

## INTERNATIONAL LAW IN THE BOARDROOM

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*Conventional wisdom expects that international law will proceed through a “state pathway” before regulating corporations: it binds national governments that then bind corporations. But recent corporate practices confound this story. American corporations complied with international laws even when the state pathway broke down. This unexpected compliance leads to three questions: How did corporations comply? Why did they do so? Who enforced international law? These questions are important for two reasons. First, many international laws depend on corporate cooperation in order to succeed. Second, the state pathway is not robust, then or now. It is therefore vital to identify alternatives to the state pathway in order for international laws – on human rights, climate change, labor rights, corruption, and other issues – to reach corporate boardrooms, C-Suites, offices, and supply chains.*

*This Article synthesizes two traditionally separate fields – public international law and corporate governance – to offer a descriptive account of how corporations incorporate international law into board governance, management decision making, and contractual relationships. It offers three case studies in climate change, human rights, and sustainable development that reveal important incentives and mechanisms for international law compliance that are neglected under the traditional view. It explains that corporations comply in order to manage risks, appease stakeholders, and advance corporate purpose and strategy. Proxy advisors, investors, civil society actors, and even peer corporations enforce international law when a government actor will not. Normatively, these insights enrich academic debates concerning the operation and effectiveness of international law. On a policy level, this Article offers three recommendations for designing international agreements in order to encourage corporate compliance:*

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*facilitate comparability, create indicators, and identify corporate-purpose compatibility. It applies these lessons to two international agreements in development: (a) treaty on business and human rights, and (b) treaty on pandemic prevention and preparedness.*

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## INTRODUCTION

Former President Donald Trump famously withdrew from the Paris Agreement on climate change,<sup>1</sup> explaining that he “was elected to represent the citizens of Pittsburgh, not Paris.”<sup>2</sup> He similarly withdrew from the United Nations Educational Scientific and Cultural Organization (“UNESCO”),<sup>3</sup> the Trans-

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<sup>1</sup> Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html> [<https://perma.cc/7GRR-68XY>].

<sup>2</sup> Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html> [<https://perma.cc/8R6E-MR2T>].

<sup>3</sup> Gardiner Harris & Steven Erlanger, *U.S. Will Withdraw from Unesco, Citing Its ‘Anti-Israel Bias,’* N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/us/politics/trump-unesco-withdrawal.html> [<https://perma.cc/7NAN-WWAD>].

Pacific Partnership (“TPP”),<sup>4</sup> the United Nations Human Rights Council,<sup>5</sup> and the World Health Organization (“WHO”),<sup>6</sup> and he *threatened* to withdraw from the World Trade Organization (“WTO”) <sup>7</sup> and the North Atlantic Treaty Organization (“NATO”).<sup>8</sup> He withdrew from treaties that the U.S. had previously ratified, including the Treaty on Open Skies<sup>9</sup> and Intermediate-Range Nuclear Forces Treaty,<sup>10</sup> and he attempted to “unsign” agreements that the United States had already supported, such as the Arms Trade Treaty.<sup>11</sup> His choices have led to a foreign policy labelled “the Withdrawal Doctrine”<sup>12</sup> with critics claiming that “the Trump administration has waged an assault on international law unparalleled in the post-war era.”<sup>13</sup>

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<sup>4</sup> Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html> [https://perma.cc/7Y5P-ECLT].

<sup>5</sup> Colin Dwyer, *U.S. Announces Its Withdrawal from U.N. Human Rights Council*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621435225/u-s-announces-its-withdrawal-from-u-n-s-human-rights-council> [https://perma.cc/96ZH-QSQ2].

<sup>6</sup> Katie Rogers & Apoorva Mandavilli, *Trump Administration Signals Formal Withdrawal from W.H.O.*, N.Y. TIMES (July 7, 2020) <https://www.nytimes.com/2020/07/07/us/politics/coronavirus-trump-who.html> [https://perma.cc/SDB2-3LGK].

<sup>7</sup> Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. 432, 433 (Nov. 12, 2018).

<sup>8</sup> *Id.* at 433–34.

<sup>9</sup> Dominick Mastrangelo, *Trump Administration Pulls Out of Open Skies Treaty with Russia*, THE HILL (Nov. 22, 2020, 8:37 AM), <https://thehill.com/homenews/administration/527056-us-withdraws-from-open-skies-treaty-with-russia> [https://perma.cc/LE7H-KXGN]; see Jean Galbraith, *Trump Administration Announces Withdrawal from Four International Agreements*, 113 AM. J. INT’L L. 131, 132 (2019) (noting that “this latest round [of withdrawals] involved three Article II treaties to which the Senate had provided its advice and consent.”).

<sup>10</sup> *The Intermediate-Range Nuclear Forces Treaty*, U.S. DEP’T OF STATE, <https://2017-2021.state.gov/inf/index.html> [https://perma.cc/58X2-SNZW] (last updated Jan. 20, 2021) (“On October 20, 2018, President Trump announced that the United States would exit the INF Treaty in response to Russia’s longstanding violation of its obligations under the Treaty.”).

<sup>11</sup> Bill Chappell, *Trump Moves to Withdraw U.S. from U.N. Arms Trade Treaty*, NPR (Apr. 26, 2019, 2:53 PM), <https://www.npr.org/2019/04/26/717547741/trump-moves-to-withdraw-u-s-from-u-n-arms-trade-treaty> [https://perma.cc/9S2T-LHPB] (“President Trump effectively “unsigned” an international arms sales agreement Friday, moving to withdraw the U.S. from the United Nations’ Arms Trade Treaty. The agreement sets global standards for regulating transfers of conventional arms, from rifles to tanks and airplanes.”).

<sup>12</sup> Richard Haass, *Trump’s Foreign Policy Doctrine? The Withdrawal Doctrine*, COUNCIL ON FOREIGN RELATIONS (May 27, 2020), <https://www.cfr.org/article/trumps-foreign-policy-doctrine-withdrawal-doctrine> [https://perma.cc/4VA7-4UMJ].

<sup>13</sup> See, e.g., Oona Hathaway, *Reengaging on Treaties and Other International Agreements (Part I): President Donald Trump’s Rejection of International Law*, JUST SECURITY (Oct. 2, 2020), <https://www.justsecurity.org/72656/reengaging-on-treaties-and-other-international-agreements-part-i-president-donald-trumps-re>

But the United States' resistance to international law both predates and will likely outlive the Trump administration.<sup>14</sup> While the Biden administration has re-engaged with international laws and organizations that the Trump administration abandoned,<sup>15</sup> it too remains wary of entering into important but legally binding agreements.<sup>16</sup> Over the decades, the United States has declined to ratify a number of prominent treaties, such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on Biological Diversity.<sup>17</sup> This foreign policy has implications for both the *United States'* conduct on the world stage and the conduct of *non-state* actors within the jurisdiction of the United States. Conventional wisdom expects that international law will reach these non-state actors through a "state pathway": international law binds states that, in turn, bind non-state actors to those international laws.<sup>18</sup> If that state pathway breaks down—as it did under the Trump administration—then conventional wisdom predicts that non-state actors would not comply with international law.

But recent developments confound this conventional wisdom. This Article explains that one type of non-state actor—

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jection-of-international-law [https://perma.cc/LZ2Z-UEUK]; see generally Harold Hongju Koh, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* 5 (2018).

<sup>14</sup> See, e.g., Kevin Jon Heller, *Symposium: Koh, Trump, Obama – and Jean Baudrillard (Part 1)*, OPINIO JURIS (Feb 21, 2018) <http://opiniojuris.org/2018/02/21/koh-trump-obama-and-jean-baudrillard> [https://perma.cc/Z58W-7LEU] (discussing retrospective and prospective views of the Trump administration's international law policies).

<sup>15</sup> Nathan Rott, *Biden Moves to Have U.S. Rejoin Climate Accord*, NPR (Jan. 20, 2021, 5:42 PM), <https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958923821/biden-moves-to-have-u-s-rejoin-climate-accord> [https://perma.cc/FKG9-3CK4].

<sup>16</sup> See, e.g., Matthew Lee, *US Tells Russia It Won't Rejoin Open Skies Arms Control Pact*, ASSOCIATED PRESS (May 27, 2021) <https://apnews.com/article/donald-trump-europe-russia-government-and-politics-69038e96de8488f2c759b126c27d1366> [perma.cc/7NY5-AWW9]; Associated Press, *WATCH: White House Cites Concerns with Pandemic Treaty, WHO Report*, PBS NEWSHOUR (Mar. 30, 2021), <https://www.pbs.org/newshour/politics/watch-live-jen-psaki-holds-white-house-news-briefing-7> [https://perma.cc/R4PB-V8V6].

<sup>17</sup> *Status of Ratifications Interactive Dashboard: United States of America*, U.N. OFF. OF HIGH COMM'R FOR HUM. RTS., <https://indicators.ohchr.org> [https://perma.cc/S2X5-ESYS] (last visited Sept. 9, 2022).

<sup>18</sup> See, e.g., Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT'L L. 189, 216 (2020) ("Corporations are neither the authors of international norms nor the primary audience for their application. Instead, international legal obligations are mandated by and for states and only reach corporations to the extent that states themselves have implemented such obligations in their domestic legal systems and made them applicable to private companies.").

corporations—complied with international law even when the state pathway broke down.<sup>19</sup> This unexpected compliance with international law raises three questions that this Article explores: (a) *how* did corporations comply with international law; (b) *why* did they do so when not legally obligated, and (c) *who* enforced international law if not government actors? By answering these questions, this Article provides *descriptive*, *normative*, and *policy* contributions that deepen academic and policy discussions of how international law operates.

*Descriptively*, this Article uses a new approach to answer an old question: Do actors comply with international law and, if so, why?<sup>20</sup> The significance of this inquiry is understandable because international law lacks many of the familiar features that compel compliance within a national setting. This Article revisits this old question but switches its focus from compliance by *state* actors to *corporate* actors to examine if and why the latter comply with international law.<sup>21</sup> It answers these questions by opening up the “black box” of the corporation to examine three of its dimensions: board governance, management decision making, and third-party contractual relationships. It relies on original research of board committee charters, investor materials, 10-K reports, proxy statements, sustainability reports, mandated online disclosures, “no-action letters,” training materials, industry and company codes of conduct, among others, to examine if and how international law in three areas—*climate change*, *human rights*, and *sustainable development*—influence corporate decision making.

This research offers a picture of international law “on the ground” or, more accurately, in the boardroom, C-suite, offices, and supply chains of approximately twenty large companies across six different sectors: Amazon, Apple, Bank of America, Berkshire Hathaway, Boeing, Chevron, ConocoPhillips, ExxonMobil, Home Depot, JPMorgan Chase, Johnson & Johnson, Microsoft, Nvidia, Pfizer, Raytheon, Tesla, United Health Group, and UPS. It finds that many of these companies institutionalize international law in several ways, including by allo-

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<sup>19</sup> See generally *id.* (providing examples when business actors complied with international law despite lack of state mandate to do so).

<sup>20</sup> See Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 191 (2006) (“[F]or many scholars, the most important issue confronting international law is how to induce compliance with international norms, that is, how to encourage nations to obey international law.”).

<sup>21</sup> See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996) (explaining the importance of examining the actions of non-state actors).

cating oversight to specific board committees; developing performance metrics; employing directors with relevant expertise; tying executive compensation to progress; creating executive level positions; utilizing cross-functional teams to coordinate implementation; joining industry-level organizations; and using supplier training to improve performance. Collectively, the case studies present a picture warranting both optimism and caution. The good news is that many corporations *do* incorporate international law into their governance and operations. The bad news is that this incorporation is unevenly distributed across *corporations*, with some doing more than others, and across *international laws*, with some receiving more attention.

*Normatively*, this Article both presents and answers an important puzzle. This Article demonstrates that corporations continue to comply with international law even when a government actor does not make them do it. This begs the question: *why?* This Article explains that government mandate is only one important incentive for corporate compliance. Corporations also comply with international law to *manage risks, maintain relationships with stakeholders, and advance corporate strategy and purpose*. Similarly, government actors are not the only ones who incentivize corporations to comply with international law. Instead, *peer corporations, investors, proxy advisors, and civil society actors* also enforce it.

On a *policy* level, this Article provides insight to policymakers on how to build upon these burgeoning corporate practices that present a promising picture but one tinged with caution. While many corporations do comply with international law, many others do not. Using three case studies, this Article provides a framework for predicting different levels of corporate compliance with international law. Specifically, it explains that compliance may be strong when the visibility of the corporation *and* the policy issue are high but compliance declines as either or both of these factors wane. It is not surprising that large and visible corporations demonstrate their adherence to international law norms on climate change given the salience of the issue, its potential impact on financial performance, and the scrutiny of investors, employees, and regulators on corporate climate mitigation strategies. In contrast, compliance may dwindle for less visible issues or less visible corporations. This framework suggests that corporate compliance – even when present among some corporations – may nonetheless vary widely across corporations, sectors, and issue areas. This Arti-

cle therefore explains how policymakers can encourage compliance by those corporations that continue to ignore international law. It recommends three lessons that policymakers should heed when designing international agreements that seek to change corporate behavior: (a) *facilitate comparability* between corporations, (b) *incorporate indicators* to measure progress, and (c) *identify corporate-purpose compatibility* of the international agreement. These lessons are particularly critical at this moment because of important international agreements currently in development that seek to change corporate behavior on two fronts: (a) human rights, and (b) pandemic prevention and preparedness. This Article applies its lessons to both of these agreements in order to guide policymakers.

This Article proceeds as follows. Section I explains that corporations maintain three distinct relationships with international law as targets of its regulation, influencers of its creation, and contributors to its enforcement. Section II provides definitional clarity by explaining what it means for a corporation to comply with international law. Section III presents case studies in three areas of international law—climate change, human rights, and sustainable development—that analyze the policies and practices of six companies in each case study. Section IV explores the normative implications of the case studies by identifying the reasons corporations comply with international law and the actors who enforce it. Section V uses these normative insights to recommend that policymakers include the following features in the design of future international agreements: (1) corporate comparability, (2) key indicators, and (3) corporate-purpose compatibility. This Section applies these recommendations to two international agreements in development that depend on corporate cooperation in order to succeed. The first is an internationally legally binding instrument on corporations and human rights authorized by the UN Human Rights Council in 2014. The second is an internationally binding instrument on pandemic prevention and preparedness authorized by the World Health Organization in 2021 in response to the COVID-19 pandemic.

## I

### THE MANY ROLES OF CORPORATIONS IN INTERNATIONAL LAW: TARGETS, CREATORS, AND ENFORCERS

This Section explains that corporations maintain three important relationships with international law as its *targets*, *cre-*

ators, and enforcers. First, corporations are targets when international laws seek to change their behavior. Second, corporations are creators of international law because of their participation in the development and interpretation of international agreements. Finally, corporations are enforcers of international law against multiple audiences, such as broader enterprise, suppliers, consumers, competitors and peers, and government actors.

#### A. Corporations as Targets of International Law

International law targets corporations by legally binding government actors to encourage some types of corporate behavior and discourage others.<sup>22</sup> For example, many corporations are implicated in human rights abuses around the world.<sup>23</sup> In December 2020, plaintiffs who are Rohingya refugees from Myanmar filed a \$150 billion class action lawsuit against Meta, Facebook's parent company, "alleg[ing] that Facebook's algorithm amplified hate speech and that the company neglected to remove inflammatory content despite repeated warnings that such posts could foment ethnic violence."<sup>24</sup> In December 2019, an international advocacy group filed a lawsuit against a number of tech giants—including Apple—for "knowingly benefiting from and aiding and abetting the cruel and brutal use of young children in Democratic Republic of Congo ("DRC") to mine cobalt, a key component of

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<sup>22</sup> See, e.g., U.N. Convention Against Corruption, art. 12(1), Oct. 31, 2003, U.N. Doc. A/58/422, at 14 ("Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.").

<sup>23</sup> See, e.g., HUM. RTS. WATCH, ALUMINUM: THE CAR INDUSTRY'S BLIND SPOT WHY CAR COMPANIES SHOULD ADDRESS THE HUMAN RIGHTS IMPACT OF ALUMINUM PRODUCTION 14–21 (2021) (describing the human rights impacts of aluminum production, which include loss of land to mining, reduced access to water, environmental contamination, and climate change); Amanda Macias, *U.S. Warns Businesses Connected to China's Xinjiang Region Run 'High Risk' of Violating Law*, CNBC (July 13, 2021), <https://www.cnbc.com/2021/07/13/us-warns-businesses-with-investment-ties-to-chinas-xinjiang.html> [perma.cc/3QZM-CYXA] (reporting that "the Biden administration added 14 Chinese companies and other entities to its economic blacklist over alleged human rights abuses and high-tech surveillance in Xinjiang.").

<sup>24</sup> Amy Cheng, *Rohingya Refugees Sue Facebook for \$150 Billion, Alleging it Helped Perpetuate Genocide in Myanmar*, WASH. POST (Dec. 7, 2021), <https://www.washingtonpost.com/world/2021/12/07/facebook-rohingya-genocide-refugees-lawsuit/> [https://perma.cc/CA2G-WKKBK]; see also Class Action Complaint at 2–7, *Doe v. Meta Platforms, Inc.*, No. 3:22-cv-00051 (N.D. Cal. Jan. 5, 2021) (further detailing the allegations against the company).

every rechargeable lithium-ion battery used in the electronic devices these companies manufacture.”<sup>25</sup> These types of corporate actions are the reason that the United Nations Human Rights Council endorsed international principles addressing the human rights responsibilities of corporations,<sup>26</sup> and authorized the development of a legally binding international agreement addressing the same.<sup>27</sup>

Corporations have also come under international scrutiny for their environmental practices. A 2017 study found that “25 corporate and state producing entities account for 51% of global industrial GHG [greenhouse gas] [e]missions”<sup>28</sup> and that “[a]ll 100 producers account for 71% of global industrial GHG emissions.”<sup>29</sup> It also found that “[t]he highest emitting companies since 1988 that are investor-owned include: ExxonMobil, Shell, BP, Chevron, Peabody, Total, and BHP Billiton.”<sup>30</sup> These practices are among the reasons that global leaders created the Paris Climate Agreement, which “is a legally binding international treaty on climate change”<sup>31</sup> that seeks “to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels.”<sup>32</sup>

But two challenges limit the effectiveness of these international laws: (a) corporate influence over the *creation* of international law, and (b) *ineffective enforcement* of international law. These implicate two additional relationships between corporations and international law that are examined below.

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<sup>25</sup> Class Complaint for Injunctive Relief and Damages at 2, *Doe v. Apple, Inc.*, No. 1:19-cv-03737 (D.D.C. Nov. 2, 2021).

<sup>26</sup> U.N. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011).

<sup>27</sup> U.N. Human Rights Council Res. 26/L.22/Rev.1, U.N. Doc. A/HRC/28/L.22/Rev1 (June 25, 2014). The third version of the draft text was released in August 2021. U.N. Human Rights Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises* (Open-Ended Intergovernmental Working Grp., Third Revised Draft, Aug. 17, 2021), <https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf> [<https://perma.cc/9RDT-92DN>] [hereinafter UNHRC, *Legally Binding Instrument*].

<sup>28</sup> PAUL GRIFFIN, THE CARBON MAJORS DATABASE: CDP CARBON MAJORS REPORT 2017 8 (2017).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *The Paris Agreement*, U.N. CLIMATE CHANGE (Dec. 28, 2021), <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> [<https://perma.cc/AD5Q-N85D>].

<sup>32</sup> *Id.*

## B. Corporations as Creators of International Law

Corporations contribute to the creation of international laws in notable ways.<sup>33</sup> First, they can influence the negotiations, drafting, adoption, and implementation of international agreements.<sup>34</sup> Tobacco companies have come under scrutiny for using their economic leverage to lobby against global tobacco controls.<sup>35</sup> In one example, tobacco companies “influenced the government of Malawi to introduce resolutions or make amendments to tobacco-related resolutions in meetings of United Nations organizations, succeeding in temporarily displacing health as the focus in tobacco control policymaking.”<sup>36</sup> The WHO recognized that “the tobacco industry has operated for years with the express intention of subverting the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic.”<sup>37</sup>

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<sup>33</sup> See, e.g., JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 488–94 (2000) (describing the influence of businesses on global regulatory norms); Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 *YALE J. INT’L L.* 393, 399–402 (2007) (explaining how informal meetings of export credit insurers developed into the Berne Union that developed technical rules that subsequently guided policy development by international organizations); Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 *CONN. L. REV.* 147, 173 (2009) (“Private parties have long engaged in private transnational rule-making to facilitate cross-border transactions.”); Susan Block-Lieb, *Soft and Hard Strategies: The Role of Business in the Crafting of International Commercial Law*, 40 *MICH. J. INT’L L.* 433, 442–44 (2019) (describing the influence of soft law developed by international organizations on international commercial law); Paul Stephan, *Privatizing International Law*, 97 *VA. L. REV.* 1573, 1595–606 (2011) (describing the influence of private actors on international law making).

<sup>34</sup> See, e.g., Melissa J. Durkee, *The Business of Treaties*, 63 *UCLA L. REV.* 264, 294 (2016) (explaining how “[b]usiness actors were instrumental at all points in the development process of the Cape Town Convention”); Ayelet Berman, *Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors*, *EUR. J. OF INT’L L.* 1, 1 (Jan. 15, 2020) (forthcoming 2022) (explaining the influence of business actors on rulemaking by international organizations because of three types of capture risks: “capture caused by the dependency of IOs on the information held by business entities, capture caused by the overrepresentation of business entities, and capture caused by the financial contributions of NSAs to IOs”).

<sup>35</sup> Martin G. Otanez, Hadii M. Mamudu & Stanton A. Glantz, *Tobacco Companies’ Use of Developing Countries’ Economic Reliance on Tobacco to Lobby Against Global Tobacco Control: The Case of Malawi*, 99 *AM. J. PUB. HEALTH* 1759, 1764 (2009) (“In July 2000, tobacco companies conducted a meeting with Malawians to formulate the Malawi government’s position in support of the economic contribution of tobacco for that month’s ECOSOC meeting on the FCTC in New York.”).

<sup>36</sup> *Id.* at 1759.

<sup>37</sup> WHO, *GUIDELINES FOR IMPLEMENTATION OF ARTICLE 5.3 OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL 3* (Nov. 2008) (quoting World Health Assembly resolution WHA54.18 on transparency in tobacco control process).

