ARTICLES

THE CORPORATE SOCIAL RESPONSIBILITIES OF FINANCIAL INSTITUTIONS FOR THE CONDUCT OF THEIR BORROWERS: THE VIEW FROM INTERNATIONAL LAW AND STANDARDS

by
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Corporate social responsibility (CSR) can be split along two distinct lines. The first touches on the nature of corporate personality and is rooted in domestic law regulating enterprises specifically and legal persons generally. The second touches on the nature of the rights of individuals and is rooted in international law (and sometimes domestic constitutional law) defining the scope of the human rights of individuals and the consequential obligations of states and legal persons. Both conversations intertwine, though they tend to operate autonomously. In both cases, however, the traditional focus of corporate responsibility has focused on the relationship between an operating company and its direct effects on individuals, society, and the environment. But increasing attention has been paid to indirect compliance through private intermediaries—the financial institutions that provide operating capital to enterprises. This Article considers the corporate social responsibilities of financial institutions, including sovereign wealth funds, for the conduct of their borrowers. The focus will be the extent of any duty or responsibility of lenders to ensure that their borrowers comply with CSR obligations (or alternatively conform to international human rights standards) as a core aspect of their own CSR obligations, or alternatively, of their responsibility to respect human rights. Section II

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examines the general regulatory framework. There are two relevant aspects. The first is to understand the scope and character of the legal norms that may apply to enterprises generally with respect to their operations that might be understood as CSR or human rights related in nature. The second aspect considers the range of non-legal normative governance rules that might apply. In the process, it will be important to distinguish between a CSR based regulatory approach and a human rights based approach. Section III considers the application of these norms to financial institutions. This requites distinguishing between those obligations that apply to the internal operations of financial institutions generally, and those obligations that apply to the financial institution's obligations with respect to its lending activities, that is with respect to its relationship with its borrowers. The Article includes a brief examination of recent cases in which financial institutions undertook such a responsibility, and the ways in which the particular institution undertook the obligation. Three different types of institutions are considered—private banks, sovereign wealth funds/state owned enterprises, and international financial institutions (IFIs). The Article ends with a preliminary consideration of the consequences of this movement for domestic CSR in the United States.

I. INTRODUCTION AND CONTEXT

Over the last half century or so the debates about corporate social responsibility (CSR) split along two distinct lines.[1] The first touches on

[1] Writings about CSR have grown enormously over the last two decades. For a sampling, see Andreas Georg Scherer & Guido Palazzo, *Globalization and Corporate Social Responsibility*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 413 (A. Crane et al. eds., 2008); Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983 (2011); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 U. KAN. L. REV. 77 (2002); Geoffrey Heal, *Corporate Social Responsibility: An Economic and Financial Framework*, 30 GENEVA PAPERS ON RISK & INS. 387 (2005); Catherine J. Morrison Paul & Donald S. Siegel, *Corporate Social Responsibility and Economic Performance* (Jan. 2006),

the nature of corporate personality and is rooted in domestic law regulating enterprises specifically and legal persons generally.[2] The second touches on the nature of the rights of individuals and more generally of society, and is rooted in international law (and sometimes domestic constitutional law) defining the scope of the human rights of individuals and the consequential obligations of states and legal persons.[3] Both conversations intertwine, though they tend to operate autonomously.[4] Yet in both cases, the object is the same. It touches on *corporate* obligation (as distinct from the obligations of states, of individuals, or of organizations other than entities engaged in economic activities); it focuses on the *societal* aspects of corporate activities (as distinct from the legal obligations imposed by or through the state through the conventional processes of formal law, statutory, or court administered); and it touches on *responsibilities* that arise from these societal aspects of economic activity (in contradistinction to the duties

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https://ssrn.com/abstract=900838.

[2] *See, e.g.*, JANET DINE, THE GOVERNANCE OF CORPORATE GROUPS, at xix (2004) (analyzing "the power and regulatory immunity of global corporations," and suggesting legal tools to strengthen consumer resistance to damaging products); M Galanter, *Law's Elusive Promise: Learning from Bhopal*, *in* TRANSNATIONAL LEGAL PROCESSES 172, 173–74 (Michael Likosky ed., 2002) (discussing the legal phase of the Bhopal disaster); PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW, at ix (2d ed. 2007) (giving a "comprehensive introduction to the regulation of multinational enterprises . . . as the principal vehicles for foreign direct investment"); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1194–96 (1991) (concluding "the corporation's nexus of contracts should be restructured to recognize that directors have fiduciary duties to mitigate the effects of layoffs and plant closings upon displaced workers"); Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379, 379–380 (1999) (examining why courts pierce the corporate veil more frequently in cases involving tort claims as opposed to other contexts); Nicole Rosenkrantz, Note, *The Parent Trap: Using the Good Samaritan Doctrine to Hold Parent Corporations Directly Liable for Their Negligence*, 37 B.C. L. REV. 1061, 1086–87 (1996) (examining the viability of the "Good Samaritan Doctrine" to hold corporations liable for their negligent acts).

[3] *See* ECOSOC, Sub-Comm'n on the Promotion & Prot. of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, ¶ 1 U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement; *see also* SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS 1 (2012); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 933–35 (2004). "It is impossible to incorporate respect for the values on which our existence is based into the current practices that aim to maximize profit regardless of other considerations." ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Working Document: The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations, ¶ 21, U.N. DOC. E/CN.4/SUB.2/1998/6 (June 10, 1998) (*prepared by* Mr. El Hadji Guissé).

[4] *See, e.g.*, Adrian Cadbury, Corporate Social Responsibility, 1(1) TWENTY-FIRST CENTURY SOCIETY 5–21(2006).

that may arise from the obligation to comply with law).[5]

As a manifestation of domestic law and policy, the term CSR occupies great importance to the debates about the nature of corporate personality, and the governance responsibilities of enterprises is as old as the corporation itself.[6] At its broadest, CSR refers to the extent to which an aggregation of capital recognized as a separate legal person must, may, or should, operate in accordance with certain standards of conduct. It mimics the general conversation a society has about the legal, civic, ethical, and societal obligations of its citizens. But since the 1930s, at least, CSR acquired a quite specific and distinct meaning. It asks the question: What is the extent of the legal, social, civic, and moral obligations of enterprises in their operations?[7] A spectrum of views advanced reflects quite distinct views of the nature of the corporate enterprise and its relation to the polity in which it is constituted and licensed to operate.

At one extreme, and still quite powerful, the law views the corporation as property in the hands of its equity owners. This property might be understood either as the aggregation of a series of contracts among actors, or as the product of a legal fiction that permits the partitioning of assets from a number of individuals into a common operation.[8] As property, exercise of corporate activity must center on its owners. From early in the twentieth century it has been commonplace to understand that the corporation and its fiduciaries owe their highest duty of loyalty to equity holders, and that this duty requires the operation of the enterprise to maximize the value of their holdings.[9] This principle of shareholder primacy continues to serve as the central principal of the legal management of corporate governance.[10] From the 1960s, CSR acquired a political dimension as well.[11] Milton Friedman famously argued that to impose political, social, cultural, or other similar obligations on corporations would be anti-democratic in the sense that

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[5] *See* Larry Catá Backer, *Corporate Social Responsibility Law—A Tentative Syllabus*, LAW AT THE END OF THE DAY (Apr. 11, 2017), http://lcbackerblog.blogspot.com/2017/04/corporate-social-responsibility-law.html.

[6] For an example, see contributions to Symposium, *Corporate Social Responsibility: Paradigm or Paradox?*, 84 CORNELL L. REV. 1282, 1290 (1999).

[7] The germinal debate, the contours of which have remained largely unchanged in relationship to domestic law, started in the 1930s between Adolf A. Berle and E. Merrick Dodd. *See generally* A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

[8] Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law beyond Asset Partitioning and Legal Personality*, 41 TULSA L. REV. 541, 541–42 (2006).

[9] *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 681–82 (Mich. 1919).

[10] Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 586 (1999).

[11] *See, e.g.*, Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33.

delegating powers to unelected and unaccountable institutions ought to instead be exercised by democratically elected governments.[12]

At the other, increasingly powerful, extreme, the law views the corporation as a creature embedded in society and as such owes duties not merely to those who hold certain contractual rights to its income and assets, but also to the state that permitted its creation and the society within which it is permitted to operate and acquire wealth. In the United States, that might mean the enterprise embedded within society; in Japan, it might suggest an enterprise embedded in itself and then society—that is, corporations are autonomous and independent entities capable of self-ownership.[13] As a societal actor, the autonomy of the enterprise is privileged over the property rights of its equity holders. As an autonomous institution, it ought to be responsible for its actions. But that responsibility might be measured in the social (rather than the legal) context in which it is exercised. More specifically, the corporation would have an obligation to ensure that it maximized the societal value of its operation, even if that meant reducing the return on investment to its shareholders. The search for meaning about the scope and nature of this corporate responsibility remains contested in the United States.[14] But the United States discussion has moved well beyond the original ideals of using corporate funds to provide charity to affected communities,[15] though still discussed in terms of value maximization to the enterprise.[16]

Within these extremes, the domestic debates about CSR tend to revolve around the extent to which an enterprise may or must engage in certain socially privileged ways—especially those that account for the social and environmental consequences of corporate activity. In the United States, shareholder primacy continues to define the legal standard.[17] "While many deplored the disconnect between corporate power and social needs, and CSR . . . became a more frequent discussion topic in corporate and academic circles, not many corporations acted meaningfully in pursuing CSR. In deed [sic], Friedman's view probably

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[12] *See id.*

[13] *See* Iwai, *supra* note 10, at 585–86.

[14] *See, e.g.*, PETER FLEMING & MARC T. JONES, THE END OF CORPORATE SOCIAL RESPONSIBILITY: CRISIS & CRITIQUE 1–2, 17 (2013).

[15] *See* M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 572–73 (2009) (exploring the demand by corporate stakeholders for charitable activities). The trend beyond charity is discussed in Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006).

[16] *See* Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism—and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan.–Feb. 2011, at 4; *see also* Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. 1968).

[17] *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 468 (2001).

remained the prevailing one for most corporations."[18] Still, it is a view that is tempered by law which recognizes that corporations remain in and not above the society in which they operate.[19] As a consequence, the embrace of CSR is advanced in terms of value maximization, of the business case for societal action.[20] Within these constraints of law and principle, corporate boards of directors may exercise wide discretion. This wide exercise of discretion of CSR principles has appeared especially useful in the United States. As a consequence, CSR remains substantially a creature of voluntary efforts in the United States and elsewhere. It is soft law in the relationship between the state and the enterprise, but it may be hard law within the governance structure and internal operations of the enterprise itself.[21]

But such voluntary efforts, even when legalized through regulatory instruments, are constrained by the shareholder primacy principle. Within law there have been efforts to seek ways to (1) soften the limitations of shareholder primacy at its limits, and (2) permit the creation of enterprises that might avoid its strictures. With respect to the former, the move toward mandatory disclosure and reporting appears to be a way of formally complying with shareholder primacy rules while using the possibility of societal pressure to manage corporate behavior in the "right" direction.[22] These include disclosures in the Dodd-Frank Wall Street Reform and Consumer Protection Act[23] as well as state disclosure statutes. With respect to the latter, the enactment of benefit corporation statutes provides for enterprises that might wish to reject shareholder primacy as a matter of law. In addition, "other constituency" statutes have also gained favor[24]—though these are still grounded in shareholder

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[18] Jerome J. Shestack, *Corporate Social Responsibility in a Changing Corporate World*, *in* CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 113, 116 (Ramon Mullerat ed., 2011).

[19] *See* A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 586, 590 (N.J. 1953) (holding that a corporation may make a charitable contribution where it promotes the goodwill of the corporation).

