



WASHINGTON AND LEE
UNIVERSITY
SCHOOL OF LAW

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Dear Working Group on Business and Human Rights,

Re: CALL FOR INPUTS – INVESTORS, ESG AND HUMAN RIGHTS

1. **How effective are international instruments, institutions and guidance that promotes HRDD, . . . effective in increasing awareness of human rights impacts among investors and other businesses? Please provide examples of participation, integration, or adherence of investors in these instruments and bodies.**
 - a. The UNGPs are particularly effective in influencing the conversation between shareholders and corporate management on the latter's implementation of human rights due diligence. Shareholders use the proposal process to shine a light on gaps in the company's compliance with the UNGPs in the following ways:
 - i. Shareholders have used the shareholder process under Rule 14a-8 to request that a company adopt a human rights policy; report on its human rights impact assessments; report on human rights risks, and other steps.¹
 - ii. In doing so, shareholders consult various third party sources that report and track a companies' compliance with the UNGPs, specifically, or its human rights practices, generally, such as media coverage, government reports, human rights rankings and other sources. These sources often identify industry laggards that shareholders engage using the shareholder proposal process. On many occasions, shareholders reference these sources and the reported gaps in human rights compliance when they submit a proposal to a company inquiring about the status of its HRDD.²

¹ See, e.g., As You Sow, [PROXY PREVIEW 2023](#) 56 (2023).

² See, e.g., Kishanthi Parella, [Investors as International Law Intermediaries: Enforcing Human Rights through Shareholder Activism](#), 45 SEATTLE UNIVERSITY LAW REVIEW 41, 72-75 (2022) (describing how companies used ranking and analysis by Amnesty International, Corporate Human Rights Benchmark and others to request that the company publish a human rights impact assessment or take other steps in HRDD).

- iii. Investors also track the implementation of HRDD among peer companies and have used these practices to pressure recalcitrant companies to improve.³
 - iv. Investors have also identified gaps in a company's stated commitments to human rights and shortfalls in its implementation of HRDD, thereby it to disclose information on how it plans to remedy the gaps.⁴
 - v. Shareholders may also withdraw their proposals in exchange for management's commitment to implement one or more steps of HRDD.⁵
- b. The shareholder process also allows shareholders to gain access to company information that may not otherwise be accessible and, on occasion, to release this information to the public:
- i. Shareholders can use the proposal process to request that a company provide information about the status of its implementation of HRDD. They may inquire about the status of policy development or implementation of risk assessments. The proposal process allows them to request specific information that a company might not otherwise disclose under a mandatory social reporting law. For example, some shareholders have requested specific information about the effectiveness of a company's HRDD and how effectiveness is assessed. This is important because a company may not otherwise report on these topics.
 - ii. Corporate management may also resist disclosing information to shareholders about the status of its implementation of HRDD. However, the processes of resistance can also release information to shareholders (and the public) about the state of a company's compliance with the UNGPs.⁶

2. What does appropriate investor action entail in the event that a client or portfolio company causes or contributes to a potential or actual adverse human rights impact?

- a. The responsibility of shareholders should be proportional to the information they possess regarding one or more companies' human rights risks. Shareholders have two unique advantages. First, they may have access to information that is not in the public realm. Second, they may routinely assess and analyze information at a firm or sector level that can alert them to particular risks to individuals or communities.
- b. Some investors may be uniquely positioned to assess human rights risks across a geographic region or industry. They receive information through public disclosure

³ *Id.* at 75.

⁴ *Id.* at 72.

⁵ *Id.* at 89-92.

⁶ *Id.* at 92-94.

and possibly private engagement. Their investments in a variety of companies incentivizes them to repeat this practice across a number of firms.

- c. It is possible that such company monitoring and analysis may reveal early signs or red flags of significant and/or imminent human rights risks that should trigger investor responsibilities. If so, it is worth considering the nature of those responsibilities.
- 3. What provisions can be included in contracts or investment agreements to encourage respect for human rights?**
- a. The most effective clauses are those that address the root causes of the human rights risks associated with a company's choice of business model, contractual partner, industry, supply chain organization, procurement practices, pricing practices, etc.⁷ The root causes of these human rights impacts vary by firm, industry, geographic location, supply chain, among other factors.
 - b. It is important that contractual clauses address the root causes of why *this* company may cause *this* impact in *this* location to *these* individuals and communities. Otherwise, there is a risk that contractual clauses will not prove effective in addressing or preventing adverse human rights impacts.
 - c. Information is vital to the ability to draft such contractual clauses. It is more feasible when policymakers, management and civil society understand the causal connection between particular business practices and subsequent human rights impacts. This has allowed for the articulation of best practices in supply chain contracts and other contexts. When this information is absent, it is important to avoid filling in the gap by importing contractual solutions from other contexts that may not address the particular causes of impacts associated a specific company.
 - d. Instead, when root causes are unknown, it is preferable to engage in heightened disclosure obligations (through private or public mechanisms) that can reveal information vital to analyzing causal connections. Alternatively, companies may be expected to address particular issues within their contracts without the expectation that such contract clauses will be the same. It may be possible to replicate and standardize clauses within an industry once we know (a) business root causes of company or industry human rights impacts, and (b) effectiveness of particular contract clauses in addressing those root causes.

Sincerely,



Kish Parella

⁷ See, e.g., Kishanthi Parella, [Protecting Third Parties in Contracts](#), 58 AMERICAN BUSINESS LAW JOURNAL 327, 338-344, 351-365 (2021); [Contractual Stakeholderism](#), 102 BOSTON UNIVERSITY LAW REVIEW 865, 897-909 (2022).