Corporations can also influence the subsequent interpretation of international agreements. For example, Professor Melissa Durkee explains that corporate actors influence interpretation by providing testimony at Congressional hearings, preparing white papers and instructional materials, and advocating before international tribunals.<sup>38</sup> Interpretation by corporations can be impactful because international agreements may include ambiguous terms that leave gaps in application and enforcement. In one prominent example, Professor Durkee explains that “[i]ndustry actors have lobbied Congress to ensure that their definition of ‘appropriation’ in the Outer Space Treaty prevails in U.S. legislation and policy, and they push the United States to advance this interpretation with international counterparts.”<sup>39</sup>

### C. Corporations as Enforcers of International Law

Corporations and other business actors enforce international norms against five distinct audiences: *broader enterprise, suppliers, consumers, competitors and peers, and government actors*.<sup>40</sup>

First, corporations enforce international law across their broader enterprise when they standardize their global operations according to the highest regulatory standard that applies to them. Scholars examining the “California Effect”<sup>41</sup> and “Brussels Effect”<sup>42</sup> explain that corporations confronting different regulatory standards in multiple jurisdictions may choose the highest standard for their entire global operations in order to benefit from economies of scale or legal considerations, among other factors.<sup>43</sup> According to Professor Anu Bradford, this standardization results in the unilateral export of one

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<sup>38</sup> Melissa J. Durkee, *Interpretive Entrepreneurs*, 107 VA. L. REV. 431, 467–70, 475–77 (2021).

<sup>39</sup> *Id.* at 486–87.

<sup>40</sup> See Kishanthi Parella, *Improving Human Rights in Supply Chains*, 95 NOTRE DAME L. REV. 727, 788–92 (2019) (describing the various roles that corporations and other actors play in expanding the reach of international law norms); Butler, *supra* note 18 at 199 (distinguishing between three different enforcement roles of corporations: “extending, enforcing, and exporting”).

<sup>41</sup> Richard Perkins and Eric Neumayer, *Does the ‘California Effect’ Operate Across Borders? Trading- and Investing-up in Automobile Emission Standards*, 19 J. OF EUR. PUB. POL’Y 217, 223–25 (2012).

<sup>42</sup> Anu Bradford, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* 25–26 (2020) (explaining the Brussels Effect and how the policies of various EU member nations become global standards).

<sup>43</sup> See generally *id.*

country's regulatory standards.<sup>44</sup> When those regulatory standards encapsulate international law norms, the standardization practices result in a corporation applying international law norms across its operations when it is not legally obligated to do so.

Second, corporations enforce international law norms against their contractual or business partners. In separate works, both Professor Michael Vandenberg and Professor Li-Wen Lin have provided distinct and prominent examples of corporate enforcement of social responsibility norms to suppliers.<sup>45</sup> They explain that corporations engage in this form of enforcement because of media exposure, consumer boycotts, and increased regulatory scrutiny, among other factors.<sup>46</sup> Corporations may also apply international law norms to consumers of its products or services. In recent years, shareholders have demanded corporations adopt "consumer due diligence" practices in order to guard against the risk that a corporation's products or services will be used to violate international law norms.<sup>47</sup>

Third, corporations influence whether their peers and competitors will comply with international law. They influence these practices directly through industry level institutions that bind members to abide by a common code of conduct or other governance framework that incorporates international law.<sup>48</sup> They also influence the practices indirectly through market

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<sup>44</sup> Anu Bradford, *Exporting Standards: The Externalization of the EU's Regulatory Power via Markets*, 42 INT'L REV. L. & ECON. 158, 159 (2015); see also Matthew S. Erie & Thomas Streinz, *The Beijing Effect: China's "Digital Silk Road" as Transnational Data Governance*, 54 N.Y.U. J. INT'L L. & POL. 1, 48–53 (2021 (describing the role of Chinese technology companies in China's "Digital Silk Road").

<sup>45</sup> Michael P. Vandenberg, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 921–26 (2007); Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711, 721–23 (2009).

<sup>46</sup> Vandenberg, *supra* note 45, at 946–50; Lin, *supra* note 45, at 718.

<sup>47</sup> For example, in 2021, the Sisters of St. Joseph of Brentwood submitted a shareholder proposal at Amazon requesting a report "assessing Amazon's process for customer due diligence, to determine whether customers' use of its surveillance and computer vision products or cloud-based services contributes to human rights violations." AMAZON.COM, INC., NOTICE OF 2021 ANNUAL MEETING OF SHAREHOLDERS & PROXY STATEMENT 25 (May 26, 2020).

<sup>48</sup> See *e.g.*, RESPONSIBLE BUS. ALL. (RBA), RESPONSIBLE BUSINESS ALLIANCE CODE OF CONDUCT 7.0 at 1 (2021), [https://www.responsiblebusiness.org/media/docs/RBACodeofConduct7.0\\_English.pdf](https://www.responsiblebusiness.org/media/docs/RBACodeofConduct7.0_English.pdf) [<https://perma.cc/JE3G-HR78>] ("In alignment with the UN Guiding Principles on Business and Human Rights, the provisions in this Code are derived from key international human rights standards including the ILO Declaration on Fundamental Principles and Rights at Work and the UN Universal Declaration of Human Rights.").

mechanisms. For example, by touting corporate values, corporations place pressure on their competitors to similarly express their own positions on domestic and international policy debates in order to appease consumers, investors, employees, and other stakeholders.<sup>49</sup> Corporations that are unsure how to address these demands may copy the practices of other corporations that the former view as more successful in navigating those challenges.<sup>50</sup> Therefore, if high profile companies commit to international law, it may influence similar practices of those companies that routinely imitate those industry leaders.

Fourth, corporations may also enforce international law against government actors. According to Professor Durkee, some corporations have formed industry groups that advise, educate, monitor, and collaborate with governments on the implementation of treaties.<sup>51</sup> In other prominent examples, Professor Jay Butler has identified occasions on which corporations have refused to comply with orders from government actors that violate international law.<sup>52</sup> Professor Butler explains that tech companies have “not merely extended international law as a guidepost for their own conduct, but also limited the ability of states to utilize their technologies to contravene international law.”<sup>53</sup> As examples, Professor Butler explains Microsoft’s refusal to “make sales to government actors when it was concerned that such technologies might be used to violate human rights”<sup>54</sup> and Google’s withdrawal “from a pro-

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<sup>49</sup> See Tom C. W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1546 (2018) (“Many in society and within corporations now expect businesses and executives, particularly those at large public companies, to engage with the critical social issues of today. Silence and indifference are becoming less and less the norm.”) (footnote omitted).

<sup>50</sup> See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 63, 70 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

<sup>51</sup> Durkee, *supra* note 38, at 464–65 (describing the role of the Aviation Working Group in the implementation of the Cape Town Convention).

<sup>52</sup> Jay Butler, *Corporate Commitment to International Law*, 53 N.Y.U. J. INT’L L. & POL. 433, 441 (2021) (identifying situations in which corporate policy diverged from government policy on international law and particularly “highlight[ing] instances when a company has declined a particular line of government business, refused state incentives to do business in a certain place, or engaged in other non-cooperative acts with government actors because of a determination that working with the government in such a way would undermine some norm of international law.”).

<sup>53</sup> Jay Butler, *The Corporate Keepers of International Law*, *supra* note 18 at 208.

<sup>54</sup> *Id.* at 208–09.

ject to assist the U.S. Department of Defense to create artificial intelligence for drone targeting.”<sup>55</sup>

## II

### HOW DO CORPORATIONS COMPLY? THE INTERSECTION OF CORPORATE GOVERNANCE AND INTERNATIONAL LAW

This Section provides definitional clarity for this Article’s case studies and subsequent analysis. Part A provides a brief overview of sources of international law and explains what it means to comply with these sources. Part B explains the significance of three dimensions of corporate governance and operations for the nature and quality of a corporation’s compliance with international law: *board governance*, *management decision making*, and *contractual relationships*.

#### A. Clarifying the International Lens: What Does it Mean to Comply with International Law?

What is international law? According to the Restatement on Foreign Relations, international law “consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.”<sup>56</sup> Two familiar sources of international law are international agreements and customary international law.<sup>57</sup> An international agreement “means an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law.”<sup>58</sup> According to the United States Department of State, the “United States enters into more than 200 treaties and other international agreements each year”<sup>59</sup> on subjects ranging from “peace, trade, defense, territorial boundaries, human rights, law enforcement, environmental matters, and many others.”<sup>60</sup>

In contrast, customary international law “results from a general and consistent practice of states followed by them from

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<sup>55</sup> *Id.* at 208.

<sup>56</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 (AM. LAW INST. 2017).

<sup>57</sup> *Id.* § 102(1); see STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38.

<sup>58</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 301 (AM. LAW INST. 2017).

<sup>59</sup> *Treaties & International Agreements*, U.S. DEPT OF STATE, <https://www.state.gov/policy-issues/treaties-and-international-agreements> [https://perma.cc/VH85-U72P] (last visited Nov. 30, 2022).

<sup>60</sup> *Id.*

a sense of legal obligation.”<sup>61</sup> A classic example is the international law principle of diplomatic immunity “by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities for both their official and, to a large extent, their personal activities.”<sup>62</sup> Finally, this Article also includes “soft law” within its examination of international law, which refers to recommendations, guidelines, and other sources of norms that are not legally binding but still influence the behavior of governments and corporate actors.<sup>63</sup> Prominent examples of soft law include the United Nations Guiding Principles on Business and Human Rights (“UNGPs”) and the United Nations Sustainable Development Goals, which are both examined in Section III, *infra*.<sup>64</sup>

As Professor Jay Butler has documented, many corporations commit to international law norms even when they are not required to do so.<sup>65</sup> The greater challenge is ascertaining whether these corporations comply with the same norms to

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<sup>61</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (AM. LAW INST. 2017).

<sup>62</sup> U.S. DEPT OF STATE, DIPLOMATIC & CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 2–3 (2018) (“The principle of diplomatic immunity is one of the oldest elements of foreign relations. Ancient Greek and Roman governments, for example, accorded special status to envoys, and the basic concept has evolved and endured until the present. As a matter of international law, diplomatic immunity was primarily based on custom and international practice until quite recently. In the period since World War II, a number of international conventions (most noteworthy, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations) have been concluded. These conventions have formalized the customary rules and made their application more uniform.”).

<sup>63</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 421–22 (2000) (explaining that “hard law” is often distinguished by its ability to impose legally binding and precise obligations on state parties with associated institutional arrangements whereas “soft law” is usually weakened on one or more of these three dimensions).

<sup>64</sup> See, e.g., *The Sustainable Development Goals*, CTR. FOR STRATEGIC & INT’L STUDIES, <https://www.csis.org/programs/project-us-leadership-development/sustainable-development-goals> [<https://perma.cc/DNH6-K3MR>] (last visited Apr. 17, 2023) (“The SDGs are not an official treaty, but a form of soft law aimed at eliminating extreme poverty, building partnerships, and spurring economic growth around the world.”); U.N. Off. of the High Comm’r for Hum. Rts., *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/14/3, at 8 (2014) (“The Guiding Principles do not constitute an international instrument that can be ratified by States, nor do they create new legal obligations.”).

<sup>65</sup> Butler, *Corporate Commitment to International Law*, *supra* note \_\_\_, at 438 (explaining that “[c]orporate opinio juris takes the principle of opinio juris ordinarily applicable to states and deploys it to describe a company’s acknowledgement that a particular activity is required by international law” and that “[b]y adapting its behavior in this way and announcing this rationale, the company seeks to follow international law, even if it is not explicitly bound by it”).

which they commit. What is compliance? Professor Butler has identified several occasions on which corporations enforce international law against government action, such as refusing to comply with government orders that violate international law.<sup>66</sup> This Article examines corporate compliance through the *institutionalization* of international law within corporate policies and practices. This emphasis on institutionalization is consistent with international legal scholarship that frequently uses it to evaluate state<sup>67</sup> or corporate<sup>68</sup> compliance with international law. Scholars argue that business actors “commit” to international law “when companies publicly declare their acceptance of human rights norms by either statements of compliance with international human rights law, by acceding to national, regional or global CSR-initiatives or by issuing company codes of conduct.”<sup>69</sup> Corporations “comply” with international law “when [companies] begin to institutionalize human rights within the company, i.e. when companies incorporate human rights norms into their management structures and risk management strategies or establish CSR units or departments.”<sup>70</sup>

But a cautionary note: compliance is not effectiveness. The fact that a corporation has human rights policies or a human rights task force does not mean that it succeeds in preventing or addressing human rights abuses. The sad truth is that many of the worst transgressors have extensive policies.<sup>71</sup> There is no denying the myriad of risks with “paper compli-

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<sup>66</sup> See, e.g., *id.* at 456–58.

<sup>67</sup> See Thomas Risse and Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 29 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999) (describing “prescriptive status” stage that involves ratification of relevant treaties and the institutionalization of norms with national constitutions or domestic law and there are “institutionalized mechanism[s] for citizens to complain about human rights violations”).

<sup>68</sup> See Nicole Deitelhoff & Klaus Dieter Wolf, *Business and Human Rights: How Corporate Norm Violators Become Norm Entrepreneurs*, *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 222, 226 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 2013).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75, 77–78 (1998) (distinguishing between *compliance*, which “‘can be said to occur when the actual behavior of a given subject conforms to prescribed behavior,’” and *treaty implementation*, which is the “the adoption of domestic rules or regulations that are meant to facilitate, but do not in themselves constitute, compliance with international agreements,” and *effectiveness*).

ance”<sup>72</sup> in which a corporation’s leadership adopts compliance practices to satisfy regulators or other actors with minimal attention to whether those practices will prove effective in achieving the stated objectives of those practices.<sup>73</sup> This Article recognizes those limitations and acknowledges that it does not evaluate the effectiveness of the examined policies and practices for achieving the objectives of the international agreement, soft law guidelines, or customary international law norm. Instead, it analyzes the congruence between the prescriptive directive those norms supply and corporate policies and practices.<sup>74</sup> If such congruence does not lead to effectiveness, then it may indicate deficiencies in a corporation’s policies or practices. Or it may reveal limitations with the underlying international law norm’s application to a business audience. But such diagnostics are beyond the scope of this Article. Instead, it offers a starting point for an evaluation of corporate compliance. While effectiveness is needed to conclude this analysis, institutionalization offers an entry point with which to begin it.

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<sup>72</sup> See, e.g., LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 5, 31 (2016) (defining “symbolic structures” as “a policy or procedure that is infused with value irrespective of its effectiveness” and explaining the risk that “[S]lavy organizations may devise forms of compliance that symbolically demonstrate attention to law while maintain sufficient flexibility to preserve managerial prerogatives and practices that are seen as advancing business goals.”).

<sup>73</sup> See, e.g., Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L. Q. 487, 510 (2003) (“[T]he U.S. legal system places a heavy emphasis on internal compliance structures as a liability determinant in a wide variety of legal contexts. . . . In fact, little evidence exists at all concerning the effectiveness of internal compliance structures as a means to reduce socially harmful conduct . . . .”); see also Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, YALE L.J. F., 869, 885–86 (2021) (“The reasons that corporations have expressed commitment to improving their own demographic diversity are, of course, multifaceted. Some firms were forced to announce reforms after significant civil litigation. Others implemented diversity initiatives because their peers had employed similar strategies—even when those initiatives had not proven effective. Still others attempted to articulate what has become known as the “business” case for diversity, arguing that diversity was good for the firm’s bottom line.”) (footnotes omitted).

<sup>74</sup> See, e.g., Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 977–78 (2018) (“Compliance seeks to mitigate these differences in interests by better aligning the goals of firms and their employees with the goals of governments. . . . Compliance programs are internal firm structures and processes designed to support firms’ efforts to achieve this concurrence.”) (footnote omitted).

## B. Clarifying the Corporate Governance Lens: How Do Corporations Institutionalize International Law?

This Article examines the institutionalization of international law norms within corporate policies and practices relating to the (a) *board of directors*, (b) *executive management (and associated personnel)*, and (c) *contractual partners*. Each of these levels is critical to the operation of a corporation; therefore, the institutionalization of international law within these levels provides a basis to evaluate a corporation's commitment and compliance with it.

### 1. *Board of Directors*

The board of directors "is responsible for managing, or directing the management of, the business and affairs of the corporation."<sup>75</sup> First, "[t]he board's decision-making function generally involves considering and, if warranted, approving corporate policy and strategy; selecting, evaluating, and compensating top management; approving budgets; and evaluating major transactions such as acquiring and disposing of material assets."<sup>76</sup> Second, "[t]he board's oversight function involves monitoring and evaluating the corporation's business and affairs, including economic performance, management, compliance with legal obligations and corporate policies, and risk management."<sup>77</sup> Several features of a board can reveal the nature, extent, and quality of its commitment to one or more international laws,<sup>78</sup> including (a) board committee oversight responsibilities, (b) board composition, and (c) training and information gathering.

First, analysis of board oversight involves evaluating whether international law compliance is assigned to a specific board committee created for that purpose, a standing committee that includes it within its scope, or the board as a whole.<sup>79</sup>

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<sup>75</sup> A.B.A., *CORPORATE DIRECTOR'S GUIDEBOOK* 9 (7th ed. 2020); *see also* BUS. ROUNDTABLE, *PRINCIPLES OF CORPORATE GOVERNANCE* 5 (2016).

<sup>76</sup> A.B.A., *supra* note 75, at 9.

<sup>77</sup> *Id.* at 7–8; *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS & RECOMMENDATIONS* § 3.02(a)(2)–(3) (AM. LAW INST. 1994); ORGANISATION FOR ECON. CO-OPERATION AND DEV., *G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE* 47–50 (2015).

<sup>78</sup> *See generally* Veena Ramani & Bronagh Ward, *How Board Oversight Can Drive Climate and Sustainability Performance*, 31 *J. APPLIED CORP. FIN.* 80 (2019) (discussing the importance of integrating multiple sustainability governance strategies, including executive compensation, director expertise, and formal board mandates for sustainability).

<sup>79</sup> *See* KPMG, *ESG, STRATEGY, AND THE LONG VIEW: A FRAMEWORK FOR BOARD OVERSIGHT* 18–19 (2017), <https://assets.kpmg.com/content/dam/kpmg/lu/pdf/lu-en-esg-strategy-framework-for-board-oversight.pdf> [<https://perma.cc/4GLJ->

It also involves analyzing coordination among board committees.<sup>80</sup>

Second, evaluating board composition involves analyzing director expertise in international law. If a corporation claims to respect international human rights, then the vital question is whether its board includes directors with expertise and experience to provide oversight over that corporation's compliance with international human rights norms.<sup>81</sup> Board composition also raises questions about how the board assesses gaps in expertise on the board; for example, a board may utilize director performance evaluations to identify gaps in expertise related to climate change, human rights, or other topics governed by international law.<sup>82</sup> The next question is whether the board uses information from such assessments to inform its preferences for director qualifications and its process for selecting new members to fill those gaps.<sup>83</sup>

Third, it is important to know how a board educates itself on international law. According to Ceres, “[b]oards need information that helps them understand the materiality of specific sustainability issues to their business so they can make the connection between sustainability and both business risk and strategy.”<sup>84</sup> In this context, “[d]irectors need to be able to confer with and question management to gain the information necessary for determining materiality and ultimately setting strategy from a holistic vantage point.”<sup>85</sup>

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7XKQ]; PWC, ESG OVERSIGHT: THE CORPORATE DIRECTORS GUIDE 13 (Nov. 2020), <https://www.pwc.com/us/en/services/governance-insights-center/pwc-esg-oversight-the-corporate-director-guide.pdf> [<https://perma.cc/B4JH-N2S2>].

<sup>80</sup> See PWC, *supra* note 79, at 25 (“The nominating and governance committee is the traditional home for corporate governance matters. Operational governance discussions are likely to be split between the audit committee and the full board. Overseeing the policies, procedures, and controls to ensure accurate public communications is a core competency of the audit committee, whereas discussions of reporting lines, strategy ownership, and execution are more suited for the full board or a standalone ESG committee.”).

<sup>81</sup> In recent proxy seasons, shareholder proponents requested that the board add an independent director with expertise in human rights and/or civil rights. See, e.g., Twitter, Inc., Proxy Statement: Notice of 2021 Annual Meeting of Stockholders 40 (Form DEF 14A) (May 27, 2021). Recognizing the importance of expertise for risk management, federal law requires expertise in the exercise of certain corporate governance functions. See Betty Simkins & Steven A. Ramirez, *Enterprise-Wide Risk Management and Corporate Governance*, 39 LOY. U. CHI. L.J. 571, 572 (2008).

<sup>82</sup> See CERES, LEAD FROM THE TOP: BUILDING SUSTAINABILITY COMPETENCE ON CORPORATE BOARDS 16 (2017).

<sup>83</sup> See *id.*

<sup>84</sup> *Id.* at 24.

<sup>85</sup> *Id.* at 26.

## 2. Senior Management

The senior management of a corporation includes those within the “C-Suite,” including the Chief Executive Officer, Chief Financial Officer, and Chief Operating Officer, as well as other senior executives.<sup>86</sup> Collectively, and under board oversight, they are responsible for strategic planning; business operations; capital allocation; risk identification, evaluation and management; maintaining “[a]ccurate and transparent financial reporting and disclosures,” and developing, implementing and monitoring the annual operating plans and budgets, among other tasks.<sup>87</sup> We can evaluate a corporation’s commitment to international law by analyzing senior management’s composition, expertise, and incentives, as well as the allocation and coordination of risk management functions for compliance with international law.<sup>88</sup>

An important characteristic is how a corporation assigns responsibility for international law compliance to senior executives and other managers.<sup>89</sup> Relevant information includes whether executive compensation is tied to performance metrics that includes compliance with international law norms.<sup>90</sup> Other important information includes whether a corporation has an assigned executive level position, such as Chief Sustainability Officer (“CSO”), who is assigned responsibility for compliance with particular international law norms, such as

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<sup>86</sup> See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS & RECOMMENDATIONS § 1.27 (AM. LAW INST. 1994).

<sup>87</sup> BUS. ROUNDTABLE, *supra* note 75, at 9–10 (2016); see PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS & RECOMMENDATIONS § 3.01 (AM. LAW INST. 1994).

<sup>88</sup> See JENNY DAVIS-PECCOUD, PAUL STONE & CLARE TOVEY, *ACHIEVING BREAKTHROUGH RESULTS IN SUSTAINABILITY 2* (2016) (“Our research shows senior leadership support is the most important factor contributing to success . . . .”); Katherine Miller & George Serafeim, *Chief Sustainability Officers: Who Are They and What Do They Do?*, HARV. BUS. REV., 2014, at 2 (“The literature indicates that CEO commitment is critical to successful implementation of sustainability strategies.”).

<sup>89</sup> See Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1465 (2020) (discussing the internal governance framework for ESG).