[20] *See* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 16–17 (2005); Matteo Tonello, *The Business Case for Corporate Social Responsibility*, HARVARD LAW SCH. FORUM ON CORP. GOVERNANCE & FIN. REGULATION (June 26, 2011), https://corpgov.law.harvard.edu/2011/06/26/the-business-case-for-corporate-social-responsibility/.

[21] *See* Erika R. George, *Tweeting to Topple Tyranny, Social Media and Corporate Social Responsibility: A Reply to Anupam Chander*, 2 CALIF. L. REV. CIR. 23, 38 (2011).

[22] *See generally* Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591 (2008) (suggesting "the focus ought to turn away from the cultivation of systems of substantive norms to a more supervisory role in the construction of markets within which stakeholders can more readily assess their involvement").

[23] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 115(a)(1), 124 Stat. 1376, 1403 (2010) (codified as amended in scattered sections of the U.S. Code).

[24] *See e.g.*, Ohio Rev. Code Ann. § 1701.59 (West 2017) (allowing directors the discretion to consider factors such as the interests of employees, state economy, and

primacy and tend to provide that boards may consider effects on other constituencies in choosing alternatives to maximizing shareholder welfare.[25]

But CSR has also become a key element of international debates. And these, to a large extent, profoundly affect both domestic discretionary approaches to CSR and the development of international consensus principles for framing corporate behavior expectations in the social sphere. But the debate is of a substantially different character. In this context, the principal focus was on the developing normative structures for human rights. Within those structures the corporation played an increasingly consequential role. The focus of human rights originally centered on the state. Since every state controlled everything and everyone within its territory, it was considered the logical point for human rights enforcement as against people and social organizations—including corporations. But the rise of transnational production chains, and enterprises powerful enough to control them through strategic organization of its assets and production, appeared to suggest that some corporations could in certain instances exercise greater authority than states.[26] A series of scandals in the 1970s and 1980s—the possible involvement of enterprises in the overthrow of the Marxist Chilean government and the murder of its president,[27] and the deadly gas leak at Bhopal India,[28] for example—suggested to many that enterprises ought to bear at least some responsibility for the protection of emerging human rights.[29]

The protection of human rights in the international sphere differs somewhat from traditional domestic CSR debates. First, human rights of individuals became the focus, from which the legal or societal obligations of states and of enterprises were derived. CSR, in that context, was understood as consequential—it did not produce rights but rather followed from the normative structures of international human rights. The object was on the legalization of human rights norms as a matter of international law. That requires a focus on international norm making with the object of creating international law that might be embedded within domestic legal orders through treaties, conventions, and similar binding instruments. CSR, then, becomes both an expression of the need to embed international norms within the operations of any enterprise (whatever its character) and also the acknowledgement that to some

community considerations in determining what is in the best interests of the corporation).

[25] *See* Richard B. Tyler, *Other Constituency Statutes*, 59 MO. L. REV. 373, 377 (1994).

[26] *See, e.g.*, THEODORE H. MORAN, MULTINATIONAL CORPORATIONS AND THE POLITICS OF DEPENDENCE: COPPER IN CHILE 5–6 (1974).

[27] *See id.* at 252–53.

[28] *See* Marc Galanter, *The Transnational Traffic in Legal Remedies*, *in* LEARNING FROM DISASTER: RISK MANAGEMENT AFTER BHOPAL 133, 148 (Sheila Jasanoff ed., 1994).

[29] *See, e.g.*, Moran, *supra* note 26, at 6.

extent this is a political and ideological project.[30] Second, the problem of human rights in this international CSR context was the enterprise itself and the governance gaps created by the growing importance of global trade and economic activity.[31] Tension existed between the role of states in protecting domestically chartered corporations and the increasing porosity of borders that permitted corporations to operate between a variety of states in a way that strategically maximized local risk and minimized enterprise risk. For many, the question centered on the character of the enterprise as an object or subject of international law.[32] But that itself challenged the central tenet of international law—one grounded in the primacy of the state and the recognition that only states were subjects of law. Third, the nature of globalization made it difficult for any one state to "solve" the problem of corporate compliance unilaterally.[33] Extraterritorial application of national law remains powerfully attractive,[34] but it is also problematic on political grounds, especially when the laws of former colonial powers were projected into the territories of former colonies. And competition for investment has created what might be considered a CSR race to the bottom. Fourth, even where there might be agreement on human rights at the international level, many states refused to transpose international norms into their domestic legal orders.[35] As a consequence, the most vigorous

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[30] *See*, Anupam Chander, *Googling Freedom*, 99 CALIF. L. REV. 1, 22–31 (2011) (elaborating a social responsibility of business in an unfree society); *cf.* George, *supra* note 21, at 25–26.

[31] The most powerful of these arguments focused on the governance gaps that result from the application of the free movement logic of economic globalization in the context of the laws of territorially bounded states whose laws could not freely move. The resulting governance gap was produced where enterprises and production chains operated among states and no one state had the power to fully regulate the global operations of the enterprise. "This makes it extremely difficult for any jurisdiction to regulate the overall activities of multinationals, and it can prevent the victims of corporate-related human rights abuses from obtaining adequate remedy." JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS, at xxxiii (2013). "Thus, business and human rights is a microcosm of a larger crisis in contemporary governance: the widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences." *Id.*

[32] *See e.g.*, Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977, 977–78 (2011).

[33] *See* Penelope Simons, *The Governance Gap: Domestic Laws and Other Governance Mechanisms*, *in* THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS, AND THE HOME STATE ADVANTAGE 178, 178 (2014).

[34] *See* R. Vernon, *Codes on Transnationals: Ingredients for an Effective International Regime*, *in* 20 TRANSNATIONAL CORPORATIONS: THE INTERNATIONAL LEGAL FRAMEWORK 69, 70–72 (A.A. Fatouros ed., 1994). "When governments think of an appropriate regime for 'their' transnational corporations, most tend to look for principles that will enlarge the rights of those corporations in foreign countries without impairing the responsibilities of such corporations to the home government." *Id.* at 72.

[35] *See* Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT'L L. 41, 81 (2010).

and successful approaches in the international arena to date are so-called soft law efforts.[36] These are non-binding norms or standards that are meant to produce a framework for guiding conduct that might eventually harden into law. Among the most successful are the U.N. Guiding Principles for Business and Human Rights (UNGP)[37] and the OECD Guidelines for Multinational Enterprises.[38]

Both domestic CSR and international human rights conversations intertwine, though they tend to operate autonomously. In both cases, however, the traditional focus of corporate responsibility is on the relationship between an *operating company* and its direct effects on individuals, society, and the environment. That discussion—contentious, conflicted, and unresolved—centers its analysis on the parameters of direct compliance. These touch on the use of the domestic law of home and host states, on soft law and indigenous governance structures, and on the private law of enterprises directly on the enterprise that is the object of behavior regulation. Yet in its conventional form, the CSR debates traditionally marginalized indirect compliance; for example, there was the instrumental use of other actors to compel CSR compliance by operating companies. One critical actor has recently drawn attention in this respect—the financial institutions that provide operating capital to enterprises. To what extent are financial institutions responsible for the human rights breaches of their borrowers? "While the obligation for the protection of human rights lies with the state, [International Financial Institutions (IFIs)] and their member states also have responsibilities to ensure that activities they support do not cause, or contribute to, human rights abuses by putting in place adequate safeguards."[39] This adds a new and important dimension to CSR and human rights governance matters. But it also produces substantial consequences which are both functional and normative. The functional consequences turn on the way that such indirect compliance may affect loan making—especially with respect to pricing loans, assessing risk, and developing covenants and the mechanisms to monitor compliance. The normative consequences might be profound—to impose on lenders a CSR-human rights responsibility to

[36] *Id.* at 44–45.

[37] U.N. Office of the High Comm'r for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; *see* BEATA FARACIK, EUROPEAN PARLIAMENT, STUDY: IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 10 (2017).

[38] OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

[39] Joint Statement to the UN Human Rights Council, *World Bank and Other International Financial Institutions Must Uphold Human Rights in All Activities They Support*, GLOBAL INITIATIVE FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Sept. 9, 2013), http://globalinitiative-escr.org/the-world-bank-and-other-international-financial-institutions-must-uphold-human-rights-in-all-activities-they-support/.

monitor and discipline their borrowers would suggest both a privatization of state regulatory power (the lender would effectively legislate CSR downstream through its contracts) and an extension of CSR principle to the financial sector in ways that affect financial markets and the cost of capital in unexplored ways. A secondary responsibility of financial sector enterprises suggests the intertwining of CSR and human rights at the heart of loan making, pricing, the regulatory effect of covenants, and the management of borrowers through a requirement for due diligence during the life of the relationship.

This Article considers the corporate social responsibilities of financial institutions, including sovereign wealth funds (SWFs), for the conduct of their borrowers. The focus will be the extent of any duty or responsibility of lenders to ensure that their borrowers comply with CSR obligations (or alternatively conform to international human rights standards) as a core aspect of their own CSR obligations, or alternatively, of their responsibility to respect human rights. After this introduction, Section II examines the general regulatory framework. There are two aspects that are relevant. The first is to understand the scope and character of the legal norms that may be applied to enterprises generally with respect to their operations that might be understood as CSR-human rights related in nature. The second is to consider the range of non-legal normative governance rules that might apply. In the process, it will be important to distinguish between a CSR based regulatory approach and a human rights based approach. Section III considers the application of these norms to financial institutions. This requires distinguishing between those obligations that apply to the internal operations of financial institutions generally, and those obligations that apply to the financial institution's obligations with respect to its lending activities, that is, with respect to its relationship with its borrowers. The Article includes a brief examination of recent cases in which financial institutions undertook such a responsibility and the ways in which that obligation was undertaken. Three different types of institutions are considered: private banks, SWFs, and IFIs. The Article ends with a preliminary consideration of the consequences of this movement for domestic CSR in the United States.

II. CSR LAW AND NORM STRUCTURES: COMPANIES AND FINANCIAL INSTITUTIONS

The legal framework for CSR is complex and the product more of projection into the societal sphere than the product of robust development of legal structures within domestic legal orders or as binding international law. Indeed, CSR is best understood as a set of law and norm structures that seek to maximize the value of linking together national and international law, social norms, and markets to produce a web of commands and guidance that might produce a coherent and targeted effect. This Section briefly considers the emerging structures of such linkages,[40] first by considering the regulatory environment for CSR applicable to operating entities and then considering their extension specifically to financial institutions.

A. National Law: Disclosure with Substantive Effects

Beyond philanthropy, national CSR related legal structures have tended to focus almost entirely on disclosure and reporting regimes.[41] Here, national efforts to regulate CSR have met some success. But even with mere obligations to disclose and report, there have been some emerging constraints, especially under the constitutional law of the United States.[42] Three of the more celebrated recent efforts[43] include the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010,[44] the U.K. Modern Slavery Act of 2015,[45] and the French Supply Chain Due Diligence Law of 2017.[46]

The Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 included within its many provisions a requirement that the Securities and Exchange Commission (SEC) promulgate disclosure rules for public companies that manufacture products with certain minerals (defined as conflict minerals—gold, tantalum, tin, and tungsten).[47] The specific rules would require these public companies that manufacture products with conflict materials to make necessary disclosures related to their source in their public filings under the federal securities law.[48] The disclosures required such companies to conduct a statutorily defined

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[40] *Cf.* Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOBAL LEGAL STUD. 617 (2011) (discussing the failure of political initiatives aimed at regulating transnational corporations (TNCs) and the more successful "voluntary" codes of conduct of the TNCs).

[41] *See supra* notes 22–25 and accompanying text.

[42] *See, e.g.*, Recent Case, National Ass'n of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015)*, 129 HARV. L. REV. 819 (2016) (discussing the First Amendment and compelled speech in the context of mandatory reporting requirements for corporations).

