ The list of failed states and failed markets enumerated above, as well as the recent global financial crisis, are exemplars of this truth. Seen fundamentally, then, law is not the enemy of the market, but rather its complement. As Ruggie remarks, businesses will not necessarily prosper where governments comprehensively tolerate legal vacuums and pursue deregulation. Without regulation and enforcement, businesses have less choice to pursue both profit and “added capacity” -- in the workforce, in consumer relations, in attracting conscientious investment, in good public relations and in eschewing corruption and fraud. In legal vacuums, all they can attend to is not being losers in the resulting race to the bottom.

So globalization is proceeding -- but it doesn't look quite like the WTO might have imagined, or the academic vanguard proposed. The limits of sovereignty have not given rise to a world of low friction, reliably smooth, self-perpetuating market transacting. Instead we observe a rough and tumble of realpolitik, national and regional exigency, high stakes-high risk opaque financial transacting and still uncertain and mixed economic results. Even leaving aside Iran's nuclear ambitions, the economic and geopolitical landscape could hardly be more dynamic and unstable.¹⁸

Though disagreements about the overall effects of globalization persist, there is consensus that the contemporary version of globalization is unique; that it's qualitatively different from earlier waves of globalization.¹⁹ To be sure, humans have been globalizers since before they were even human. Recent studies in paleo-anthropology suggest that Homo Erectus meandered out of Africa behind the grazing animals foraging through the grassy plains advancing through Asia and

¹⁶ Robert Gilpin, *International Political Economy*, Princeton 2001.

¹⁷ Of course the finest treatment of the place of market (economic) institutions within the broader scheme of social institutions remains Max Weber, *Economy and Society*.

¹⁸ For example, we see increasingly dramatic signs of climate change across the globe, as exemplified by a rise in large scale natural disasters and widespread fatalities; and yet we are at a moment of hope in relation to Palistinian-Isaeli peace talks.

¹⁹ Can cite to Gilpin again. (first several pages)

Europe. The progress in science, technology, arts and letters, and economic organization (the shift away from feudalism) that marked the European Renaissance were spurred by advances in trade and finance. And the Chinese, famously, were fantastic early traders, as their thousands of years of cultural achievements display. Yet, modern technology appears to have occasioned a seismic shift in the phenomenon of globalization; and one that is highly relevant to the multinational corporations.

The secret, of course, is technology. With global satellites and cheap, pervasive cell phone service, communications technology has advanced profoundly in the last thirty years. And with the development of the personal computer and radically “micro” micro-processing power, information technology has been transformed. The transformation in communications and information technology has facilitated the gathering, integration, synthesis and instant-updating of financial and operational information vital to corporate and market transacting on a global basis.²⁰

Finally, let us not forget that the invention of the modern, multi-national corporation is itself a 20th century technological leap of enormous moment. Our minds tend to conflate what is with what was inevitable; but it isn't so. The modern, highly capitalized, professionally managed, limited liability corporation is the result of early twentieth century legal transformation. Its story partakes of both legal invention and legal dis-integration (deregulation). The former is recognizable in the pervasive acceptance of the corporation as a robustly capable, distinct legal person invested with an astoundingly broad set of legal rights, including durability over both time (immortality) and space (national and international recognition). An example of deregulation is the enactment of broadly enabling corporation codes which eliminated the bevy of earlier stakeholder regarding proscriptions. The elimination of most all limits and requirements from these codes encouraged capital investment in the corporate form, and hence a tremendous leap in industrial infrastructure.²¹ And the codes' simplicity enabled even nonlawyers to establish corporations “preloaded” (as a matter of law) with all powers requisite to their business. If you contrast the laws of personal inheritance, the fragility of trusts and wills, the complexity even of marrying and divorcing, with the easy formation and

²⁰ For discussion see e.g. Gilpin (first several pages) and also Eric Schmidt, “Truth or Consequences,” Forbes Magazine, August 12, 2010.

²¹For discussion of the transition from the pattern of legislative chartering and proscriptive regulation of the corporate form to the far more “deregulatory” pattern of incorporating via simple filings under statutes which freely grant corporate powers and impose very few restrictions see Faith Stevelman, Regulatory Competition, Choice of Forum and Delaware's Stake in Corporate Law...Delaware Journal of Corporate Law (there is a specific discussion of this in the early part of the paper – as it relates to Delaware's interest in holding onto the firms chartered there) and see also Frederick Tung, Internal Affairs Doctrine ...

muscularity of the corporate form, the powerful legal technology that is the modern corporation comes into view.

My task is to comment on the excellent article of Larry Cata Backer which provides an account of the “protect, respect, remedy” framework set forth in the seminal 2008 report by John Ruggie, the Special Representative to the Secretary General, on Business and Human Rights.²² Installed in 2005, Ruggie’s office has been extended under the administration of the current secretary general, Ban Ki-Moon. Ruggie’s most recent efforts have been directed at commencing the operationalization of this framework, which has been vetted world-wide with governments, lawyers, academics, and human rights advocates.²³ How will governments, corporations, business associations and rights advocates imagine and construct the varieties of fora and modes of recourse available to hear rights grievances?²⁴

My comments are not intended to be comprehensive. I focus first on Backer’s accomplishments, and then on the remaining features of the 2008 PRR framework which I find noteworthy. I then turn my analysis to developments in corporate and securities law which are relevant to this evolving human rights framework. I end with a contemplation of the complex relationship between legal transformation and social transformation. Clearly, there is no simple answer to the question of how cultural and legal transformation evolves and what their interrelationship is. But Backer is surely correct in his conclusion that the ‘protect, respect, remedy’ framework will be influential in the evolving relationship of business and human rights.

I. Overview: The PRR Framework of the 2008 Report

There were reports prior to 2008,²⁵ and there have been ones since, so why do commentators focus on the 2008 Report made by John Ruggie, the Special Representative to the Secretary General of the United Nations on Business & Human Rights? The answer is that the 2008 Report lays out the core principles of the foundation for the Human Rights Council’s initiative in promoting adherence to human rights standards by international businesses. The 2008 Report refers to itself as a “conceptual and policy” framework for business and human rights, and its central message is captured in the phrase: “Protect, Respect, Remedy.”

²² Add citation to Backer

²³ Ruggie so describes in the 2008 report and, also, Fried Frank has produced a memo/survey which describes further vetting.

²⁴ This was the precise subject of the fall 2008 consultation with the SRSB which I attended, as sponsored by the Kennedy School of Government in conjunction with Oxfam at the Boston offices of Foley & Hoag.

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As lawyers and others who follow the field know, the Ruggie Reports follow the spectacular descent into oblivion of the so-called “Norms” (the “UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”). The Norms were released in 2003 and by 2004 they had been roundly rejected. Their failed approach was to enunciate a core set of international human rights standards that business would be responsible for addressing in terms of compliance and prevention (i.e. protecting from abuses), in coordination with the responsibilities assigned to states. Ruggie was one of the most outspoken detractors from the Norms. The fear was that the list of “core” business/human rights norms was underinclusive and the assignment of primary and secondary responsibility amongst states and businesses would yield unproductive dissension. Hence, in 2005 the UN appointed Professor Ruggie as the “Special Representative on business and human rights,” reporting to the Secretary General and the Human Rights Council. His five year term was extended for another five years in 2010.²⁶

The 2008 Report begins with an extensive discussion of states’ duty to protect citizens from human rights violations, whether committed by individuals or corporations. Along these lines, the Report describes governments’ roles in promoting corporate cultures where respect for human rights will be a salient, core value. The Report notes states’ shortfalls in vertical coherence (where governments play lip service to firms’ duties to respect human rights but fail to implement efficacious mechanisms of redress) as well as horizontal coherence (where states facilitate a disconnect between the agencies tasked with promoting human rights, and other governmental bodies empowered to advance commercial and investment goals). Finally, the tremendously important role of business investment treaties is mentioned. These treaties all too often stymie host governments from enacting new regulations to raise social and environmental standards in the country during the pendency of an ongoing development project (perhaps over several decades). Far too little attention has been brought to this controversial subject within mainstream legal academia, but it is not a central focus of the Ruggie project.²⁷

Yet there is no ambiguity surrounding the fact that the central question in the report is how to promote human rights compliance by businesses – and the role of governments, businesses, civil society advocates and international organizations in

²⁶ For a superb overview of the United Nations Human Rights treaties dating back decades and leading up to the Ruggie Reports, see “Global Efforts to Hold Corporations Accountable: Past Efforts and Current Initiatives,” 12 *The International Review* 16 (published by New York Law School, 2009).

²⁷ For a sober (i.e. relatively nonpartisan) account of the investment treaty process and structure see Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 *A.J.I.L.* 179 (2010)

achieving this goal. According to the 2008 Report, a crucial factor that's been missing is a coherent "conceptual and policy" framework, and this is where the Protect-Respect-Remedy constellation is intended to make a meaningful contribution.

Within the 2008 Report, corporations' duty to respect human rights is captured in the phrase of "do no harm." Yet it is more than a passive duty. Rather, the report describes the many intra-corporate initiatives which would add up to a meaningful commitment to avoid complicity in human rights abuses. Here again, Ruggie invokes the notion of "corporate culture," which encompasses leadership from the top, systematic compliance codes, the dissemination of such codes of conduct throughout each level of the organization, and the creation of internal mechanisms for reporting and addressing grievances. As part of this effort, corporations are advised to undertake impact assessments before the undertake various projects, and to conduct extensive, ongoing "due diligence" into potential human rights problems through the course of their operations. In this way, the report suggests, corporations can limit the possibility that they will become embroiled in complicity with human rights abuses, and hence limit the possibility that they will be held liable in national courts, nongovernmental fora and in the court of public opinion.

A further achievement of the report is its reporting on the sum of many different kinds of human rights initiatives and their varied innovations. First of all, the 2008 Report clarifies that it itself is a product of an astoundingly comprehensive "due diligence" process. This process encompassed 14 multi-stakeholder consultations on five continents; the undertaking of more than two dozen research projects, along with the assistance of global law firms and other legal experts; the amassing of 1,000 pages of documents and twenty 'submissions;' and two previous reports to the Commission on Human Rights and the Human Rights Council.²⁸ And as one works through the 2008 Report one becomes aware of the accumulation of varied efforts to promote businesses' conformity with evolving human rights standards; for example, as enunciated in the Equator Principles, the Paris Principles, a multitude of multi-stakeholder initiatives including the Kimberly Process, the OECD Guidelines for Multinational Enterprises, the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the Global Compact, as well as the sustained efforts of the International Labor Organization. The point is, there appears to be a growing crescendo of broad-based concern to promote ethical conduct by business – through initiatives which are *not* anti-

²⁸ This is described in the Report at #4, p. 3. According to footnote #1, therein, "All documentation produced by and for the mandate is posted on the Business and Human Rights Resource Centre's website: <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>."

business or *anti*-market, but rather see the future of strong markets and strong businesses being sustained only within broad-based frameworks of values and efficacious remedial mechanisms.