<sup>90</sup> See Robert G. Eccles, Mary Johnstone-Loius, Colin Mayer & Judith C. Strohle, *The Board’s Role in Sustainability: A New Framework for Getting Directors Behind ESG Efforts*, HARV. BUS. REV., Sept.-Oct. 2020, at 48, 50–51; Friso Van der Oord, *Tying CEO Pay to Carbon Emissions Works. More Companies Should Try It*, CNN (Aug. 12, 2021), <https://www.cnn.com/2021/08/12/perspectives/climate-carbon-emissions-ceo-pay/index.html> [<https://perma.cc/B9Y5-DZ8J>]; Natalie Runyon, *Evolving Requirements for C-suite ESG Roles amid Changing Environment*, REUTERS (Apr. 14, 2021), <https://www.thomsonreuters.com/en-us/posts/news-and-media/company-esg-roles> [<https://perma.cc/G6GM-3G6U>].

climate change and human rights.<sup>91</sup> If such a position exists, it is important to know (a) the reporting structure and whether the CSO reports directly to the CEO or board;<sup>92</sup> (b) how other members of the senior executive team support the work of the CSO;<sup>93</sup> and (c) the educational and professional background of those who occupy this role.

A second characteristic is how management incorporates international law into its overall risk identification and management processes. A critical component of risk management is due diligence, which “involves a bundle of interrelated processes to identify adverse impacts, prevent and mitigate them, track implementation and results and communicate on how adverse impacts are addressed with respect to the enterprises’ own operations, their supply chains and other business relationships.”<sup>94</sup> It is therefore important to know how a corporation identifies and addresses potential risks for non-compliance with international law, including metrics for international law and the significance of those metrics for corporate decision making, including executive compensation.<sup>95</sup>

A final feature concerns coordination of international law compliance across various corporate functions and units.<sup>96</sup> According to the OECD, various corporate units play an impor-

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<sup>91</sup> See BOEING CO., 2021 SUSTAINABILITY REPORT 14 (2021) (explaining its appointment of its first CSO, an executive council position, who will “advanc[e] Boeing’s approach to sustainability, focusing on priorities, stakeholder-oriented reporting and company performance,” as well as lead the Global Enterprise Sustainability organization); Miller and Serafeim, *supra* note 88, at 2 (reporting that “[t]he number of companies with a full-time sustainability officer doubled between 1995 and 2003, and doubled again between 2003 and 2008”).

<sup>92</sup> Miller and Serafeim, *supra* note 88, at 6 (reporting on survey data that reveals that less than 10% to approximately 30% of CSOs report directly to the CEO).

<sup>93</sup> See COSO & WBCSD, ENTERPRISE RISK MANAGEMENT: APPLYING ENTERPRISE RISK MANAGEMENT TO ENVIRONMENTAL, SOCIAL AND GOVERNANCE-RELATED RISKS 20 (Oct. 2018) (“[M]anagement of ESG-related risk is not the responsibility of the sustainability practitioner alone. All of management should be able to articulate significant ESG-related risks that impact strategy and decision-making.”).

<sup>94</sup> ORGANISATION FOR ECON. CO-OPERATION AND DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT 17 (2018); John F. Sherman, III, *The Corporate General Counsel Who Respects Human Rights*, 24 LEGAL ETHICS 1, 9–11 (2021) (discussing the role of general counsel in encouraging human rights due diligence in corporations).

<sup>95</sup> See generally SHIFT PROJECT, LEADERSHIP & GOVERNANCE INDICATORS OF A RIGHTS RESPECTING CULTURE: 22 PRACTICES AND BEHAVIORS THAT HELP FOSTER BUSINESS RESPECT FOR HUMAN RIGHTS (Feb. 2021), <https://shiftproject.org/resource/lg-indicators/about-lgis> [<https://perma.cc/LCM7-YHUS>].

<sup>96</sup> See *id.* at 58–59; NAT’L ASS’N OF CORP. DIRS. (NACD), GOVERNANCE CHALLENGES 2017: BOARD OVERSIGHT OF ESG 6 (Mar. 27, 2017) (“All leaders in the C-suite—not just the chief sustainability officer, chief risk officer, or chief diversity officer—should be aware of today’s higher ESG stakes.”).

tant role in ensuring responsible business conduct, such as those that determine *compliance* (“legal, compliance, human resources, environment departments, on the ground management”), *new business relationships* (“sourcing departments, procurement departments, sales departments, investment fund managers”), and *development and oversight of high risk operations and products* (“product designers, operational and technical leads”).<sup>97</sup> In order to achieve collaboration across units and functions, corporations may utilize cross-functional teams or councils that include senior level representatives.<sup>98</sup> This coordination is important to prevent “siloes” approaches to risk management, a feature that is often blamed for the failure of these strategies in the 2008 financial crisis.<sup>99</sup>

### 3. *Third Party Contractual Relationships*

We can also evaluate a company’s compliance with international law by examining its contractual relationships with suppliers and consumers of its products or services.

Companies maintain relationships with suppliers through contracts that stipulate terms such as quality, volume, price, and other functions. Through similar contractual arrangements, codes of conduct, and training practices, a company may encourage its suppliers to comply with one or more international laws. But these policies are only as good as their enforcement. It is therefore important to know the nature, extent, and quality of supplier monitoring and potential sanctions for non-compliance.

It is also important to know how a corporation ensures that its products or services are not used by its clients and consumers to violate international law.<sup>100</sup> In 2021, shareholders

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<sup>97</sup> ORGANISATION FOR ECON. CO-OPERATION AND DEV., *supra* note 94, at 57.

<sup>98</sup> See DAVIS-PECCOUD, STONE & TOVEY, *supra* note 88, at 2 (explaining that “Novozymes created an executive sustainability board, including vice presidents of each business function, as a catalyst for change” and that “[g]iving each member direct responsibility for results helped ensure that efforts to meet sustainability targets also created value for the business”).

<sup>99</sup> Michelle M. Harner, *Ignoring the Writing on the Wall: The Role of Enterprise Risk Management in the Economic Crisis*, 5 J. BUS. & TECH. L. 45, 50 (2010) (“Prior to the crisis, UBS followed a ‘silo’ approach to risk management. Each group within the organizational structure had a role to play in the risk management process, but there was little coordination, communication, or monitoring among the groups.”) (footnote omitted); Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 971 (2009) (explaining that many firms had adopted a siloes approach to risk management “in which different types of risk were managed by different teams within the firm using different processes”).

<sup>100</sup> See, e.g., ORGANISATION FOR ECON. CO-OPERATION AND DEV., DUE DILIGENCE FOR RESPONSIBLE CORPORATE LENDING AND SECURITIES UNDERWRITING: KEY CONSIDERATIONS

raised concerns about customer due diligence, submitting a shareholder proposal to Amazon requesting that it “commission an independent third-party report . . . assessing Amazon’s process for customer due diligence, to determine whether customers’ use of its surveillance and computer vision products or cloud products contributes to human rights violations.”<sup>101</sup> The shareholder proponents explained that “Amazon’s surveillance and cloud products may exacerbate systemic inequities, compromise oversight, and contribute to mass surveillance”<sup>102</sup> and “Amazon Web Services (AWS), the top cloud provider with 2019 revenue of \$35 billion, serves all U.S. intelligence agencies, and international governments.”<sup>103</sup>

### III

#### ASSESSING CORPORATE COMPLIANCE WITH INTERNATIONAL LAW: THREE CASE STUDIES IN CLIMATE CHANGE, HUMAN RIGHTS, AND SUSTAINABLE DEVELOPMENT

This Section examines the policies and practices of approximately 20 large companies concerning their commitment and compliance with international law norms addressing climate change, human rights, and sustainable development. Part A explains the case selection for this analysis, Parts B-D present the three case studies, and Part E provides a summary of the findings.

#### A. Case Study Selection

This Section analyzes corporate commitments and compliance in three areas of international law: (1) climate change, (2) human rights, and (3) sustainable development. These case studies were selected for two reasons. First, each involves international agreements or other frameworks that target both government *and* corporate behavior; therefore, it is important to analyze corporate compliance to evaluate the agreements’ operation and effectiveness. Second, this Section chose case studies with weak “state pathways,” thereby enabling analysis of corporate compliance in the absence of state mandate.

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FOR BANKS IMPLEMENTING THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 15 (2019) (recognizing that banks may contribute to harmful impacts through their client relationships).

<sup>101</sup> AMAZON.COM, INC., *supra* note 47, at 25.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

The sectors were selected for two reasons based on the issues raised in each case study: (1) the *impact of particular issues* on financial performance in that sector, or (2) the *impact of that sector* on those issues. First, this Section chose sectors based on whether the international law issues in a case study impacts financial performance in that sector.<sup>104</sup> To make these determinations, the Section relied upon the MSCI ESG Ratings that “provide an assessment of the long-term resilience of companies to environmental, social, and governance (ESG) issues”<sup>105</sup> and identifies key issues for each sector and sub-industry. For example, international human rights norms implicate the ESG MSCI issue “Supply Chain Labor Standards.”<sup>106</sup> This Section therefore chose the sectors for which this was a key issue, which includes information technology and consumer discretionary.<sup>107</sup> Second, and alternatively, this Section chose sectors based on their impact on those issues; for example, the energy sector is important for the Paris Climate Agreement and was therefore selected for the case study on climate change. Once the sectors are identified, this Section selects three large companies within each sector.<sup>108</sup>

The materials for the case studies are drawn from a variety of primary sources, including: investor reports and statements; SEC filings; litigation documents; company manuals and handbooks; shareholder proposals; NGO benchmarks and reports; media reports, and legal disclosures. Where possible, this Article includes criticisms of company policies and practices raised by shareholders, NGOs, government actors, and the media that highlight the shortcomings of these policies and practices.

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<sup>104</sup> MSCI, MSCI ESG RATINGS METHODOLOGY: EXECUTIVE SUMMARY 3 (2020), <https://www.msci.com/documents/1296102/0/MSCI+ESG+Ratings+Methodology+-+Exec+Summary+ec+2020.pdf/9c54871f-361d-e1ff-adc7-dfdee299dfb3?t=1607501860114> [https://perma.cc/VUE2-8DEH].

<sup>105</sup> *ESG Industry Materiality Map*, MSCI, <https://www.msci.com/our-solutions/esg-investing/esg-industry-materiality-map> [https://perma.cc/86LS-8RQ4] (last visited Apr. 17, 2023).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *S&P 100*, S&P GLOBAL, <https://www.spglobal.com/spdji/en/indices/equity/sp-100/#overview> [https://perma.cc/Q63G-E62D] (last visited Apr. 17, 2023) (“The S&P 100, a sub-set of the S&P 500®, is designed to measure the performance of large-cap companies in the United States and comprises 100 major blue chip companies across multiple industry groups.”); *S&P 100 STOCKS, MARKETS INSIDER* [https://markets.businessinsider.com/index/components/s&p\\_100](https://markets.businessinsider.com/index/components/s&p_100) [https://perma.cc/QE2E-E4DD] (last visited Apr. 17, 2023).

## B. Climate Change

The Paris Agreement “is a legally binding international treaty on climate change”<sup>109</sup> that was adopted by 196 Parties in 2015 and entered into force a year later. The goal of the Agreement “is to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels.”<sup>110</sup> As part of the Paris Agreement, countries submit nationally determined contributions (“NDCs”) that explain their climate action plans “to reduce their Greenhouse Gas emissions in order to reach the goals of the Paris Agreement”<sup>111</sup> and “to build resilience to adapt to the impacts of rising temperatures.”<sup>112</sup>

In 2017, former President Donald Trump announced that he intended to withdraw the United States from the Paris Agreement.<sup>113</sup> On November 4, 2019, the U.S. Department of State notified the United Nations of the United States’ withdrawal from the Agreement, and it went into effect one year later.<sup>114</sup> However, after taking office, President Biden signed an executive order to rejoin the Paris Climate Agreement<sup>115</sup> that took effect in February 2021.<sup>116</sup>

Several corporations deepened their commitments to and compliance with the Paris Climate Agreement even during the Trump administration. This Part examines two sectors—energy<sup>117</sup> (E) and industrials<sup>118</sup> (I)—and three large companies

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<sup>109</sup> U.N. CLIMATE CHANGE, *supra* note 31.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Camila Domonoske & Colin Dwyer, *Trump Announces U.S. Withdrawal from Paris Climate Accord*, NPR (June 1, 2017), <https://www.npr.org/sections/thetwo-way/2017/06/01/530748899/watch-live-trump-announces-decision-on-paris-climate-agreement> [<https://perma.cc/59Y7-5GRZ>].

<sup>114</sup> JANE A. LEGGETT, CONG. RESEARCH SERV., R46204, THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, THE KYOTO PROTOCOL, AND THE PARIS AGREEMENT: A SUMMARY (Jan. 29, 2020).

<sup>115</sup> Nathan Rott, *supra* note 15.

<sup>116</sup> Veronica Stracqualursi & Drew Kann, *US Officially Rejoins the Paris Climate Accord*, CNN (Feb. 19, 2021), <https://www.cnn.com/2021/02/19/politics/us-rejoins-paris-agreement-biden-administration/index.html> [<https://perma.cc/FKG9-3CK4>].

<sup>117</sup> The Global Industry Classification Standard (“GICS”) defines the energy sector as comprising “companies engaged in exploration & production, refining & marketing, and storage & transportation of oil & gas and coal & consumable fuels” and “also includes companies that offer oil & gas equipment and services.” MSCI & S&P GLOBAL, GLOBAL INDUSTRY CLASSIFICATION STANDARD (GICS) 1 (Sept. 28, 2018), <https://www.msci.com/documents/1296102/11185224/GICS+Sector+Definitions+Sept+2018.pdf/afc87e7b-bbfe-c492-82af-69400ee19e4f> [<https://perma.cc/2U7T-QXJA>].

<sup>118</sup> The GICS defines the industrials sector as including “manufacturers and distributors of capital goods such as aerospace & defense, building products,

within each of these sectors: ExxonMobil (E), Chevron (E), ConocoPhillips (E), UPS (I), Raytheon (I), and Boeing (I).<sup>119</sup>

### 1. *Corporate Commitments to Climate Change Mitigation*

All six companies expressed support for the Paris Climate Agreement.<sup>120</sup> But the energy companies identified specific corporate targets that align with the Agreement's objectives, such as substantial reductions in greenhouse gas emissions by 2030 (compared to 2016 baseline); achieving net zero operational emissions by 2050; supporting the World Bank Zero Routine Flaring by 2030 initiative; reducing methane intensity; and supporting a carbon price to reduce end-use emissions.<sup>121</sup>

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electrical equipment and machinery and companies that offer construction & engineering services[.] . . . providers of commercial & professional services including printing, environmental and facilities services, office services & supplies, security & alarm services, human resource & employment services, research & consulting services . . . [as well as] companies that provide transportation services." *Id.*

<sup>119</sup> S&P 500 Companies by Weight, SLICKCHARTS <https://www.slickcharts.com/sp500> [<https://perma.cc/S97Q-Y7UL>] (last visited Apr. 17, 2023); S&P 500 Materials [Sector], GLOBE AND MAIL, <https://www.theglobeandmail.com/investing/markets/indices/SRIN/components/> [<https://perma.cc/3LTC-ETK5>] (last visited Apr. 17, 2023); S&P 500 Energy [Sector], GLOBE AND MAIL, <https://www.theglobeandmail.com/investing/markets/indices/SREN/components/> [<https://perma.cc/SZ45-SSQT>] (last visited Apr. 17, 2023).

<sup>120</sup> See, e.g., CONOCOPHILLIPS CO., 2021 PROXY STATEMENT 3 (Mar. 29, 2021), <https://static.conocophillips.com/files/resources/conocophillips-2021-proxy-statement.pdf> [<https://perma.cc/R5YM-RMB2>] (Chairman and CEO of Conoco Phillips: "In October 2020 we became the first U.S.-based oil and gas company to adopt a Paris-aligned climate risk strategy . . . ."); EXXONMOBIL CORP., UPDATED 2021 ENERGY & CARBON SUMMARY 47 (Apr. 2021) ("ExxonMobil has supported the Paris Agreement from its adoption. The Company also continues to support U.S. government participation in the framework."); *Advancing a Lower Carbon Future*, CHEVRON CORP., <https://www.chevron.com/sustainability/environment/energy-transition> [<https://perma.cc/MY9Z-LSSJ>] (last visited Feb. 22, 2022) ("Chevron supports the Paris Agreement and is committed to helping to address climate change while continuing to deliver energy that supports society."); BOEING CO., *supra* note 91, at 15 ("We support the goals of the Paris Agreement and consider climate change to be an urgent issue."); RAYTHEON TECHNOLOGIES CORP., CDP DISCLOSURE 2021 11 (2021), <https://investors.rtx.com/static-files/c0d9205a-5333-4c04-a632-223c4e0a0dcb> [<https://perma.cc/Z9XB-TTNZ>] (describing industry commitments to reduce their carbon emissions to half their levels from 2005 by the year 2050).

<sup>121</sup> See, e.g., CONOCOPHILLIPS CO., ANNUAL REPORT 2021 36–37 (2022) (setting targets for Scope 1 and Scope 2 emissions and explaining approach to Scope 3 emissions); *Lower Carbon Intensity of Our Operations*, CHEVRON CORP., <https://www.chevron.com/sustainability/environment/lowering-carbon-intensity> [<https://perma.cc/W4EX-6D2Q>] (last visited Feb. 22, 2022). However, shareholders have raised concerns about the emissions practices and disclosures of these same companies. See, e.g., Letter from Mackenzie Ursch, Legal Advisor, Follow This & Mark van Baal, Founder-Director, Follow This, to Off. of the Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm., Ex. A (Feb. 25, 2021) (on file with author) (addressing Chevron's "no-action" request to exclude shareholder propo-

In contrast, the companies in the industrials sector varied in their commitments to specific targets under the Paris Climate Agreement. Boeing committed to reducing long-term emissions in the aviation sector through “fleet renewal and technology, infrastructure, sustainable aviation fuels, and carbon offsets.”<sup>122</sup> Additionally, Boeing recently stated “that our commercial airplanes will be capable and certified to fly on 100% sustainable aviation fuels by 2030.”<sup>123</sup> Raytheon stated its sustainability goals include a 10% reduction in greenhouse gas emissions, water consumption, and waste to landfill and incineration from its 2019 levels by 2025.<sup>124</sup> While UPS committed to carbon neutrality by 2050,<sup>125</sup> shareholders have criticized it for failing to clarify its own goals for addressing climate risks and advancing the goals of the Paris Climate Agreement.<sup>126</sup>

## 2. Corporate Compliance with Climate Change Mitigation

First, most of these corporations have a separate committee that addresses public or sustainability issues, which often includes responsibility for climate-related risks.<sup>127</sup> For example, ExxonMobil’s Public Issues and Contributions Committee

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sal that requested that Chevron “substantially reduce the greenhouse gas (GHG) emissions of their energy products (Scope 3) in the medium- and long-term future, as defined by the Company”).

<sup>122</sup> BOEING CO., 2021 ANNUAL MEETING OF SHAREHOLDERS 25 (Apr. 20, 2021).

<sup>123</sup> *Id.* at 25–26 (committing to 10%-25% reductions in energy and water consumption, greenhouse gas emissions, and solid waste).

<sup>124</sup> RAYTHEON TECHNOLOGIES CORP., 2021 ENVIRONMENTAL SOCIAL GOVERNANCE REPORT 47 (2021), <https://www.rtx.com/our-responsibility/environment-health-and-safety/environment-health-safety> [<https://perma.cc/BT2W-RFRN>] (last visited Feb. 22, 2022); RAYTHEON TECHNOLOGIES CORP., *supra* note 120, at 11.

<sup>125</sup> UNITED PARCEL SERV., INC., TCFD REPORT 6 (2020) (explaining that this goal includes “30% sustainable aviation fuel” by 2035).

<sup>126</sup> UNITED PARCEL SERV., INC., NOTICE OF 2020 ANNUAL MEETING OF SHAREOWNERS AND PROXY STATEMENT 68 (May 14, 2020) (describing shareholder proposal submitted by Trillium Asset Management and Zevin Asset Management to UPS requesting that a report “[D]escribing if, and how, it plans to reduce its total contribution to climate change and align its operations with the Paris Agreement’s goal of maintaining global temperature increases well below 2 degrees Celsius.”). In response, UPS’s board clarified that UPS has set targets to facilitate its switch to renewable energy. *Id.* at 69.

<sup>127</sup> BOEING CO., GOVERNANCE & PUBLIC POLICY COMMITTEE CHARTER 2 (2021); *see also* CHEVRON CORP., CHEVRON CORPORATION PUBLIC POLICY AND SUSTAINABILITY COMMITTEE CHARTER 1 (2021); CONOCOPHILLIPS CO., PUBLIC POLICY AND SUSTAINABILITY COMMITTEE CHARTER 1 (2021); RAYTHEON TECHNOLOGIES CORP., RAYTHEON TECHNOLOGIES CORPORATION COMMITTEE ON GOVERNANCE AND PUBLIC POLICY CHARTER 2 (2021). UPS does not appear to have a specific committee with delegated oversight responsibility for climate change risks, but its Risk Committee is tasked with oversight of the company’s ERM systems. UNITED PARCEL SERV., INC., RISK COMMITTEE CHARTER 1 (2020).

has the mandate “to review and provide advice . . . regarding the Corporation’s policies, programs and practices on public issues of significance,” which include the environment.<sup>128</sup> Its activities include reviewing the effectiveness of “policies, programs and practices”<sup>129</sup> on the environment and “[c]omplet[ing] an annual review of safety, security, health[,] and environmental performance of major operating organizations.”<sup>130</sup> These committees are usually cross-populated with directors serving on multiple board committees.<sup>131</sup> Other committees also support the management of climate risks, such as the audit and finance committee (oversees risks related to climate change), board affairs committee (engages external experts), and compensation committee (incentivizes executives to consider climate related risks).<sup>132</sup> Finally, some corporations added an independent director with expertise in climate science,<sup>133</sup> as well as other members with demonstrated experience in environmental affairs from the non-profit, governmental, or private sector.

Second, some corporations have integrated their climate policies into executive and organizational management.<sup>134</sup> Boeing and UPS created senior management positions that oversee the implementation of sustainability or climate poli-

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<sup>128</sup> *Public Issues and Contributions Committee Charter*, EXXONMOBIL CORP. (Apr. 24, 2019).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See *ExxonMobil Board of Directors*, EXXONMOBIL CORP., <https://corporate.exxonmobil.com/About-us/Who-we-are/Corporate-governance/ExxonMobil-board-of-directors#BoardCommitteesOverview> [<https://perma.cc/NW6V-TT7V>] (last updated Jan. 5, 2023); RAYTHEON TECHNOLOGIES CORP., *Board Composition, Leadership & Committees* (2022), [https://prd-sc101-cdn.rtx.com/-/media/rtx/our-company/corporate-governance/files/rtx\\_corporate-governance-board-composition-leadership-committees.pdf?rev=6e2410c0466445d3be9c193e0002441d](https://prd-sc101-cdn.rtx.com/-/media/rtx/our-company/corporate-governance/files/rtx_corporate-governance-board-composition-leadership-committees.pdf?rev=6e2410c0466445d3be9c193e0002441d) [<https://perma.cc/SDJ7-BFRJ>].