[43] For a look at another effort, see JONATHAN MORRIS & FARID BADDACHE, BUS. FOR SOC. RESPONSIBILITY, THE FIVE *W'S* OF FRANCE'S CSR REPORTING LAW (2012), https://www.bsr.org/reports/The_5_Ws_of_Frances_CSR_Reporting_Law_FINAL.pdf.

[44] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

[45] Modern Slavery Act 2015, c. 30 (UK). The transparency in supply chains is set out in section 54 of the Act. *Id.* § 54.

[46] Loi nº924 du 21 février 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 924 of February 21, 2017 on the Obligation of Vigilance of Parent Companies and Outsourcing Companies].

[47] Dodd-Frank Act, § 1502(b) (codified at 15 U.S.C. § 78m(p) (2012)).

[48] *Id.* This provision has proven to be controversial. *See* Lauren Wolfe, *How Dodd-Frank is Failing Congo*, FOREIGN POL'Y (Feb. 2, 2015), http://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/.

"reasonable country of origin inquiry" (RCOI) to determine whether the minerals specified originated in the Democratic Republic of the Congo or certain adjoining countries deemed to be territories in which there is violent conflict over those minerals.[49] On the basis of that RCOI, a reporting company might be required to make additional disclosures to the SEC, conduct additional due diligence, file a "Conflict Minerals Report" with the SEC, and/or disclose publicly whether or not the company's products are "DRC conflict free."[50] The SEC regulations issued to implement these requirements[51] were challenged in the U.S. federal courts.[52] The D.C. Circuit held that the portion of the regulation that required public disclosure of whether products were "DRC conflict free" is unconstitutional compelled speech.[53]

The U.K. Modern Slavery Act of 2015 requires every qualifying organization carrying on a business in the United Kingdom to produce a slavery and human trafficking statement for each financial year of the organization.[54] The obligation applies only to organizations with annual income in excess of £36 million.[55] And it applies only to those organizations that supply goods or services and that carry on a business or part of a business in the United Kingdom.[56] The statement must include a narrative on "the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place—(i) in any of its supply chains, and (ii) in any part of its own business . . . ."[57] Note that an organization is not required to produce a statement; it may elect to prepare a statement that the organization has taken no steps to ensure that slavery and human trafficking is not taking place.[58] Upon failure to comply, the government may seek a judicial order compelling production of the statement.[59] Failure to comply with the injunction may expose the organization to contempt proceedings, civil fines, and other penalties.[60]

The French supply chain vigilance law appears to go beyond mere

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[49] Dodd-Frank Act § 1502(b)(1)(a)(ii) (codified at 15 U.S.C. § 78m(p)(1)(A)(ii)).

[50] *Id.*

[51] 17 C.F.R. § 240.13p–1 (2017).

[52] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 519–20 (D.C. Cir. 2015).

[53] *Id.* at 556.

[54] Modern Slavery Act 2015, c. 30, § 54(1) (UK). California has enacted a similar disclosure provision. *See* Supply Chains Act of 2010, S.B. 657, 2009–2010 Reg. Sess. (Cal.).

[55] Modern Slavery Act § 54(2); UK HOME SECRETARY, TRANSPARENCY IN SUPPLY CHAINS, ETC.: A PRACTICAL GUIDE 5, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf.

[56] Modern Slavery Act 2015 § 54(2).

[57] *Id.* § 54(4)(a).

[58] *Id.* § 54(4)(b).

[59] *Id.* § 54(11); *see also* UK HOME SECRETARY, *supra* note 55, at 6.

[60] UK HOME SECRETARY, *supra* note 55, at 6.

reporting and disclosure.[61] It requires certain French parent companies to identify and avoid adverse human rights and environmental impacts of their own activities and the activities of enterprises they control or with whom they have an established commercial relationship.[62] It requires covered French companies to engage in corporate compliance in a form similar to that specified in the UNGP.[63] The law applies to the largest French companies—those with at least 5,000 employees and head offices in French territory, or otherwise with 10,000 employees.[64] These companies must establish a vigilance plan that covers the company, its subsidiary, and other companies that it may control.[65] Noncomplying companies may be compelled to publish a vigilance plan that meets statutory minimum requirements.[66] Where a company breaches its obligations under the vigilance law, it can be held liable for consequential harm.[67] But liability is limited to the harm that proper fulfillment of the obligations under the vigilance law (i.e., publishing and implementing the vigilance plan) would have avoided.[68] And those seeking compensation bear the burden of proof—requiring evidence of fault, causation, and damages.[69]

Each of these provisions applies directly to operating companies—to the extent they meet the statutory definition. Yet each of them may also serve as a basis for indirect compliance. Financial institutions, for example, could embed these provisions into their own loan agreements, not merely within a general obligation to obey applicable law. Each provides a structure through which a financial institution can make mandatory and expand the reporting and monitoring obligations of national law. That obligation would be constructed as a contractual obligation that runs to the financial institution. Yet the effect would potentially be profound. Financial institutions can make mandatory permissive provisions, and can reserve the right to enforce (through its loan agreement) any heightened obligation to monitor, report, and remedy. National law, even disclosure and mild remediation rules, can

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61 *See* Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317, 320 (2017).

62 *Id.*

63 *See id.* at 321; *see also infra* note 97 and accompanying text (discussing human rights due diligence under the UNGP).

64 Loi n°924 du 21 février 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 924 of February 21, 2017 on the Obligation of Vigilance of Parent Companies and Outsourcing Companies]; *see* Cossart et al., *supra* note 61, at 320.

65 *Supra* note 64. The plan must include a mapping and ranking of risk, assessment procedures, mitigation plans, alert mechanisms, and a monitoring scheme to assess the efficiency of the plan. *See* Cossart et al., *supra* note 61, at 320.

66 Cossart et al., *supra* note 61, at 321–22.

67 *Id.* at 321.

68 *Id.*

69 *See id.*

serve as a basis for the development of private law that links national efforts to private transnational regulation. And, indeed, such private regulation might even overcome the constitutional limitations on disclosure that has effectively narrowed national authority to impose disclosure rules. Thus, this is the great power of privatizing national legal requirements—its ability to expand rules and avoid governmental restrictions on the assertion of authority to compel.

B. *International Law and Norms: Mostly Norms for CSR*

International human rights instruments impose duties on states with respect to their subject matter. The basic structures of international norms can be usefully divided into two broad categories—hard law and soft law. Hard law can also be divided between international law that has come into force, and those laws that express principles of actions or objectives. With respect to hard law, the number of international instruments that create general international law with respect to the human rights duties of states are numerous. Their core might be understood to include those instruments that constitute the so-called International Bill of Human Rights.[70] But recall that not every state has adopted each of the core documents. Some of the documents are not legally binding in international law, and even if ratified, have not been transposed into domestic law.[71] In addition, the United Nations has adopted a number of additional treaties and conventions with human rights impacts, along with numerous declarations and other non-binding instruments that are said to reflect global consensus on the human rights matters they consider.[72]

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[70] The International Bill of Human Rights is the name given to UN General Assembly Resolution 217 A (III) and to the two international treaties that were derived from it. The International Bill of Human Rights consists of the Universal Declaration of Human Rights (adopted in 1948), the International Covenant on Civil and Political Rights (entered into force in 1976) with its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (entered into force in 1976). OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, FACT SHEET NO.2 (REV.1), THE INTERNATIONAL BILL OF HUMAN RIGHTS (1996), http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf.

[71] *See id.*

[72] These include the Convention on the Prevention and Punishment on the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 62599, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); International Convention on the Protection of the Rights of All Migrant Workers and Members of their

More directly connected to businesses and their responsibilities are the conventions of the International Labour Organization (ILO) and the recently-adopted anti-bribery conventions. The ILO has identified eight conventions as fundamental expressions of labor rights.[73] Most states have ratified these conventions;[74] although there is a wide variation in both the transposition to domestic law and the actual form of implementation, consistent with the national context of each state.[75] The ILO monitors the status of the implementation of its conventions but it is limited to dialogue and technical assistance in the event of implementation failures.[76]

The United Nations Convention against Corruption entered into force on December 14, 2005.[77] A Conference of the States Parties is established to review implementation and facilitate activities required by the Convention.[78] The Convention is grounded on prevention, criminalization, international cooperation, and asset recovery.[79] It is important to setting up a baseline for business dealings that may impact enterprise operations and touch on their governance responsibilities.

Lastly, a number of regional human rights conventions have come into force.[80] These are centered on the declaration of a set of principles,

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Families, Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003); Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008); and International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3 (entered into force Dec. 23, 2010).

[73] The eight fundamental Conventions are: (1) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); (2) Right to Organise and Collective Bargaining Convention, 1949 (No. 98); (3) Forced Labour Convention, 1930 (No. 29); (4) Abolition of Forced Labour Convention, 1957 (No. 105); (5) Minimum Age Convention, 1973 (No. 138); (6) Worst Forms of Child Labour Convention, 1999 (No. 182); (7) Equal Remuneration Convention, 1951 (No. 100); and (8) Discrimination (Employment and Occupation) Convention, 1958 (No. 111). INT'L LABOUR OFFICE, THE INTERNATIONAL LABOUR ORGANIZATION'S FUNDAMENTAL CONVENTIONS 8 (2002).

[74] *See Ratifications of Fundamental Conventions by Country*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:::NO:10011:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F (last visited Sept. 9, 2017).

[75] *See e.g.*, INT'L LABOUR OFFICE, WORKING TOGETHER TO PROMOTE A SAFE AND HEALTHY WORKING ENVIRONMENT: INTERNATIONAL LABOUR CONFERENCE, 106TH SESSION, 2017 (surveying the occupational safety and health instruments concerning the promotional framework, construction, mines and agriculture).

[76] *See Applying and Promoting International Labour Standards*, Int'l Labour Org., http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang—en/index.htm (last visited Oct. 11, 2017).

[77] United Nations Convention against Corruption, Dec. 11, 2003, 2349 U.N.T.S. 41.

[78] *Id.* at 181.

[79] *See id.* at 146.

[80] *See, e.g.*, African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986); American Convention on Human Rights: "Pact of San José, Costa Rica," Nov. 22, 1969, 1979 U.N.T.S. 143 (entered into

modeled for the most part on the Universal Declaration of Human Rights, administered through a Secretariat, and enforced through a court of commission system that is empowered to hear cases brought by individuals against states.[81] These are important sources for regional development of human rights norms. And they may play a role in the determination of the context in which the human rights responsibilities of enterprises must be considered.

These human rights instruments describe the basic framework and structures of human rights at the international level. Yet, *collectively they do not directly regulate CSR*. First, these instruments do not directly impose obligations, for the most part, on non-state actors. Second, they are expressions of general law that may be applied by states to everyone. Third, none of these impose human rights obligations directly or indirectly on financial institutions. Each of these instruments operates, however, to provide the substantive basis for general conduct that, though directly applicable against states, may also be applied indirectly against non-state actors, like enterprises. It must be remembered, however, in many cases these international law instruments either have no independent legal effect or have not been acceded to by every state; or, where there has been ratification, the law may be constrained by treaty reservations, or the treaty obligations may not be transposed to domestic law such that the individuals acquired no rights under the treaty. This is a technical point—but a technical point of great importance—because the states aggressively defend it.

And, indeed, the interplay between national law, regional treaty framework, international law, and international norms remains fluid and contentious. While international efforts seek to establish normative baselines for conduct, national law tends to mostly be disclosure oriented.[82] The reasons are fairly straightforward. At the international level, the object is to create an integrated and well-coordinated system of substantive law that centers on the elaboration and protection of the basic rights of the individual—as against the state. But in that elaboration the expectation is that the state will also have a duty to extend the protections of human rights against their breach by non-state actors within the nation. These principles would be applicable without regard to any other provisions of national law—including principles of shareholder primacy or of the autonomous legal personality of enterprises. At the national level, however, these international standards must be blended into the fabric of law—not just the national

force July 18, 1978); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 1955 U.N.T.S. 222 (entered into force Sept. 3, 195).