And on the issue of remedies, the 2008 Report does a superb job of surveying the strengths and weaknesses of the entire spectrum of fora and approaches: from state based tribunals, to international tribunals, to nonstate tribunals, to arbitration councils established by consortium of businesses across various industries. The Reports statements about the limits of redress available for corporations' host-state rights violations in home state courts is well taken. Travel and litigation costs, jurisdictional and statute of limitations blocks, evidentiary problems, and even defenses based on 'state interests' (including the recent 'state secrets' defense used to a Boeing subsidiary's advantage in federal court) will commonly mean that the grievance cannot effectively be pursued in the corporation's home state. And all too often the host state will lack the capacity to provide acceptable redress. Perhaps the most exciting new idea in the report in the area of remedies, is the establishment of an international "ombudsman," who could consider and recommend appropriate vehicles and modes of redress in response to seemingly valid complaints of human rights abuses by business.

As its conclusion makes clear, the 2008 Report, while a major conceptual and policy innovation, is only one step in the evolving program to improve businesses' conscientiousness in regard to human rights. This Report, along with the ones presented in 2006 and 2007, suggest progress which, as stated therein, "would not have been conceivable a decade ago." Nevertheless, the success of the project does not rest on formal, legal change, at least not as a primary, first-order response. The Reports and the other initiatives they refer to be judged as contingent responses to a growing and serious international problem. While contingent, their multiplicity and creativity and purposefulness may cumulatively create the traction to inspire grass roots change – change in the social expectations which support commerce and investment. If that occurs, then the necessary legal and regulatory and also informal mechanisms of accountability will develop accordingly.

II. Comments on Backer's critique of the 2008 Ruggie Report

A. The Importance of History.

The Introduction and first substantive section of Backer's article provides an historical account of the conceptual and practical background and evolution of John Ruggie's reports. We get an account of private sector (voluntary business) initiatives aimed at fostering human rights compliance, including global reporting initiatives and the "Guidelines for Multinational Corporations" promulgated by

the OECD (Organization for Cooperation and Development). We also learn about the prior efforts by UN agencies, including the UN Global Compact and the abandoned UN “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. Finally, Backer offers an account of Ruggie’s annual reports, beginning in 2005.²⁹

Why so much history? In the climate of law and economics, corporate legal teaching and scholarship has had little need for history. Even securities law is commonly taught and analyzed from an ahistorical perspective.³⁰ Human rights law, it would appear, is different – different because of its contingency, its optative nature. In contrast to (domestic) corporate law in the United States, and securities law, the extra-sovereign nature of human rights law means that it is an ongoing, contingent project.³¹ It exists as law in a different way than corporate and securities law do, and hence its “manufacture” is inherently interesting and important. In sum, the conceptual and practical “archeological evolution” underlying Ruggie’s 2008 report and PRR framework is a necessary and worthwhile aspect of its study and Backer’s piece accomplishes this clearly and succinctly.

B. The Premise of Law and the Uncertain Promise of Polycentricity

At the most superficial level we consider “law” to be that which cannot be disregarded without the risk of state sanction, civil or criminal. But the concept of law is quite patently broader, more profound and more elusive than this definition would represent. Law gives authority to concepts and standards which are broadly (if not comprehensively) endorsed. As social scientist Tom Tyler and others have illuminated, laws are actualized, mostly, because they are internalized as legitimate.³² Adherence to law is inspired, mostly, not by the mathematics of risk and magnitude of sanction but rather by virtue of law’s adherence to broadly shared value and understandings connected to substantive and procedural justification and legitimation.³³

²⁹ Cite Backer and take any necessary cites to the UN initiatives, the voluntary initiative and the reports from his footnotes.

³⁰ A wonderful deviation from this ahistorical focus, which helps to make sense of the broader arc of the securities laws, is contained in the library and archives of the SEC Historical Society. See Also Joel Seligman, *The Transformation of Wall Street: A History of the Securities and Exchange Commission*.

³¹ See Ruti Teitel, *Humanity’s Law*, Oxford University press (forthcoming)

³² See Tom Tyler, *Procedural Justice*

³³ For a fascinating analysis of the theoretical bases for recognition of private law beyond sovereign borders see Florian Rodl, *On the Legitimatory Problem of Private Law "Beyond the State"* 56 *Am. J. Comp. L.* 743 (2008).

Human rights law is challenged at both ends of the spectrum. The limits of sovereignty pose a functional problem in terms of sanction.³⁴ And value pluralism poses a challenge in terms of the commonality of understandings necessary for internalization and voluntary adherence. Of course, this challenge is magnified when the “laws” are addressed to large, faceless bureaucracies which, even if we could find them, and decipher their voices, would speak in different tongues.

These challenges – enforceability and value pluralism -- are part of why Ruggie’s business and human rights project resolved itself around the concept of businesses’ “respecting” human rights, instead of endorsing affirmative duties for businesses’ advancing human rights, as had been true in the subsequently abandoned “Norms.” The “respect” framework, plainly, is a looser, more conceptually derivative concept, and one which can evolve through soft law mechanisms -- at least whilst it matures. In contrast, the duty (attributed to states) to protect citizens against human rights abuses needs a harder legal edge.³⁵

In a very real sense, then, the Ruggie project of mandating, informally, that corporations “respect” human rights” is a child of the new governance.³⁶ And Backer’s commentary on Ruggie’s synthesis of hard law with softer rules and industry voluntarism is illuminating. The synthesis is intellectually exciting, but also confounding – confounding because the “new governance” movement is itself a moving target. “New governance” – the synthesis of hard law and softer rules and norms, means different things to different legal and scholarly communities. Corporate and securities law have enthusiastically embraced one form of the new governance in their favoring soft law, self-regulatory approaches to addressing economic and commercial challenges, but not because of value pluralism or skepticism regarding potential enforceability.³⁷

In corporate law, the expansion of soft law and the new governance has meant, for example, favoring governance requirements imposed by the stock exchanges and FINRA -- the Financial Institutions Regulatory Authority, over both federal and

³⁴The problem is illustrated, for example, by the controversy surrounding the legitimacy and authority surrounding the International Criminal Court – which is still opposed by the United States and other countries.

³⁵ For Ruggie’s own discussion of the challenge see John Gerard Ruggie, *Business & Human Rights: The Evolving International Agenda*, 101 A.J.I.L. 819(2007)

³⁶ cite to articles on The New Governance. e.g. Orly Lobel, *Setting the Agenda for New Governance Research*, 89 *Minn. L. Rev.* 498 (2004). ; Fred Amman; *2010 Wisconsin Law Review Wisconsin Law Review*, 2010, 2010 *Wis. L. Rev.* 673, 21963 words, SYMPOSIUM: NEW GOVERNANCE AND THE TRANSFORMATION OF LAW: ARTICLE: THREE CONCEPTIONS OF LAW: TOWARDS A JURISPRUDENCE OF DEMOCRATIC EXPERIMENTALISM, Dr. Michael Wilkinson; David Esty, *Yale L J Global Administrative Law*

³⁷ The project of rethinking self-regulation in the financial industry has, of course, more than begun. See e.g. Saule Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, *BROOK. J. INT’L L.* (forthcoming). Cite to recent paper by Chris Brummer presented at Columbia forum on Law & Economics; Gillian Hadfield;

state corporate laws.³⁸ (FINRA is a stand alone “regulatory” body which absorbed the regulatory functions of the New York Stock Exchange and the National Association of Securities Dealers.) In this same vein, scholars and industry participants have favored housing accounting standards-setting in the private “Financial Accounting Standards Board,” and auditing oversight in the quasi-private, quasi-public (and apparently unconstitutional³⁹) Public Company Accounting Oversight Board. Even the state courts and especially Delaware’s courts of equity –most nationally influential state courts in corporate law area -- have favored “intra-corporate solutions” like ratification/approval by subcommittees of “independent” directors over ex post judicial intervention (even where fiduciary malfeasance has been alleged).⁴⁰ These are only a few of the infinite tasks assigned to “self-regulatory,” private bodies in the new “soft governance” world.

Of course, the guiding motive behind this push to self regulation is that it will be less costly and more flexible, hence conducive to private parties’ maximization of wealth. In short, the guiding motive is “efficiency.” Law promulgated by legislatures (state or federal) or even specialized administrative agencies (encumbered by notice and comment processes for example) is disfavored. Of course, private, self regulation looks most attractive in a world of equal commercial bargaining power, relative equality of information and voice, and few externalities. Where the opposite conditions pertain, self-regulation may operate as an alternative mode of regulatory capture (sans the regulation). To be sure, the experiences of late 2007 through today, as they have rocked the financial services industry and the real economy, are making government, lawyers and citizens rethink the self-regulation paradigm. The excesses of self-regulation are being paid for by those suffering in the real economy (the New York Times just reported that

³⁸ For the argument that the internationalization of capital has effectuated a system of enhanced exchange-based financial regulation and regulatory competition, see Chris Brummer, *Stock Exchanges and the New Market for Securities Laws*, 75 U. Chi. L. Rev. __ (2008)

³⁹ See *Free Enterprise Fund et al v. Public Company Accounting Oversight Board*, (2009), Supreme Court; for discussion see Donna Nagy, _____

⁴⁰ The most aggressive of such proposals involves eliminating judicial review of controlling shareholders’ freezeout transactions where there’s been majority of the minority shareholder consent and special committee consent. See e.g. *In re Cox Communications* (Strine 20__). For commentary, see e.g. Kenneth B. Davis, Jr. *Structural Bias, Special Litigation Committees, and the Vagaries of Director Independence*, 90 Iowa Law Review 1305 (2005).

one in seven Americans lives in poverty)⁴¹ and by those bemoaning the strictures of the new “Dodd-Frank” legislation.⁴²

Yet Backer, and clearly Ruggie too, are sanguine about the promise of polycentricity and the synthesis of hard law, state-based duties to protect and softer law corporate commitments to respect human rights. (The protect and respect duties come together in relation to remedies: both states and businesses are foreseen as having to innovate new kinds and new for a for remediation.) But are they correct to pause on the soft ground of soft governance? Is the abandonment of the *UN Norms* on business and human rights (which might have obtained mandatory force through the construction of a matrix of binding contracts), a move in the right direction? Both authors believe it’s an improvement, but neither entirely spells out why.

In fact, I agree with them. The “commitment to respect” framework is a positive innovation in an imperfect world. It’s a commitment that will facilitate management’s ability to maximize human rights adherence by corporate actors *in conditions of scarcity and uncertainty* – which is to say the real world that businesses face every day. Ruggie nails this when he discusses human rights due diligence for businesses and how contextually driven it must be. Business’ appropriate attentiveness to avoiding human rights abuses will require an appraisal of country/regional factors, business-specific practices and the corporation’s larger network of operations, as the 2008 report states.⁴³ In such a dynamic environment, the hands-on executives, on their own or in conjunction with their lawyers and board committees, will need to make a fact specific analyses of priorities along the spectrum of “do no harm.” Clearly, this is not the kind of mandate that could readily be specified *ex ante*, at least not with any meaningful precision. I’d say that the key is to encourage, to condition and incentivize business leaders to include the downside of corporate human rights abuses *as part of their business judgment*, rather than to remove or downsize the scope of that judgment through harder, more intrusive forms of human rights law-making.⁴⁴

⁴¹ The ranks of the working-age poor climbed to the highest level since the 1960s as the recession threw millions of people out of work last year, leaving one in seven Americans in poverty. The overall poverty rate climbed to 14.3 percent or 43.6 million people the Census Bureau said Thursday in its annual report on the economic well-being of U.S. households. [citation to census report, week of September 17th].