<sup>132</sup> EXXONMOBIL CORP., *supra* note 120, at 7; CONOCOPHILLIPS CO., CDP DISCLOSURE 2020 3, 4 (2020), <https://static.conocophillips.com/files/resources/2020-conocophillips-cdp.pdf> [<https://perma.cc/RH29-38D2>].

<sup>133</sup> For example, ExxonMobil appointed a climate scientist to its board. Steven Mufson, *Besieged by Climate Controversy, ExxonMobil Puts a Climate Scientist on its Board*, WASH. POST (Jan. 26, 2017, 3:25 PM), <https://www.washingtonpost.com/news/energy-environment/wp/2017/01/26/besieged-by-climate-controversy-exxonmobil-puts-a-climate-scientist-on-its-board> [<https://perma.cc/8N2J-NUR8>] (discussing the addition of Susan Avery, a physicist and atmospheric scientist).

<sup>134</sup> See, e.g., RAYTHEON TECHNOLOGIES CORP., *supra* note 120, at 2 (explaining the responsibility of the Senior Vice President, Operations and Supply Chain for climate change and sustainability).

cies.<sup>135</sup> These and others created sustainability councils or teams within senior levels of management to integrate policies across different departments.<sup>136</sup> For example, ConocoPhillips's Sustainability and Public Policy Executive Council is a subcommittee of the Executive Leadership Team and includes senior vice-presidents from global operations, strategy and technology, government affairs, corporate relations, and legal counsel.<sup>137</sup> Additionally, a number of companies have integrated sustainability metrics into the determination of executive compensation.<sup>138</sup>

### C. Human Rights

The United States has not signed a number of human rights treaties.<sup>139</sup> This resistance intensified under the Trump administration when the United States withdrew from the United Nations Human Rights Council, a 47-member "inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them."<sup>140</sup> The Human Rights Council is significant for corporate conduct because, in 2011, it endorsed the United Nations Guiding Princi-

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<sup>135</sup> See, e.g., BOEING CO., *supra* note 91, at 14 (explaining that Boeing appointed Chris Raymond as its inaugural Chief Sustainability Officer); UNITED PARCEL SERV., INC., *supra* note 127, at 2 (explaining that UPS's Chief Sustainability Officer "has responsibility for sustainability and climate change oversight within UPS" and manages the company's sustainability team that implements the sustainability strategy that includes "[a]ssessing and managing climate-related risks and opportunities").

<sup>136</sup> See, e.g., BOEING CO., *supra* note 91, at 14 (explaining that the Global Sustainability Council that is "[C]omposed of global leaders from across our business units and functions was established to provide executive leadership, advocacy and partnership with the sustainability organization to advance our objectives and strategy.").

<sup>137</sup> RAYTHEON TECHNOLOGIES CORP., *supra* note 120, at 6; CONOCOPHILLIPS CO., SUSTAINABILITY REPORT 2020 6–11 (2020).

<sup>138</sup> See, e.g., RAYTHEON TECHNOLOGIES CORP., *supra* note 120, at 3 (detailing monetary incentives provided to corporate officers and management personnel based on attainment of climate-related goals); see also EXXONMOBIL CORP., NOTICE OF 2021 ANNUAL MEETING AND PROXY STATEMENT 49–50 (2021) (describing how "[d]emonstrated . . . accomplishments in progressing company goals and objectives" is a factor in determining executive compensation, where the reduction of emissions is one such goal); CONOCOPHILLIPS CO., CDP DISCLOSURE 2020, CONOCOPHILLIPS CO., *supra* note 132, at 3 (noting that "[t]wo components of executive compensation include metrics related to sustainability performance" which takes into account annual environmental performance).

<sup>139</sup> U.N. OFF. OF HIGH COMM'R FOR HUM. RTS., *supra* note 17.

<sup>140</sup> *Welcome to the Human Rights Council*, U.N. Human Rights Council, <https://www.ohchr.org/en/hr-bodies/hrc/about-council> [<https://perma.cc/2WBJ-4QY6>] (last visited Apr. 17, 2023).

ples on Business and Human Rights that identify human rights policy, due diligence, and remediation expectations for businesses.<sup>141</sup> In 2014, the Council authorized development of an international agreement on business and human rights.<sup>142</sup> However, the Trump administration opposed this development. In 2019, the U.S. Mission to Organizations in Geneva announced that it “once again will not participate in this week’s session of the Open-Ended Intergovernmental Working Group (“OEIGWG”) on the articulation of a business and human rights treaty in Geneva, because it remains opposed to the treaty process and the manner in which it has been pursued.”<sup>143</sup> It explained that the treaty process “detract[s] from the valuable foundation laid by the UN Guiding Principles”<sup>144</sup> and “negotiations around the draft treaty continue to be highly contentious, resulting in a crippling lack of participation from many key stakeholders—most notably a sizable percentage of the States that are home to the world’s largest transnational corporations.”<sup>145</sup>

But many corporations deepened their commitment to human rights during the years of the Trump administration. This Part examines corporate practices within two sectors—consumer discretionary<sup>146</sup> and information technology<sup>147</sup>—and three large corporations in each sector: Amazon (CD), Tesla (CD), Home Depot (CD), Apple (IT), Microsoft (IT), and Nvidia (IT).<sup>148</sup>

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<sup>141</sup> U.N. HUMAN RIGHTS COUNCIL, HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES 2, U.N. Doc. A/72/162 (July 19, 2017).

<sup>142</sup> *Binding Treaty*, BUS. & HUMAN RIGHTS RES. CTR., <https://www.business-humanrights.org/en/big-issues/binding-treaty> [https://perma.cc/8G3H-ZZUY] (last visited Apr. 17, 2023).

<sup>143</sup> *The U.S. Government’s Continued Opposition to the Business & Human Rights Treaty Process*, U.S. MISSION TO INT’L ORGS. IN GENEVA (Oct. 16, 2019), <https://geneva.usmission.gov/2019/10/16/the-united-states-governments-continued-opposition-to-the-business-human-rights-treaty-process> [https://perma.cc/2243-LDF4].

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> The GICS defines “consumer discretionary” as “includ[ing] automotive, household durable goods, leisure equipment and textiles & apparel” while “[t]he services segment includes hotels, restaurants and other leisure facilities, media production and services, and consumer retailing and services.” MSCI & S&P GLOBAL, *supra* note 117.

<sup>147</sup> Information technology refers to “companies that offer software and information technology services, manufacturers and distributors of technology hardware & equipment such as communications equipment, cellular phones, computers & peripherals, electronic equipment and related instruments, and semiconductors.” *Id.*

<sup>148</sup> SLICKCHARTS, *supra* note 119; The Globe And Mail, *S&P 500 Consumer Discretionary [Sector]*, <https://www.theglobeandmail.com/investing/markets/>

### 1. *Corporate Commitments to Human Rights*

There is no shortage of corporate commitments to international human rights. Most of the corporations in the case study align their stated values and policies with familiar international norms contained in the United Nations Guiding Principles on Business and Human Rights (“UNGPs”), Core Conventions of the International Labour Organization (“ILO Core Conventions”), ILO Declaration on Fundamental Principles and Rights at Work (“ILO Declaration”), and UN Universal Declaration of Human Rights (“UDHR”).

Corporations commit to international human rights norms *directly* or *indirectly*. Amazon commits directly by aligning its Global Human Rights Principles with the UNGPs and ensuring that its policy “is informed by international standards,” noting in particular the Core Conventions of the International Labour Organization (“ILO”), the ILO Declaration on Fundamental Principles and Rights at Work, and the UN Universal Declaration of Human Rights.<sup>149</sup> In contrast, Nvidia commits indirectly by committing to a third party organization, the Responsible Business Alliance’s (“RBA”) Code of Conduct, which, in turn, aligns with the UNGPs, ILO Declaration, and the UDHR.<sup>150</sup> Corporations also invoke human rights norms for different purposes. Some use it for *definitional* reasons; Tesla’s human rights policy states “[w]e endorse and base our definition of human rights on the [UDHR].”<sup>151</sup> Others rely on international human rights norms for operational guidance; Microsoft’s human rights policy commits to international institutions that operationalize human rights compliance, such as the UNGPs.<sup>152</sup>

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indices/SRCD/components/ [https://perma.cc/3NH4-Y3NQ]; S&P 500 Information Technology [Sector], GLOBE AND MAIL, https://www.theglobeandmail.com/investing/markets/indices/SRIT/components/ [https://perma.cc/7S76-8MKN] (last visited Apr. 17, 2023).

<sup>149</sup> *Amazon Global Human Rights Principles*, AMAZON.COM, INC., https://sustainability.aboutamazon.com/governance/amazon-global-human-rights-principles [https://perma.cc/S2PH-DYDC] (last visited Sept. 2, 2022).

<sup>150</sup> NVIDIA CO., 2020 CORPORATE SOCIAL RESPONSIBILITY REPORT 30 (2020), https://www.nvidia.com/content/dam/en-zz/Solutions/documents/FY2020-NVIDIA-CSR-Social-Responsibility.pdf [https://perma.cc/6HKD-MR2H].

<sup>151</sup> TESLA, INC., IMPACT REPORT 2021 19 (2021), https://www.tesla.com/ns\_videos/2021-tesla-impact-report.pdf [https://perma.cc/SW8C-BGYL].

<sup>152</sup> *Microsoft Global Human Rights*, MICROSOFT CORP., https://www.microsoft.com/en-us/corporate-responsibility/human-rights-statement?activetab=Pivot\_1:primaryr5 [https://perma.cc/T5UZ-HQ2G] (last visited Apr. 17, 2023).

## 2. Corporate Compliance with Human Rights

Most of the corporations had some level of board oversight over human rights.<sup>153</sup> Some had a board committee with oversight over human rights, specifically, or corporate social responsibility or ESG issues, generally.<sup>154</sup> Others integrated human rights issues into the charters of their other standing committees. For example, the charter of Amazon's Nominating and Governance Committee states that its purpose includes "[o]versee[ing] the Company's Environmental, Social, and Corporate Governance Policies and Initiatives,"<sup>155</sup> which includes overseeing and monitoring "the Company's policies and initiatives relating to corporate social responsibility, including human rights"<sup>156</sup> But these committees continue to lack director expertise on human rights, thereby explaining why shareholders demand independent directors with human rights expertise.<sup>157</sup>

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<sup>153</sup> Tesla has come under investor pressure to enhance its board oversight of human rights. Tesla, Inc., Definitive Proxy Statement (Schedule 14A) at 25–26 (May 28, 2020), [https://www.sec.gov/Archives/edgar/data/1318605/000156459020027321/tsla-def14a\\_20200707.htm](https://www.sec.gov/Archives/edgar/data/1318605/000156459020027321/tsla-def14a_20200707.htm) [<https://perma.cc/KD46-BJKG>].

<sup>154</sup> See, e.g., MICROSOFT CORP., ENVIRONMENTAL, SOCIAL, AND PUBLIC POLICY COMMITTEE CHARTER 1 (2022), <https://view.officeapps.live.com/op/view.aspx?src=https://c.s-microsoft.com/en-us/CMSFiles/Environmental,%20Social,%20and%20Public%20Policy%20Committee%20Charter.docx?version=D8690c7d-21db-bfd4-2fd5-9bb417de99e1> [<https://perma.cc/L5P6-JQCV>] (describing how the Environmental, Social, and Public Policy Committee is responsible for reviewing and providing guidance to the Board and management about human rights issues, in addition to environmental and responsible sourcing matters).

<sup>155</sup> *Nominating and Corporate Governance Charter*, AMAZON.COM, INC., <https://ir.aboutamazon.com/corporate-governance/documents-and-charters/nominating-and-corporate-governance-committee/default.aspx> [<https://perma.cc/U3Q5-CHRD>] (last visited Sept. 2, 2022).

<sup>156</sup> *Id.*; see also NVIDIA CO., CHARTER OF THE NOMINATING AND CORPORATE GOVERNANCE COMMITTEE OF THE BOARD OF DIRECTORS 2 (2021), [https://s22.q4cdn.com/364334381/files/doc\\_downloads/governance\\_documents/2022/NVDA-NCGC-Charter-\(March-3-2022\).pdf](https://s22.q4cdn.com/364334381/files/doc_downloads/governance_documents/2022/NVDA-NCGC-Charter-(March-3-2022).pdf) [<https://perma.cc/NK54-AEZZ>] ("The Committee [of the Board of Directors] shall periodically review and discuss with management the Company's practices with respect to environmental, social and corporate governance.").

<sup>157</sup> For example, in 2021, shareholders submitted requests to Facebook, Twitter, and Alphabet that these companies' boards nominate a director with human rights expertise. See, e.g., ALPHABET, INC., NOTICE OF 2020 ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT 66 (2020), [https://abc.xyz/investor/static/pdf/2020\\_alphabet\\_proxy\\_statement.pdf?cache=CE8ed0f](https://abc.xyz/investor/static/pdf/2020_alphabet_proxy_statement.pdf?cache=CE8ed0f) [<https://perma.cc/F9F4-PEVB>] (detailing Alphabet Stockholder Proposal Number 7 regarding the establishment of a Human Rights Risk Oversight Committee).

Second, many corporations state that they integrate their commitment to international human rights in company<sup>158</sup> or industry<sup>159</sup> codes of conduct that are then integrated into management and operational level decision making.<sup>160</sup> Tesla reports that it “maintains a specialized team within the company’s global supply chain organization to lead our due diligence efforts with respect to conflict minerals and modern slavery”;<sup>161</sup> “[t]hese efforts cover all of Tesla’s subsidiaries throughout the world,”<sup>162</sup> and “an internal cross-functional Tesla Responsible Sourcing Steering Committee composed of Tesla management from Supply Chain, Internal Audit, Environmental, Health and Safety, Policy, ESG, Compliance and Legal oversees these due diligence efforts and potential risks and issues within our global supply base.”<sup>163</sup>

Third, corporations apply their human rights commitments to their supply chains using different strategies, including: screening suppliers for human rights performance;<sup>164</sup>

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<sup>158</sup> See, e.g., AMAZON.COM, INC., SUPPLY CHAIN STANDARDS MANUAL 2, [https://sustainability.aboutamazon.com/amazon\\_supplier\\_manual\\_english.pdf](https://sustainability.aboutamazon.com/amazon_supplier_manual_english.pdf) [<https://perma.cc/7M3X-FH49>] (“Our Supplier Code is based on the United Nations Guiding Principles on Business and Human Rights, and the Core Conventions of the International Labour Organization (ILO), including the ILO Declaration on Fundamental Principles and Rights at Work and the UN Universal Declaration of Human Rights.”).

<sup>159</sup> For example, Nvidia commits to the RBA Code of Conduct that aligns with the UNGPs and are derived from various international human rights standards. NVIDIA CO., *supra* note 150, at 28, 30; RESPONSIBLE BUS. ALLIANCE, *supra* note 48, at 1.

<sup>160</sup> APPLE INC., 2020 STATEMENT ON EFFORTS TO COMBAT HUMAN TRAFFICKING AND SLAVERY IN OUR BUSINESS AND SUPPLY CHAINS 2–5 (2020), <https://www.apple.com/supplier-responsibility/pdf/Apple-Combat-Human-Trafficking-and-Slavery-in-Supply-Chain-2020.pdf> [<https://perma.cc/9EB9-UHK8>] (describing cross-functional teams tasked with overseeing Apple’s anti-human trafficking policies).

<sup>161</sup> TESLA, INC., CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT STATEMENT 4 (2020), <https://www.tesla.com/sites/default/files/about/legal/2020-california-transparency-supply-chain-act-statement.pdf> [<https://perma.cc/EK7S-4R33>].

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*; see also APPLE INC., PEOPLE AND ENVIRONMENT IN OUR SUPPLY CHAIN: 2021 ANNUAL PROGRESS REPORT 99 (2021), [https://www.apple.com/supplier-responsibility/pdf/Apple\\_SR\\_2021\\_Progress\\_Report.pdf](https://www.apple.com/supplier-responsibility/pdf/Apple_SR_2021_Progress_Report.pdf) [<https://perma.cc/J9TS-RJ5R>] (explaining that a number of cross-functional teams oversee human rights due diligence); NVIDIA CO., CORPORATE SOCIAL RESPONSIBILITY (CSR) DIRECTIVE 2 (2020), <https://www.nvidia.com/content/dam/en-zz/Solutions/about-us/documents/nvidia-corporate-responsibility-directive.pdf> [<https://perma.cc/DZ6V-NDFH>] (explaining that a cross-functional team ensures that the business functions contribute to the company’s CSR goals).

<sup>164</sup> NVIDIA CO., 2019 SLAVERY AND HUMAN TRAFFICKING STATEMENT 2, <https://www.nvidia.com/content/dam/en-zz/Solutions/about-us/documents/2019-UK-Slavery-and-Human-Trafficking-Statement.pdf> [<https://perma.cc/NXE6-XCWC>] (reporting that in 2019, it “screened 100% of new suppliers for environmental and social criteria”); APPLE INC., *supra* note 160, at 11 (reporting that it

binding suppliers to international human rights norms through company codes<sup>165</sup> and supplier contracts;<sup>166</sup> and monitoring suppliers' compliance with on-site audits.<sup>167</sup> Companies incentivize suppliers to improve their human rights practices through rewards systems,<sup>168</sup> cooperation in remediation efforts,<sup>169</sup> and termination for non-compliant suppliers.<sup>170</sup> Some corporations expect suppliers to cascade the supplier code obligations to subcontractors deeper in the supply chain.<sup>171</sup> Finally, some corporations require that their suppliers have management systems in place to comply with the

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"uses a supplier selection framework that includes comprehensive review of human rights and modern slavery risks, including debt-bonded labor" and "[i]n 2020, 11 percent of prospective suppliers evaluated were prevented from entering our supply chain").

<sup>165</sup> For example, Tesla states that "[a]ll of Tesla's supply chain partners are subject to our Supplier Code of Conduct and our Human Rights and Conflict Minerals Policy." TESLA, INC., *supra* note 161, at 1; *see also* APPLE INC., *supra* note 160, at 4 ("Suppliers are required to operate in accordance with the Apple Code and Standards, and in full compliance with all applicable laws and regulations.").

<sup>166</sup> MICROSOFT CORP., MODERN SLAVERY AND HUMAN TRAFFICKING STATEMENT 16 (2021), <https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RE4HXwB> [<https://perma.cc/USC2-V43S>] (explaining that they enforce supplier standards, including those relating to human rights, "through supplier contracts, supplier assessments and audits, corrective action, and capability building and training programs"); *California Transparency in Supply Chain Act Disclosure*, HOME DEPOT, INC., [https://www.homedepot.com/c/California\\_Supply\\_Chain\\_Act](https://www.homedepot.com/c/California_Supply_Chain_Act) [<https://perma.cc/WU9Y-E55S>] (last visited Sept. 2, 2022) ("Since 2005, The Home Depot has had a set of Social and Environmental Responsibility (SER) Standards which all suppliers are obligated to comply with by contract.").

<sup>167</sup> AMAZON.COM, INC., *supra* note 158, at 6; HOME DEPOT, INC., *supra* note 166; APPLE INC., *supra* note 160, at 17–18 (describing code of conduct assessments that relies upon management interviews, site walk-throughs, employee interviews, and extensive document review and reporting that 842 code of conduct assessments performed in 2020); MICROSOFT CORP., *supra* note 166, at 16–17.

<sup>168</sup> NVIDIA CO., *supra* note 164, at 2 ("[W]e have implemented a performance-based award system for suppliers that allocates points in their performance score for their efforts to participate in social and environmental initiatives.").

<sup>169</sup> HOME DEPOT, INC., *supra* note 166 ("At the conclusion of every Audit where an issue of noncompliance is found, a Corrective and Preventive Action (CAPA) plan is created with firm timelines based on the level of risk (High 30 days, Medium 90 days).").

<sup>170</sup> *See, e.g.*, AMAZON.COM, INC., MODERN SLAVERY STATEMENT 7 (2021), <https://sustainability.aboutamazon.com/modern-slavery-statement-2021.pdf> [<https://perma.cc/2JZJ-ERNX>] ("Amazon will not enter into or continue a relationship with a Supplier in particularly egregious cases where an audit results in a confirmed case of human trafficking, forced labor, employer destruction of employee personal papers, or restriction of movement that prevents workers from accessing basic liberties.").

<sup>171</sup> *See, e.g.*, APPLE INC., *supra* note 160, at 4 ("Suppliers are also required to apply our requirements to their sub-contractors, next-tier suppliers, and third-party recruitment agencies, through all levels of the supply chain. If a supplier is unwilling or unable to meet our requirements, the supplier risks removal from Apple's supply chain.").

human rights and other expectations contained in company codes.<sup>172</sup>

#### D. United Nations Sustainable Development Goals

In 2015, the United Nations (UN) General Assembly adopted the 2030 Agenda for Sustainable Development and thereby “committed to achieving sustainable development in its three dimensions—economic, social and environmental—in a balanced and integrated manner.”<sup>173</sup> The Agenda is organized around seventeen Sustainable Development Goals (SDGs) and 169 associated targets that address the various dimensions of the 2030 Agenda.<sup>174</sup> The UN SDGs encompass many different sustainability issues involving human rights, inequality, and environmental concerns.<sup>175</sup>

The Center for Strategic & International Studies (“CSIS”) claims that “[w]hile active in creating the SDGs and Agenda 2030[,] . . . the U.S. government has assumed a largely agnostic role in the framework over the past four years.”<sup>176</sup> This lack of support is reflected in the poor performance of the United States on the UN SDGs:

In the global Sustainable Development Report 2021, the US ranked 32nd in the world, far behind most of the high-income countries. The US is especially lagging because of high obesity (SDG 2), low share of renewable energy (SDG 7), high inequality of income (SDG 10), high flows of wastes and emissions embodied in imports (SDG 12), high CO2 emissions (SDG 13), low protection of marine (SDG 14) and terrestrial (SDG 15) ecosystems, high rates of homicide and carcera-

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<sup>172</sup> TESLA, INC., TESLA’S MISSION: TO ACCELERATE THE WORLD’S TRANSITION TO RENEWABLE ENERGY 7–9 (2021), <https://www.tesla.com/sites/default/files/about/legal/tesla-supplier-code-of-conduct.pdf> [<https://perma.cc/4YCM-FC83>] (requiring policy commitments, company representatives tasked with implementation of management systems, and risk assessment and management strategies, among others).

<sup>173</sup> G.A. Res. 70/1, ¶ 2, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015), <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> [<https://perma.cc/MBC2-7J3J>].

<sup>174</sup> *Id.* at ¶ 18.

<sup>175</sup> *Id.* at ¶ 3.