[81] *See supra* note 77.

[82] *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010) (codified at 15 U.S.C. § 78m(p) (2012)); Modern Slavery Act 2015, c. 30, § 54 (UK).

constitutional framework, but the core principles of economic, societal, and cultural practice woven into the structures of national law. With that in mind, the most likely form of national legislation touching on the codification of CSR tends to respect the fundamental principles of corporate enterprise autonomy and shareholder primacy. That tends to make disclosure obligations the most likely form of *legalization* of CSR now plausible, a constraint that has been criticized by many in the academic community.[83] It also ensures that, whatever the state of the human rights legalization project at the international level, CSR remains outside the law. It is for the state to legislate international human rights norms into national law. It is for the enterprise to obey the general law—like every other natural or legal person. But this law must be applied within the general principles of corporate governance and the primacy principle. Taken together, even domesticated human rights law could not *compel* the enterprise to avoid shareholder primacy or waive its legal autonomy. But such rules could guide the enterprise in assessing its operational risk—that is, the consequences for its relations to consumers, investors, and government of a failure to act socially responsible as those terms are understood in a national context.[84]

There is one treaty on the horizon—a comprehensive treaty for business and human rights—the elaboration of which is being considered by an intergovernmental working group (IGWG) established for that purpose in 2014 by the U.N. Human Rights Council.[85] The U.N. Human Rights Council directed the newly created IGWG to devote its first two sessions to "conducting constructive deliberations on the content, scope, nature and form of the future international instrument."[86] Thus far the group has reached little consensus on these questions except at a very high level of generality.[87] There also appears to be only a tenuous consensus among the parties pushing this treaty

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[83] *See, e.g.*, Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 815 (2005); Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN. J. L. BUS. & FIN. 31, 67–68 (2005).

[84] *See* Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739, 1774–77 (2007).

[85] *See* Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014) (elaborating "an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights").

[86] María Fernanda Espinosa (Chair-Rapporteur of the Working Group), *Report on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument*, at 1, U.N. Doc. A/HRC/31/50 (Feb. 5, 2016).

[87] Consider the various statements proffered to the working group by civil society organizations around its first session. *See Intergovernmental Working Group Sessions*, BUS. & HUMAN RIGHTS RES. CENTRE, http://business-humanrights.org/en/binding-treaty/intergovernmental-working-group-sessions (last visited Oct. 11, 2017).

project forward.[88] The treaty as concept and instrument remains highly contentious and its final form is not yet clear.[89]

Taken together, then, international law (with all its limitations) offers little beyond these limited efforts to create a hard law of human rights, most with substantially no direct applicability to the operation of businesses and their corporate responsibilities. Instead, like CSR at the national level, the development of rules for the regulation of the human rights obligations of enterprises is largely confined to the area of voluntary standards and soft law. Soft law, of course, refers to standards that are not law in the classical sense. Yet it might have substantial influence and authority as social norms, and in some cases enough influence that the functional difference between social and legal norm is slight. Among the most important of the soft law business and human rights instruments that together comprise the emerging universe of international CSR norms are the UNGP, Bilateral and Multilateral Investment Treaties with human rights components, third-party standards, and the internal norms of multinational enterprises. Each is briefly discussed below.

The U.N. Human Rights Council endorsed the UNGP in 2011.[90] The UNGP does not create new CSR or human rights legal protections. Instead, it is meant as a framework for the translation of international human rights norms into the CSR regimes of enterprises and to better focus states on compliance with their duty to protect human rights.[91] The UNGP is most notable for its polycentricity. It is grounded on the simultaneous application of national, international, and societal norms to the enterprise as it develops a framework for assessing human rights risks and remedying wrongs.[92] It is grounded in a three-part structure. The first is the *state duty to protect human rights*.[93] This extends no further than

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[88] *See* ESCR-Net Corp., Statement of the ESCR-Net Corporate Accountability Working Group (CAWG), http://business-humanrights.org/sites/default/files/media/documents/cawg_statement_re_un_hrc_resolution_text.pdf ("[S]ome States involved in the negotiation are attempting to qualify this text with the following definition: 'Other business enterprises' denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law. The inclusion of this restrictive definition in the resolution text is a damaging development, which would result in a missed opportunity to ensure a level playing field for all corporations worldwide, while also ensuring that all corporate human rights violations are addressed by future international normative developments.").

[89] *See generally* Larry Catá Backer, *Pragmatism Without Principle? How a Comprehensive Treaty on Business and Human Rights Ought to be Framed, Why It Can't, and the Dangers of the Pragmatic Turn in Treaty Crafting*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS (Surya Deva & David Bilchitz eds., Cambridge University Press forthcoming 2017).

[90] *See* U.N. Office of the High Comm'r for Human Rights, *supra* note 37, at iv.

[91] *See id.* at 1.

[92] *See id.*

[93] *Id.* at 3.

legal obligations of a state under international law. The consequence is that the international law is reduced to its legal effects; those legal effects can vary widely from state-to-state, consistent with international law principles. It also opens the door to extraterritorial application of national law under certain circumstances. The second is the *corporate responsibility to respect human rights*.[94] These are responsibilities that apply in the societal sphere and extend beyond compliance with national law in the places where a corporation operates. Yet, unlike the state duty to protect, the corporate responsibility to respect human rights is bound by a uniform minimum set of norms—the International Bill of Human Rights augmented by the ILO's Declaration on Fundamental Principles and Rights at Work.[95] The essence of corporate responsibility is implemented through programs of human rights due diligence.[96] It is meant to apply throughout the production chain of corporate operations. In this sense it serves to harmonize the application of international law through private ordering in a way that is impossible under the constraints of international law.[97] Additionally, because these corporate responsibilities are private and societal, it can include an obligation to work around host state restrictions that either may draw a corporation into complicity with state breaches of its own duty to protect human rights[98] or that is necessary to mitigate human rights breaches.[99] The third is the *access to remedy*.[100] This touches on the remedial obligations for states and enterprises. The principal focus is on state mechanisms through its courts. But provisions are made for non-judicial public remedies and for remedial programs created and administered by the enterprise. Additionally, resort to international and private mechanisms is also encouraged—including the remedial protections of the OECD Guidelines for Multinational Enterprises.[101]

The last point suggests a close connection between the UNGP and the OECD Guidelines for Multinational Enterprises. And indeed, that connection was cemented with the incorporation of the UNGP into a new chapter of the OECD Guidelines.[102] The two are now substantially

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[94] *Id.* at 13.

[95] *Id.* ("The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.").

[96] *See id.* at 17–21.

[97] "The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions." *Id.* at 14.

[98] *See id.* at 18.

[99] *See id.* at 21–22.

[100] *Id.* at 27.

[101] *Id.* at 28.

[102] OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, *supra* note 38, at 3.

integrated in their formal strictures, and the UNGP is able to take advantage of the OECD Guidelines' procedural mechanisms for remedies. The OECD Guidelines are, strictly speaking, both voluntary and initially addressed by governments to enterprises. "They provide principles and standards of good practice consistent with applicable laws and internationally recognized standards. Observance of the [OECD] *Guidelines* by enterprises is voluntary and not legally enforceable."[103] They are more comprehensive than the UNGP, covering a number of general areas: transparency/disclosure, human rights, employment/industrial relations, environmental issues, bribery/corruption, consumer protection, technology transfer, anti-competitive schemes, and taxation.[104] As a supplement, the Guidelines provide a special toolkit for weak governance zones. What makes the Guidelines potentially more potent is the inclusion of complaint procedures through National Contact Points. These have had a spotty history. The United States has tended to ignore and downplay the use of its National Contact Point for anything resembling the litigation of issues of interpretation or application of the OECD Guidelines.[105] The United Kingdom, the Netherlands, and Norway have taken the opposite position, delivering a number of important Final Statements that have been influential in shaping corporate compliance with the OECD Guidelines.[106] National Contact Point actions have been increasingly used in two contexts. The first is by NGOs to advance international normative agenda. The second is by labor unions to leverage national litigation.

Bilateral Investment Treaties (BITs) typically deal with investment and investment protection.[107] Most BITs focus on investor protection, especially in three respects. The first is the internationalization of domestic law to ensure that the legal standards applied conform to international standards and expectations.[108] The second touches on constructive and actual, full or partial, expropriation (interference with

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[103] *Id.* at 17.

[104] *See id.* at 5.

[105] *See* Arvind Ganesan, *US: Review of the National Contact Point for the OECD Guidelines for Multinational Enterprises*, HUMAN RIGHTS WATCH (Nov. 3, 2010), https://www.hrw.org/news/2010/11/03/us-review-national-contact-point-oecd-guidelines-multinational-enterprises.

[106] *See* Larry Catá Backer, Case Note, Rights and Accountability in Development ('Raid') v DAS Air *and* Global Witness v Afrimex*: Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 MELBOURNE J. INT'L L. 258, 273–83 (2009); *see also Statements by National Contact Points for the OECD Guidelines for Multinational Enterprises*, OECD, http://www.oecd.org/corporate/mne/ncpstatements.htm (last updated July 2013) (listing final statements of the Netherlands and Norway National Contact Points).

[107] *See* LUKE ERIC PETERSON & KEVIN R. GRAY, INT'L INST. FOR SUSTAINABLE DEV., INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 7–8 (2005).

[108] *Id.* at 8–9.

investment) and the mechanisms for seeking compensation.[109] The third touches on protection against discrimination in favor of national or other investors with more favorable investment protections.[110] A few Marxist Leninist states focus instead on the prerogatives of the state. The bilateral investment treaty model has now been expanded into multilateral form through efforts like the Trans Pacific Partnership (TPP).[111]

Most BITs provide for resolution of disputes either in the national courts or, increasingly, through arbitration. It is in this respect that the human rights implications of BITs have been criticized as problematic. The argument is that arbitration procedures, and especially those of ICSID, represent a closed system that tends to favor investors—particularly large enterprises—against either small states or individuals seeking protections through the democratic process of states. Moreover, many of these proceedings are opaque; transparency is not mandatory in either the proceedings or in the opinions generated. As a result, moving investment disputes from state judiciaries to an international tribunal could substantially and adversely affect the protection of human rights and itself constitute a human rights violation by depriving states of their ability to democratically manage their own internal affairs.

In addition, there have been efforts to rethink BITs and multilateral efforts like the TPP by embracing human rights protective provisions.[112] For example, this might be undertaken by incorporating human rights norms in BITs subject to stabilization protection. Alternatively, the arbitration provisions could be strengthened by making them more transparent requiring consideration of human rights related factors in decision making. The great difficulty in these cases has been internal to states. Such efforts require the sort of coordination between the trade and human rights bureaucracies of states that have thus far failed to be effectively constructed. Sometimes the results have been remarkable. The South African experience of trade negotiations with the European Union is a case in point.[113] There, the commerce ministry concluded a treaty with the European Union that essentially voided human rights advancing rules that had been implemented by another ministry.[114] The resulting policy incoherence was resolved through deference to the foreign relationship.[115]

A critical development to the incorporation of CSR into corporate

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109 *Id.*

110 *Id.*

111 *See* Larry Catá Backer, *The Trans-Pacific Partnership: Japan, China, the U.S., and the Emerging Shape of a New World Trade Regulatory Order*, 13 WASH. U. GLOBAL STUD. L. REV. 49, 53–65 (2014) (discussing the TPP).

112 *See* PETERSON & GRAY, *supra* note 107, at 5–6.

113 *Cf.* Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, E.U.-S. Afr., Dec. 4, 1999, 1999 O.J. (L 311/3).