⁴² add official cite to Dodd Frank

⁴³ cite to disc. of Due Diligence in the report

⁴⁴ There’s little doubt that American corporate law affords corporate directors substantial leeway to avoid the public and corporate harms arising from human rights abuses. This discretionary space exists within the construct of “the business judgment rule.” For a recent review of the grounds of board primacy (from the perspective of efficiency or civil society theory) see Grant Hayden & Matthew T. Bodie, *SHAREHOLDER DEMOCRACY AND THE CURIOUS TURN TOWARD BOARD PRIMACY* 51 *William & Mary Law Review* 2071 (2010) ,

And yet I think that Backer overstates the character of Ruggie's legal framework with his almost Ovidian account of legal morphogenesis (the synthesis of hard and soft law and social norms and standards into the "polycentric" business and human rights framework). As I will describe below, a curious but powerful feature of Ruggie's success is the humility of his PRR framework, as reflected in his relative avoidance of novel concepts and grandiose "internationalist" rhetoric. He proposes merely a slight expansion, a customization of the current corporate governance framework, as it takes into account many systems of internal controls requisite to compliance and reporting.⁴⁵

C. Due Diligence and the Problem of Complicity

In fleshing out his duty to respect Ruggie invokes the commonly used conceit of "corporate due diligence."⁴⁶ As described in the report, and by analogy to the overall process of corporate due diligence, the human rights due diligence process would encompass gathering information of many kinds (especially about apparent rights-based "risks" and the rights-compliance conduct of stakeholders, affiliates and third parties), creating a statement of purpose, setting goals and standards and integrating the message throughout the organization.⁴⁷ In addition, of course, it would be essential to measure and systematically revisit compliance goals. Corporations do this kind of assessment in many areas, of course. The communications and technology revolutions of these decades have transformed corporations' ability to just these kinds of assessments, and influenced corporate law to prescribe them.⁴⁸ The challenge of remaining profitable in a condition of global competition, one would think, would demand a nearly constant refinement of the firm's systems and practices for nearly real time accounting for revenues, resources and risks, etc.⁴⁹

Corporate lawyers do "due diligence" for their business clients prior to a variety of transactions and events. Due diligence is required prior to an offering of securities

⁴⁵ For the argument that accurate and comprehensive internal reporting, up to the offices of senior management, the board and shareholders, as required, is the most vital component of corporate fiduciary duty see Faith Stevelman Kahn, *Transparency and Accountability: Rethinking the Relationship of Corporate Fiduciary Duty and Corporate Disclosure*, U Ga Law Review 2000.

⁴⁶ For a famous account of corporate due diligence in relation to corporate securities offering materials see *Escott v Barchriss*.

⁴⁷ For an early statement of the comprehensive importance of internal corporate information gathering and reporting systems see *The Treadway Report*, 1987; and for commentary on its gradual acceptance into the corporate governance framework see Melvin A. Eisenberg, *The Board of Directors and Internal Controls*...

⁴⁸ For the landmark instance see *In re Caremark*, Delaware Court of Chancery 1996, Chancellor Allen.

⁴⁹ Many corporate commentators have suggested that we are on the verge of moving to a system of real time corporate disclosure, instead of the system of periodic reporting with updating on Form 8-K or as necessary to obviate selective disclosure (as required by Reg FD). But the law has not moved that far yet.

and the preparation of other public filings, so that the public statements match the actual condition of the firm – this is an outgrowth of the anti-fraud provisions of the securities laws.⁵⁰ Due diligence is required in the context of mergers and acquisitions, so that representations can be made and conditions agreed to, and so that valuations can be arrived to facilitate bargaining. The firm’s lawyers work hand in hand with a variety of corporate offices to fulfill these requirements and goals.

But the understanding of due diligence that Ruggie invokes is a more recent one having to do with improvements in internal controls designed to bring such corporate information gathering to a far more comprehensive, timely and accurate level. The emphasis on internal control systems evident in Sarbanes Oxley (there it relates principally to financial reporting) was both an outgrowth and exemplar of what had been an ongoing, comprehensive trend in corporate best practices. This upward trend in favor of internal corporate transparency reflects decades of evolution, harkening back to the original Treadway Report of 1987,⁵¹ if not the books and records provisions included by Congress in the Foreign Corrupt Practices Act, about a decade earlier.⁵²

The major problem with Ruggie’s human rights due diligence idea is not, in fact, it’s feasibility. Nor its cost, because if there is a palpable danger of serious corporate complicity in human rights abuses, given the potential public relations and litigation costs, firms will have a meaningful financial incentive to invest in due diligence and compliance efforts to avoid them (assuming the firm is well run and its agents have nothing to gain personally from the abuses). Rather, the problem with the due diligence concept endorsed in the 2008 report is corporate incentive and the “law of unintended consequences.” A smart, reasonable, well constructed system of due diligence and human rights risk assessment should help a corporation avoid serious human rights abuses – in many, though surely not in all, cases. On the positive side, if such abuses occur despite a well-conceived, conscientious human rights compliance program, there is a solid platform for corporations to avoid legal liability and lessen public opprobrium.

The problem is that sporadic due diligence efforts and poorly run compliance programs might be worse than nothing. Ruggie is silent about this possibility, but Backer notes it. It’s a dicey, real world problem for a firm contemplating

⁵⁰ Cite again to *Escott v Barchris*. Note, too, that due diligence is becoming more complicated and less effective in a “shelf offering” world. See e.g. WorldCom litigation against directors. And see the new disclosure requirements for securitizations as shelf offerings under Dodd Frank.

⁵¹ repeat cite to Treadway from above

⁵² provide official citation to Section 13b)(.) (___ of the Securities Exchange Act – the books and records provisions of the FCPA...

establishing human rights compliance and due diligence programs. Damned if you don't do it, damaged if you do it poorly?

Furthermore, as both Ruggie and Backer acknowledge, complicity is itself a dicey and potentially sweeping concept and terminology. The scope of legal complicity in human rights abuses would track, in most cases, the scienter and causality concepts inherent in corporate criminal law (and in slightly weaker form, corporate securities law fraud provisions). Given this high bar, proving corporate complicity in human rights abuses in a court of law would be extremely difficult, except in egregious cases. The twenty six years that plaintiffs spent pursuing a remedy against Union Carbide on account of the tragedy in Bhopal, and the limited success of the result, stand as illustration.⁵³ The same is true of the criminal trial against W.R. Grace employees for poisoning the population of Libby Montana through toxic asbestos exposure. Despite a hard-driving federal prosecution team that pressed forward for close to a decade, not one of the executives who had been in charge of decades of egregious asbestos leaks from a local refinery owned and operated by W.R. Grace was held criminally liable.⁵⁴

But legal complicity is not all that's at stake, of course. Social opprobrium, and consumer and investor backlash aren't constrained by the civil rights protections and other structures which stifle prosecutors. In a world where there is growing popular concern about human rights compliance and growing technological capacity to post any form of "smoking gun" evidence to the web, the prospect of more aggressive human rights due diligence will appear as a two-edged sword. Consumers, employers, investors and governments will demand or at least expect it; corporations will become more accustomed to their commitments if not duties to do it. But they will be anxious and conflicted about this responsibility to "protect" through appropriate, ongoing due diligence and compliance programs. Bottom line: corporations are well aware that they have the potential to incriminate as well as exonerate themselves in these efforts. Information possessed internally in electronic form, even accessible to electronic transmission – which is to say almost anything -- readily becomes information in the public domain.⁵⁵ On this basis, conclusion that "companies can avoid complicity" in human rights abuses through appropriate due diligence appears naïve.

⁵³ In June 2010, seven ex-employees, including the former UCIL chairman, were convicted in Bhopal of causing death by negligence and sentenced to two years imprisonment and a fine of about \$2,000 each, the maximum punishment allowed by law. An eighth former employee was also convicted but died before judgment was passed. Lydia Polygreen & Hari Kumar, "8 Former Executives Guilty in '84 Bhopal Chemical Leak, NY Times, June 7, 2010

⁵⁴ For reference to an extensive archive of trial related materials and commentary see http://www.asbestosnetwork.com/news/nw_060209_wr_grace.htm

⁵⁵ The phenomenon is recently addressed by Google's CEO. See Eric Schmidt, "Truth of Consequences," Forbes _____

D. States, Firms and Civil Society

The 2008 report acknowledges the very different structure and incentives that operate in business corporations versus states. As stated therein: “Corporations are economic organizations, not democratic public interest institutions. As such, their responsibilities cannot and should not mirror the duties of states.” Furthermore, Ruggie’s framework is definitive in attributing to states, and only states, the responsibility for *protecting* citizens against human rights abuses, whether by individuals or by enterprises or institutions. In sum, although the report presents itself as a “conceptual and policy framework” for advancing human rights compliance by business, it quite simply avoids any pronouncements about the relationship of states to corporations or the “place” of corporations in a globalized structure usually analyzed in terms of states and (natural persons as) citizens.

To elaborate, there are no references to civil society theory. There are no references to social contract theory. There are no references to democratic theory. Nor, even, is there mention of corporate “legal personhood.” Nevertheless, in reading the report, we don’t initially notice these omissions. The report gains greater force and coherence by eschewing theory and presenting a meaningfully practical account of how corporate culture might be shaped (by states and corporations themselves) to actualize greater human rights compliance. Globalization, according to the report – the enhanced scope and scale of corporate operations in conjunction with limits on legal compliance arising from law’s historic “stickiness” to national boundaries – is the “causal” explanation for Ruggie’s mandate to address and clarify the necessity of corporations’ commitments to the human rights agenda, as described in the report.

And yet Backer finds grounds for identifying a larger conceptual framework: one synthesizing legal obligations and social norms into a coherent conceptual framework – an elaborate, “multi-level system of polycentric governance.” As he describes it, the “three pillar framework acknowledges the reality of nonstate governance systems centered on the regulatory community of economic actors.” Elsewhere he states that the report “builds a system [of corporate commitments] that is not tied to the state... but rather grounded in social legitimacy and what might be understood as disciplinary and culturally embedded techniques.”

Here I am skeptical. Indeed, the Ruggie reports are remarkable for the scope of what they achieve while eschewing any theorizing about where the state “fits” into a[ny] model of political or social theory. The most obvious one, the one that would fit most easily into the report’s PRR framework, would be a theory of corporate personalty. That is, since corporate law (and even more robustly, the U.S.

Constitution, after the speech-rights decision rendered by the Supreme Court in *Citizens' United* case⁵⁶) allows for a robust construct of the corporation-as-person, why does Ruggie assiduously avoid it? Isn't it so that all persons have a duty to respect human rights, and that the state has a duty to protect its citizens from human rights abuse by any person? Ruggie acknowledges the latter, but not the former. One would assume there was something about the concept of legal personalty that was found insufficient or otherwise unsatisfactory. Why, then, the decision "not to go there?"

Perhaps it's this: all human persons exist in a place and have a certain, specified citizenship. Real persons do not escape the bounds of sovereignty, except in extraordinary cases (especially where extradition is not an option). But corporations – however we “construct” them as persons-- certainly can transcend geographic and political boundaries, because of their intangible, legal nature. The globalization problem – the limits of state sovereignty and the contingent nature of international law – forces the issue of human rights compliance to the fore. For this reason, the corporate personalty answer/approach does nothing to help resolve the practical and even theoretic problems posed by the limits of sovereignty and the scope of multinational business enterprises.