<sup>176</sup> Kristen Cordell, *The Sustainable Development Goals: A Playbook for Re-engagement*, CSIS BRIEFS 1 (Sept. 2021), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210924\\_Cordell\\_SDGs\\_Playbook.pdf?VersionId=ScaFbZnuB8kA9WV.LoZcVYwMSiPtWf4v](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210924_Cordell_SDGs_Playbook.pdf?VersionId=ScaFbZnuB8kA9WV.LoZcVYwMSiPtWf4v) [<https://perma.cc/B4WE-4E5B>].

tion (SDG 16), low levels of development assistance (SDG 17), and excessive tax secrecy (SDG 17).<sup>177</sup>

Additionally, “[t]he state level data not only replicate this overall lack of progress, but signal enormous variations across the US states.”<sup>178</sup>

But many corporations deepened their commitment to the UN SDGs during the years of the Trump administration. This Part examines corporate practices within two sectors—financials<sup>179</sup> and health care<sup>180</sup>—that contribute to the success or failures of the UN SDGs and the practices of three of the largest companies in each of those sectors: Berkshire Hathaway (F), JPMorgan Chase (F), Bank of America (F), Johnson & Johnson (HC), United Health Group (HC), and Pfizer (HC).<sup>181</sup>

### 1. *Corporate Commitments to United Nations Sustainable Development Goals*

Many corporations have policies that commit to the United Nations SDGs, specifically, or other internationally recognized principles that are incorporated into the SDGs. For example, Bank of America announced that it “support[s] the aims of the 17 UN Sustainable Development Goals”<sup>182</sup> and that its “sustainable finance mission is to mobilize and scale financial capital and human innovation to accelerate financing of companies

<sup>177</sup> SUSTAINABLE DEV. SOLS. NETWORK (SDSN), UNITED STATES SUSTAINABLE DEVELOPMENT REPORT 2021 6 (Nov. 2021), <https://s3.amazonaws.com/sustainabledevelopment.report/2021/United+States+Sustainable=Development+Report+2021.pdf> [https://perma.cc/UB6N-A9M8].

<sup>178</sup> *Id.*

<sup>179</sup> The GICS defines the financial sector as including those companies that are “involved in banking, thrifts & mortgage finance, specialized finance, consumer finance, asset management and custody banks, investment banking and brokerage and insurance,” as well as “Financial Exchanges & Data and Mortgage REITs.” MSCI & S&P GLOBAL, *supra* note 117.

<sup>180</sup> The GICS defines the health care sector as including “health care providers & services, companies that manufacture and distribute health care equipment & supplies, and health care technology companies,” and “companies involved in the research, development, production and marketing of pharmaceuticals and biotechnology products.” *Id.*

<sup>181</sup> SLICKCHARTS, *supra* note 119; S&P 500 Financials [Sector], GLOBE AND MAIL, <https://www.theglobeandmail.com/investing/markets/indices/SRFI/components/> [https://perma.cc/RP75-S6GK] (last visited Apr. 17, 2023); S&P 500 Health Care [Sector], GLOBE AND MAIL, <https://www.theglobeandmail.com/investing/markets/indices/SRHC/components/> [https://perma.cc/R6GK-JWQF] (last visited Apr. 17, 2023).

<sup>182</sup> BANK OF AMERICA CORP., BANK OF AMERICA CORPORATION ENVIRONMENTAL AND SOCIAL RISK (ESRP) POLICY FRAMEWORK 8 (2022), [https://about.bankofamerica.com/content/dam/about/pdfs/ESRPF\\_ADA\\_Tagged\\_Secure\\_June\\_2022\\_Final.pdf](https://about.bankofamerica.com/content/dam/about/pdfs/ESRPF_ADA_Tagged_Secure_June_2022_Final.pdf) [https://perma.cc/B547-3HWV].

and projects that are aligned with the SDGs.”<sup>183</sup> Pfizer recognized UN SDG 3 (“good health and well-being”) as “critical to both our business and societal mission.”<sup>184</sup> And Johnson & Johnson announced its “Health for Humanity” goals that are aligned with eleven of the UN SDGs concerning global health, social justice, environmental stewardship, and responsible business practices.<sup>185</sup>

## 2. *Corporate Compliance with United Nations Sustainable Development Goals*

Almost all corporations have board committees with some level of oversight for sustainability and development.<sup>186</sup> Many

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<sup>183</sup> *Id.* (explaining that the primary SDG commitments are in environmental transition and inclusive development); see also Press Release, Bank of Am. Corp., *Bank of America Increases Environmental Business Initiative Target to \$1 Trillion by 2030* (Apr. 8, 2021, 9:00 AM), <https://newsroom.bankofamerica.com/content/newsroom/press-releases/2021/04/bank-of-america-increases-environmental-business-initiative-targ.html> [<https://perma.cc/3XWA-MWFH>] (stating that Bank of America significantly increased its environmental business initiative target to \$1 trillion by 2023—from its original \$300 billion by 2030 target set in 2019—and set a broader SDG-focused sustainable finance target of \$ 1.5 trillion by 2030).

<sup>184</sup> *How Pfizer Supports Good Health and Well-Being*, PFIZER INC. (2018), [https://www.pfizer.com/sites/default/files/investors/financial\\_reports/annual\\_reports/2018/our-culture-our-purpose/our-purpose/sustainable-development-goals/index.html](https://www.pfizer.com/sites/default/files/investors/financial_reports/annual_reports/2018/our-culture-our-purpose/our-purpose/sustainable-development-goals/index.html) [<https://perma.cc/H85F-QCQF>].

<sup>185</sup> JOHNSON & JOHNSON, *HEALTH FOR HUMANITY 2025 GOALS 4* (2021), <https://www.jnj.com/health-for-humanity-goals-2025> [<https://perma.cc/RX25-ZWTF>]; see also UNITEDHEALTH GRP., *2021 PROXY STATEMENT 29-30* (2021), <https://www.unitedhealthgroup.com/content/dam/UHG/PDF/investors/2021/UNH-Proxy-Statement-2021.pdf> [<https://perma.cc/A2AN-9XLD>] (identifying long term commitments to creating a modern, high-performing health system, responsible business practices, inclusive culture with diverse people, and environmental health).

<sup>186</sup> BANK OF AM. CORP., *BANK OF AMERICA CORPORATE GOVERNANCE, ESG, AND SUSTAINABILITY COMMITTEE CHARTER 4* (June 22, 2022), [https://d1io3yog0oux5.cloudfront.net/\\_d8e55b6713068e82f3a9a024c137c253/bankofamerica/db/791/7247/file/BAC+CGESC+Charter++June+22%2C+2022+-+Final+-+IR+Website+Version.pdf](https://d1io3yog0oux5.cloudfront.net/_d8e55b6713068e82f3a9a024c137c253/bankofamerica/db/791/7247/file/BAC+CGESC+Charter++June+22%2C+2022+-+Final+-+IR+Website+Version.pdf) [<https://perma.cc/V5J6-ZWDZ>] (explaining that responsibilities include “[r]eview[ing] the Company’s ESG and sustainability strategy, initiatives and policies, and receive updates from the Company’s management committee responsible for significant ESG and sustainability activities”); *Public Responsibility Committee*, JPMORGAN CHASE & CO. (July 2021), <https://www.jpmorganchase.com/about/governance/board-committees/public-responsibility-committee> [<https://perma.cc/WWY4-7MTZ>] (explaining that the committee’s responsibilities include “oversight and review of the Firm’s positions and practices on public responsibility matters such as community investment, fair lending, sustainability, consumer practices and other public policy issues that reflect the Firm’s values and character and impact the Firm’s reputation among all of its stakeholders”); JOHNSON & JOHNSON, *REGULATORY COMPLIANCE & SUSTAINABILITY COMMITTEE CHARTER 3* (2019), <https://www.investor.jnj.com/regulatory-compliance-sustainability-committee> [<https://perma.cc/5M44-XW7U>] (“The Committee shall review and discuss with relevant management the implementation and effective-

of these oversight responsibilities specify the sustainability issues that are particularly critical in each sector.<sup>187</sup> For example, JPMorgan Chase's Public Responsibility board committee has the responsibility to oversee and review the company's positions and practices on "community investment, fair lending, sustainability, consumer practices[,] and other public policy issues that reflect the Firm's values and character and impact the Firm's reputation among all of its stakeholders."<sup>188</sup> Members of these committees also serve on other board committees, such as the board's enterprise risk committee or regulatory and compliance committee.<sup>189</sup>

Second, corporations operationalize their commitments through management-level sustainability committees that incorporate and coordinate pursuit of SDG goals across the company's various units and functions.<sup>190</sup> At Bank of America, the Global Environmental, Social & Governance Committee is a

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ness of policies and risk management programs in the areas of sustainability, employee health and safety and environmental regulation."); PFIZER INC., CHARTER: GOVERNANCE & SUSTAINABILITY COMMITTEE 3 (2020), [https://s28.q4cdn.com/781576035/files/governance\\_docs/2022/Governance-Sustainability-Committee-Charter-\(Last-Revised-December-2021\).pdf](https://s28.q4cdn.com/781576035/files/governance_docs/2022/Governance-Sustainability-Committee-Charter-(Last-Revised-December-2021).pdf) [<https://perma.cc/AF8Z-64BW>] (including "provid[ing] oversight of the Company's environmental, social and governance strategy and reporting, and corporate citizenship matter"); UNITEDHEALTH GRP., BOARD OF DIRECTORS: PUBLIC POLICY STRATEGIES AND RESPONSIBILITY COMMITTEE CHARTER 2 (Nov. 3, 2020), <https://www.unitedhealthgroup.com/content/dam/UHG/PDF/About/UNH-Public-Policy-Committee-Charter.pdf> [<https://perma.cc/47G4-QRU9>] (including functions that include "[r]eview[ing] and recommend[ing] to the Board policies, positions and practices concerning broad public policy issue").

<sup>187</sup> See, e.g., UNITEDHEALTH GRP., *supra* note 185, at 28 (explaining that "[t]he Public Policy Strategies and Responsibility Committee oversees risk associated with the public policy arena, including health care reform and modernization activities, political contributions, government relations, community and charitable activities and corporate social responsibility").

<sup>188</sup> JPMORGAN CHASE & CO., *supra* note 186.

<sup>189</sup> *Board Committees & Charters*, PFIZER INC., <https://investors.pfizer.com/Investors/Corporate-Governance/Board-Committees—Charters> [<https://perma.cc/YE3W-G5CF>] (last visited Apr. 17, 2023) (indicating that members of the Governance and Sustainability Committee also serve on the Executive Committee and the Regulatory and Compliance committee); *Board Committees*, BANK OF AM. CORP., <https://investor.bankofamerica.com/corporate-governance/board-committees> [<https://perma.cc/WVM8-XU98>] (last visited Apr. 18, 2023) (indicating that some members of the Corporate Governance, ESG, and Sustainability Committee also serve on the Enterprise Risk Committee).

<sup>190</sup> See, e.g., JPMORGAN CHASE & CO., ENVIRONMENTAL, SOCIAL & GOVERNANCE REPORT 11 (2020), <https://www.jpmorganchase.com/content/dam/jpmc/jpmorganchase-and-co/documents/jpmc-esg-report-2020.pdf> [<https://perma.cc/XA49-TPUW>] (describing the functions of the company's corporate sustainability team and operational sustainability team); Johnson & Johnson, *supra* note 186, at 2 (noting the responsibilities of the Regulatory Compliance and Sustainability Committee).

management level committee “comprised of senior leaders across every major line of business and support function” that reviews the company’s activities and practices on ESG.<sup>191</sup> It reports or updates two board committees (enterprise risk and management risk), coordinates its work with other management-level committees, and oversees other company committees devoted to specific ESG issues, such as sustainable finance.<sup>192</sup> At Johnson & Johnson, the Enterprise Governance Council “is comprised of senior leaders who represent our three business segments and our global enterprise functions” and who discuss and debate ESG issues significant to Johnson & Johnson, such as “investments needed to help contribute to a sustainable economy.”<sup>193</sup>

Third, some corporations bind their contractual partners to the SDG values that they espouse. Both JPMorgan Chase and Bank of America maintain a list of prohibited activities as part of their environmental and social policies.<sup>194</sup> JPMorgan Chase clarifies that it will not “provide lending, capital markets or advisory services to clients where there is evidence of forced or child labor, human trafficking or slavery” or “project financing or other forms of asset-specific financing where the proceeds will be used to develop within UNESCO World Heritage sites,” subject to certain exceptions.<sup>195</sup> Bank of America maintains a similar list of prohibited activities.<sup>196</sup> But despite these prohibitions, shareholders have criticized these financial institutions for supporting projects that violate international law.<sup>197</sup>

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<sup>191</sup> BANK OF AMERICA CORP., *supra* note 182, at 4.

<sup>192</sup> *Id.* at 4–5.

<sup>193</sup> JOHNSON & JOHNSON, *supra* note 185, at 3.

<sup>194</sup> JPMORGAN CHASE & CO., ENVIRONMENTAL AND SOCIAL POLICY FRAMEWORK 4–5 (Oct. 8, 2021), <https://www.jpmorganchase.com/content/dam/jpmc/jpmorganchase-and-co/documents/environmental-and-social-policy-framework.pdf> [<https://perma.cc/5AMN-HQBZ>]; BANK OF AMERICA CORP., *supra* note 182, at 7; *but see* Press Release, Sec. and Exchange Comm’n, JPMorgan Chase Paying \$264 Million to Settle FCPA Charges (Nov. 17, 2016) <https://www.sec.gov/news/press-release/2016-241> [<https://perma.cc/RNC5-368R>] (“The Securities and Exchange Commission today announced that JPMorgan Chase & Co. has agreed to pay more than \$130 million to settle SEC charges that it won business from clients and corruptly influenced government officials in the Asia-Pacific region by giving jobs and internships to their relatives and friends in violation of the Foreign Corrupt Practices Act (FCPA).”).

<sup>195</sup> JPMORGAN CHASE & CO., *supra* note 194, at 4.

<sup>196</sup> BANK OF AMERICA CORP., *supra* note 183, at 6–7 (adding additional prohibited activities, such as payday lending).

<sup>197</sup> JPMorgan Chase & Co., SEC No-Action Letter 4 (Mar. 19, 2019), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/martinharangozo031919-14a8.pdf> [<https://perma.cc/GVJ2-NDPY>].

### E. Summary

The three case studies suggest that many large corporations are institutionalizing international law. At the board level, corporations have assigned responsibility to board committees for human rights, environmental impact, and other issues. At the management level, corporations use cross-functional teams, executive-level positions and committees, key performance indicators, due diligence processes, and compensation metrics to encourage compliance with international law within the corporation. Finally, some corporations incorporate international law into their policies and procedures with suppliers and clients.

While these examples are promising, it is important to recognize two factors that may limit the generalizability of these findings: *visibility of corporations* and *visibility of issues*.<sup>198</sup> First, compliance may improve with the visibility of the corporation, which is influenced by its size, brand, reputation, product or service, or other organizational features. This visibility can make corporate reputations particularly susceptible to scandal, and we can therefore expect that these corporations would invest in those compliance practices that would safeguard their organizations from reputational risks.<sup>199</sup> Large corporations may also enjoy greater resources to address these risks with higher operating budgets and larger personnel. We can therefore expect a direct relationship between a corporation's international law compliance and its visibility because of its vulnerability to risks and capacity to address them.

Second, compliance may also improve with the visibility of the issue. Some issues garner greater attention within society because of their emotional salience, magnitude, and nature of harms, victims, and media coverage, among other factors. Issues may also attain high visibility within a sector when investors or other groups recognize the potential for that issue to influence the financial performance of a corporation.<sup>200</sup>

From these factors, we can create a framework that can help to predict when we may witness corporate compliance

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<sup>198</sup> Parella, *supra* note 40, at 759–67, 784–87 (discussing international law's contribution to the visibility of an issue and factors that contribute to the visibility of a corporation).

<sup>199</sup> See, e.g., Microsoft Corp., Annual Report (Form 10-K) 33 (2021) (recognizing that “[i]f our reputation or our brands are damaged, our business and operating results may be harmed” and that “[t]here are numerous ways our reputation or brands could be damaged” and that “[t]he proliferation of social media may increase the likelihood, speed, and magnitude of negative brand events”).

<sup>200</sup> See MSCI, *supra* note 104, at 3–4.

with international law (Table 1). We can expect that corporate compliance with international law will be strong when the visibility of the corporation *and* policy issue are both high. It is therefore not surprising that many of the corporations in the case studies illustrate some level of corporate compliance because most of them satisfy these requirements. By selecting large corporations, the case studies involved corporations that are highly visible. The case studies also selected sectors for which an international law issue may influence a corporation's financial performance or was otherwise significant, suggesting that these issues had already reached high visibility within those sectors. The combination of these factors can help to explain the relatively positive findings in the case studies. In contrast, corporate compliance may decrease when the visibility of either the corporation or the issue dwindles. We would expect the weakest level of corporate compliance when the visibility of the corporation and the issue are low.

TABLE 1: PREDICTING CORPORATE COMPLIANCE WITH INTERNATIONAL LAW

		Visibility of the Corporation	
		High	Low
Visibility of the Issue	High	Strong Compliance	Intermediate Compliance
	Low	Intermediate Compliance	Weak Compliance

This framework is useful in two ways. First, it allows us to predict the types of compliance that we may expect, which may vary widely across corporations, sectors, and issue areas. It therefore urges caution in managing expectations despite the relatively positive findings in Parts B-D, *supra*. Second, it is also useful in policy design because it identifies factors that may encourage or discourage corporate compliance. Both the visibility of a corporation or of an issue are both dynamic factors that may rise and fall. Section IV, *infra*, therefore explores the actors and mechanisms that can influence the visibility of one or both of these factors. Section V, *infra*, applies this insight to provide explicit recommendations to policymakers on how to design international agreements to encourage compliance among corporate laggards and even improvement by corporate leaders.

## IV

NORMATIVE IMPLICATIONS: UNDERSTANDING THE  
INCENTIVES AND MECHANISMS FOR CORPORATE  
COMPLIANCE WITH INTERNATIONAL LAW

This Section draws upon the case studies in Section III, *supra*, to explain a puzzle presented by these same case studies: we witness corporate compliance with international law despite a weak or absent “state pathway.” These findings raise two important questions for both international legal theory and policymaking: (a) *why* do these corporations comply with international law when a government does not make them do so, and (b) *who* enforces international law against corporations if not governments? This Section uses the case studies from Section III, *supra*, to answer both of these questions. Part A explains that many corporations in the case studies complied with international law to *promote corporate purpose and strategy, manage risks, and maintain stakeholder relationships*. Part B explores the range of actors who enforced international law norms against these corporations, such as *peer corporations, investors, proxy advisors, and civil society actors*.

This Section intentionally examines the incentives created by non-state actors for corporations to institutionalize international law. But it is important to recognize the contributions of government actors even when the state pathway for international law is weak. While government actors may reject international treaties or challenge international organizations, they may nonetheless encourage the adoption of associated international law norms in other ways.<sup>201</sup> Additionally, many domes-

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<sup>201</sup> For example, while the United States has been hostile to the development of an international legally binding agreement on business and human rights, which would require mandatory human rights due diligence for certain categories of businesses, the legislative and executive branches have enacted a number of measures that would encourage or require such human rights due diligence in global supply chains. See GIBSON, DUNN & CRUTCHER LLP, ENFORCEMENT OF THE UYGHUR FORCED LABOR PREVENTION ACT BEGINS IN THE UNITED STATES 1 (June 23, 2022) (“[T]he UFLPA is the latest in a long line of U.S. executive and legislative efforts targeting alleged forced labor in the supply chains of goods entering the United States.”), <https://www.gibsondunn.com/wp-content/uploads/2022/06/enforcement-of-the-uyghur-forced-labor-prevention-act-begins-in-the-united-states.pdf> [<https://perma.cc/3SSG-JGBY>]; U.S. CUSTOMS & BORDER PROT., UYGHUR FORCED LABOR PREVENTION ACT: U.S. CUSTOMS & BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS (June 13, 2022), [https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP\\_Guidance\\_for\\_Importers\\_for\\_UFLPA\\_13\\_June\\_2022.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP_Guidance_for_Importers_for_UFLPA_13_June_2022.pdf) [<https://perma.cc/DT9L-3CMJ>].

tic laws and regulations enable non-state actors to create the incentives discussed below.<sup>202</sup>

A. Understanding Incentives: Why Do Corporations Comply with International Law?

1. *Corporate Strategy and Purpose*

In his 2019 letter to CEOs, Larry Fink defined corporate purpose as “a company’s fundamental reason for being—what it does every day to create value for its stakeholders. Purpose is not the sole pursuit of profits but the animating force for achieving them.”<sup>203</sup> The challenge is that “firms are increasingly engaging in the same sorts of sustainability and governance activities—and thus failing to differentiate themselves strategically.”<sup>204</sup> In order “[t]o outperform their competitors, companies need to find approaches that are more difficult to imitate.”<sup>205</sup>

International law provides a solution to this challenge. Some corporations explicitly connect international law norms to their corporate purpose in order to distinguish themselves from their competitors.<sup>206</sup> Pfizer’s stated purpose is based on five strategic priorities that are aligned with several UN SDGs, including good health and well-being (SDG 3), gender equality (SDG 5), and reducing inequalities (SDG 10), among others.<sup>207</sup> In 2020, Pfizer aligned its ESG priority areas and Key Performance Indicators with these strategic objectives.<sup>208</sup> Johnson & Johnson similarly connects its corporate purpose to performance on the UN SDGs, announcing that “we will actively con-

<sup>202</sup> For example, shareholders use Rule 14a-8 to submit shareholder proposals to corporations requesting information about that corporation’s compliance with international law norms. Their ability to do so depends on amendments to the rule as well as guidance from the U.S. Securities & Exchange Commission. See Complaint at 1–2, *Interfaith Ctr. on Corp. Resp. v. SEC.*, No. 1:21-cv-01620 (D.D.C. June 15, 2021).

<sup>203</sup> Larry Fink, *Profit & Purpose*, BLACKROCK (2019), <https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter> [<https://perma.cc/3TZT-JUGB>].

<sup>204</sup> George Serafeim, *Social-Impact Efforts That Create Real Value*, HARV. BUS. REV., Sept.-Oct. 2000, <https://hbr.org/2020/09/social-impact-efforts-that-create-real-value> [<https://perma.cc/79W5-U8TC>].

<sup>205</sup> *Id.*

<sup>206</sup> See Butler, *supra* note 52, at 484–86 (describing the value of international law compliance for organizational, executive, employee, and investor self-identities).

<sup>207</sup> PFIZER INC., ENVIRONMENTAL, SOCIAL & GOVERNANCE REPORT 2020 9 (2020), [https://s28.q4cdn.com/781576035/files/doc\\_downloads/Pfizer-ESG-Report-2020\\_2021-03-10.pdf](https://s28.q4cdn.com/781576035/files/doc_downloads/Pfizer-ESG-Report-2020_2021-03-10.pdf) [<https://perma.cc/X2JS-WACT>].