114 *Id.*

115 *Id.*

activity has been marked by the rise of third-party standard setting, reporting, and certification organizations. Global Reporting Initiative (GRI) provides a framework for social, economic, and rights-based reporting of economic activity.[116] Private-public partnerships, like those represented by the International Organization for Standardization (ISO), have also been active in developing harmonized CSR standards.[117] Its ISO 26000 CSR seeks to provide a framework for embedding CSR generally into corporate operations.[118] Similar efforts target specific industry efforts, for example the Extractive Industries Transparency Initiative (2016 Standard) (EITI).[119] More importantly, private organizations have increasingly drawn upon international standards to develop their own principles of corporate behavior compliance with which they are willing to certify. These certifications have proven appealing to some corporations as a basis for getting their parties to attest to their CSR compliance.[120] These third-party providers are as important for monitoring CSR compliance as they are for creating and certifying compliance with standards. The involvement of the Fair Labor Association with Apple, Inc.'s CSR compliance in the operation of its downstream production facilities is a case in point.[121] They are common in the extractives sector as well, where, for example, third-party validation processes are increasingly being used.[122]

Lastly, the largest transnational enterprises have long established their own internal governance systems for CSR and human rights compliance across their production chain. The largest multinational enterprises have already harmonized, and sometimes these involve complex systems of CSR-based control of their supply and production chains throughout their global operations. Among these, in the extractives sector, are Rio Tinto,[123] Barrick,[124] and TransCanada.[125] In that

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[116] *See* GLOBAL REPORTING INITIATIVE, EMPOWERING SUSTAINABLE DECISIONS: GRI'S ANNUAL REPORT 2015-2016, at 6–8, https://www.globalreporting.org/resourcelibrary/GRI-AnnualReport2015-2016.pdf.

[117] *See ISO 26000 - Social Rresponsibility*, INT'L ORG. FOR STANDARDIZATION, https://www.iso.org/iso-26000-social-responsibility.html (last visited Oct. 12, 2017).

[118] *Id.*

[119] *See* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, THE EITI STANDARD 2016, at 13 (targeting the extractive industry).

[120] *See, e.g.*, Errol Meidinger, *Multi-Interest Self Governance Through Product Certification Programmes*, *in* RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 259, 263 (Olaf Dilling et al. eds., 2008) (describing home improvement companies and forest certification).

[121] *See Apple Joins FLA,* FAIR LABOR ASS'N (Jan. 13, 2012), http://www.fairlabor.org/blog/entry/apple-joins-fla (announcing Apple, Inc. joining the FLA, which "conduct[s] independent assessments of participating companies' supplier facilities").

[122] *See, e.g.*, TRANSCANADA, CORPORATE SOCIAL RESPONSIBILITY REPORT 2015, at 9.

[123] *See* RIO TINTO, 2013 SUSTAINABLE DEVELOPMENT: SUPPORTING OUR LICENSE TO OPERATE, http://www.riotinto.com/documents/RT_SD_report_2013.pdf.

[124] *See* BARRICK, CORPORATE SOCIAL RESPONSIBILITY CHARTER, http://www.

sector, one of the most contentious areas of self-regulation involves the concept of the social license to operate. This explicitly suggests the polycentric character of CSR, combining legal requirements, societal expectations of communities at the sub-legal level, private rulemaking, and corporate self-regulation.[126] The most well-known of these global internal standards of CSR-human rights are those of large retail establishments—Apple, Inc., The Gap, Wal-Mart, and Nike, among others.[127] These self-regulatory governance systems are grounded in contractual and corporate relationships with all parties to a production chain in which the regulating entity occupies the apex position. That apex company develops a set of regulatory materials through a variety of instruments—supplier codes of conduct, third-party monitoring and certification relationships, internal monitoring, and remediation units that effectively tie the operations of the production chain to the administrative oversight of the apex company.[128] Yet these internal self-

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barrick.com/files/responsibility/Barrick-CSR-Charter.pdf.

[125] *See Our Commitment to You*, TRANSCANADA, https://www.transcanada.com/en/commitment/ (last visited Oct. 12, 2017). The TransCanada CSR Report 2015, suggests the alignment of corporate CSR efforts with peer behaviors and social norm developments in which international standards are embedded.

> In 2012, TransCanada defined CSR as our 'commitment to operating in an economically, socially and environmentally sustainable manner, while recognizing the interests of our stakeholders.' In addition, we established a CSR office tasked with raising standards on our reporting and performance. We have invested time and resources to determine the most important issues facing our company and develop more rigorous programs to track our performance, identify gaps and minimize risk. We continue to work toward alignment with the Global Reporting Initiative (GRI) G4 standard, allowing us to set targets and measure our performance in a manner that is consistent with our industry peers as we continue our journey toward more comprehensive reporting.

TRANSCANADA, *supra* note 122, at 4.

[126] A useful definition of social license provides:

> "Social license" generally refers to a local community's acceptance or approval of a company's project or ongoing presence in an area. It is increasingly recognized by various stakeholders and communities as a prerequisite to development. The development of social license occurs outside of formal permitting or regulatory processes, and requires sustained investment by proponents to acquire and maintain social capital within the context of trust-based relationships. Often intangible and informal, social license can nevertheless be realized through a robust suite of actions centered on timely and effective communication, meaningful dialogue, and ethical and responsible behavior.

Brian F. Yates & Celesa L. Horvath, *Social License to Operate: How to Get It, and How to Keep It* 1 (2013) (unpublished working paper), http://www.nbr.org/downloads/pdfs/eta/PES_2013_summitpaper_Yates_Horvath.pdf.

[127] *See generally* Patrick M. Erwin, *Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance*, 99 J. BUS. ETHICS 535 (2011) (evaluating corporate codes of conduct); Esben Rahbek Pedersen & Mette Andersen, *Safeguarding Corporate Social Responsibility (CSR) in Global Supply Chains: How Codes of Conduct Are Managed in Buyer-Supplier Relationships*, 6 J. PUB. AFF. 228 (2006) (describing IKEA's supply chains).

[128] *See* Larry Catá Backer, *Multinational Corporations as Objects and Sources of*

regulatory efforts have been criticized as well for ineffectiveness, as "greenwashing," and as a means of stripping local people of control over their regulatory environment.[129]

One can see in these criss-crossing normative frameworks the emergence of a complex and dynamic picture of CSR-human rights regulation in international law. First, there are a series of inherent tensions between the development of consensus notions about corporate personality and shareholder primacy on the one hand, and the social responsibility of enterprises with respect to national obligations and international protections of the human rights of individuals regardless of nationality on the other. That tension arises as the protections of shareholder primacy and corporate autonomy appear to inhibit the robust application of human rights and societal protection regimes in law. Second, there is very little international law in the classical sense of obligations binding on states which are required to be transposed into a domestic legal order. Third, reflecting the difficulty of legislating societal obligations on a corporation in both national and international law in the face of the conflicts of principles, the principal means of advancing programs of regulation that focus on social responsibility, including respect for human rights, has been in norm-making and in what is commonly understood as soft law. At the international level, this has produced a number of distinct sources of norms. Fourth, the soft law character of these initiatives has strengthened the non-state sector as a source of rulemaking. Private rulemaking at the international level has emerged as a potent source of governance, especially in the context of social responsibility and conformity to international human rights norms with application to economic activity. They are especially important in those areas of governance gaps—where law does not extend either through national or international mechanisms. Fifth, the resulting polycentricity produces a regulatory environment in which there is order around the extra-legal norms of CSR but no ordering center in a supreme public institution. Sixth, the effective result has been to produce a rich area of governance, internal to enterprises and overseen by a complex interplay of national and international, public and private, bodies that have substantially sought to order and develop principles and

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Transnational Regulation, 14 ILSA J. INT'L & COMP. L. 499, 508–23 (2008) (illustrating "soft law" using Gap Inc. as an example).

[129] *See* Larry Catá Backer, *Transparency Between Norm, Technique and Property in International Law and Governance: The Example of Corporate Disclosure Regimes and Environmental Impacts*, 22 MINN. J. INT'L L. 1, 39, 49–50 (2013) (explaining the "regulatory environment grounded in principles of regulatory commodification consumed within transnational markets"). *See generally About Greenwashing*, GREENWASHING INDEX, http://greenwashingindex.com/about-greenwashing/ (last visited Oct. 12, 2017) ("It's greenwashing when a company or organization spends more time and money claiming to be 'green' through advertising and marketing than actually implementing business practices that minimize environmental impact. It's whitewashing, but with a green brush.").

implementation of CSR and its human rights elements in economic transactions. It is in this context that the extension of this governance framework to financial institutions—not just in their internal operations, but in the operation of their lending and investment activities—that we turn to next.

III. FINANCE-SPECIFIC OBLIGATIONS: HARDENING SOFT LAW THROUGH PRIVATIZATION OF GOVERNANCE

A. *International Soft Law and Finance-Specific Obligations*

Five years after the endorsement of the UNGP, the basic contours of the obligations of the principal actors under the First and Second Pillars are well known. Much progress has been made in moving forward on a developing consensus of the state duty to protect human rights, which is currently managed through the National Action Plan process.[130] Likewise, the contours of the corporate responsibility to respect human rights have been advanced to an even greater degree by the development of procedures for engaging in human rights due diligence. Both states and corporate enterprises have also begun to clarify and operationalize more meaningful techniques for remediating human rights wrongs. All three remain at a formative stage of development. There is no strong consensus yet on paths toward development. But the contours of the debate and the possibilities available for the way forward are well recognized. Those contours have at their center the relationship between states, enterprises directly bound up within a global production chain, and the individuals and communities affected by the actions of both. Within these relationships, the "model" state is patterned after members of the OECD; the default enterprise is a private undertaking usually organized in corporate form; those affected are usually understood as workers or communities in non-model states downstream in production chains; and civil society actors act as essential mediators and bridging agents.

Yet even years after endorsement, the situation respecting the relationship between the UNGP and those actors beyond this core triadic relationship remains relatively undeveloped. Among these, three actors are particularly critical to leadership and leverage in the operationalization of the UNGP. Banks, SWFs and state-owned enterprises (SOEs) represent some of the greatest economic forces underlying the global system of production at the heart of the structural framework of the Guiding Principles. Banks stand at the center of the relationship between the supply of money and the operation of states and enterprises in those activities at the core of the UNGP. SWFs and SOEs,

[130] UN WORKING GROUP ON BUS. & HUMAN RIGHTS, GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS, at ii (2014), http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.

each in their own way, serve as the means through which states project their activities into private markets, not as states but as private actors, although as private actors serving the interests of states. SWFs represent the bridge between the normative construction of human rights in economic activity and its application in investor markets. They serve as a means through which states and international organizations may leverage their regulatory authority and the obligations referenced in the UNGP in their market participation. It provides an opportunity for states to lead by example, not just as states under the First Pillar but as private oriented investors under the Second Pillar. SOEs represent the state as a private actor—the most direct and effective means through which states might lead by example. They are an instrumentality of the state and thus directly subject to the state's First Pillar obligations to the extent that the state exercises its ownership rights. But SOEs are also enterprises themselves directly subject to the potentially more expansive responsibility to respect human rights in the Second Pillar. SOEs provide the best means of not only leading by example, but of leveraging state power and law through its application of enterprise policy at the instance of its principal shareholder. Banks and related public financial institutions represent the potential for private leverage. But more than that—banks represent a means for hardening the soft law of international standards into the hard law of lending contracts supervised by financial institutions. Banks represent a means through which the corporate responsibility to respect human rights can become its own governance order. Most important is that banks, SWFs, and SOEs represent an extraordinary means for implementing international business and human rights substantive norms: banks through their contracts, SWFs through their investment decisions and active shareholding, and SOEs through their internal governance within production chains

Likewise, the OECD has begun to clarify the obligations of financial institutions under its Guidelines.[131] The OECD has noted the need to