Nevertheless, it's worth noting that the robustness of the corporate person was not always universally accepted. As Professor Tung and other scholars (including myself) have noted, a vestigial feature of the corporations as “creatures of state law” notion was that it wasn't clear, late in the 19th and early in the 20th century, that the full complement of legal rights and privileges afforded a corporation by its chartering state, would be respected by a court (and plaintiffs' bar) in a foreign jurisdiction.⁵⁷ Nor should this be understood as a foreign state's trampling on an established rule of law. The point is – the foreign state was enforcing the law (as pressed by a plaintiff) as it construed the law to be. The concept of corporate personalty (the inviolability of a corporation's rights to its property, self direction, power to sue, and the limited liability of its shareholders etc.) is in the end a legal tautology; it is true only because it is accepted by states and courts as being true. And it would appear that is accepted by states and courts as being true for a fundamentally economic purpose, i.e. to encourage capital formation and economic development via the corporate form. So it's simply not clear that there is any

⁵⁶ Add citation to *Citizens United*, 5 CT 2010. For a landmark case establishing the “separate” legal personhood of a corporation see *Dartmouth College v. Woodward* 17 U.S. [4Wheat] 518 (1819).

⁵⁷ Cite to [Fred Tung, *Corporate Internal affairs doctrine: it's in the first dozen pages or so*; and F Stevelman, *Regulatory Competition, Choice of Forum and Delaware's Stake in Corporate Law 2009* (it's in the discussion of the early version of the internal affairs doctrine).

political or social theory that has evolved to keep pace with the legal/conceptual/technological development of the modern corporation.

Backer “solves” the theoretical problem or void in the 2008 Report by pointing to what he believes is recognition of an internationally meaningful framework of social legitimacy. I have a few problems with that. First, I am not sure that the reports suggest there is anything close to consensus in the area of business and human rights. Second, I am pretty sure there isn’t any such global consensus about human rights at present (perhaps with the exception of corporate complicity in torture – but even that is not uncomplicated, on account of the so-called “war on terror”).⁵⁸

Thirdly, as a general matter, I remain confused about the relationship and complementary development of social norms and law (whether “soft” or “hard”). Which is the cart and which is the horse, or does it change depending on the context? It would seem that there are times that law gets out just in front of where the majoritarian consensus is; and at other times, the foundations of social change are clear, and the law catches up. How this will play out in the business and human rights arena remains a subject for further study.

E. What is “Law?”

A central preoccupation of the Law and Society movement is answering the question: “What fits within the category of ‘law’ and why? And how is ‘law’ constituted?” For Law and Society scholars (such as my colleague, Frank Munger⁵⁹) the question is an opportunity to bring to bear the richness of other social sciences on the study of law and law making. More prosaically, for anyone who has personally dealt with the courts or other legal authorities (which is to say everyone at some point, even if only on a relatively trivial level), the question is patently of enormous moment. Who gets to decide what is and is not “law,” in an authoritative manner (and why) matters immensely.

Clearly this is a central issue for the study of human rights “law” too. But the question is not addressed in the Ruggie framework or reports, which, again, take a wisely pragmatic approach to promoting human rights compliance and reducing abuses by business. Such theoretical questions (“What is Law?” “Where does

⁵⁸ Insert footnote to recent Jeppeson case where Obama administration successfully defeated plaintiff’s allegations of torture against US Government AND BOEING SUBSIDIARY via a state’s secrets defense...nb the case may be appealed. The United States Supreme Court has accepted certiorari to hear the case in the coming term.

⁵⁹ See e.g. Frank Munger, *Globalization, Investing in Law, and the Careers of Lawyers for Social Causes: Taking on Rights in Thailand*, 53 NYLS L. Rev. 745 (2009/10); David Engel and Frank Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (Chicago 2003) (Analyzing beliefs about what the law is and how those beliefs influence everyday action).

business “fit” into the structure of the state/society that recognizes governmental authority and individual rights?”) may be unnecessary to achieving the goal. A different, more sweeping, prescriptive and conceptually enriched approach (as was evident in the *Norms*) would likely incite more controversy than it would warrant, given that progressive change “on the ground” is the focus of the reports and UN initiative.

More troubling however, is Backer’s – and perhaps the entire new governance movement’s – comfort with the “potpourri” notion of law. In this perspective there are many compelling, perhaps equally authoritative versions of law (hard and soft, national, international, privately generated etc.). Backer endorses the view, and yet he himself notes not only its slipperiness (the idea that “law” is everywhere, and constantly in dynamic process); but also the potentially frightening implications of just such an all-inclusive (unprincipled?), liberal, approach to law.

Of course, that question – what constitutes “law” and why -- is far too large to address, *a fortiori* resolve in my remarks here. But it clearly is a formative, inexorable challenge to the field of human rights “law.” Furthermore, as mentioned above, the drive for efficiency has catalyzed the issue – i.e. the comparative advantage – of laws, rules and private standards. In a world of globalized transacting, Backer’s “polycentricity” is likely both apt and inevitable, but that doesn’t make it less intellectually and pragmatically unsettling. Comprehensive relativism is troubling as a mode of achieving coherence. And something precious, likely, is lost in the enterprise of “all is law; law is all.” Like the limits of liberalism, such easy pluralism is morally, intellectually and institutionally unsatisfying and unstable.

III. Thoughts on the “Protect, Respect, Remedy” Framework of the 2008 Report

A. The State’s Role in Shaping Corporate Culture

The 2008 Report states “Governments are uniquely placed to foster corporate cultures in which respecting rights is an integral part of doing business.” To a corporate law scholar the statement is at once self-evident and, oddly, shocking.

It’s self-evident in the sense that governments clearly can tax and regulate and sanction or subsidize and reward all kinds of behavior by corporations. Obviously, there’s nothing novel in that idea. Plainly, too, in cumulative effect, how the government chooses to dole out rewards and punishments will inevitably have a major effect on the conduct of business in the corporate form.

So why would the statement be shocking? For starters, in eighteen years of reading corporate legal scholarship and following public commentary, I have never read anything to suggest that the government should take an active role in shaping corporate culture (or even suggesting it could). Perhaps this in itself reflects the silent power of the ethos of neo-liberalism – in which we have accepted that corporations, as much as possible, should be free to follow their own ends and adapt themselves to the demands of the market. Of course, to the extent we believe in powerful notions of market efficiency, corporate culture would be an extension or reflection of the market – and there'd be little for government to mold. In the past twenty five years, of course, there has been greater market competition affecting corporate firms, as a result of the fall of trade barriers, the technological innovations described earlier and otherwise. But perhaps even more powerfully, the end of communism and the fall of the Berlin wall have bequeathed to us a presumption of “market comprehensiveness.” (In a 2001 article, in the wake of the accounting fraud scandals that market those years, I referred to this ethos as “market fundamentalism,” a term which gained further traction after 2007⁶⁰).

Furthermore, if (as has been accepted), markets exert a high level of pressure on prices and corporate decision-making, governmental intervention (to shape culture and otherwise) would be at least wasteful, if not perilous to the firm's viability. Specialists in anti-trust, both legal scholars and economists, have long acknowledged that the pressure of market forces operates at different levels of intensity in different industries and at different times. But corporate legal scholars have preferred to adhere to the presumption of robust and comprehensive market pressure in analyzing corporate governance possibilities. The view of market dynamics described above, the complexity of the notion of “corporate culture,” and its under theorized status in the legal literature explain the novel ring to the idea that government can and should more actively endeavor to mold a corporate culture of legal and human rights compliance.

And yet, despite the lack of overt discussion of law's role in shaping corporate culture, it's apparent that Congress has at various times endeavored to do just this, for example, in enacting the Sarbanes-Oxley Act of 2002. In this Act, Congress enacted new laws to raise the base line level of corporate transparency (through various new internal controls and auditing requirements), heightened executive/managerial accountability for achieving corporate transparency, general counsel responsibility for alerting the firm to evidence of unlawful conduct, protection for whistleblowers and other measures designed, individually and in their totality, to shift corporate culture in the direction of greater conformity with

⁶⁰ Bombing Markets, Subverting the Rule of Law, Faith Stevelman, Tulane Law Review

the rule of law. Indeed, this speaks directly to the controversiality of the Act. Many legal commentators argued that its attendant costs would drive down efficiency and perhaps even discourage listing in the United States.⁶¹ In the alternative, a few legal scholars realized that the scope and magnitude of the accounting scandals signaled that (rather than a “few bad apples” problem) there was a wide ranging problem in the legal culture which had taken hold atop many seemingly “blue chip” American corporations. Hence there were a few defenses of Sarbanes Oxley on the grounds that, though imperfect and incomplete, it was a well-intentioned legal program to shift corporate culture in the direction of compliance with the law and democratic norms of transparency and accountability.⁶²

, including recently, has sought promote to effectuate higher standards of legal compliance, including the avoidance of human rights abuses),the not surprising then that the 2008 Report’s admonition that government and law can go far in shaping corporate culture – even if they have sought to do just that, for example through the enactment of Sarbanes Oxley with its emphasis on better internal controls and greater transparency.⁶³

Furthermore, although corporate legal scholars have digested much wisdom from the discipline of economics, they have been less adventurous in exploring the management and organizational behavior literature (with some notable exceptions.⁶⁴) Even the notion that there is something that is “corporate culture” is not generally theorized in corporate legal scholarship or corporate governance writing. After the seemingly endless series of fraudulent accounting scandals from ’01 to ’03, scholars became more attuned to the relationship of law and corporate culture. For example, corporate legal scholars Marlene O’Connor and Lynne Dallas wrote about law, group psychology and corporate culture (especially as related to the problem of “group think” and executives’ seemingly irrational assessment of the risk of corporate failure from high level fraud).⁶⁵

⁶¹ cite to Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*

⁶² See e.g. James Fanto, *A Social Defense of Sarbanes Oxley*, NYLS L Rev 2008?; John C. Coates, “The Goals and Promise of Sarbanes-Oxley,” 91 J. Econ. Persp. (2007).

⁶³ Add official citation to Sarbanes Oxley, corporate governance provisions (Third part –) see esp 404: certification of internal controls; ceo cfo disgorgement of bonus compensation where there’s a restatement based on wrongdoing; increased speed of disclosure of various corporate events and transactions.... rotation of auditing partner.

⁶⁴ See Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 Geo. L.J. 797-832 (2001).

⁶⁵ See Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. Cin. L. Rev. 1233, 1264 (2003); Lynne Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Directors and Officers for Corporate Climate: The Psychology of Enron’s Demise*, 35 Rutgers Law Journal (2003)

I am sure that almost all corporate legal scholars have a view of the role of government and law in affecting corporate leadership and firm-level behavior. It's just that we don't generally acknowledge it as such, a *fortiori* encourage the connection between law-making and the formulation of "corporate culture." It just hasn't been "politically correct" to enunciate the issue in such terms. And yet it was precisely this question that underlay the debates over what became the Dodd-Frank legislation.⁶⁶ Could financial services firms and banks be allowed to recoup and redefine (for themselves) the contours of their new approach to firm-level risk-taking, consumer relations and responsibility to the (international) financial infrastructure? Or was legal intervention required to mold a new corporate culture of financial services in the public interest? Apparently, we've just lived through a transformative moment in which there was a consensus in government, seemingly vastly supported by the public, that law has a vital role to play in molding corporate (financial) culture. It's just that the terms of the debate did not play out in this lexicon of "molding corporate culture."