<sup>208</sup> *Id.* at 29.

tribute to 11 SDGs, which span global health, social justice, environmental stewardship and responsible business practices, while taking on two of the most fundamental health challenges of our time: pandemics and epidemics, and global health equity.”<sup>209</sup>

Other corporations have recognized ways that international law compliance creates opportunities for increased strategic value.<sup>210</sup> At the 2019 Paris Air Show, the chief technology officers of seven global aviation manufacturers issued a joint statement committing their companies to sustainable aviation and industry CO<sub>2</sub> reduction targets.<sup>211</sup> Raytheon therefore recognizes that “[t]here will be strong competition among companies to develop and roll out new, workable technologies and/or designs that support the aviation industry’s sustainability goals. Companies will seek to be first to market with new technologies.”<sup>212</sup> It also recognized strategic value in developing technologies for which consumer demand will increase with climate change.<sup>213</sup>

But corporate purpose is a double-edged sword because it encourages both compliance *and* non-compliance with international law. Consider Tesla, which defines its mission as “Accelerating the World’s Transition to Sustainable Energy.”<sup>214</sup> The danger is that the pursuit of this goal may exclude the pursuit of other international law norms that conflict with it. Specifically, NGOs have identified severe human rights risks that accompany the transition to electric vehicles.<sup>215</sup> Tesla’s failure to similarly incorporate these human rights norms into its pur-

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<sup>209</sup> JOHNSON & JOHNSON, 2020 HEALTH FOR HUMANITY REPORT: PROGRESS IN SUSTAINABILITY 12 (June 2021), <https://www.jnj.com/2020-health-for-humanity-report> [<https://perma.cc/X66E-CJ9W>].

<sup>210</sup> See, e.g., Butler, *supra* note 52, at 482–83 (explaining how the Global Battery Alliance’s (GBA) alignment with international law norms through a Battery Passport would “advantage batteries from GBA producers, potentially allowing them to charge a premium for the added work of verifying the entire supply chain’s compliance with prescribed standards”).

<sup>211</sup> RAYTHEON TECHNOLOGIES CORP., *supra* note 125, at 8.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *About Us*, TESLA, INC., <https://www.tesla.com/about> [<https://perma.cc/VB9U-E4Q9>] (last visited Sept. 13, 2022).

<sup>215</sup> AMNESTY INT’L, “THIS IS WHAT WE DIE FOR”: HUMAN RIGHTS ABUSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO POWER THE GLOBAL TRADE IN GLOBAL COBALT 5–6, 15 (2016), <https://www.amnesty.org/en/documents/afr62/3183/2016/en> [<https://perma.cc/R6F2-M9N5>] (documenting the human rights abuses associated with artisanal cobalt mining in the DRC and explaining that “[d]emand for cobalt is growing at over 5 percent a year, and it is expected to continue doing so as the lithium-ion battery market expands with the increasing popularity of electric vehicles”).

pose may have contributed to criticism of its human rights practices.<sup>216</sup>

## 2. Risk Management

Corporate actors also comply with international law to manage various risks that the corporation confronts, such as *legal, strategic, operational, business continuity, and reputational* risks.<sup>217</sup> Legal risks are most familiar to lawyers and are implicated when corporate conduct violates laws, regulations and other institutions that may expose the corporation to legal consequences. Strategic risks result from a “[f]ailure to anticipate or adapt policy direction and business model in a rapidly changing environment.”<sup>218</sup> Operational risks are “[u]nacceptable differences between actual and expected operational performance,”<sup>219</sup> whereas reputational risks are “[u]nacceptable differences between how an organization wants and needs to be perceived and how it is actually perceived,”<sup>220</sup> and can result from a failure to manage other risks.<sup>221</sup> Finally, business continuity risks refers to the “[i]nability to prevent, detect or correct business outages within established limits.”<sup>222</sup>

Compliance with international law can help a corporation to manage these risks. An EU study found that many corporations observe international human rights norms to manage reputational risks.<sup>223</sup> Similarly, corporations also recognize that climate-related risks can implicate strategic and operational risks, such as operational disruptions, shifting consumer preferences, reputational impacts, and infrastructural

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<sup>216</sup> Class Complaint, *supra* note 25, at 9; Tesla, Inc., *supra* note 153, at 25.

<sup>217</sup> COSO & WBSCD, *supra* note 93, at 56, 88; *see also* Bainbridge, *supra* note 99, at 967, 969 (distinguishing between operational, market, and credit risk); Simkins & Ramirez, *supra* note 81, at 574-77 (describing risks associated with human resource mismanagement, internal controls, and accounting fraud, among others).

<sup>218</sup> COSO & WBSCD, *supra* note 93, at 56.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Lise Smit et al., STUDY ON DUE DILIGENCE REQUIREMENTS THROUGH THE SUPPLY CHAIN 16 (2020); *see also* BANK OF AM. CORP., BANK OF AMERICA CORPORATION ENVIRONMENTAL AND SOCIAL RISK POLICY (ESRP) FRAMEWORK 4 (June 2022), [https://about.bankofamerica.com/content/dam/about/pdfs/ESRPF\\_ADA\\_Tagged\\_Secure\\_June\\_2022\\_Final.pdf](https://about.bankofamerica.com/content/dam/about/pdfs/ESRPF_ADA_Tagged_Secure_June_2022_Final.pdf) [<https://perma.cc/5ZEA-U2DL>] (explaining that ESG issues impact many risks areas “starting with reputational risk”).

damage,<sup>224</sup> and that adherence to the Paris Agreement can help to manage these risks.

Conversely, non-compliance with international law exposes a corporation to a variety of risks.<sup>225</sup> Microsoft recognizes that human rights practices, supply chain issues, and environmental performance can impact its reputation and brand value.<sup>226</sup> Therefore, its Regulatory and Public Policy Committee has the responsibility to “oversee[ ]the Company’s key non-financial regulatory risks that may have a material impact on the company and especially its ability to sustain trust with customers, employees, and the public,”<sup>227</sup> including oversight for human rights issues. Similarly, JPMorgan Chase’s Public Responsibility Committee oversees the company’s positions and practices on a variety of “public policy issues that reflect the Firm’s values and character and impact the Firm’s reputation among all of its stakeholders.”<sup>228</sup>

### 3. Stakeholder Management

Corporations rely on relationships with a variety of stakeholders, which is “[a]ny group or individual who can affect or is affected by the achievement of the firm’s objectives,”<sup>229</sup> such as customers, suppliers, media, governments, investors, employees, and others.<sup>230</sup> These groups are important because they supply a corporation with the resources that it needs to compete and succeed.<sup>231</sup>

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<sup>224</sup> See, e.g., JPMORGAN CHASE & CO., *supra* note 190, at 15–16 (explaining how physical and transition risks associated with climate change implicate operational, strategic, market, and credit and investment risks); CONOCOPHILLIPS CO., 2020 ANNUAL REPORT 27 (2021) (“Existing and future laws, regulations and internal initiatives relating to global climate change, such as limitations on GHG emissions, may impact or limit our business plans, result in significant expenditures, promote alternative uses of energy or reduce demand for our products.”).

<sup>225</sup> See, e.g., Marsh & McLennan Cos., *A Framework to Assess and Disclose the Impact of Climate Change on Financial Performance*, in GOVERNANCE CHALLENGES 2017: BOARD OVERSIGHT OF ESG 11, 13 (NAT’L ASS’N OF CORP. DIRS. ed., 2017) (listing climate-related risks).

<sup>226</sup> MICROSOFT CORP., ENVIRONMENTAL, SOCIAL, AND PUBLIC POLICY COMMITTEE CHARTER 2 (2022), [https://www.dealpointdata.com/corp/pdf/2147364677\\_120570887.pdf](https://www.dealpointdata.com/corp/pdf/2147364677_120570887.pdf) [<https://perma.cc/F2D2-S53Z>].

<sup>227</sup> *Id.* at 1.

<sup>228</sup> *Public Responsibility Committee*, JPMORGAN CHASE & CO., <https://www.jpmorganchase.com/about/governance/board-committees/public-responsibility-committee> [<https://perma.cc/WWY4-7MTZ>] (last visited Sept. 16, 2022).

<sup>229</sup> R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 25 (1984).

<sup>230</sup> *Id.*

<sup>231</sup> ORGANISATION FOR ECON. CO-OPERATION AND DEV., *supra* note 77, at 34.

This desire to manage stakeholder relationships can incentivize corporations to comply with international laws important to stakeholders.<sup>232</sup> How a corporation discloses its commitments and compliance with international law tells us something about the stakeholder it is trying to impress. Amazon posts information about its human rights policies on its website dedicated to sustainability, which also shares information about Amazon's commitment to the climate, racial justice and equity, and pay equity.<sup>233</sup> While this website may target numerous audiences, the tab "Sustainability for Customers" suggests that a primary purpose of this information sharing is to reach customers.<sup>234</sup> Other corporations share this information on webpages explicitly dedicated to "investor relations."<sup>235</sup> Finally, corporations share human rights information on webpages dedicated to legal disclosures and requirements.<sup>236</sup> It is important to know where a corporation shares information because it reveals their intended audience and the stakeholder group who may have leverage to press for greater information or even improved practices.<sup>237</sup>

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<sup>232</sup> See, e.g., Esben Rahbek Gjerdrum Pedersen & Wencke Gwozdz, *From Resistance to Opportunity-Seeking: Strategic Responses to Institutional Pressures for Corporate Social Responsibility in the Nordic Fashion Industry*, 119 J. BUS. ETHICS 245, 260 (2014) ("[F]ashion companies tend to conform to stakeholder requirements rather than considering resistance and opportunity-seeking strategies."); Matthias Damert & Rupert J. Baumgartner, *Intra-Sectoral Differences in Climate Change Strategies: Evidence from the Global Automotive Industry*, 27 BUS. STRATEGY & ENV'T 265, 274 (2018) (explaining "that being closer to the end consumer translates into more sophisticated action due to greater visibility and exposure to public scrutiny").

<sup>233</sup> See, e.g., *Amazon Sustainability*, AMAZON.COM, INC., <https://sustainability.aboutamazon.com/> [<https://perma.cc/2QRZ-NYF6>] (last visited Sept. 9, 2022).

<sup>234</sup> *Id.*

<sup>235</sup> *Supplier Responsibility*, APPLE INC., <https://www.apple.com/supplier-responsibility/> [<https://perma.cc/V958-7W48>] (last visited Sept. 9, 2022).

<sup>236</sup> *Privacy and Legal*, TESLA, INC., <https://www.tesla.com/legal> [<https://perma.cc/YZU8-K94Y>] (last visited Sept. 9, 2022) (discussing the Responsible Materials Policy).

<sup>237</sup> See, e.g., Kareem M. Shabana, Ann K. Buchholtz & Archie B. Carroll, *The Institutionalization of Corporate Social Responsibility Reporting*, 56 BUS. & SOC'Y 1107, 1110 (2017) (explaining a three-stage model of CSR reporting: "In the first stage, reporting is driven by deficiencies that call negative attention to the firm's operations leading to reporting as a mechanism for showing improvement and defending against attacks. In the second stage, reporting is opportunity driven for firms that have strengths to highlight and media coverage to assist in getting out the message. The third stage is characterized by firms that report because the practice of CSR reporting has become widely accepted and so not reporting might be considered problematic."); Cory Searcy & Ruvena Buslovich, *Corporate Perspectives on the Development and Use of Sustainability Reports*, 121 J. BUS. ETHICS 149, 154 (2014) (finding that companies reported sustainability practices in the absence of legal requirements because of stakeholder requests for information).

B. Understanding Mechanisms: Who Enforces International Law Norms Against Corporations?

1. *Other Corporations*

The case studies illustrate three ways in which corporations enforce international law against other corporations or business actors. First, they bind their suppliers to international law norms using codes of conduct and supplier contracts.<sup>238</sup> They incentivize compliance through monitoring, rewards, remediation cooperation, and sanctions.<sup>239</sup> Critically, some corporations require suppliers to “cascade” international law norms to subcontractors,<sup>240</sup> thereby transforming these suppliers from targets of international law to its enforcers.

Second, corporations enforce international law when they bind their customers to respect international legal norms. Section III.D., *supra*, explains how financial institutions maintain policies and procedures to ensure that they are not facilitating their clients’ commission of international law violations.<sup>241</sup> Both JPMorgan Chase and Bank of America maintain lists of prohibited activities that they will not support through their financing, advisory, or other services.<sup>242</sup> This type of enforcement is enhanced by enterprise risk management practices that ensure that these financial institutions translate their policies into practices.<sup>243</sup>

Third, corporations influence the international law compliance of their peer and competitor corporations. When corporations adopt international law norms as part of overall corporate purpose, their peers may experience pressure to similarly express their values. Johnson & Johnson’s commitment to UN SDG 3 inevitably shines a light on the comparable commitments and practices of its peers.<sup>244</sup> It is therefore not surprising that Pfizer similarly commits to UN SDG 3 and adopts specific targets to achieve it.<sup>245</sup> If corporations adopt international law norms as part of risk management processes, then

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<sup>238</sup> See, e.g., Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

<sup>239</sup> See *supra* Section III.

<sup>240</sup> See, e.g., APPLE INC., *supra* note 160, at 4 (“Suppliers are also required to apply our requirements to their sub-contractors, next-tier suppliers, and third-party recruitment agencies, through all levels of the supply chain.”).

<sup>241</sup> See *supra* notes 185-197 and accompanying text.

<sup>242</sup> JPMORGAN CHASE & CO., *supra* note 194, at 4; BANK OF AM. CORP., *supra* note 223, at 6.

<sup>243</sup> JPMORGAN CHASE & CO., *supra* note 194, at 5.

<sup>244</sup> JOHNSON AND JOHNSON, POSITION ON SUPPORTING THE UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS 1 (2016).

<sup>245</sup> PFIZER INC., PFIZER 2018 ANNUAL REVIEW 44 (2018).

stakeholders of peer companies may demand similar processes in order to ensure adequate risk management by the corporation.<sup>246</sup>

## 2. *Investors*

Investors are in a unique position to enforce international law because they are afforded important rights.<sup>247</sup> For example, Rule 14a-8 allows investors to submit shareholder proposals to a company's management regarding that company's policies and practices on one or more issues. Rule 14a-8 defines a shareholder proposal as a "recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders."<sup>248</sup> If the shareholder proponent and the proposal satisfy the requirements of Rule 14a-8, then a "company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders."<sup>249</sup>

Shareholders have used this rule to alert their fellow shareholders—and management—to a corporation's non-compliance with international law norms concerning human rights due diligence, climate change, and other issues governed by international law.<sup>250</sup> Proposals can also have an impact independent of their voting impact. Some proposals are withdrawn by the shareholder proponent in exchange for the corporation's management entering into an agreement with the proponent to make changes to practices.<sup>251</sup> For example, a shareholder withdrew its human rights proposal at Kraft Heinz when the latter "committed to conducting a [human rights impact assessment] consistent with the UN Guiding Principles on Business and Human Rights (UNGPs)."<sup>252</sup> The significance of

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<sup>246</sup> TRILLIUM ASSET MGMT. & ZEVIN ASSET MGMT., UPS PROPOSAL 6: REPORT ON PARIS ALIGNMENT 2 (2020) ("[O]ther UPS peers are setting bold goals at the level of overall corporate emissions, which include airline impacts.").

<sup>247</sup> See generally Del. Code Ann. tit. 8, §§ 212–233 (2019) (listing the voting rights of stockholders); see also ORGANISATION FOR ECON. CO-OPERATION AND DEV., *supra* note 77, at 18 (listing issues that shareholders have the right to influence).

<sup>248</sup> 17 C.F.R. § 240.14a-8(a) (2013).

<sup>249</sup> *Id.*

<sup>250</sup> See *supra* Section III.

<sup>251</sup> Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 283 (2016).

<sup>252</sup> Julie Wokaty, *Investors Commend Kraft Heinz for Efforts to Advance Human Rights Due Diligence Throughout its Supply Chain*, INTERFAITH CTR. ON CORP. RESP.: JULIE WOKATY'S BLOG (May 5, 2021), <https://www.iccr.org/investors-commend-kraft-heinz-efforts-advance-human-rights-due-diligence-throughout-its->

human rights issues also grow as institutional investors publicly state their position on these issues.<sup>253</sup>

Delaware is a leading domicile for many corporations.<sup>254</sup> “Section 220 of the Delaware General Corporation Law allows a stockholder to inspect books and records of a corporation, provided that the stockholder’s inspection demand meets the form and manner requirements contained in the statute, and the inspection is demanded for a proper purpose.”<sup>255</sup> In 2012, the Louisiana Municipal Police Employee’s Retirement Systems (LAMPERS) filed a complaint against Hershey to enforce its right to inspect certain corporate books and records because “[t]here are substantial grounds to believe that the Company’s Board of Directors (the “Board”) has caused or permitted the Company to support the use of unlawful child labor, in fact integrating this illegal conduct into its business model.”<sup>256</sup> In addition to potential unlawful conduct, “Hershey has placed its brand and reputation at risk”<sup>257</sup> and “[a]ccordingly . . . there is a reasonable basis to investigate whether the Board has permitted Hershey to act in an *ultra vires* manner in breach of the Board’s fiduciary duties to the Company and its shareholders.”<sup>258</sup> The plaintiff had submitted a “demand letter” under Section 220 requesting access to minutes of Board meetings at which topics of child labor were discussed, as well as any communications or documents created regarding the same, as well as other topics.<sup>259</sup>

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supply-chain [https://perma.cc/Y6EE-5XU5]; see also 2021 *Human Rights Impact Assessment*, INTERFAITH CTR. ON CORP. RESP., https://exchange.iccr.org/node/88002/text [https://perma.cc/2DFL-A8JT] (last visited Oct. 31, 2022) (requesting that Kraft Heinz publish Human Rights Impact Assessments).

<sup>253</sup> See BlackRock, OUR APPROACH TO ENGAGEMENT WITH COMPANIES ON THEIR HUMAN RIGHTS IMPACTS 2 (2022), https://www.blackrock.com/corporate/literature/publication/blk-commentary-engagement-on-human-rights.pdf [https://perma.cc/7ZJB-799K].

<sup>254</sup> *About the Division of Corporations*, DELAWARE.GOV (last visited Oct. 31, 2022). https://corp.delaware.gov/aboutagency/#:~:text=More%20than%201,000,000%20business%20entities,complete%20package%20of%20incorporations%20services [https://perma.cc/CH8L-DQKB] (“The State of Delaware is a leading domicile for U.S. and international corporations. More than 1,000,000 business entities have made Delaware their legal home. More than 66% of the Fortune 500 have chosen Delaware as their legal home.”).

<sup>255</sup> *La. Mun. Police Emps.’ Ret. Sys. v. Hershey Co.*, C.A. No. 7996-ML, 2013 WL 6120438, at \*7 (Del. Ch. Nov. 8, 2013) (citing Del. Code Ann. tit. 8, § 220(c) (2010)).

<sup>256</sup> Verified Complaint at 1, *La. Mun. Police Emps.’ Ret. Sys. v. Hershey Co.*, C.A. No. 7996-ML, 2013 WL 6120438 (Del. Ch. Nov. 8, 2022).

<sup>257</sup> *Id.* at 2.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 21–22.

### 3. *Proxy Advisors*

Proxy advisors can also encourage companies to comply with international law. “These private companies collect information, analyze corporate elections, and provide voting recommendations to clients for a fee.”<sup>260</sup> While institutional investors hold the vast majority of public company shares, “their structure and financial model limits their ability to research and cast informed votes on all matters without incurring significant costs, thus opening the door for proxy advisors to help guide their voting decisions.”<sup>261</sup> Therefore, “[t]o supply advice at scale, they reach conclusions about ‘best practices’ on each issue and then set governance guidelines that are enforced through their voting guidance.”<sup>262</sup> The consequence is that “proxy advisors influence not only investor voting but also board and management behavior before the corporate proxy even arrives.”<sup>263</sup>

In recent years, proxy advisors have supported international law norms. Glass Lewis recommended that shareholders vote in favor of proposals requesting human rights due diligence reports at Tyson Foods, Sanderson Farms, and Pilgrim’s Pride.<sup>264</sup> It also recommended in favor of a proposal at Alphabet requesting that the board establish a human rights risk oversight committee, explaining that “[a]lthough Alphabet had implied some level of human rights-related oversight through its audit committee, we believed that its significant exposure to legal, reputational, and regulatory human rights-related risks warranted additional oversight.”<sup>265</sup> Both Glass Lewis and Institutional Shareholder Services (ISS) supported a shareholder

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<sup>260</sup> Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2594 (2021).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 2595.

<sup>263</sup> *Id.* at 2595–96 (“Many companies proactively adopt governance policies that mesh with ISS and Glass Lewis recommendations, and sometimes even seek their behind-the-scenes consulting advice on executive compensation packages and management-sponsored proposals to increase the likelihood that shareholders will approve them.” (footnotes omitted)). *But see generally* Andrew F. Tuch, *Proxy Advisor Influence in a Comparative Light*, 99 B.U.L.R. 1459 (2019)(observing and explaining the differences in influence of proxy advisors in the United States compared to the United Kingdom).

<sup>264</sup> GLASS, LEWIS & CO, 2020 PROXY SEASON REVIEW 32 (2020), <https://www.glasslewis.com/wp-content/uploads/2020/09/2020-Proxy-Season-Review-Shareholder-Proposals.pdf> [<https://perma.cc/3JNW-EYGT>].

<sup>265</sup> *Id.* at 8.

proposal submitted to Tesla that requested human rights disclosures.<sup>266</sup>

#### 4. *Civil Society Actors*

Civil society actors<sup>267</sup> encourage corporations to abide by international law in several unique ways. First, they encourage transparency on environmental or social issues so that investors, consumers, and other stakeholders are better informed on corporate practices. Many corporations disclosed climate-related information pursuant to the CDP, which is “a not-for-profit charity that runs the global disclosure system for investors, companies, cities, states and regions to manage their environmental impacts.”<sup>268</sup> As part of their CDP disclosures, companies like Raytheon and ConocoPhillips disclosed information on board and management oversight on climate-related issues (including incentives); climate-related risk assessments, including identification of specific risks in value chain, and climate-related opportunities.<sup>269</sup> According to the CDP, “[o]ver 13,000 companies disclosed through CDP on climate change, water security and forests.”<sup>270</sup>

Second, civil society groups also compare and rank the performance of corporations based on the disclosed information. The CDP maintains “A Lists” of corporations based on their disclosures on climate change, forests, and water security.<sup>271</sup> CDP’s “scoring measures the comprehensiveness of dis-

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<sup>266</sup> 24.8% Support for Human Rights Proposal at Tesla, INV’R ADVOCATE FOR SOC. JUSTICE (Sept. 25, 2020), <https://iasj.org/iasj-urges-tesla-shareholders-to-vote-for-human-rights-disclosure-proposal> [<https://perma.cc/LAQ9-S6Y8>].