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[131] *See* Letter from John G. Ruggie, Affiliated Professor in Int'l Legal Studies, Harvard Law Sch., to Roel Nieuwenkamp, Chair, Working Party for Responsible Bus. Conduct, Org. for Econ. Cooperation & Dev. (Oct. 22, 2013), *in* OECD, Global Forum on Responsible Business Conduct: Expert Letters and Statements on the Application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the Context of the Financial Sector (2014), http://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-3.pdf; OECD, Global Forum on Responsible Business Conduct: Scope and Application of 'Business Relationships' in the Financial Sector under the OECD Guidelines for Multinational Enterprises 2 (2014), http://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-2.pdf [hereinafter OECD, Scope and Application]; OECD, Global Forum on Responsible Business Conduct: Due Diligence in the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products or Services by a Business Relationship 1 (2014), http://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf [hereinafter OECD, Due Diligence].

align the interpretation of the UNGP and the Guidelines. Both suggest that under certain circumstances financial institutions may be linked to the conduct of their borrowers, especially those that take a minority shareholder position in their borrower:

> The Guidelines contain an expansive description of the term 'business relationships.' Since the Guidelines operate with non-exhaustive descriptions of key terms, their possible use or "scope" is not limited by sector, to certain kinds of enterprises or to certain kinds of business relationships. A minority shareholding can therefore in principle be seen as a business relationship under the Guidelines, even if this is not spelled out in the text of the Guidelines itself.[132]

Likewise, the OECD has moved to suggest that the business relationship and linkages between the financial services industry and borrowers may be strong enough to support an obligation to conduct due diligence and to mitigate the human rights risks of dealing with certain borrowers—from deciding not to lend to monitoring of the conduct of the borrower.[133] But the OECD has avoided bright lines and expansive readings and insists that the obligation remains highly contextual.[134]

In addition, the growing number of third-party standards for financial institutions and their transactions speak to the developing consensus on the responsibility of lenders for the conduct of the enterprises they finance. These include the IFI Financial valuation toolkit, the Equator Principles, the U.N. Principles for Responsible Investment (PRI), the Ethics Guidelines for Sovereign Wealth Funds (including the Santiago Principles, generally, and the SWF specific Guidelines), and a growing number of public-private efforts. Each is discussed briefly in turn.

The IFC Financial Valuation Toolkit was designed "to help companies identify the optimum sustainability investment portfolio to deliver maximum business and social value."[135]

The Equator Principles (EP), a risk management framework, adopted by financial institutions for determining, assessing, and managing environmental and social risk in projects in the area of project finance.[136] The EP is organized as a guideline for incorporation into loan documents.[137] It has been reported that "[c]urrently 91 Equator

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[132] OECD, Scope and Application, *supra* note 131, at 6.

[133] *See id.* at 1–2.

[134] *See* OECD, Due Diligence, *supra* note 131, at 1.

[135] *About the Financial Valuation Tool*, INT'L FIN. CORP., http://www.fvtool.com/about-us (last visited Oct. 12, 2017).

[136] EQUATOR PRINCIPLES, THE EQUATOR PRINCIPLES 2 (2013), http://www.equator-principles.com/resources/equator_principles_III.pdf.; *accord* Franck Amalric, *The Equator Principles: A Step Towards Sustainability?* 2 (Ctr. for Corp. Responsibility & Sustainability at the Univ. of Zurich, Working Paper No. 01/05).

[137] Equator Principles, Guidance for EPFIs on Incorporating Environmental and Social Considerations into Loan Documentation 1 (2014), http://www.equator-

Principles Financial Institutions (EPFIs) in 37 countries have officially adopted the EP, covering over 70 percent of international Project Finance debt in emerging markets."[138] The current version, Equator Principles II, was adopted in 2013.[139] The object of the EP is to develop a set of baseline conduct expectations that are then hardened into law through the contractual arrangements between financial institutions and their clients. The innovative aspect of this is to use private lenders, rather than governments, as the means by which binding CSR and related regulatory norms are built into economic relationships.[140] It represents an important step in the privatization of law. And perhaps it is a necessary one. Where states are reluctant to cede their law-making authority upward to globalized law-making institutions, legal privatization allows them to avoid that potentially difficult step but at the same time cure the governance gap problem that made this choice necessary. It has the benefit of being tailored to specific economic transactions, yet drawn from a single set of consensus norms. And to the extent that these norms may be enforced through judicial processes, the state retains a hand in the regulatory enterprise.

The signatory financial institutions agree, as part of their internal environmental and social review and due diligence, to categorize lending based on the magnitude of its potential environmental and social risks and impacts.[141] The client is expected to conduct an assessment process that addresses environmental and social risks and impacts of a proposed project.[142] This assessment is to address compliance with relevant host country laws, regulations, and permits that pertain to environmental and social issues, but to do so in accordance with international standards.[143] All borrowers will be required to develop or maintain an Environmental and Social Management System (ESMS) and to demonstrate effective stakeholder engagement with respect to the project financed.[144] Each ESMS must also provide for a grievance system that uses independent

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principles.com/resources/ep_guidance_for_epfis_on_loan_documentation_march_2014.pdf.

[138] *The Equator Principles*, EQUATOR PRINCIPLES, http://www.equator-principles.com/ (last visited Oct. 12, 2017).

[139] EQUATOR PRINCIPLES, *supra* note 136, at 2.

[140] This is made clear in the Equator Principles Preamble:

> We commit to implementing the Equator Principles in our internal environmental and social policies, procedures and standards for financing Projects. We will not provide Project Finance or Project-Related Corporate Loans to Projects where the client will not, or is unable to, comply with the Equator Principles. As Bridge Loans and Project Finance Advisory Services are provided earlier in the Project timeline, we request the client explicitly communicates their intention to comply with the Equator Principles.

Id. at 2.

[141] *See* Equator Principles, *supra* note 137, at 16.

[142] *Id.*

[143] *Id.* at 1–2.

[144] *Id.* at 5.

review and assessment.[145] These obligations are written into the contract as covenants linked to compliance.[146] Lastly, the EP imposes reporting and outside expert evaluation procedures.[147]

The PRI[148] serves as a declaration of purpose for investors and lenders with respect to their operations. It declares the principal duty of institutional investors to act in the long-term best interests of their owners, but then embeds CSR and human rights objectives as consistent with those core fiduciary obligations:

> As institutional investors, we have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios (to varying degrees across companies, sectors, regions, asset classes and through time).[149]

The object is to "better align investors with broader objectives of society."[150] Yet the overriding duty of institutional investors must be welfare maximization of the fund, and societal and environmental concerns are understood to bend to that end. As a result, the declaration binds institutional investors to CSR objectives only to the extent "consistent with our fiduciary responsibilities."[151] Still, even within those broad constraints the UNPRI embeds broad authority in investors to project their power to ensure that borrowers or investment vehicles comply with general international CSR and human rights norms (including environmental standards) organized around six standards.[152] Investors who sign onto the UNPRI commit to adopt and implement them, but again only where consistent with their fiduciary responsibilities. In addition, they agree to undertake evaluation and monitoring obligations of their performance under the Principles.[153] In 2016, UNPRI further refined its operations with the publication of its

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145 *Id.* at 4, 18.

146 *Id.* at 9–10.

147 *Id.*

148 *The Six Principles*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/about/the-six-principles (last visited Oct. 12, 2017).

149 *Id.*

150 *Id.*

151 *Id.*

152 The following are the six Principles: (1) "We will incorporate ESG issues into investment analysis and decision-making processes"; (2) "We will be active owners and incorporate ESG issues into our ownership policies and practices"; (3) "We will seek appropriate disclosure on ESG issues by the entities in which we invest"; (4) "We will promote acceptance and implementation of the Principles within the investment industry"; (5) "We will work together to enhance our effectiveness in implementing the Principles", (6) "We will each report on our activities and progress towards implementing the Principles." *Id.*

153 *Id.* ("We also commit to evaluate the effectiveness and improve the content of the Principles over time.").

Sustainable Financial System: Nine Priority Conditions to Address.[154] The nine obstacles to a sustainable global financial system will be the basis for recommendations to be released in 2017.[155]

SWFs serve as a source of CSR-human rights principles for lending in two respects. The first is through the principles of self-organization and operation set forth in the Santiago Principles.[156] The second is through SWFs' specific development of ethical guidelines for the operation of a specific fund. Among the most well-known of these are the Ethics Guidelines of the Norwegian Pension Fund Global.[157] The Santiago Principles open the door to the incorporation of CSR and human rights principles to the investment and lending decisions of funds. Though the principal focus of funds is meant to maximize the investment value of the fund itself, such a fund maximizing principle may be implemented through long-term investment strategies that necessarily may embed CSR and human rights elements.[158] The Norwegian Pension Fund Global has established a comprehensive system of privatized lawmaking that seeks to incorporate an internationalized legal regime on its decisions to invest in global equity markets and on the ways in which it uses its shareholder power as companies in which it owns a minority stake.[159] The Pension

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[154] *PRI Sets Out Nine Priority Conditions to Address in Sustainable Financial System Work*, PRINCIPLES FOR RESPONSIBLE INV. (Sept. 21, 2016), https://www.unpri.org/page/pri-sets-out-nine-priority-conditions-to-address-in-sustainable-financial-system-work.

[155] *Id.* The nine priority conditions are as follows: (1) Short-term investment objectives; (2) Attention to beneficiary interests; (3) Policy maker influence on markets; (4) Capture of government policy by vested interests; (5) Influence of brokers, rating agencies, advisors, and consultants on investment decisions; (6) Principal-agent relationships in the investment chain; (7) Cultures of financialisation and rent-seeking in market actors; (8) Investment incentives misaligned with sustainable economic development; and (9) Investor processes, practices, capacities and competencies. *Id.*

[156] *See* INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, GENERALLY ACCEPTED PRINCIPLES AND PRACTICES: "SANTIAGO PRINCIPLES" 1–2 (2008), http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf.

[157] GUIDELINES FOR OBSERVATION AND EXCLUSION FROM THE GOVERNMENT PENSION FUND GLOBAL § 1 (2014), https://www.regjeringen.no/contentassets/7c9a364d2d1c474f8220965065695a4a/guidelines_observation_exclusion2016.pdf [hereinafter ETHICS GUIDELINES].

[158] "If investment decisions are subject to *other than* economic and financial considerations, these should be clearly set out in the investment policy and be publicly disclosed." INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, *supra* note 156, at 8 (quoting Santiago Subprinciple GAPP 19.1). The Explanation and Commentary emphasizes the discretionary nature of this authority:

> Some SWFs may exclude certain investments for various reasons, including legally binding international sanctions and social, ethical, or religious reasons (e.g., Kuwait, New Zealand, and Norway). More broadly, some SWFs may address social, environmental, or other factors in their investment policy. If so, these reasons and factors should be publicly disclosed.

Id. at 22.

[159] *See* Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets*, 29 AM. U. INT'L L.

Fund Global effectively seeks to operationalize the implications of the UNGP and the OECD Guidelines in the financial sector by setting up a series of rules that embed human rights due diligence and international normative human rights standards in its investment decisions. The system is grounded in the application of a set of Ethics Guidelines through an Ethics Council that makes recommendations to the fund manager, the Norges Bank.[160] The Ethics Guidelines set out the criteria for determining the suitability of a company for investment.[161] The Ethics Council may undertake an investigation of companies and recommend that they either be excluded or put under observation for failure to conform to the constraints of the Guidelines.[162] The extent of this relationship and the scope of the Pension Fund's obligations under the UNGP and the Guidelines remains contentious.[163] A recent decision of the Norwegian National Contact Point suggested that the Pension Fund Global had not complied fully with its responsibilities to respect human rights in its investment decisions.[164]

Lastly, there are a growing number of public-private efforts. These include general guidance from IFIs.[165] But they also include country-

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REV. 1, 5–8 (2013).

[160] *See id.* at 7.