III. Corporate Law: The "Who" and "Why" of Human Rights Compliance

A. Who? Of Boards, Committees, Officers and Shareholders

1. Boards and Committees.

For an academic/social theorist, the report's failure to provide any coherent political or social theory for integrating corporations into the framework of "states versus individuals" is a notable omission and shortcoming. For a human rights scholar, the intentional refusal to create a limited set of rights and prioritize them for business may be the most notable.

But for a corporate governance scholar, on the other hand, the most notable omission in the 2008 Report is a discussion of where in the corporate organization, institutionally speaking, the duty/commitment to respect human rights lies. Such allocation of decision-making authority (among the board, senior officers, various committees, etc.) is crucial both from a legal and a pragmatic/functional perspective.

From a formal, legal perspective it's an "absolute" that the board of directors has plenary governance and decision-making authority over corporate affairs.⁶⁷ This is reflected in the states' corporation codes, as well as the corporate case law. As for the latter, this is embodied in the "business judgment rule," where both

⁶⁶ Official cite to Dodd-Frank, again

⁶⁷ See e.g. Delaware General Corporation Law section 141 "The business and affairs of every corporation shall be run by or under the discretion of the board of directors." See also NYBCL, Section 701 [the same]

courts and shareholders are “removed” from overturning operational decisions absent some egregious governance breakdown.⁶⁸ But applying this touchstone governance concept (i.e. board plenary authority) to the business and human rights context, difficult issues surface immediately.

First of all, though boards have plenary authority in corporate affairs, their service is only part time – a fundamental contradiction of corporate governance that scholars and theorists have never resolved or even addressed aggressively. Given the sheer number and complexity of matters that are assigned to board discretion within the formal model, the American system of governance is fundamentally contradictory and dysfunctional. And it’s due to grow worse: worse because the list of matters that the “ultimate corporate decision-maker” should appropriately oversee is only growing in scope and complexity, as corporate affairs and the scope of corporate operations are growing exponentially in scope and complexity.

The tentative, technical solution to the practical problem of “too many responsibilities, too little time” is to assign precise, delineated functions to particular subsets (working subcommittees) of the board. In particular, as a matter of current “best practices,” as authorized by statute, corporations constitute specific committees assigned to executive compensation, board nominations, audit and financial reporting oversight, shareholder litigation and takeover response, and other matters presenting any kind of conflict of interest among the corporate actors. Along these lines, it’s easy to imagine an increased prevalence of a “risk management” board committee whose responsibilities would, inter alia, encompass avoiding human rights abuses and the negative consumer/employee/investor fallout -- hence, costs -- which their disclosure occasions. The creation of a board level “compliance/risk management” committee is probably the best of the alternative solutions to the issue of where within the corporation to lodge this function.

And yet this solution is problematic in the human rights context because the risk management committee – presumably a committee composed of directors at the parent company in the home country -- is likely to be extremely remote geographically and hence “informationally” from the field of human rights risks. Perhaps to avoid just this kind of “bureaucratic stacking,” of corporations, early codes of incorporation proscribed corporations from owning stock in other firms.

⁶⁸ See e.g. *Dodge v. Ford Motor Company*, (where the court refused the shareholders’ protest against Ford Motor company’s building of a smelter plant); *Kamen v. American Express* (where the court refused the shareholders’ protest that a sale of stock owned by the company would be more advantageous than distributing that stock to the company shareholders as a dividend); and *Shlensky v. Wrigley* (where the court refused to compel the company to alter its policy against night baseball games, despite the revenue which they quite patently would produce). And more recently, see *Citigroup* (shareholders’ litigation) where the court held that the board’s approach to and oversight of business risk was not susceptible to challenge as a matter of fiduciary duty.

The hydra-like structure of parent/holding company atop potentially infinite subsidiaries and subsidiaries of subsidiaries -- creating compounding layers of bureaucracy and layers of plausible deniability -- was an organizational impossibility. In a Jeffersonian tradition, governments were simply loathe to allow their commercial “creatures” to grow so powerful, agile and faceless. But the fifty states let go of this approach of proscriptions and limitations, within corporate law, as response to the “threat” of excess corporate power and lack of corporate accountability.

Perhaps most importantly (as described further below), the fiduciary duties which apply to boards in their oversight of such matters as human rights are profoundly indeterminate – this would include boards’ (and committees’) duties of care, good faith and oversight).⁶⁹ The most vital “legal force” in influencing boards’ and committees’ conduct is not the “letter of the law,” but rather the persuasive force of their lawyers. What the dense web of corporate laws do most significantly, is ensure that a sensible board (or board committee) will keep its corporate counsel close at hand and well informed. Following out this idea, the locus of “regulation” vis a vis governance of this sort, is not the state (as legislature or court), but rather the moral and rhetorical power of individual corporate lawyers, as backed by their law firms.

In just this mode, large, ambitious, international corporate law firms and their cadre of experienced, enterprising corporate lawyers have taken on the “business and human rights” agenda, in advising boards, committees and devising compliance plans and codes of conduct, as part of their core competencies.⁷⁰ In this tradition, lawyers like Martin Lipton (at Wachtell)⁷¹ and Ira Millstein (at Weill, Gotshall),⁷² and law firms like Fried, Frank, and the lawyer/members of the American Bar Association itself (for example, under the aegis of the Section on International Law, Corporate Social Responsibility section) have taken on responsibility for counseling boards on how to respond to, and become proactive about the growing specter of human rights liability and negative public campaigns resulting from discovered abuses.

⁶⁹ William J. Carney & George Shepherd, *On the Mystery of Delaware Corporate Law’s Continuing Excess...* 2005 or 06 or 07.

⁷⁰ I believe that the 2009 or 2010 report makes reference to a survey conducted by Fried Frank of lawyers and law firms and their approach to business and human rights counseling. The rising interest is reflected also, in the ABA’s recent creation of a “Committee on Corporate Social Responsibility,” as part of the International Law Section.

⁷¹ Wachtell Lipton put out a memo on the 2008 Report, which was cautionary if not critical of the increasing pressure being brought to bear on boards and firms in general.

⁷² Ira Millstein, of Weill, Gotshall, also put out a client memorandum; he was less critical of the PRR framework and its import for corporate governance.

This proactive, precautionary message aimed at boards and client firms (by elite corporate counselors and their firms) is progress as a matter of institutional design. But there's room for concern as well. This same cadre of distinguished, effective advocates will reconstitute themselves as defense counsel should there be any real specter of liability/"complicity" on the part of the corporation in the human rights area.

2. Officers: Chief Compliance Officer, Chief Operating Officer, General Counsel

The most obvious institutional site for a "human rights abuse avoidance" program would be within the office of the Chief Compliance Officer. Over the past decade the legal compliance function, as a corporate office distinct from, say, the legal department, has grown exponentially. At bottom, creating a plan of compliance, enunciating the standards for avoiding noncompliance and its importance, disseminating the compliance agenda and instructions and monitoring the firm's agents' and employees' adherence thereto is a coherent corporate function, most likely, independent of the precise substantive area of concern.⁷³ This augurs for locating this function within a compliance department and assigning oversight to a chief compliance officer. The problem with this approach, as Ruggie's 2008 report implies, is that its unintended effect is likely to diminish the importance and potentially even the actual, on the ground likelihood of compliance, on account of this phenomenon of institutional segregation/ghetto-ization. A check-the-box approach to human rights abuse avoidance is likely to work the best when the situation on the ground is stable and the likelihood of important abuses are low – which is to say when it matters the least. Furthermore, there is a burgeoning literature on corporate compliance which suggests that achieving the desired result is far more complicated than it would initially appear, and is described in the 2008 Report in terms of "due diligence" and avoidance of "complicity."⁷⁴

What about elevating the task of "eliciting" rights abuse avoidance to the office of the chief operating officer ("COO"), even, potentially, the chief operating officer at subsidiaries in host countries? This turns the aforesaid problems on their head.

⁷³ This corporate function gained increased salience as a result of the federal sentencing guidelines pertaining to corporations. The guidelines expressly endorsed a more "forgiving" approach where corporations had adopted reasonable compliance programs and endeavored in good faith to implement them on a firm wide level. For commentary see e.g. Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 *Iowa L. Rev.* 697 (2002) (discussing the positive effects of the corporate compliance programs induced by the Federal Sentencing Guidelines).

⁷⁴ See e.g. Gabel, Mansfield & Houghton, *Letter vs. Spirit: The Evolution of Compliance into Ethics*, 46 *Am. Bus. L.J.* 453 (2009); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 *B.C. L. Rev.* 949 (2009); James Fanto, *Recognizing the "Bad Barrel" in Public Business Firms: Social and Organizational Factors in Misconduct by Senior Decision-Makers*, 57 *Buffalo L. Rev.* 1 (2009); Pamela H. Bucy, *Corporate Criminal Liability: When Does it Make Sense?* 46 *Am. Crim. L. Rev.* 1437 (2009).

Chief Operating Officers are likely to be able to anticipate where there would be problems, and respond either ex ante to prevent them or ex post to limit the damage or provide some immediate remediation. Of course, this is especially true if the job goes to the COO at a foreign subsidiary, in regions where there is relatively weak rule of law or relatively high risk of conflict. The problem is that the COO's duties are already so broad, and in essence, keyed into keeping the overall operations "on the rails," so to speak, that avoiding human rights abuses is just not likely to achieve sufficient salience as part of the COO's responsibilities. The scope of duties falling to a COO in a public company (and even a foreign subsidiary of a public company) is likely to be so broad – and so oriented towards profit-making -- that abuse avoidance won't be a priority. Enhanced global market competition is part of the conundrum of achieving greater global adherence to base line norms of human rights compliance. More of the former may not directly lead to more of the latter, but if competition is sufficiently fierce, it may drain organizational resources away from truly important but not "essential" functions like achieving better corporate citizenship.

That leaves the office of the general counsel – what is the role of the office of the general counsel in human rights abuse avoidance and remediation? On this issue, interestingly, the Sarbanes Oxley Act of 2002 becomes relevant, in two ways. First, the Act puts a premium on the construction of robust and comprehensive systems of internal controls for corporations. As part of this push, the Act requires chief executive officers to certify the integrity – the reasonable sophistication and efficacy -- of the corporation's internal controls systems.⁷⁵ This is the flip side of the advances in communications and information technology described above. Put simply, as firms have acquired the technical capability of tracking their conduct more comprehensively, they have gradually been held to a higher standard for being aware of and responsible for their conduct. And Sarbanes Oxley connects the internal controls function to the institutional role of the general counsel.

This is true because the Act, in Section 307, mandates that where the general counsel becomes aware of "evidence of unlawful conduct" he or she must respond and report "up the ladder," and even to the board of directors if necessary.⁷⁶ The general counsel must drive the evidence to the upper echelon of the corporation, until he or she is satisfied that there will be an appropriate response. This up the ladder, bright line, federal legal reporting duty prescribed for inside counsel is an enormously promising development for advancing business compliance with

⁷⁵ Add official citation to Section 404 of Sarbanes Oxley. And see also Houman Shadab, Innovation and Corporate Governance: The Impact of Sarbanes-Oxley, 10 U. Pa. J. Bus. & Emp. L. 955 (2008).

⁷⁶ Add official citation to SOX section 307.

human rights. Although there is controversy of what the operational standard of “evidence of unlawful corporate conduct” is, there’s no doubt that a wise general counsel would not volunteer to be the scapegoat for unlawful corporate activity by “sitting on” disturbing information and facilitating under-reporting.