<sup>267</sup> CHARLES KOJO VANDYCK, CTR. FOR STRATEGIC & INT’L STUDIES, CONCEPT AND DEFINITION OF CIVIL SOCIETY SUSTAINABILITY 1-2 (2017), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/170630\\_VanDyck\\_CivilSocietySustainability\\_Web.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/170630_VanDyck_CivilSocietySustainability_Web.pdf) [<https://perma.cc/4V6U-D7TP>], (defining civil society as “an ecosystem of organized and organic social and cultural relations existing in the space between the state, business, and family, which builds on indigenous and external knowledge, values, traditions, and principles to foster collaboration and the achievement of specific goals by and among citizens and other stakeholders” that includes NGOs, faith-based organizations, and community-based organizations; online groups and activities; social movements; labor unions and organizations; and social entrepreneurs).

<sup>268</sup> *About Us*, CDP, <https://www.cdp.net/en/info/about-us> [<https://perma.cc/4KS6-98RL>] (last visited Oct. 31, 2022).

<sup>269</sup> See generally RAYTHEON TECHNOLOGIES CORP., *supra* note 120; CONOCOPHILLIPS, CDP DISCLOSURE 2021 (2021), <https://static.conocophillips.com/files/resources/2021-cdp-climate-change-report.pdf> [<https://perma.cc/4P97-SG9T>].

<sup>270</sup> *What We Do*, CDP, <https://www.cdp.net/en/info/about-us/what-we-do> [<https://perma.cc/93EQ-P2T5>] (last visited Oct. 31, 2022).

<sup>271</sup> *The A List 2021*, CDP, <https://www.cdp.net/en/companies/companies-scores> [<https://perma.cc/8VWF-E4VF>] (last visited Sept. 13, 2022).

closure, awareness and management of environmental risks and best practices associated with environmental leadership, such as setting ambitious and meaningful targets.”<sup>272</sup> The Corporate Human Rights Benchmark (“CHRB”) “provides a comparative snapshot year-on-year of the largest companies on the planet, looking at the policies, processes, and practices they have in place to systematise their human rights approach and how they respond to serious allegations.”<sup>273</sup>

These rankings contextualize the information that corporations disclose. Practices that may appear satisfactory in isolation may subsequently lose their gloss when compared to industry benchmarks and the practices of peers. Rankings allow for market differentiation among corporations based on their compliance with one or more international law norms. For example, the Access to Medicines Index (“ATMI”) “rank[s] 20 of the world’s largest pharmaceutical companies” to measure how the companies are “improv[ing] access to medicine across 106 low- and middle-income countries for 82 high-burden diseases, conditions and pathogens.”<sup>274</sup> In 2021, the ATM ranked Pfizer as fourth,<sup>275</sup> which is a significant move upward from its 2018 ranking (eleventh)<sup>276</sup> and 2016 ranking (fourteenth).<sup>277</sup> In 2021, the President of Pfizer’s Biopharmaceuticals Group stated that “[w]e are proud of our upward movement on the ATMI this year.”<sup>278</sup> Consequently, these rankings are important because they can incentivize international law compliance.<sup>279</sup>

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<sup>272</sup> *Id.*

<sup>273</sup> *Corporate Human Rights Benchmark*, WORLD BENCHMARKING ALL., <https://www.worldbenchmarkingalliance.org/corporate-human-rights-benchmark> [<https://perma.cc/JPF6-RXCU>] (last visited Sept. 2, 2022).

<sup>274</sup> ACCESS TO MED. FOUND., ACCESS TO MEDICINE INDEX 2021 9 (Jan. 26, 2021), [https://accesstomedicinefoundation.org/medialibrary/resources/613f5fb390319\\_Access\\_to\\_Medicine\\_Index\\_2021.pdf](https://accesstomedicinefoundation.org/medialibrary/resources/613f5fb390319_Access_to_Medicine_Index_2021.pdf) [<https://perma.cc/EN72-Y5AL>].

<sup>275</sup> *Id.* at 192.

<sup>276</sup> ACCESS TO MED. FOUND., ACCESS TO MEDICINE INDEX 2018 172 (Nov. 20, 2018), [https://accesstomedicinefoundation.org/medialibrary/resources/5e27136ad13c9\\_Access\\_to\\_Medicine\\_Index\\_2018.pdf](https://accesstomedicinefoundation.org/medialibrary/resources/5e27136ad13c9_Access_to_Medicine_Index_2018.pdf) [<https://perma.cc/3ZPM-72WQ>].

<sup>277</sup> ACCESS TO MED. FOUND., ACCESS TO MEDICINE INDEX 2016 132 (Nov. 14, 2016), [https://accesstomedicinefoundation.org/medialibrary/resources/5bc5edde7a277\\_Access-to-Medicine-Index-2016.pdf](https://accesstomedicinefoundation.org/medialibrary/resources/5bc5edde7a277_Access-to-Medicine-Index-2016.pdf) [<https://perma.cc/4KBM-DYZ7>].

<sup>278</sup> PFIZER INC., *supra* note 207, at 12.

<sup>279</sup> *See infra* Section V.A.1.

## V

## POLICY IMPLICATIONS: DESIGNING INTERNATIONAL LAW FOR CORPORATE AUDIENCES

The previous section identified important incentives and mechanisms that encourage corporations to comply with international law norms. Important incentives include corporate purpose, risk management, and stakeholder management. Critical mechanisms include other corporations (partners, peers, and competitors), investors, proxy advisors, and civil society actors. This Section poses a simple question: how could treaty drafters apply these insights to design better international agreements that encourage corporate compliance? As Section III.E., *supra*, explained, corporate compliance may vary significantly among corporations based on the visibility of the issue or corporation. This Section's policy recommendations can encourage improvement by both laggards and leaders. Specifically, Table 1 in Section III, *supra*, offered a framework for identifying corporate laggards by predicting when corporate compliance would be particularly weak; this Section's policy recommendations are designed to improve practices by this group. But it is also important to focus on the shortcomings of corporate leaders. This Article examined compliance by analyzing institutionalization. There is an obvious risk that corporations in this category limit their efforts to adopting policies and practices without doing much more. The case studies revealed that most corporations only adopt a subset of the potential institutionalization strategies and many lack board directors with explicit expertise in the relevant international law norms.<sup>280</sup> Therefore, it is important that policymakers design international agreements to incentivize constant improvement by these corporations.

Part A applies the insights from Section IV, *supra*, to provide general guidance to policymakers on how to design international agreements to encourage corporate compliance. Part B applies these recommendations to two international agreements in progress that address (a) business and human rights, and (b) pandemic prevention and preparedness.

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<sup>280</sup> Shili Chen, Niels Hermes & Reggy Hooghiemstra, *Corporate Social Responsibility and NGO Directors on Boards*, 175 J. BUS. ETHICS 625, 641 (2022) (finding that the addition of NGO directors on corporate boards does not lead to immediate improvements in CSR but can lead to long-term improvements).

### A. Recommendations for Treaty Design

In order to improve corporate compliance with international law, policymakers should incorporate three features into the design of international agreements: (1) Corporate Comparability, (2) Key Performance Indicators, (3) Purpose Compatibility. These features will encourage corporations to comply with legally binding international agreements even when the “state pathway” breaks down. These features also encourage corporate compliance with legally *non-binding* international institutions that depend heavily on voluntary corporate compliance. Some of these institutions already incorporate one or more of these design features.<sup>281</sup> But as discussed below, these same features are neglected when the international institution aspires to be legally binding.

#### 1. *Facilitate Comparability between Companies*

Policymakers should design international agreements to facilitate comparability between corporations so that those observing corporate conduct—such as regulators, investors, consumers, and suppliers—can more easily distinguish between the corporations that comply with international law and those that do not.

Comparability facilitates corporate change both directly and indirectly. It facilitates change directly when stakeholders shame a corporation based on its performance against its peers. For example, Trillium Asset Management (“Trillium”) submitted a shareholder proposal with UPS requesting that the latter prepare a climate change report describing its plans to reduce its total contribution to climate change and align its operations with the Paris Agreement.<sup>282</sup> As part of its request, Trillium pointed out that “[m]ore than 1,500 companies have now committed to achieve the Paris Agreement’s climate goals by becoming net zero by 2050, including UPS’s peer DHL Group”<sup>283</sup> and that “[m]any airlines have committed to net zero operations by 2050 or sooner, including Delta, Qantas, British Airways, and American Airlines.”<sup>284</sup>

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<sup>281</sup> See, e.g., G.A. Res. 70/1, *supra* note 173.

<sup>282</sup> UNITED PARCEL SERV., INC., NOTICE OF 2021 ANNUAL MEETING OF SHAREHOLDERS AND PROXY STATEMENT 81 (May 13, 2021), <https://pcg.law.harvard.edu/wp-content/uploads/brtpurposearchive/Statement-in-Opposition-to-Shareholder-Proposals/United%20Parcel%20Service,%20Inc.pdf> [https://perma.cc/8YER-JU A6].

<sup>283</sup> *Id.* (citation omitted).

<sup>284</sup> *Id.*

Pfizer may experience similar shareholder pressure to change its practices because of the actions of a peer, Merck, that announced in 2021 its decision to “enter[] a key COVID-19 anti-viral drug, molnupiravir, into the Medicines Patent Pool (MPP) to allow for royalty-free patent-sharing with generic manufacturers.”<sup>285</sup> Shareholder groups welcomed Merck’s decision as “as a precedent-setting event that will hopefully pressure other pharmaceutical companies with COVID-19 entries in late-stage trials such as Pfizer and Roche to follow suit and enter into negotiations with the MPP, and for peer companies to consider joining similar license-sharing programs such as the WHO’s mRNA technology hub.”<sup>286</sup> These developments by Merck shine a light on Pfizer’s own practices and its commitments to the UN SDGs on access to health care.

In contrast, comparability drives change indirectly when managers of one corporation copy compliance practices of their peers.<sup>287</sup> The incentive for imitation is the prospect of rewards—from consumers, investors, employees, media, regulators, or another group—for improved compliance practices. But for these groups to reward corporations they must be able

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<sup>285</sup> Julie Wokaty, *Shareholders Welcome Merck’s Decision to Share IP for Covid-19 Anti-Viral Drug*, INTERFAITH CTR. ON CORP. RESP.: JULIE WOKATY’S BLOG (Oct. 28, 2021), <https://www.iccr.org/shareholders-welcome-mercks-decision-share-ip-covid-19-anti-viral-drug> [https://perma.cc/3DA6-SVGZ]; see also Press Release, Merck & Co., Inc., *The Medicines Patent Pool (MPP) and MSD Enter into License Agreement for Molnupiravir, An Investigational Oral Antiviral COVID-19 Medicine, To Increase Broad Access in Low- and Middle- Income Countries* (Oct. 27, 2021), <https://www.merck.com/news/the-medicines-patent-pool-mpp-and-merck-enter-into-license-agreement-for-molnupiravir-an-investigational-oral-antiviral-covid-19-medicine-to-increase-broad-access-in-low-and-middle-income-countries/> [https://perma.cc/TSY7-LVPM] (announcing agreement).

<sup>286</sup> See Wokaty, *supra* note 285 (quoting Sr. Judy Byron of the Northwest Coalition for Responsible Investment: “Merck has become a first-mover with molnupiravir for COVID-19 and we will be letting its peers know of our expectation that they will soon be following in Merck’s footsteps.”).

<sup>287</sup> See, e.g., Shabana, Buchholtz & Carroll, *supra* note 237, at 1110 (explaining that mimetic isomorphism can explain the final stage of institutional pressure for CSR reporting when “CSR reporting is not done from a goal-oriented perspective as much as it is from a desire to be consistent with firms that the manager considers to be peers or aspires to identify with as peers”); Aaron K. Chatterji & Michael W. Toffel, *How Firms Respond to Being Rated*, 31 STRATEGIC MGMT. J. 917, 922 (2010) (“Laggards might further benefit by leveraging the experience of leaders.”); DiMaggio & Powell, *supra* note 50, at 70 (explaining that organizations may change in order “to model themselves after similar organizations in their field that they perceive to be more legitimate or successful,” which may be likely to occur under conditions of uncertainty); Lynn M. LoPucki, *Repurposing the Corporation Through Stakeholder Markets*, 55 U.C. DAVIS L. REV. 1445, 1449 (2022) (“Because no effective system for measuring and comparing CSR currently exists, corporations can, and do, make false CSR claims with little risk of contradiction or censure.”).

to distinguish between corporate performance so that they can reward leaders and punish laggards.<sup>288</sup> When this fails, so does the incentive for corporate change.

Comparability is also important for the internal allocation of resources to international law compliance. Those championing international law within a corporation may depend on comparability—and the rewards it brings—to justify internal allocation of corporate resources.<sup>289</sup> A dollar spent on international law compliance is a dollar not spent on marketing or product development or another corporate function.<sup>290</sup> Implementing international law may prove costly, thereby creating proponents and opponents of such implementation within the corporation. Proponents may need to point to tangible “wins” that justify the corporation’s investment in implementing international law.<sup>291</sup> A corporation’s improved performance on industry metrics and rankings may help to bolster the position of international law’s proponents within a corporation, especially when that improved performance is rewarded by key stakeholders.

In order to assist internal advocates, international agreements should include institutional features that facilitate comparability between corporations. Such features might include the establishment of an inter-governmental body that produces

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<sup>288</sup> See LoPucki, *supra* note 287, at 1459–60 (describing the “ESG Information System” and identifying three key weaknesses: (a) “no single set of dominant standards define the data to be collected”; (b) “the number of corporations reporting to GRI or SASB standards are inadequate to produce meaningful ratings and rankings,” and (c) “no comprehensive systems exists to furnish ESG information to Potential Stakeholders other than investors at the point of decision”); see also Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 513–17 (2020) (describing how increased access to information can facilitate corporate accountability in the form of consumer distaste, employee protest, and political participation).

<sup>289</sup> See, e.g., Alvisé Favotto & Kelly Kollman, *When Rights Enter the CSR Field: British Firms’ Engagement with Human Rights and the UN Guiding Principles*, 23 HUM. RTS. REV. 21, 36 (2022) (“The creation of market rationales and standards for measuring environmental sustainability, combined with changing professional norms, have spurred more substantive corporate engagement with environmental CSR issues and practices. Their continued absence and underdevelopment is notable in the human rights field.”); *id.* at 35 (“Although many firms have re-balanced their CSR programs towards labour and human rights since the mid-2000s, it is not clear that human rights issues always have ‘insider champions’ who are willing to push the agenda in the same way as seen with environmental issues.”).

<sup>290</sup> See LoPucki, *supra* note 287, at 1492.

<sup>291</sup> See, e.g., Soltes, *supra* note 74, at 976 (“First, managers often struggle with non-revenue generating areas when the return of investment is unclear. . . . [S]ince effectiveness is not binary, to the extent that a firm invests more, managers should understand what they are receiving in return.”).

annual rankings of corporate performance. The agreement could also mandate regular disclosures by an identified category of corporations on specified practices and according to a common reporting framework. These and similar features enable comparability and facilitate market mechanisms to incentivize corporations to comply with international law.

## 2. *Draft Language That Creates Indicators*

As Section III, *supra*, illustrated, companies improve performance on what they can measure.<sup>292</sup> Key Performance Indicators (KPIs) are significant for translating strategic objectives into concrete, achievable goals that can be tracked and assessed by both internal and external audiences. While indicators create their own challenges,<sup>293</sup> they may prove valuable in translating broad strategic objectives into concrete, measurable tasks that can be tracked and evaluated.

For example, companies developed KPIs to measure their progress towards the UN Sustainable Development Goals (UN SDGs).<sup>294</sup> Johnson & Johnson developed several company goals that contribute towards eleven of the seventeen UN SDGs and identified KPIs that translate those goals into concrete company practices.<sup>295</sup> It identified several company goals that advance UN SDG 3 concerning good health and well-being, such as preventive viral vaccine capabilities, vaccination monitoring platform, developing tuberculosis (TB) treatment, global access plans, and access to HIV treatment.<sup>296</sup> Each of these goals has a corresponding KPI that Johnson & Johnson (and

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<sup>292</sup> See *id.* at 985 (“A foundational management principle is that one cannot manage what one cannot measure. Thus, if a program or initiative cannot be measured, it cannot be effectively managed.”); Martinez & Fletcher, *supra* note 73, at 890 (“Firms must rigorously measure and assess their reforms to identify the strategies that result in greater equality within their organizations, their supply chains, and their communities.”).

<sup>293</sup> Damiano de Felice, *Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect Challenges and Opportunities*, 37 HUM. RTS. Q. 511, 540–50 (2015); see Soltes, *supra* note 74, at 985 (“To accurately assess performance, measures need to closely track the desired outcome. To the extent that a change in a measure only weakly relates to the outcome, the measure does not adequately capture the relation between actions taken and desired objective.”).

<sup>294</sup> Some companies provide performance data on their progress towards their long-term commitments. See, e.g., UNITEDHEALTH GRP., SUSTAINABILITY REPORT 61–62 (2021), [https://www.unitedhealthgroup.com/content/dam/UHG/PDF/sustainability/final/2020\\_SustainabilityReport.pdf](https://www.unitedhealthgroup.com/content/dam/UHG/PDF/sustainability/final/2020_SustainabilityReport.pdf) [<https://perma.cc/J2FL-ZWA9>].

<sup>295</sup> JOHNSON & JOHNSON, *supra* note 185, at 4.

<sup>296</sup> *Id.* at 5–6.

its stakeholders) can use to measure its progress towards the UN SDGs.<sup>297</sup>

The UN SDGs assist with the identification of these KPIs because each goal is accompanied by specific targets.<sup>298</sup> For example, UN SDG 1 aims to “[e]nd poverty in all its forms everywhere.”<sup>299</sup> This goal is accompanied by several specific targets, such as “[b]y 2030, eradicate extreme poverty for all people everywhere, currently measured as people living on less than \$1.25 a day” (Target 1.1).<sup>300</sup> In 2017, the United Nations General Assembly adopted a global indicator framework for Sustainable Development Goals.<sup>301</sup> This means that each of the UN SDG targets is now accompanied by one or more indicators.<sup>302</sup> For example, UN SDG Target 1.1 is accompanied by the following indicator: “Proportion of population below the international poverty line, by sex, age, employment status and geographical location (urban/rural).”<sup>303</sup>

The identification of goals, targets, and indicators can help corporate actors institutionalize international law norms. Pfizer prioritizes UN SDG 3 in its strategy and mission and tracks its progress with reference to the UN SDGs’ associated indicators.<sup>304</sup> More generally, a specific target or indicator can improve uniformity of corporate practices. Indicators also

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<sup>297</sup> See, e.g., JOHNSON & JOHNSON, HEALTH FOR HUMANITY 2020 GOALS PROGRESS SCORECARD (2021), <https://healthforhumanityreport.jnj.com/2020-health-for-humanity-report-2020-goals-progress-scorecard-pdf> [<https://perma.cc/42CY-BCL5>] (using KPI’s to evaluate progress toward goals). For example, Johnson & Johnson stated as a goal to achieve UN SDG 3 that “[b]y 2025, enable access to bedaquiline to 700,000 cumulative patients, potentially averting 6,000,000 new multidrug-resistant TB (MDR-TB) infections.” JOHNSON & JOHNSON, *supra* note 185, at 5. Its associated KPI is the “# of cumulative patients receiving access to bedaquiline molecule (branded and generic) globally from 2021 through to end of 2025.” *Id.*

<sup>298</sup> G.A. Res. 70/1, *supra* note 173, ¶ 18 (“We are announcing today 17 Sustainable Development Goals with 169 associated targets which are integrated and indivisible.”).

<sup>299</sup> *Id.* at 15.

<sup>300</sup> *Id.*

<sup>301</sup> G.A. Res. 71/313, ¶ 1 (July 10, 2017).

<sup>302</sup> *Id.* at 4–25.

<sup>303</sup> *Id.* at 4.

<sup>304</sup> See *2016 Annual Review: Sustainable Development Goals (SDGs)*, PFIZER INC., [https://www.pfizer.com/sites/default/files/investors/financial\\_reports/annual\\_reports/2016/our-business/sustainable-development-goals-sdgs/index.html](https://www.pfizer.com/sites/default/files/investors/financial_reports/annual_reports/2016/our-business/sustainable-development-goals-sdgs/index.html) [<https://perma.cc/TYJ3-EGYJ>] (last visited Nov. 2, 2022). For example, UN SDG Indicator 3.2 focuses on the preventable deaths of newborns and children under five years of age “with all countries aiming to reduce neonatal mortality to at least as low as 12 per 1,000 live births and under-5 mortality to at least as low as 25 per 1,000 live births.” *SDG Indicators: Metadata Repository*, U.N. STATISTICS DIV., <https://unstats.un.org/sdgs/metadata?Text=&Goal=3&Target=3.2> [<https://perma.cc/J24M-NYB2>] (last visited Jan. 12, 2022).

address the risk of self-interpretation that occurs when corporations adapt international law to conform to current corporate practices instead of the other way around. These two advantages “level the field” among corporate actors so that there are clear and uniform expectations for corporate conduct. KPIs also help stakeholders distinguish between companies because of their ability to evaluate and assess corporate performance on specific targets. This is important because, otherwise, high-performing companies may claim that their better practices comes at a competitive loss when they do more while others do less and all claim to follow international law, obtaining similar rewards from stakeholders who cannot differentiate between the two.<sup>305</sup>

Therefore, international agreement should identify targets and indicators that corporate managers can either incorporate directly into operations or adapt as appropriate for their corporations. These targets are especially important when the international agreement’s substantive norms are vague and ambiguous, creating the risk of corporate self-serving interpretations and challenging comparability between corporations.

### 3. *Identify the Compatibility between Corporate Purpose and the International Agreement’s Objectives and Norms*

Among other reasons, corporations institutionalize international law to manage risks or to advance organizational purpose. *Risk* drives compliance when corporate managers adopt and implement international law norms within a corporation to protect it from legal liability (legal risk), brand damage (reputational risk), heightened regulatory oversight (regulatory risk), or damage to operations (infrastructure risk), among others. In contrast, *purpose* drives compliance when managers adopt and implement international law norms as part of a strategy for growth, including introducing new products and services, market differentiation, or improving operations.

The case studies in Section III, *supra*, provide illustrations of both of these drivers.<sup>306</sup> Risk management frequently drives compliance with international human rights because corporations institutionalize these norms to appease consumers and investors whose scrutiny can deepen following media exposure

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<sup>305</sup> See Kishanthe Parella, *Levelling the Field through Transnational Regulation*, 24 J. INT’L ECON. L. 630, 645 (2021).