[161] ETHICS GUIDELINES §§ 2–3. Section 3 of the Ethics Guidelines provides the criteria for conduct-based observation and exclusion of companies:

> Companies may be put under observation or be excluded if there is an unacceptable risk that the company contributes to or is responsible for:
>
> a) serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour and the worst forms of child labour
>
> b) serious violations of the rights of individuals in situations of war or conflict
>
> c) severe environmental damage
>
> d) acts or omissions that on an aggregate company level lead to unacceptable greenhouse gas emissions
>
> e) gross corruption
>
> f) other particularly serious violations of fundamental ethical norms.

ETHICS GUIDELINES § 3.

[162] *See id.* § 5. The application of the process for determining sanctions has been criticized as inconsistent. *See* Larry Catá Backer, *Incoherence or Discretion in Corruption and Investment Approaches?—The Norwegian Pension Fund Global Places Petroleo Brasileiro SA (Petrobras) Under Observation*, LAW AT THE END OF THE DAY (Feb. 2, 2016), http://lcbackerblog.blogspot.com/2016/02/incoherence-in-corruption-and.html.

[163] *See, e.g.*, Larry Catá Backer, *Realising Socio-Economic Rights Under Emerging Global Regulatory Frameworks: The Potential Impact of Privatisation and the Role of Companies in China*, *in* SOCIO-ECONOMIC RIGHTS IN EMERGING FREE MARKETS: COMPARATIVE INSIGHTS FROM INDIA AND CHINA 44, 65–66 (Surya Deva ed., 2016) (discussing the Norwegian Pension Fund's interactions with Korean MNE, POSCO).

[164] *See* Hans Petter Graver, *Background Note from NCP Norway: Does Norges Bank Investment Management Fall under the OECD Guidelines*, OECD (Sept. 12, 2013), https://www.regjeringen.no/globalassets/upload/ud/vedlegg/ncp/nbim_note2013.pdf.

[165] *See Sustainable Banking Network—Guidance from SBN Members*, INT'L FIN. CORP., http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/

specific arrangements, including guidance agreements for lending.[166] One of the most well-known involves the government of Colombia and the financial sector with respect to green lending.[167]

Taken together these emerging trends suggest that the soft law of CSR and human rights in economic transactions, including the human right to environmental protection,[168] has been steadily embedded in the practices and operations of financial institutions. Such a trend has added a new regulatory dimension to the management of the human rights and CSR-related activities of enterprises. That regulatory dimension appears to advance the movement toward privatizing regulatory governance. Banks and other financial institutions are increasingly serving as the site for the development of regulatory instruments for the management of human rights and CSR activities of enterprises. The shift also changes the focus of lawmaking from statutes, treaties, and regulations in administrative agencies to regulation built into the contractual relations of enterprises with broad scopes of operations in production chains. In effect, lawmaking appears to be accelerating a shift from states and other public institutions to enterprises and non-state actors. This shift remains underexplored for its own human rights effects. Most notable is the effect on the legitimacy of the enterprise of law making and its connection to the democratic legitimacy-enhancing structures of the state.[169] This also emerges in the context of opposition to multilateral efforts to privatize regulation in instruments such as the TPP. It is to the actual implementation of these new forms of governance that we turn to in the last Section of this essay.

B. Transposing Soft Law into Hard Governance—Private Standards and Delegated Legal Ordering, a Preliminary Encounter

To what extent have the trends suggested in the previous Section actually emerged in the practice of institutions? One can now begin to see the possible outlines of emerging frameworks within which some of the trends toward privatization and governance through financial

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sustainability-at-ifc/company-resources/sustainable-finance/sbn_guidancefrommembers (last visited Oct. 12, 2017) (listing 13 member countries that "have launched national policies, guidelines, principles, or roadmaps focused on sustainable banking").

166 *See id.*

167 *See* GOBIERNO NACIONAL Y EL SECTOR FINANCIERO COLOMBIANO, PROTOCOLO VERDE: AGENDA DE COOPERACIÓN ENTRE EL GOBIERNO NACIONAL Y EL SECTOR FINANCIERO COLOMBIANO (2012), http://unfccc.int/files/cooperation_and_support/financial_mechanism/standing_committee/application/pdf/protocolo_verde_colombia_-_version_final_-_20120604_%282%29%5B1%5D.pdf.

168 *See* Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 3, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016).

169 *See* Larry Catá Backer, *Fractured Territories and Abstracted Terrains: Human Rights Governance Regimes Within and Beyond the State*, 23 IND. J. GLOBAL LEGAL STUD. 61, 80 (2016).

institutions are being realized. Prominent among these are the relationships between the U.N. Guiding Principles and banks, SWFs, and SOEs for their potential to leverage the U.N. Guiding Principles and to provide vehicles for both public and private leadership in protecting the human rights of all actors, especially those least able to protect themselves. What is becoming evident is the importance of linkages across governance structures that are producing hybrid governance frameworks.[170] The normative frameworks are initiated by international soft law; these then tend to inform national efforts. That linkage strengthens, in turn, the linkages between societal demand for enterprise behaviors and the underlying normative structures that now appear in attenuated form in domestic law.[171] That linkage then produces an additional linkage between direct and indirect compliance mechanisms.

In the case of financial institutions, the forces that produce both legal and societal standards for operating companies then also produce a linkage to those enterprises that form part of the financing chain for business operation.[172] That link takes two forms. In the first instance, these financial enterprises assume responsibility for CSR standards applied to their own internal operations. More importantly, CSR standards are then linked to their own operations. But that linkage then produces an additional effect—to the extent that financial enterprises incorporate CSR norms into their own business operations, they then create a governance framework that privatizes and hardens soft law standards. Yet the linkages and the privatization evidenced by this trend do more than merely privatize normative and legal frameworks—they may expand them as well. To the extent that financial enterprises also move beyond legal and soft law minimums, financial enterprises then serve as an autonomous source of privatized institutional regulation not entirely dependent on either the rules of domestic legal orders or of the standards adopted in international soft law. The best example would be the financial enterprise that insists that all borrowers adhere to the reporting and monitoring standards of the U.K. Modern Slavery Act—whether or not the borrower would otherwise have a legal obligation to comply. To the extent that the financial institution then links failure to comply with loan default, it has hardened as well as expanded the scope of law beyond both the requisites and jurisdiction of the legislating state.

In the case of state-owned enterprises and SWFs, it more closely links the domestic legal order with the international normative order

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[170] *Cf.* Wolfram Elsner, *The "New" Economy: Complexity, Coordination and a Hybrid Governance Approach*, 31 INT'L J. SOC. ECON. 1029, 1041–44 (2004) (advocating a "hybrid" system of effective coordination for institutions).

[171] Those linkages remain dependent on the domestic context. *See, e.g.*, Wendy Chapple & Jeremy Moon, *Corporate Social Responsibility (CSR) in Asia: A Seven-Country Study of CSR Web Site Reporting*, 44 BUS. & SOC'Y 415, 436–37 (2005) (finding that CSR is best explained by national factors in the cases of India and Singapore).

[172] *Cf.* MARCEL JEUCKEN, SUSTAINABLE FINANCE AND BANKING: THE FINANCIAL SECTOR AND THE FUTURE OF THE PLANET 2–3 (2001).

applicable to private activity. The resulting conflation pushes states to legal compliance, even of norms that they have failed or refused to recognize. Commercial enterprises of states—the SWFs and SOEs, at least to the extent that they desire to operate beyond their own borders—would have to conform to international norms at least to the same extent as equivalent private enterprises.[173] But that may link the SOE in its outbound activities, for example, to a host of international law and norms that its home state has categorically rejected, at least within the home state. Thus, for example, SOEs might have to comply with the International Bill of Human Rights as part of their responsibility to respect human rights under the UNGP, even though, for example, their host states have failed to ratify part of that IBHR. In its most advanced form one anticipates irony—U.S. companies with a responsibility to embed the International Covenant for Economic, Social, and Cultural rights in its worldwide operations even though the United States has refused to embed that Covenant in its domestic law. At the same time, the SOE may be linked closely enough to the state that the legal obligations of the state under international law might bind the enterprise as well.[174] In the case of SWFs, it might suggest the obligation to use their shareholder and investor power to advance international legal and normative frameworks in companies with no legal obligation to do either within the home or host states of their operation.[175] Where SOEs engage in investment activities as well as operations (where the SOE takes equity positions in related enterprises within its production chain, for example), or otherwise serve as a conduit for state directed development activities,[176] the SOE serves as a state organ that now may also be bound to the commercial expectations of financial institutions.

Thus, these emerging frameworks might be most usefully evidenced through the lens of three broad developments. Each case highlights the way in which private governance is emerging and points to the way in

[173] *See* CAMILLA WEE, INT'L COMM'N OF JURISTS, REGULATING THE HUMAN RIGHTS IMPACT OF STATE-OWNED ENTERPRISES: TENDENCIES OF CORPORATE ACCOUNTABILITY AND STATE RESPONSIBILITY 10–12 (2008), https://business-humanrights.org/sites/default/files/reports-and-materials/State-owned-enterprises-Oct-08.pdf.

[174] *See* Human Rights Council, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 35–37, U.N. Doc. A/HRC/32/45 (May 4, 2016).

[175] The Norwegian SWF is a case in point. *See* Backer, *supra* note 159, at 6 ("Norway adds a policy-oriented use of traditional shareholder power to affect the behavior and governance of companies in which the NSWF has invested."); Ashby Monk, *Recasting the Sovereign Wealth Fund Debate: Trust, Legitimacy, and Governance*, 14 NEW POL. ECON. 451, 458 (2009) (explaining SWFs are trustworthy but lack legitimacy in the eyes of policy makers).

[176] *See, e.g.*, CHARLES WOLF, JR. ET AL., RAND NAT'L DEF. RESEARCH INST., CHINA'S FOREIGN AID AND GOVERNMENT-SPONSORED INVESTMENT ACTIVITIES: SCALE, CONTENT, DESTINATIONS, AND IMPLICATIONS (2013) ("assessing the scale, trends, and composition of China's foreign aid and government-sponsored investment activities in Africa, Latin America, the Middle East, South Asia, Central Asia, and East Asia").

which these entities can leverage their position to better embed the UNGP in their business operations and in that way to lead by example.

Consider first the trends of indirect compliance through banks at the center of corporate responsibility. Drawing from the recent proceedings before the Netherlands National Contact Point (Rabobank),[177] one might consider the regulatory consequences that follow when a group of banks that together control a substantial portion of palm oil financing enter into an agreement with its home state obligating it to incorporate international palm oil sustainability standards into their financing agreements.[178] To the extent that palm oil is farmed in states with weak governance zones, it is possible that the agreement itself will require the lender not merely to monitor borrowers but also to provide substantial interventions in some circumstances.[179] The banks may have a responsibility to determine the full extent of international standards that might be applicable and the extent to which the banks have a responsibility to incorporate those standards in their loan agreements. More importantly, banks have broad discretion to incorporate national as well as international standards, grounded especially in their assessment of risk and the needs of compliance, particularly where assessment of compliance failures by borrowers may threaten the security of their lending.

Consider next the indirect compliance trend through SWFs and active shareholding. Drawing from recent actions before the Ethics Council of the Norwegian Pension Fund Global,[180] one might consider the

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[177] *See* NAT'L CONTACT POINT OECD GUIDELINES FOR MULTINATIONAL ENTERS., INITIAL ASSESSMENT: FRIENDS OF THE EARTH EUROPE, FRIENDS OF THE EARTH NETHERLANDS/MILIEUDEFENSIE-RABOBANK 2 (2014) (summarizing the notification to the Netherlands National Contact Point "with regard to an alleged violation of the OECD Guidelines . . . by Rabobank").

[178] *Id.* at 3.