Furthermore, and of crucial importance, once the information about a potential human rights problem is reported to the senior-most corporate officers and/or directors, the scope for “plausible deniability” is lessened radically. The scope for either liability or public opprobrium would accordingly expand.

B. The Corporate Law Duty of Oversight and Directors’ Accountability for Human Rights Abuse Avoidance?

As discussed earlier, the Ruggie PRR framework barely addresses the conceptual underpinnings of corporations’ duty to respect human rights. Ironically, corporate fiduciary law (in tandem with expanding SEC disclosure requirements) may hold some answers to why corporations have a duty to respect human rights (by avoiding complicity in human rights abuses). Here we turn to the question of boards’ and officers’ fiduciary duties to establish internal systems of information gathering and reporting systems, oversee their operations in good faith, and employ the information acquired to promote legal compliance. This obligation is referred to in corporate fiduciary law under a number of rubrics: as a duty of oversight, a duty of care and a duty of good faith (in avoiding unlawful corporate conduct).⁷⁷ In any event, in each of these versions of the fiduciary duty, the directors would have an obligation to be observant about corporate human rights risks in implementing information gathering and reporting systems, and to take decisive action if they become cognizant of corporate complicity.

Again, the heart of the PRR framework for is for companies (their officers, lawyers and boards) to become more aware of the danger of corporate complicity in human rights abuses, more vigilant about avoiding them. As for the law, in the aftermath of a landmark 1996 decision of the Delaware Court of Chancery, *In re Caremark*, it has been widely accepted that boards have a duty to implement and oversee efficacious systems of information gathering and reporting. This duty of oversight relates not only to the production of accurate *financial* information, but also to the gathering of information relevant to compliance with laws and corporate policies quite generally.⁷⁸ (Indeed, in *Caremark* the issue was (non)compliance with health care regulations, rather than financial accounting fraud.) This explicit, board-level,

⁷⁷ For a thorough and thoughtful survey of the field and the contemporary case law see Eric J. Pan, A Board’s Duty to Monitor, 54 N.Y.L.S.L. Rev. 717 (2009/10).

⁷⁸ *In re Caremark Int’l Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

legal duty of oversight arose belatedly in corporate law -- after the internal controls framework had already been well established in auditing and securities regulations.⁷⁹ And though there is ongoing argumentation over what circumstances would mandate board or individual director *liability* for oversight and compliance failures,⁸⁰ there really is no longer any dispute about whether the board has acquired a legal obligation of overseeing the integrity of the systems supporting corporate legal compliance (and its “sister,” good corporate citizenship).

This duty of oversight is sufficiently new in corporate law, and sufficiently crucial to the “corporate respect for rights” project that it warrants further detailed examination herein. Again, the landmark case in corporate law was written in 1996 by Chancellor Allen of the Delaware Chancery Court. In his opinion in *In re Caremark*, Allen provided a new reading of the “duty of care,” so that it encompassed, for the board, an ongoing duty to establish and oversee internal controls systems which would gather, synthesize and report vital information up the ladder -- presumably to the company’s internal auditors, financial officers, general counsel and compliance team, operating officers, CEO and ultimately the board itself. The Caremark opinion is unflinching in endorsing this facet of institutional design and assigning it, as a new fiduciary responsibility, to the highest corporate office (the board). The opinion, furthermore, is sweeping in describing the scope and purpose of such corporate information gathering and reporting systems: they are crucial to ensure the accuracy of mandated public reporting; and crucial to promoting corporate legal compliance as a general matter. Importantly, there are distinct echoes of the Caremark language in the 2008 Ruggie report. For example, where the Report refers to the importance of ensuring the widespread distribution of compliance programs throughout the enterprise, as a facet of managing and reducing the potential for corporate criminal liability.⁸¹ This “Caremark oversight and compliance” duty remained controversial – in part because the Court of Chancery is not the highest court in Delaware, and in part because the opinion was in many respects “advisory” in nature (written in the context of approving a settlement of a shareholder action.) But in 2006, in *Stone v. Ritter*, the Delaware Supreme Court affirmed these “Caremark duties” on the part of corporate directors, as a facet of their duty of good faith. This augurs for

⁷⁹ For an excellent account of the history of the internal controls notion, prior to its acceptance into the corporate fiduciary canon, see Melvin A. Eisenberg, *The Board of Directors and Internal Control*, 19 *Cardozo L. Rev.* 237, 244-50 (1997); and see also,

⁸⁰ See *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

⁸¹ In *Caremark* this appears in the discussion of boards’ duties to adopt compliance programs, consistent with reducing the foreseeable scope of corporate criminal liability, consistent with the federal sentencing guidelines. *Caremark* at ____

improved internal reporting of the firm's record in the human rights area, and heightened attention to avoiding trap of legal complicity in human rights abuse.

On the other hand, things are never this simple in corporate fiduciary law, and they are certainly not simple in the area of corporate and director responsibility for human rights compliance. Most germanely, there is a persistent schism between "standards of conduct" and "standards of liability" in corporate law.⁸² For this reason, the clear legal mandate for improved information gathering and reporting and improved corporate legal compliance, as a facet of the board's responsibility, is not backed by a forceful threat of board *liability* -- at least not within corporate fiduciary law. For example, the Delaware courts have resolved to find a breach of good faith warranting personal liability only where the plaintiff has demonstrated intentional bad faith -- that is, willful indifference to corporate legal compliance.⁸³ And so the "take away" from this fiduciary development is mixed. And, again, the result-- the message to the firm and the board about the duty of oversight and enhanced legal compliance responsibilities -- is highly contingent on the interpretation of the law by the individual corporate counselor advising the board and the business. From the vantage point of standards of conduct, there is movement in the right direction, at least; and the threat of very damaging publicity and even shame (where truly bad acts are aired) may be sufficient to fill the void of real liability risk.

But there is an additional caveat to the scope and force of directors' duty of oversight. The duty has recently been truncated in claims arising from the global financial crisis. The Delaware Court of Chancery dismissed a board "failure to monitor" claim which did not relate to corporate *legal* violations. Most prominently, in a derivative suits against the board of Citigroup, the shareholders alleged that the directors were grossly uninformed about the actual risks attendant to the firm's enormous stockpile of subprime mortgage assets and assumption of extraordinarily high amounts of leverage (which led to the firms' insolvency and need for a government bailout). Because the shareholders could not demonstrate the board's (or any individual director's) awareness of a legal violation, the shareholders' duty of oversight claims were dismissed under the "business judgment rule" (which holds that operational matters, even if they go horribly awry, cannot be challenged by shareholders under fiduciary law or otherwise).⁸⁴ This result raises the question of whether shareholders could sue the board for

⁸² For the landmark treatment of the subject see Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 52 *Fordham L. Rev.* 437, 439-49 (1993).

⁸³ See *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005); *Brehm v. Eisner*, 906 A.2d 27 (Del. 2006); *McPadden v. Sidhu*, 964 A.2d 1262, 1273-74 (Del. Ch. 2008).

⁸⁴ *In re Citigroup Inc. S'holders Derivative Litig.*, 964 A.2d. 106 (Del. Ch. 2009).

oversight failures vis a vis human rights abuses, if they could not establish a predicate of actual *legal* violations on the company's part. Indeed, that is the most likely legal interpretation of the extant case law. Personal financial liability for the board, on account of human rights abuse by the firm, is an extraordinarily remote legal possibility.

Moreover, even if the hurdle of legal violations of human rights were established on the corporation's part, there is the matter of proving "scienter," as a predicate to success in holding a director personally liable on an oversight/breach of good faith claim.⁸⁵ Up the ladder reporting obligations on the general counsel's part and functioning internal controls systems can only go so far. Even where the factual information travels up to the board, it may be insufficient to allow the plaintiffs' to meet the extraordinarily high bar of showing the board's "willful" and deliberate indifference to corporate human rights (legal) violations. The Delaware Court of Chancery's recent dismissal of a derivative suit against the board of Dow Chemical alleging oversight failure vis a vis proven corporate bribery (involving a joint venture in Kuwait) demonstrates the high bar to establishing actionable oversight failure or bad faith on the board's part.⁸⁶ Hence the fiduciary duty of oversight and duty of good faith add little to rights advocates' storehouse of actionable legal remedies – at least in the matter of genuine civil liability. The existence of these board fiduciary duties is not irrelevant. They provide a clear mandate for greater board attentiveness and improved compliance programs and systems of information gathering about human rights compliance by the company – as described in the 2008 Report. But to the extent they obtain growing force, as duties and corporate commitments, it will not obtain force through the leverage of genuine director liability risk.

IV. U.S. Securities Law and Human Rights Concerns

Securities law has a fundamentally different focus from corporate law, of course; and may – ironically -- be ahead of corporate law in promoting corporate human rights conscientiousness by business.

⁸⁵ Again, this is the standard that is established in *Brehm v. Eisner*, 906 A.2d 27 (Del. 2006).

⁸⁶ In *Re The Dow Chemical Company Derivative Litigation*, Cons. No. 4339, (Del. Ch., Jan. 11, 2010), The ruling from Delaware Chancellor William B. Chandler III dismissed each claim, stating the plaintiffs did not provide enough evidence to support their claims. The lawsuit, filed by shareholders of The Dow Chemical Co., alleged that board members breached their duties during the company's purchase of Rohm and Haas Co. In the lawsuit, plaintiffs Michael D. Blum and Norman R. Meier claimed Dow's board breached its financial duties by approving the deal, misrepresented how a failed joint venture in Kuwait would affect the purchase of Rohm and Haas and failed to prevent alleged bribery, misrepresentation, insider trading and wasteful compensation. Chandler found that the "(p)laintiffs have failed to plead particularized facts sufficient to establish a substantial likelihood of liability for any Dow director, let alone a majority of the board, on the grounds of bribery, misrepresentations, insider trading, excessive or wasteful compensation or any other ground."

The guiding principle in securities law has always been: “What information is important to reasonable investors – and how should federal law encourage such corporate disclosure and intra-shareholder communications?” This orientation would seem entirely compatible with a corporate reporting and shareholder proposal system encompassing not only financial and commercial corporate information, but also information shedding light on the negative externalities produced by corporate operations. In this latter vein, both Louis Brandeis⁸⁷ and Adolfe A. Berle Jr. were interested in the development of corporate and securities laws, including disclosure laws, serving the social interest, broadly construed. Though Berle’s landmark “The Modern Corporation and Private Property,” is most commonly read as a treatise on the agency costs arising from separating corporate ownership from control, the volume’s themes are far broader in actuality.⁸⁸ Indeed, Berle devotes substantial attention to the problem of vast, bureaucratic, public companies accruing social and political power unaccountable to anyone beyond the elite, insulated group of professional managers atop the firm.⁸⁹ His articulated fear was that they might wield such immense organizational resources selfishly, and contrary to the public interest.

Nevertheless, for most of the 20th century, the more cramped view of investors’ interests shaped and limited the disclosure and shareholder proposal systems overseen by the SEC. And yet, as described more fully below, there are several signs of change – both at the Congressional and SEC level.