<sup>306</sup> BLACKROCK, *supra* note 253, at 2; see *supra* notes 221–133 and accompanying text.

or a lawsuit.<sup>307</sup> In contrast, corporate purpose appears to drive the commitment of the life sciences companies to the UN SDGs. Johnson & Johnson's overall strategy is based on the company's "Credo" created by a former chairperson, Robert Wood Johnson.<sup>308</sup> The Credo recognizes the company's responsibilities to a variety of stakeholders, first and foremost "[t]he patients, doctors and nurses, to mothers and fathers and all others who use our products and services."<sup>309</sup> The company uses the Credo to define its sustainability efforts, including its global health strategy goals that contribute to the UN SDGs.<sup>310</sup>

While both risk and purpose can drive corporate change, they may lead to differences in both *resource allocation* and *responsibility allocation* for international law compliance. Regarding resource allocation, corporate actors may be more willing to invest in international law when the reason for doing so is driven by purpose rather than risk. For example, a study of human rights reporting by British firms showed that companies are generally underperforming on disclosing plans for future improvement on specific rights; however, they appear to assume more substantive responsibility—going beyond compliance by promoting respect and commitments for future improvements—for issues such as environmental sustainability, health and safety and gender diversity that they perceive to be *sources of future economic or social capital* necessary to retain legitimacy within the field.<sup>311</sup>

Similarly, responsibility allocation for international law compliance may depend on whether it is motivated by purpose or risk. For example, chief sustainability officers ("CSOs") are allocated responsibility for the design and implementation of policies affecting the environmental and social impacts of corporations.<sup>312</sup> One exploratory study found that corporate leaders created these CSO positions when they sought to elevate the *strategic* importance of sustainability within the corporation and to keep it on the agendas of the top executive team.<sup>313</sup>

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<sup>307</sup> See *supra* notes 217–225 and accompanying text.

<sup>308</sup> *Our Credo*, JOHNSON & JOHNSON, <https://www.jnj.com/credo> [<https://perma.cc/CR8H-CCDL>] (last visited Sept. 2, 2022).

<sup>309</sup> *Id.*

<sup>310</sup> JOHNSON & JOHNSON, *supra* note 209, at 9.

<sup>311</sup> Favotto & Kollman, *supra* note 289, at 37 (emphasis added); see, e.g., Chatterji & Toffel, *supra* note 287, at 929 (indicating that firms which face significant environmental regulations are particularly likely to improve substantive performance in the wake of receiving poor environmental ratings).

<sup>312</sup> Miller & Serafeim, *supra* note 88, at 3, 11.

<sup>313</sup> Robert Strand, *Strategic Leadership of Corporate Sustainability*, 123 J. BUS. ETHICS 687, 696–97 (2014).

These positions are important because their creation is often accompanied by the introduction of “bureaucratic structures” with the corporation that complement the efforts of the CSO, such as formalization of processes and identification of key performance indicators (KPIs).<sup>314</sup>

Collectively, these observations suggest the possibility that when a corporation follows international law because of corporate purpose, as opposed to solely risk management, it invests in greater resource and responsibility allocation. If so, it is important for drafters of international agreements and guidelines to explain the relationship between the relevant international law norms and corporate purpose. The extent of engagement on a purpose level may explain why some international law norms enjoy a greater level of corporate institutionalization compared to others.

#### B. Application of Recommendations to Treaty Design

The following section applies the insight from Part A to two international legally binding instruments in development that address (1) business and human rights, and (2) pandemic prevention and preparedness. The former was authorized in 2014 and has a longer history with multiple published draft texts. The latter was only recently authorized in 2021 following the onset of the global COVID-19 pandemic with the text of a Zero Draft released in 2023. This Part applies the recommendations of Part A to the draft texts of these proposed agreements.

##### 1. *Legally Binding Instrument on Business and Human Rights*

In 2014, the United Nations Human Rights Council approved a resolution establishing an open-ended intergovernmental working group (the “Working Group”) “on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”<sup>315</sup> This treaty project is ambitious in its purpose and scope and confronts some serious challenges with its future adoption and enforcement. The first challenge is that not all states supported its creation. The reso-

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<sup>314</sup> *Id.* at 701.

<sup>315</sup> U.N. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9, at 2, (July 14, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement> [<https://perma.cc/Q3VH-3DJ5>].

lution authorizing it was opposed by countries such as the United States, United Kingdom, France, Germany, Italy, Japan, and Korea, among others.<sup>316</sup> Many of the world's largest corporations operate in these jurisdictions. Without the cooperation of these countries, it may prove challenging to apply the international agreement's norms to corporate behavior. A second challenge is that many global business organizations have expressed their concerns (or even resistance) to the draft texts of this potential treaty. For example, the International Chamber of Commerce ("ICC") endorsed the primacy of the UNGPs and "still remains unconvinced that a treaty-based approach can be truly effective in dealing with the web of complex interrelationships between business and human rights."<sup>317</sup>

Policymakers can address both challenges by drafting the agreement to appeal directly to corporate audiences so that they adopt its norms without state mandate or associational requirements. The following analysis is based on the third revised draft text that was released by the Working Group in August 2021.<sup>318</sup> Its goals include encouraging businesses to improve their performance in two areas: human rights due diligence and access to remedies for victims.<sup>319</sup> Article 6.3 identifies four key components of such diligence: (a) identification, assessment, and publication of actual or potential human rights abuses; (b) appropriate measures taken to avoid, prevent and mitigate the identified actual and potential human rights abuses; (c) monitoring the effectiveness of measures to prevent and mitigate human rights abuses; and (d) regular communication with stakeholders on their policies and measures.<sup>320</sup> Article 6.4 identifies additional steps that state parties should ensure that businesses include in order to implement human rights due diligence, including undertaking and publishing human rights and environmental human rights impact assessments, integrating a gender perspective into human rights due diligence, consulting with affected individuals and communities, and including human rights due diligence requirements in their contracts.<sup>321</sup>

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<sup>316</sup> *Id.* at 3.

<sup>317</sup> INT'L CHAMBER OF COM., ICC BRIEFING: THE UNITED NATIONS TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS 2 (Oct. 26, 2020), <https://iccwbo.org/wp-content/uploads/sites/3/2019/10/icc-issues-brief-on-un-treaty-process-finalb.pdf> [<https://perma.cc/F3KZ-L57H>].

<sup>318</sup> UNHRC, *Legally Binding Instrument*, *supra* note 27.

<sup>319</sup> *Id.* at 7.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 8.

The draft text relies on state parties to provide appropriate incentives to ensure that businesses comply with Articles 6.3 and 6.4.<sup>322</sup> But states that do not support work on this instrument are unlikely to provide the necessary incentives. Instead, the instrument's text *itself* must incentivize corporations directly. Unfortunately, there are some notable missed opportunities for doing so. First, the preamble<sup>323</sup> misses an opportunity to engage directly with corporate purpose. It does not acknowledge the multi-stakeholder vision of corporate purpose recently announced by the Business Roundtable,<sup>324</sup> the World Economic Forum,<sup>325</sup> and individual CEOs.<sup>326</sup> While such statements may be empty rhetoric,<sup>327</sup> they provide a common language with which to frame the objectives and expectations contained within the proposed international agreement. The agreement is designed to protect those whose human rights may be adversely affected by businesses. As such, it fits squarely within the multi-stakeholder vision for corporate purpose advocated by many corporate organizations and leaders.<sup>328</sup> Implementing human rights due diligence is a tangible

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<sup>322</sup> *Id.* at 7–8.

<sup>323</sup> Instead, the preamble emphasizes the human rights obligations of businesses without explicitly acknowledging the value of these obligations for contributing towards strategic objectives or corporate purpose. *Id.* at 3.

<sup>324</sup> *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans,'* BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [https://perma.cc/BVY3-5TZB] (“Business Roundtable today announced the release of a new Statement on the Purpose of a Corporation signed by 181 CEOs who commit to lead their companies for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders.”).

<sup>325</sup> Klaus Schwab, *Davos Manifest 2020: The Universal Purpose Company in the Fourth Industrial Revolution*, WORLD ECON. F. (Dec. 2, 2019), <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/#:~:text=the%20purpose%20of%20a%20company,communities%20and%20society%20at%20large> [https://perma.cc/J2ZS-T426] (“The purpose of a company is to engage all its stakeholders in shared and sustained value creation.”).

<sup>326</sup> Larry Fink, *supra* note 203 (“[S]ociety is increasingly looking to companies, both public and private, to address pressing social and economic issues. These issues range from protecting the environment to retirement to gender and racial inequality, among others.”).

<sup>327</sup> Aneesh Raghunandan & Shiva Rajgopal, *Do Socially Responsible Firms Walk the Talk?* 2 (Apr. 1, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3609056](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3609056) [https://perma.cc/835K-MJRM].

<sup>328</sup> *See* BLACKROCK, *supra* note 253, at 2 (“Unmanaged potential or actual adverse human rights issues can not only harm the people directly affected, but also expose companies to significant legal, regulatory, operational, and reputational risks.”).

and concrete action that is faithful to this multi-stakeholder vision.<sup>329</sup> But this connection must be clear and explicit from the draft text and its accompanying reports, guidance, and recommendations. Clarifying its corporate-purpose compatibility contributes to a business case for human rights, but one that is forward looking and goes beyond risk management to emphasize other organizational levers that can influence corporate practices, such as identity, mission, and values.

Second, the text should facilitate comparability between corporations to reveal which ones are actually improving corporate practices. Article 6.4(e) encourages comparability by requiring businesses to report publicly and periodically on non-financial matters, including “policies, risks, outcomes and indicators concerning human rights, labour rights, health, environmental and climate change standards.”<sup>330</sup> But such reporting facilitates comparability when businesses use a *common* reporting framework. Otherwise, corporations are going to report in ways that make them look good. This will make it difficult for stakeholders to know what is actually happening on the ground. It also makes it challenging to compare corporations, reward high performers, and thereby incentivize a “race to the top.” This means that Article 6.4 or its accompanying guidance should clarify a common framework for such reporting.

Third, to facilitate comparability, the Working Group should also consider developing its own targets and indicators for human rights due diligence that corporations can directly incorporate into their operations. This reduces the burdens on businesses to develop their own, thereby increasing the odds that they may do so, and ensures that these businesses are evaluated against a common baseline.

Fourth, the Working Group should include institutional arrangements that create incentives for corporate compliance. Article 15 addresses institutional arrangements to facilitate effective implementation and access to remedies for victims.<sup>331</sup> However, additional institutional arrangements should be considered that can foster comparability, such as the (a) creation and maintenance of a searchable database for corporate reports under Article 6.4; (b) list of non-compliant businesses under Article 6.4, and (c) annual reports and rankings of companies that measure both *peer to peer* performance and indi-

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<sup>329</sup> *Id.*

<sup>330</sup> UNHRC, *Legally Binding Instrument*, *supra* note 27, at 8.

<sup>331</sup> *Id.* at 18.

vidual company *year to year* improvements or setbacks.<sup>332</sup> Such comparisons can help stakeholders distinguish between the leaders and laggards and evaluate which companies are continuing to improve while others are falling behind.

Many of these recommendations do not apply to the second objective: facilitating access to remedies. It is not helpful to incentivize compliance with this objective with reference to indicators or rankings because of the significant risks to victims that such metrics can produce. However, the preamble and accompanying reports should also highlight the corporate-purpose compatibility of access to remedies that also contributes to a multi-stakeholder vision of corporate purpose. The draft text focuses on the importance of human rights obligations to potential and actual victims, but it neglects the value of such obligations for businesses. Specifically, such obligations facilitate the ability of corporations to develop into a vision of themselves that they currently champion. Companies do not become stakeholder-focused by simply talking about it; instead, they must do it. This draft text offers a roadmap to aid them in doing so.

## 2. *Legally Binding Instrument on Pandemic Prevention and Preparedness*

The world is amidst a global pandemic that has wrought significant losses for individuals, communities, and nations. Its onset and spread have painfully demonstrated the importance of the UN SDGs, especially access to healthcare. The World Health Organization (WHO) is the agency of the United Nation dedicated to global health and security.<sup>333</sup> Its main decision-making body is the Health Assembly attended by delegations from all WHO Member States.<sup>334</sup> Under Article 19 of the Constitution of the WHO, “[t]he Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organization.”<sup>335</sup> In

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<sup>332</sup> See, e.g., Cordell, *supra* note 176, at 1 (explaining that “[d]ue to the public nature of [UN SDG voluntary national reviews], they can be powerful tools to draw attention to a country’s commitment to the SDGs and to assert leadership”).

<sup>333</sup> *Frequently Asked Questions*, WHO <https://www.who.int/about/frequently-asked-questions> [<https://perma.cc/J55B-U93J>] (last visited Sept. 15, 2022).

<sup>334</sup> *World Health Assembly*, WHO <https://www.who.int/about/governance/world-health-assembly> [<https://perma.cc/WQ5C-FY37>] (last visited Sept. 15, 2022).

<sup>335</sup> Constitution of the World Health Organization, in WHO, BASIC DOCUMENTS 7 (49th ed. 2020), [https://apps.who.int/gb/bd/pdf\\_files/BD\\_49th-en.pdf](https://apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf) [<https://perma.cc/SP98-ASMV>]

December 2021, the Health Assembly announced its decision to establish an intergovernmental negotiating body ["INB"] to draft and negotiate a WHO internationally legally binding instrument to "strengthen pandemic prevention, preparedness and response"<sup>336</sup> under article 19 of the WHO Constitution.

In February 2023, the INB released a Zero Draft of the "WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response" ("WHO CA+").<sup>337</sup> Article 3 of the draft clarifies that its objective is to "prevent pandemics, save lives, reduce disease burden and protect livelihoods, through strengthening, proactively, the world's capacities for preventing, preparing for and responding to, and recovery of health systems from, pandemics."<sup>338</sup> The WHO CA+ is intended "to comprehensively and effectively address systemic gaps and challenges that exist in these areas, at national, regional and international levels, through substantially reducing the risk of pandemics, increasing pandemic preparedness and response capacities, progressive realization of universal health coverage and ensuring coordinated, collaborative and evidence-based pandemic response and resilient recovery of health systems at community, national, regional and global levels."<sup>339</sup>

It is obvious that private sector cooperation is required in order to achieve these objectives. For example, Article 6 establishes a global supply chain and logistics network for pandemic prevention, preparedness, response and recovery.<sup>340</sup> In another example, Article 7 elaborates on particular steps that State Parties should encourage private sector actors to take. During inter-pandemic periods, Article 7(3)(a) & (c) bind State Parties to "coordinate, collaborate, facilitate and incentivize manufacturers of pandemic-related products to transfer relevant technology and know-how to capable manufacturer(s)"<sup>341</sup>

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<sup>336</sup> Press Release, WHO, World Health Assembly Agrees to Launch Process to Develop Historic Global Accord on Pandemic Prevention, Preparedness and Response (Dec. 1, 2021), <https://www.who.int/news/item/01-12-2021-world-health-assembly-agrees-to-launch-process-to-develop-historic-global-accord-on-pandemic-prevention-preparedness-and-response> [https://perma.cc/MKB6-RCDN].

<sup>337</sup> *Zero Draft of the WHO CA+ for the Consideration of the Intergovernmental Negotiating Body at its Fourth Meeting 1* (WHO, Feb. 1, 2023), [https://apps.who.int/gb/inb/pdf\\_files/inb4/A\\_INB4\\_3-en.pdf](https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf) [https://perma.cc/S8EY-ENJC].

<sup>338</sup> *Id.* at 10.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 13.

<sup>341</sup> *Id.* at 14.

and “encourage entities, including manufacturers within their respective jurisdictions, that conduct research and development of pre-pandemic and pandemic-related products, in particular those that receive significant public financing for that purpose, to grant, on mutually agreed terms, licences to capable manufacturers, notably from developing countries, to use their intellectual property and other protected substances, products, technology, know-how, information and knowledge used in the process of pandemic response product research, development and production, in particular for pre-pandemic and pandemic-related products.”<sup>342</sup> In the event of a pandemic, Article 7 binds State Parties to additional obligations, including “encourag[ing] all holders of patents related to the production of pandemic-related products to waive, or manage as appropriate, payment of royalties by developing country manufacturers on the use, during the pandemic, of their technology for production of pandemic-related products,”<sup>343</sup> among other steps.

While the WHO CA+ recognizes the importance of private sector cooperation, it relies on the state pathway to effectuate such cooperation. But, as in other areas of international cooperation, the state pathway may be weak or non-existent. The Biden administration has expressed concerns about the legally binding nature of a potential pandemic treaty.<sup>344</sup> The prior Trump administration took an even stronger stance with the WHO and terminated the U.S. relationship with it.<sup>345</sup> Thus, there is a significant risk that the United States would not join an agreement such as WHO CA+.

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<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 14-15.

<sup>344</sup> Associated Press, *supra* note 16 (reporting White House Press Secretary Jen Psaki’s remarks that “[w]e do have some concerns primarily about the timing and launching into negotiations for a new treaty right now”); Carmen Paun, *Omicron Drives New Urgency for Global Pandemic Treaty*, POLITICO (Dec. 2, 2021), <https://www.politico.com/newsletters/global-pulse/2021/12/02/omicron-drives-new-urgency-for-global-pandemic-treaty-495286> [<https://perma.cc/D6Z4-4KE7>] (explaining that “countries disagree whether the agreement should be a legally binding treaty” with some preferring that “the content [is] negotiated before the legal form” and that the “U.S. seems to be in the latter camp.”); *Lawmakers Pushing Back Against Proposed Accord with WHO*, CBS AUSTIN (Feb. 27, 2023, 9:13 AM), <https://cbsaustin.com/news/nation-world/lawmakers-pushing-back-against-proposed-accord-with-who-coronavirus-pandemic-energy-department-covid-origins-wuhan-lab-covid-19-senator-marsha-blackburn> [<https://perma.cc/AAE7-E8AN>] (describing a bill called the No WHO Pandemic Preparedness Treaty Without Senate Approval Act).

<sup>345</sup> *Coronavirus: Trump Terminates US Relationship with WHO*, B.B.C. (May 30, 2020), <https://www.bbc.com/news/world-us-canada-52857413> [<https://perma.cc/9EHP-K4T7>].

In order to secure corporate cooperation, the INB may want to apply some of the lessons discussed in this Article. First, as discussed in Section III.D., *supra*, some large life sciences corporations have already embraced international law norms on global health as part of their corporate purpose.<sup>346</sup> The INB may want to relate its objectives and expectations, such as those in Article 7, to the UN SDGs addressing inequality and good health so that corporate managers understand how complying with the WHO CA+ is consistent with their prior commitments to the UN SDGs. The same is also true for corporate commitments to other international law norms, including human rights. Articles 4 and 14 of the WHO CA+ already recognize that the agreement must be implemented in a way that respects human rights. But corporate managers may benefit from understanding how compliance with the WHO CA+ may advance their commitments to other international human rights norms.<sup>347</sup> NGOs and civil society actors might also use these prior corporate commitments to international law norms to leverage similar corporate commitment to the WHO CA+ by bundling these norms and explaining the relationship that these norms have to each other. Specifically, they may argue that the WHO CA+'s norms are not only consistent with UN SDGs and other international norms but can serve as benchmarks for how well a corporation implements these norms in practice. In other words, it may be beneficial to (a) align the WHO CA+'s obligations, especially those in Article 7, with other international law norms to which the companies have committed, and (b) highlight when compliance with the former is a necessary condition to proving compliance with the latter.

Second, the WHO CA+ should identify specific indicators that corporate managers can use to guide and track their own compliance. It may be particularly valuable to provide indicators for Article 7 that can guide corporate managers in incorporating its content into their practices and measuring their compliance. Government, NGO, investors, and civil society actors can also use these indicators to assess corporate compliance with Article 7 and other provisions, thereby providing some level of external accountability. For example, investors

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<sup>346</sup> See discussion *supra* Section III.D.1-2.

<sup>347</sup> See, e.g., Amnesty Int'l, Glob. Initiative for Econ., Soc., and Cultural Rights, Hum Rts. Watch, and Int'l Comm'n of Jurists, Press Release: The Pandemic Treaty Zero Draft Misses the Mark on Human Rights (Feb. 24, 2023), <https://www.amnesty.org/en/documents/ior40/6478/2023/en> [https://perma.cc/7FKN-NSQP].

may reference such indicators in shareholder proposals requesting disclosures on corporate compliance with the WHO CA+. Indicators can also improve the comparability between companies and facilitate the design and effectiveness of corporate rankings that distinguish corporations on their achievement of the WHO CA+'s objectives.

Finally, and as a related matter, the WHO CA+ should include institutional features that enable comparability between companies. One approach is to incorporate the WHO CA+'s norms into current reporting and rankings frameworks. For example, the Access to Medicines "reports how 20 pharma companies make medicines, vaccines and diagnostics more accessible for people in low- and middle-income countries."<sup>348</sup> The index provides an interactive tool for users to select and compare multiple corporations.<sup>349</sup> Many of the WHO CA+'s stated objectives relate to matters that the index measures, such as equitable access to medicine. The INB may consider including institutional features that coordinate with this index so that the WHO CA+'s norms are included within it. Alternatively, they could incorporate a similar rankings framework into the institutional design of the agreement.

#### CONCLUSION

This Article illustrates how many large corporations complied with international law norms in three areas of international law that seek to change corporate behavior: *climate change*, *human rights*, and *sustainable development*. Through original research of corporate governance documents, mandated disclosures, investor materials, SEC filings, litigation documents, and other materials, this Article presents a picture of corporate compliance with international law that is optimistic and cautious. It confirms that corporations *do* comply with international law even when a government actor does not order them to do so. As such, it challenges a traditional view of international law that assumes that the state pathway is a necessary condition for corporations to comply with international law. This Article explains that corporations choose to comply with international law for reasons other than legal mandate, such as

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<sup>348</sup> *Analysis: Handful of New Children's Meds on the Horizon. But Will They be Accessible in LMICs?*, ACCESS TO MED. FOUND. (Mar. 25, 2021), <https://access-to-medicines-foundation.org/news/handful-of-new-childrens-meds-on-the-horizon-but-will-they-be-accessible-to-children-in-lmics> [https://perma.cc/4SMH-NKWM].

<sup>349</sup> *Id.*

corporate strategy and purpose, risk management, and stakeholder management. It also reveals that actors other than government officials enforce international law, such as peer corporations, investors, proxy advisors, and civil society actors.

But this Article also illustrates that such compliance is rarely ideal. No corporation adopted all of the compliance strategies discussed in Section III, *supra*. Instead, the majority adopted some promising strategies that policymakers can build upon by offering the optimal incentives for further development, as discussed in Section V, *supra*.

Finally, this Article deepens the academic debate concerning the effectiveness of international law by revealing the acquiescence of a cast of characters who are routinely ignored when we judge the success of international law by looking at the actions of governments only. This Article reveals why such a myopic view is misplaced. Future evaluation of international law must be mindful of international law's broad audience, comprised of both *state* and *non-state* actors, who have the power to advance international law or to curtail it.