[179] *See* OECD, OECD RISK AWARENESS TOOL FOR MULTINATIONAL ENTERPRISES IN WEAK GOVERNANCE ZONES 21, 29 (2006) (suggesting strategies such as heightened managerial care and speaking out about wrongdoing); INT'L ORG. OF EMP'RS, BUSINESS AND HUMAN RIGHTS: THE ROLE OF BUSINESS IN WEAK GOVERNANCE ZONES 3–4 (2006), http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf.

[180] For recent actions before the Ethics Council of the Norwegian Pension Fund, see Larry Catá Backer, *Norwegian Sovereign Wealth Fund: Recommendations from 2010, 2012 and 2014 regarding the Companies Repsol S.A. and Reliance Industries Limited*, LAW AT THE END OF THE DAY (Sept. 17, 2014), https://lcbackerblog.blogspot.com/2014/09/norwegian-sovereign-wealth-fund.html; Larry Catá Backer, *Indonesian Company PT Astra International Tbk Placed Under Observation (Severe Environmental Risks) by the Norwegian Pension Fund Global (SWF) Investment Universe*, LAW AT THE END OF THE DAY (Oct. 13, 2015), http://lcbackerblog.blogspot.com/2015/10/indonesian-company-pt-astra.html; Backer, *supra* note 162; Larry Catá Backer, *Norway Council on Ethics for the Government Pension Fund Global Recommends Exclusion of San Leon Energy Plc for Contribution to Serious Violations of Fundamental Ethical Norms*, LAW AT THE END OF THE DAY (Mar. 4, 2016), http://lcbackerblog.blogspot.com/2016/03/norway-council-on-ethics-for-government.html; Larry Catá Backer, *Corruption and Investment—Chinese Company ZTE Corp. Excluded from Norway Sovereign Wealth Fund Investment Universe*, LAW AT THE END OF THE DAY (Jan. 7, 2016), http://lcbackerblog.blogspot.com/

regulatory consequences, in terms of sources of law and compliance, where large enterprises stand at the center of investigations commenced in several states simultaneously for corruption and failures to consult indigenous people when it negotiated for the exploitation of land next to land reserved for indigenous people.[181] Where SWFs and SOEs invest in these enterprises, the issue of corruption itself becomes an indirect compliance issue of CSR for the investing entity. This poses questions of the extent to which the SWF ought to develop standards of investment grounded in the UNGP First or Second Pillar obligations (or both—where the Second Pillar scope is broader); the extent to which that should affect investment decisions; and the extent to which the SWF ought to use its shareholder status to monitor and seek to induce changes in the company.

Last, consider the role of SOEs as the bridge between state duty to comply with law and commercial responsibility under CSR standards, including human rights and sustainability standards in operations and investment activity. Drawing from recent examples, one might consider a garment manufacturing SOE with operations both in the home state (design) and in several host states (sewing and assembly) where labor is cheaper and state administration is weak.[182] Where the SOE invests in foreign operators, for example, the issue of the conflation of the state and the SOE cannot be avoided. But to the extent that such conflation exists, it raises issues of sovereign immunity as well as sovereign obligation—these are more legal in character and affect the commercial character of the enterprise. International CSR standards—especially those that apply directly to financial institutions—may apply to investment activity, but in ways that remain unexplored. This becomes more difficult where, for example, a state SWF acquires national SOEs with international operations and then seeks to raise money through investments secured by the SOEs, drawn from private banks that seek to impose international normative standards that the state has rejected as a matter of law. This is not far-fetched.[183]

What are the critical takeaways from this examination? These might

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2016/01/corruption-and-investment-chinese.html.

[181] *Cf.* Ligia Maura Costa, *Battling Corruption Through CSR Codes in Emerging Markets: Oil and Gas Industry*, RAE ELECTRÔNICA (2008), http://dx.doi.org/10.1590/S1676-56482008000100009 (analyzing the corruption issues seen in CSR codes of conduct in major oil and gas companies operating in emerging markets).

[182] *See State-Owned Enterprises Must Lead by Example on Business and Human Rights—New UN Report*, U.N. OHCHR (June 17, 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20123&LangID=E#sthash.DBeOUVO8.dpuf (reporting on the performance of SOEs on issues of governance and human rights).

[183] *See, e.g.*, *Turkey Transfers Stakes Worth Billions in Major Public Companies to Wealth Fund*, HURRIYET DAILY NEWS (Feb. 6, 2017), http://www.hurriyetdailynews.com/turkey-transfers-stakes-worth-billions-in-major-public-companies-to-wealth-fund.aspx?pageID=238&nID=109384&NewsCatID=344; s*ee also* Larry Catá Backer, *Sovereign Wealth Funds as Development Mechanisms—The Emerging Case of Turkey and its SWF-SOE Hybrid*, LAW AT THE END OF THE DAY (Feb. 9, 2017), http://lcbackerblog.blogspot.com/2017/02/sovereign-wealth-funds-as-development.html.

be most usefully divided into two parts. Both are focused on capacity building among critical stakeholders and participants. The first are conceptual. This provides a brief recapitulation of basic principles and objectives and the critical distinctions between state actors and states acting through organizations in private markets. These help frame issues relating to the responsibilities of financial entities within the project of business and human rights. CSR and human rights regulation shifts regulatory power from states to two distinct actors. First, international organizations appear increasingly to drive the normative project of CSR. Second, private global firms appear to drive regulatory mechanisms and systems for the actual implementation of these CSR governance programs. These drivers present a fundamental challenge to the role of law and of the state in the construction and implementation of CSR and human rights projects. Certainly the state remains important. But the normative drivers and the actual implementation of these norms appear to have moved beyond the state. To that extent, the primacy of the state and its constitutional order may be threatened. That, of course, is at the heart of concern about multilateral trade negotiation that seeks to legalize these trends in ways that may cement the authority of private actors but that may be unsatisfactory with respect to the normative implementation of CSR and human rights elements.

The second are practical. These touch on the roles and resources available to all participants and the techniques and methodologies to effectively participate in governance.[184] The principal role for states appears to remain formal and increasingly relegated to transparency issues.[185] The normative drivers have moved elsewhere, states have become decentralized,[186] but are not absent as sources of both domestic and internal law and norm making.[187] But, for public international bodies the role appears equally constrained—the production of norms but not its legalization. For non-state actors, however, the CSR-human rights project has reshaped the relationship of non-state actors and law:

NGOs have obtained the most prominent roles in areas such as

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[184] *See generally* Penelope Simons, *The Governance Gap: Multistakeholder and Intergovernmental Initiatives*, *in* THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS, AND THE HOME STATE ADVANTAGE, *supra* note 33, at 79 ("assessing the voluntary self-regulatory initiatives that purport to govern transnational corporate behaviour with respect to human rights").

[185] *See, e.g.*, Backer, *supra* note 22, at 628–30.

[186] *Cf.* Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, *in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3, 8 (Christian Joerges et al. eds., 2004) (advancing a theory that "abandons the state-centering of the constitution" and advocating for "the emergence of a multiplicity of civil constitutions" for a world society).

[187] For a consideration of this intertwining and national de-centering focused on Nigeria, see generally OLUFEMI AMAO, CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS, AND THE LAW: MULTINATIONAL CORPORATIONS IN DEVELOPING COUNTRIES (2011).

> human rights and environmental protection. Both of these issues are secondary concerns to the governments of most emerging economies, and the strengthening of human rights norms and rules may even be seen as threatening by some of these governments.[188]

That has forced CSR out from the center of a legalization project centered on the state to a project of privatization of governance through key institutions in production chains—multinational corporations and financial institutions. It is to these that regulatory power has been delegated. Though the language is one of soft law, the reality is of a ceding of authority.

These trends produce important consequences for the lawyer as well as for law. Where contract becomes the new legislation, and where constraints are driven from sources outside the state and formal lawmaking, the nature and character of legal practice in the transnational sphere is substantially changed.[189] Lawyers now must worry about the regulatory character of contracts and their effectiveness across borders. They must worry about the societal effects of pursuing conduct that is precisely lawful but that violates the regulatory governance of the societal sphere. These changes are drawn most clearly in the consequences for law of imposing on financial institutions a responsibility to respect human rights that extends to its decision making for lending and investment. To the extent that these responsibilities find their way into the lending policies—and the loan agreements—of financial institutions, the legalization of these responsibilities move from the public to the private sphere, from regulation to regulatory contract. Ironically, the move to privatize regulatory development might move the structure of international law toward a greater acceptance of the notion that private enterprises may be subjects of international law and legitimate creators of legal orders within the sphere of their contractual relations.[190]

IV. CONCLUSION

The emerging framework for the incorporation of issues of CSR and human rights relating to economic activities is both dynamic and

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[188] Robert O. Keohane & Arild Underdal, *The West and the Rest in Global Economic Institutions*, *in* GOVERNING THE GLOBAL ECONOMY: POLITICS, INSTITUTIONS, AND ECONOMIC DEVELOPMENT 51, 65 (Dag Harold Claes & Karl Henrik Knutsen eds., 2011).

[189] *See* Backer, *supra* note 128, at 504.

[190] *Cf.* Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 787 (questioning whether "including in the rulemaking process representatives of organizations with direct interests in the rules under consideration [will] both minimize these risks and maximize the positive results"); J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa*, 18 AM. U. INT'L. L. REV. 851, 895–97 (2003).

complex. That framework remains contentious, conflicted, and unresolved. It is further complicated as the activities of financial institutions, which provide operating capital to enterprises, are increasingly embedded in the regulatory framework. This essay considered the corporate social responsibilities of financial institutions, including SWFs, for the conduct of their borrowers. The focus was on the extent of any duty or responsibility of lenders to ensure that their borrowers comply with CSR obligations (or alternatively conform to international human rights standards) as a core aspect of their own CSR obligations, or alternatively, of their responsibility to respect human rights. The Article started with a consideration of the extent of legal and societal (soft law) duties and obligations that may apply to financial institutions. The scope of those obligations in the international arena tend to mirror those of national legal orders—an unwillingness to enact directly effective international law in favor of the development of normative standards that may be used in the societal sphere as soft law. The result is the development of two streams of lawmaking in CSR and human rights: the first, a narrow but generally applicable legal regime for human rights; the second, a more specifically tailored set of private law ordering for CSR and business engagement with human rights responsibilities. The Article then considered the scope of the application of these responsibilities to financial institutions—in particular, the extent to which they might apply not merely to the internal operations of a lending enterprise, but also extend to the obligation to seek compliance with CSR and human rights related responsibilities of its borrowers. The Article then considered the techniques and methods through which these obligations may be implemented. These evidenced the way in which international standards have been used to develop programs of sector-specific regulation that are implemented through the contractual relations among apex corporations and their production chains, either as operating companies or now, increasingly, as financial institutions. The obligation of the financial institutions through these regulatory programs increasingly appears to substitute these enterprises for the state as the principal organs for the development and execution of CSR as law.

The Article ended with a brief examination of recent cases in which financial institutions undertook such a responsibility and consideration of the consequences of this movement for domestic CSR in the United States The most important of these consequences touched on the way that the trends in CSR and human rights regulation appear to be shifting regulatory power from states to two distinct actors. First, international organizations appear to increasingly drive the normative project of CSR. Second, private global firms appear to drive regulatory mechanisms and systems for the actual implementation of these CSR governance programs throughout their operations within, between, and beyond the state. For lawyers and policymakers, the implications may be substantial indeed. They touch on everything from the character of contracts in transnational space to the role and function of national law in transnational production chains and cross border activities. Yet the fundamental tension remains. With virtually no exception, either for operating companies or for financial institutions that seek to take on social responsibilities however framed, corporate action that materially decentralizes the core value maximizing objectives of the enterprise may be beyond the power of corporate managers or the board to undertake.[191] For the lawyer, certainly this points to a new frontier and a very different sort of practice.

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[191] *See* Elhauge, *supra* note 83, at 740–56.