A. Social Disclosure and the New Dodd-Frank Provisions

Over the last fifteen or so years, especially as a result of sustained and mounting pressure by socially conscientious mutual funds and public pension funds, an altered dynamic is emerging in the contours of mandatory public company reporting under the oversight of the SEC. As a result of various commissioned studies, the scope of the subjects that Congress and the SEC now assume falls within the interest of a reasonable investors has broadened considerably.⁹⁰ The strictures of the mandatory reporting system are being enlarged to require

⁸⁷ Louis D. Brandeis, *Other People’s Money and How the Banker’s Use It* (August M. Kelley, 1986, Originally published 1914), at 92 (“publicity is justly commended as a remedy for social and industrial diseases.”). The o

⁸⁸ For recent commentary on the landmark volume see Symposium, Seattle University School of Law, Volume ____ (arising from meeting in November 2009).

⁸⁹ Reference to *The Modern Corporation and Private Property*, 1932 [I can find the pages]

⁹⁰ See Dodd Frank Wall Street Reform and Consumer Protection Act ... provisions calling for disclosure of gap between senior-most executive compensation pay and the average worker’s pay. And see also, Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 (May 21, 1998), available at <http://www.sec.gov/rules/final/34-40018.htm>. Therein the SEC stated: “We have gained a better understanding of the depth of interest among shareholders in having an opportunity to express their views to company management on employment-related proposals that raise sufficiently significant policy issues.” Id

additional reporting of corporations' environmental compliance, labor standards, executive compensation rates, anti-corruption efforts and anti-discrimination policies. Shareholders have become more attuned to the fact substantial white collar criminal penalties attach to malfeasance in many of these areas, as well as civil fines, embarrassing enforcement actions and negative publicity campaigns. Moreover, as large institutional investors, and especially pension funds, play an increasingly salient role in the securities markets, the investing public's concerns increasingly mirror those of the broader citizenry. The costs of social degradation are costs to investors too.

The recent Dodd-Frank Legislation ("Dodd Frank"⁹¹) includes three new socially-significant disclosure mandates. The first, in Section 1504, requires U.S. listed, internationally active extractive enterprises to disclose payments to foreign governments for resource rights, including the extraction of oil, natural gas and other mineral rights.⁹² The new law gives the SEC roughly nine months to promulgate final regulations to require such resource extraction issuers (and/or their subsidiaries or controlling companies) to make disclosure in their annual reports of any payments made to foreign governments (or to the federal government) for commercial development of oil, natural gas or minerals. In formulating the precise features of this disclosure mandate, the SEC is directed to take account of the features and guidelines extant in the well established (but merely voluntary) disclosure mandates incorporated into the Extractive Industries Transparency Initiative. Such disclosures will be beneficial to investors, as they will protect companies from false publicity asserting below-market, "collusive" contracts between the company and corrupt governments for the resources (and, accordingly, minimize the potential for asset seizures). And the disclosures will also benefit indigenous populations by facilitating the work of nongovernmental organizations devoted to tracking whether the proceeds from resources sales and contracts feed back into civic projects, consistent with the rights of the citizens of such countries.

In a similar vein, Section 1502 of Dodd-Frank requires the SEC to engage in rule-making addressing public companies (or subsidiaries or controlling entities of such companies) whose products make use of certain "conflict" minerals originating in the Democratic Republic of the Congo or adjoining countries. The impetus for the SEC's rule-making is a conviction that companies whose manufacturing employs

⁹¹ The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173)

⁹² In the interests of full disclosure: I testified before the House Financial Services Committee in favor of passage of the bill. My testimony appears as an Appendix in Stelman, *Globalization and Corporate Social Responsibility: Challenges for the Academy, Future Lawyers and Corporate Law*, 53, *NYLS L Rev* 817 (Appendix A, 853-858) (2009/10).

minerals obtained from such areas must exercise due diligence on the “source and chain of custody of such minerals.” Congress has specifically mandated that the report provide evidence of an independent private sector audit demonstrating the company’s efforts to ensure that the minerals were obtained absent corporate complicity in indigenous conflicts and violence. Under the Act, the SEC has until April 17, 2011 to promulgate rules requiring annual reports to the SEC by such firms, as well as their making such information available to the public on their company’s website. This provision, quite patently, is a step forward in Congress’ effort to promote human rights observance by U.S. firms and their affiliates.

Finally, after several recent high profile coal mining disasters, in Section 1503 of the Act, Congress has endorsed greater disclosure, in each periodic report filed with the SEC, of mining companies’ (and their subsidiaries’) health and safety records, including the total number of any mining-related fatalities at the enterprise. The new disclosure requirements, which went into effect already, on August 20, 2010, should also vastly increase the leverage of the Mine Safety and Health Administration (“MSHA”). They require comprehensive disclosure of the MSHA’s issuance of notices of violations (of health and safety standards), imminent danger orders and the total value of financial fines (“assessments”) it has levied for violations. The Section is largely self-effectuating -- i.e. it does not depend on subsequent SEC rule-making in order to become effective.⁹³ Evidencing some alarm at the deviation from the narrowest definition of investors’ “reasonable” concerns, one well known, traditional corporate law firm noted (in a client advisory) that the mining health and safety record disclosure are “unbounded by traditional concepts of materiality.”⁹⁴

This article takes a favorable view of the expansion of mandatory SEC reporting so as to encompass areas where public companies’ operations risk implicating the firm in human rights abuses or otherwise producing substantial negative social externalities. Yet there’s no doubt that Congress’ and the SEC’s new embrace of “social disclosure” is not complete and, for some, still controversial. One corporate law firm went so far as to describe the Dodd-Frank Act’s new disclosure mandates as “an unfortunate use of the federal securities laws for purposes unrelated to securities transactions and disclosures.”⁹⁵ Perhaps for some corporate law firms and general counsel, the old view of securities investors as being reified, merely two-dimensional beings interested exclusively in garnering immediate financial profits is not entirely dead. But at the same time it’s also true that more and more

⁹³ See circa 5. U.S.C. Section 553 (b).

⁹⁴ See p. 3 Covington & Burley, LLP “Advisory/Dodd-Frank Act: New Disclosure Rules Relating to Extractive Industries,” July 22, 2010 [from the web

⁹⁵ *Id* at 4.

companies are perceiving the employee, customer and investor morale benefits of publishing corporate social responsibility reports, and the International Standards Organization (ISO) is working on an increasingly robust set of standards for quantifying corporate performance in the human rights and social responsibility areas. In sum, it's a transitional moment in the development of standards of transparency, accountability and human rights compliance for publicly listed United States firms; but the trend is solidly in the direction of greater disclosure and greater accountability.

B. Social Action Shareholder Proposals in the Company Proxy

Shareholder proposals to be included in the corporate proxy statement are the most established, consistent channel for shareholder social activism (or "corporate social responsibility") in the United States.⁹⁶ This reflects Congress' mandate to the Commission which specifically empowered it to consider "the public interest," as well as the matter of investor protection, per se, when crafting the rules to govern shareholders' communications with management and one another. In its earliest incarnation, in 1942, the SEC's shareholder proposal rule reflected the desire to render the corporate proxy statement materially complete as to the matters which were expected to be presented, in person, at the annual shareholders' meeting. This was especially pressing because the proxies (votes, essentially) would be returned/cast prior to the live meeting. Hence, were the proposals not so included, the shareholder body would not be informed of them, and the rule provided for inclusion of any shareholder proposal which "constituted a proper subject for shareholder action."⁹⁷ Of course, circulation of an independent proxy statement by the shareholder-proponent would be prohibitively costly.

It was in the 1970's that social action shareholder proposals truly took off. Indeed, after a famous ruling by the D.C. District Court in *Medical Committee for Human Rights v. S.E.C.*,⁹⁸ in 1976, the SEC altered the shareholder proposal rule to provide, expressly, that matters which raised substantial social policy issues could not be excluded from the corporate proxy even if they addressed some facet of fundamental corporate operations – i.e. something traditionally within the purview

⁹⁶ For a brief account of the legal history of corporate social responsibility within the American system of corporate governance, see Faith Stevelman, *Globalization and Corporate Social Responsibility*, NYLS L Rev (2009) at 823 – 827.

⁹⁷ SEC Securities, Exchange Act Release No. 3638, 1945 SEC LEXIS 233 1 (Jan. 3, 1945).

⁹⁸ 432 F.2d 659 (D.C.Cir. 1970), vacated as moot, 404 U.S. 403 (1972). For commentary on the development of shareholder proxy activism through this twenty year period see Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 Ala. L. Rev. 879 (1993).

of the board and not the shareholders.⁹⁹ In this same early period, Reverend Leon Sullivan used the publicity arising from his submission of shareholder proposals to General Motors to persuade the company to accelerate its progress towards racial and gender diversity in its management ranks.¹⁰⁰

And Dr. Sullivan went on, through further proxy activism to spur the campaign for divestment from apartheid era South Africa.¹⁰¹ Social action shareholder proposals have flourished ever since. Many shareholder proposals dealing with firms' environmental and workers' safety records, labor practices, political activities, executive compensation policies and approach to equality and anti-discrimination efforts have been included in corporate proxies. Even where they have not garnered a majority of shareholder votes, they have often proven "successful" when measured by the publicity and leverage to catalyze change which they have generated. Many times, the proponents are able, even, to drop their campaign to have the proposal included, because the companies, proactively, voluntarily conform their conduct to the objective described in the shareholder proposal.

There are an increasing number of shareholder proposals which expressly raise the issue of business and human rights, or raise issues which are encompassed as part of a business and human rights agenda. For example, a group called "Investors Against Genocide" has employed the shareholder proposal process to persuade TIAA-CREF and American Funds to commit to avoiding investment in firms

⁹⁹ Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 41 Fed. Reg. 52,994, 52,998 (Nov. 22 1976).

¹⁰⁰ For commentary see See Donald E. Schwartz, The Public-Interest Proxy Contest: Reflections on Campaign GM, 69 MICH. L. REV. 419 (1971).

¹⁰¹ The connection between Dr. Sullivan's obtaining a presence on GM's board and the genesis of the "Sullivan Proposals" is described in a recent letter to the SEC from the Interfaith Center on Corporate Responsibility ("ICCR"), which has been perhaps the most active proponent of shareholder social activism through the proxy. See Letter to the SEC from Paul M. Neuhauser, on behalf of the ICCR, in favor of the adoption of amendments to the SEC's rules to facilitate shareholder director Nominations, Releases 33-9046, 34-60089, IC 28765; File No. S7-10-09 (June 10, 2009) dated August 17, 2009 As described therein: " In 1971 the Episcopal Church introduced a shareholder proposal at General Motors requesting that registrant to cease operations in South Africa, a nation then enforcing a very separation by race in the workplace (jobs, pay, drinking fountains etc). The registrant's proxy statement revealed that one of GM's directors, the Rev Leon Sullivan, had voted against the Board's decision to oppose the shareholder proposal. At the annual meeting Rev. Sullivan came down from the dais and spoke in favor of the shareholder proposal. The upshot of the "conflict" on GM's Board was the creation, by a coalition led by General Motors but consisting of almost all of the major US corporations operating in South Africa, of the "Sullivan Principles", a code of conduct to abolish apartheid in their South African workplaces. Thus, the need for GM's Board to adopt a modus vivendi between the conflicting views on the Board brought real progress not only at GM, but at virtually all American companies operating in South Africa." For further commentary on the shareholder proposal system as a vehicle for enhanced social transparency and social accountability on behalf of public companies, see Cynthia A. Williams, The Securities Exchange Commission and Corporate Social Transparency, 112 Harv. L. Rev. 1197 (1999).

which are implicated in the genocide in Darfur.¹⁰² Investors Against Genocide is presently campaigning to expand this “disinvestment” campaign to virtually all of the major American mutual fund companies and major financial institutions. In this same vein, Fidelity was informed by the SEC that it could not omit a shareholder proposal proposing a ban on investment in corporations doing business in Sudan.¹⁰³

Shareholder proposals seeking to raise corporate awareness of labor abuses occurring along the company’s supply chain have been presented to corporations including Gap, Mattel, Sears, Walt Disney Co., McDonalds and Costco.¹⁰⁴ These shareholder proposals have encouraged the companies to adopt the core conventions of the International Labor Organization in ensuring against forced labor and especially child labor. In addition, through the use of shareholder proposals, companies in the mining sector have been made to feel increased pressure to raise their standards of safety and environmental compliance. Indeed, even the submission of the proposals is sometimes sufficient to improve the company’s social responsiveness. In 2006, for example, roughly one third of the social action proposals submitted were voluntarily withdrawn prior to the circulation of the proxy statement because the shareholder advocates had reached a voluntary resolution of their concerns in consultation with the company’s management.¹⁰⁵ In this same vein, in 2008, several ethically motivated investor groups agreed to drop their formal proxy proposal when Canadian mining firm Goldcorp, Inc. agreed to conduct a study of its Human Rights record in Guatemala.¹⁰⁶

Finally, shareholder proposals have been used to demand greater transparency and accountability about corporations’ political (and purportedly philanthropic) activities -- including politically motivated donations to think tanks and foundations associated with politicians.¹⁰⁷ Disclosure arising from traditional

¹⁰² See Investors Against Genocide at <http://investorsagainstgenocide.net/aboutus>.

¹⁰³ 2008 SEC No-Act LEXIS 31 (January 22, 2008).

¹⁰⁴ See e.g. Re: Costco Wholesale Corporation, 2004 SEC No-Act. LEXIS 806 (October 26, 2004); The Gap Inc., 2002 SEC No-Act. LEXIS 385, *40 (March 13, 2002). For citation and discussion see Adam Kanzer, “The Use of Shareholder Proposals to Address Corporate Human Rights Performance, Chapter 5, FINANCE FOR A BETTER WORLD (Macmillan, 2009).

¹⁰⁵ Carolyn Mathiasen and Heidi Welsh, “Social Policy Shareholder Resolutions in 2006: Issues, Votes and Views of Institutional Investors (Published by the Social Issues Service, ISS, March 2007).

¹⁰⁶ For citation to the study completed by Goldcorp. see <http://hria-guatemala.com>; For a brief summary of Ethical Funds’ accord with Goldcorp which led to the study see <https://www.ethicalfunds.com/en/Investor/OurStory/InTheNews/EthicalFundsInTheNews/Pages/17052010e.aspx>

¹⁰⁷ Such shareholder proposals can be excluded from the corporate proxy for a variety of reasons, including: (i) where they are deemed not to be a subject for shareholder but rather for board decision-making; (ii) where they are vague (iii) where they reflect a “personal grievance” on the part of the proponent, inter alia. See Rule 14a-8 (Question 9). And see also, See e.g. Halliburton 2010 SEC No-Act

campaign finance and lobbying laws is deficient in providing an adequately clear and comprehensive account of such corporate activities. For this reason, activist shareholders have resorted to asking companies directly to account for their donations and gifts.¹⁰⁸ Shareholder proposals in the area of corporate political activity and transparency are particularly important in the wake of the Supreme Court's *Citizens United* decision, which expanded corporations' power to expend funds in a variety of political contests.¹⁰⁹ The push for greater transparency in regard to businesses' lobbying and campaign finance expenditures is part of the broader concern for advancing the rule of law and democratic values – both being essential facets of the human rights agenda.

C. The Anti-Bribery Provisions of the Securities Exchange Act

As described above, the PRR framework enumerates a comprehensive set of human rights but declines to single out or prioritize among rights that corporations might impinge upon. Nevertheless, it's apparent that corporate bribery and other forms of unlawful dealings between businesses and foreign governments are contrary to fundamental tenets of human rights. Furthermore, consistent with this viewpoint, the United Kingdom has just enacted the toughest of modern anti-corporate bribery laws¹¹⁰ – laws which are far more stringent than their American counterpart, the Foreign Corrupt Practices Act.¹¹¹

LEXIS 82 (Jan. 21, 2010) (concluding that company had no proper basis to exclude request for disclosure of company's political contributions); Pacific Gas & Electric, 2010 SEC NO. Act LEXIS 239 (Allowing company to exclude proposal requesting semi-annual report of company's charitable contributions and policies governing them on basis that request was "substantially implemented" by the company); Caremark Rx 2005 SEC No-Act LEXIS 352 (refusing to concur with the corporations reasons for excluding request for report on company's charitable contributions).

¹⁰⁸ For a discussion of the disclosure void relevant to politically motivated corporate "philanthropic" donations to politically active foundations, think tanks and litigation boutiques, see Nancy Knauer, *Reinventing Government: the Promise of Institutional Choice and Government Created Charitable Organizations*, 41 *NEW YORK LAW SCHOOL LAW REVIEW* 945 (1997) Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, __ *UCLA L. Rev.* __ (1997). And on the use of seemingly philanthropic "conduits" to mask corporate political activities see Nancy Knauer

¹⁰⁹ *Citizens United v Federal Election Commission*, 558 U.S. 50 (2010),

¹¹⁰ On April 8, 2010, the U.K. Parliament passed significant and long-pending legislation reforming Britain's laws on criminalizing corrupt payments to government officials. Expected to come into full force this autumn, the Bribery Act of 2010 replaces fragmented and difficult-to-prosecute, common law bribery offenses and statutory offenses that date back to the early 1900s. The reform coincides with significantly increased enforcement efforts by the U.K. Serious Fraud Office and responds to international criticisms that U.K. legislation lagged behind OECD Anti-Bribery Convention implementation legislation and the U.S. Foreign Corrupt Practices Act. For an overview of the new U.K. law see Gary DiBianco & Penny Madden, "U.K. Parliament Enacts Landmark Anti-Bribery Law" Skadden, Arps, Slate, Meagher & Flom LLP, April 15, 2010 available at

¹¹¹ § 78dd-1 [Section 30A of the Securities & Exchange Act of 1934].

The Foreign Corrupt Practices Act (“FCPA”) was enacted in 1977 after a series of scandals involving American companies paying bribes to foreign governments to win contracts abroad.¹¹² The FCPA was enacted into the Securities Act of 1934, along with a more stringent “accurate books and records” provision for public corporations.¹¹³ The idea, clearly, was that if companies were making such unlawful payments, they would not be accounting and reporting them consistent with the disclosure requirements mandated by the securities laws, including accounting under generally accepted accounting principles. This is an early example of how disclosure enacted in the interest of investors quite obviously was intended to encompass broader public social welfare objectives.

Over the past five years, there has been an increasing intensification in the number and seriousness of FCPA enforcement actions brought by the SEC (in civil cases) and the Department of Justice (for alleged criminal violations of the FCPA). Indeed enforcement over the past five years has set several new records.¹¹⁴ For example, in April 2010, the DOJ announced that the German automobile manufacturer Daimler, A.G. agreed to pay \$185 million in criminal and civil penalties in settlement to resolve FCPA charges.¹¹⁵ Also in April of this year, a Virginia federal court sentenced an American who paid bribes to the Panamanian government in order to facilitate a twenty year, no bid contract for “Ports Engineering Consultants Corp., to over seven years in jail.¹¹⁶ This enhanced scrutiny and enforcement is motivated not only by anti-corruption, and anti-money laundering concerns, but also, perhaps ironically, by provisions of the USA Patriot’s Act which target eradicating the flow of funds to governments which potentially support terrorist organizations.¹¹⁷ The stepped up anti-bribery legislation enacted by the United Kingdom was mentioned above. This renewed

¹¹² For a landmark case (decided after the enactment of the FCPA) which allowed a special litigation committee to quash a shareholder derivative suit against a board of directors and senior officers where the company had engaged in pattern of making unlawful payments to foreign governments, prior to the enactment of the FCPA, see *Auerbach v. Bennett*, 47 NY2d 619 (1979).

¹¹³ U.S.C.; TITLE 15; CHAPTER 2B--SECURITIES EXCHANGES; § 78m. Periodical and other reports; (a) Reports by issuer of security; contents.

¹¹⁴ See Lanny A. Breur, Asst Atty’ Gen. U.S. Dep’t of Justice, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), at *1 <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf>.

¹¹⁵¹¹⁵ As part of the settlement, former FBI Director Louis Freeh will serve as the company’s independent compliance monitor for three years. For announcement see the FCPA blog: <http://www.fcpablog.com/blog/2010/3/25/freeh-named-daimler-monitor.html>

¹¹⁶ The official announcement of the verdict and findings is presented by the DOJ at <http://www.justice.gov/opa/pr/2010/April/10-crm-442.html>

¹¹⁷ Provide official citation to US Patriot’s Act.

commitment is evidenced in many European Union, United Nations and International Treaties as well.¹¹⁸

Clearly, there is a broad and deep consensus that a strong stand against business-facilitated corruption is essential to building a strong, law-abiding, human rights respecting international order.

Conclusion

There are powerful reasons to be skeptical and cynical about efforts to raise the level of business compliance with human rights – that is to use law, policy, and public pressure to transform corporate cultures to rights respecting ones, rather than rights-exploiting ones. There is no embarrassment in expecting the worst and being proven correct, or being passive in the face of complex problems. Businesses' efforts to promote respect for human rights may be lambasted as public relations, or as ineffectual, or simply inefficient. Governments' efforts may be criticized on the same basis. However, when pressure mounts at various fronts, simultaneously and with increasing force -- from leaders in many governments, leaders in nongovernmental organizations, activists from employee and labor groups, investor groups, citizens' and students' groups – pressure to hold businesses which profit from global operations to account for their treatment of vulnerable populations and scarce natural resources, attention should be paid.

Change happens, momentous, transformational change – like the end of segregation in the United States, the end of Apartheid in South Africa, the fall of the Berlin Wall. None of these changes seemed inevitable. In this same vein, as John Ruggie's reports caution, gaps in global governance regimes are making it too easy for multinational corporations to exploit regulatory vacuums to do harm. Yet these harms will not stay invisible on account of the technological innovations which facilitate information gathering and real time reporting on the web. The Human Rights Council has done well in authorizing John Ruggie to sponsor several years of international consultations with leaders in governments, business and in the human rights community. If they follow the "Protect, Respect, Remedy" framework with seriousness of purpose, businesses may be able to get out in front of the tumultuous change their abuses might otherwise spur. Then instead of

¹¹⁸ See e.g. The European Union's Convention on the Protection of European Communities' Financial Interests, the Organization of American States' Inter-American Convention Against Corruption, the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Officials in International Business Transactions, the United Nations' Convention Against Corruption; the African Union's Convention on Preventing and Combatting Corruption, as well as policies instituted by the World Bank and the IMF allowing for the investigation of corruption committed by companies and governments. For commentary and statistics, see Shearman & Sterling, LLP, Recent Trends and Patterns of FCPA Enforcement (as of February 13, 2008).

violent transformation and anti-business regulation, we might see gradual, international progress towards a more humane and also more prosperous world where business and human rights concerns are not always viewed as fundamentally at odds.

