INPUT | BUSINESS CONTRIBUTIONS TO DEVELOPMENT

To: Surya Deva, *UN Special Rapporteur on the right to development*
From: Kish Parella, *Professor of Law, Washington and Lee University School of Law*
Re: **Call for inputs - 2023 reports of the UN Special Rapporteur on the right to development**

This submission is responsive to the following questions posed by the UN Special Rapporteur:

A. "Reinvigorating the right to development: A vision for the future"

- **(5) How can the role of actors such as development agencies, international financial institutions, businesses, universities, civil society and the media be harnessed to contribute to the realization of the right to development?**
- **(6) What more should be done to strengthen cooperation among States as well as collaboration with various non-State actors in realizing the right to development?**

B. "Role of businesses in realizing the right to development"

- **(1) What laws, policies and incentives are in place (or should be introduced) to encourage businesses to contribute to the effective realization of the right to development?**
- **(3) How do businesses ensure that development projects do not result in environmental pollution and/or forced displacement of communities, including indigenous peoples?**

➢ **Summary**: Businesses can contribute to development in many important ways but the challenge is that their business models do not prioritize development goals ("development contribution plans"). It is important that company boards of directors and senior management align their business models to promote development goals. In order to align business with development, boards of directors must be involved with identifying business strategies for promoting development, including assigning oversight responsibility; educating themselves and reviewing information; and approving and monitoring development contribution plans. However, boards may not prioritize such tasks, which is why government and non-state actors are vital to encouraging boards to adopt these responsibilities. In particular, non-state actors can help to demonstrate to boards how contributions to development offers opportunities for growth, market differentiation, and resource management. Alternatively, they can also explain how a failure to do so may expose the business to risks that endanger the achievement of strategic or operational objectives.

➢ **Business Models and Development**

1. Many corporate harms to the planet, people, and environment are consequences of the business model that a company adopts.

    a. For example, civil society actors have identified the causal connections between features of supply chain governance and significant human rights abuses in supply chains.[1]

    b. Both regulators and civil society actors have similarly raised concerns about the commercialization of privacy among tech companies.

    c. For these reasons, it is important that company mangers evaluate whether the company's business model is compatible with improving the lives of people or condition of the planet. Otherwise, remedial strategies will only address symptoms and not root causes of the adverse impact.[2]

2. A business model can also impede a company from making a greater contribution to development when it has the capacity to do so. For example, it may prioritize the interests of some stakeholders over others, permitting their interests to determine the prioritization, pricing, distribution, and accessibility of particular goods and services.

3. Business leaders will claim that they do not know what is expected of them or their organizations.

    a. But precision is challenging because companies will vary in how they can contribute to different dimensions of development. The challenge is how broadly and universally these obligations can be defined without losing the precision that enables businesses to act.

    b. One approach is to develop sector-specific recommendations, goals, targets and indicators regarding business contributions to development.

        i. The advantage of specific guidelines is that it can encourage company-level implementation and sector coordination regarding the same.

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1 University of Leicester & Centre for Sustainable Work and Employment Futures, NEW INDUSTRY ON A SKEWED PLAYING FIELD: SUPPLY CHAIN RELATIONS AND WORKING CONDITIONS IN UK GARMENT MANUFACTURING, CENTRE FOR SUSTAINABLE WORK AND EMPLOYMENT FUTURES, 22–25 (2015).

2 Kish Parella, *Contractual Stakeholderism,* 102 B. U. L. REV. 865, 897-911 (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821887; Kish Parella, *Protecting Third Parties in Contracts,* 58 AM. BUS. L. J. 327, 338-342 (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697273.

ii. The disadvantage is that some sectors may claim that their responsibilities and burdens are greater than those in other sectors. Additionally, there may be important differences among companies in the same sector.

4. **An alternative approach is to identify a universal and replicable process that encourages boards of directors to evaluate how their business model facilitates or impedes the right to development; identify strategies for improving their contributions to specific development goals; revise and adapt current strategy and operations or create new initiatives to advance identified opportunities for development; implement such strategies; and periodically review and revise such strategies as appropriate ("development contribution plans")**.

➢ **<u>Changing Business Models: Board Governance & Stakeholder Engagement</u>**

1. It is essential that the board of directors and senior management participate in the processes to create, revise, evaluate, monitor, and assess company-level development contribution plans. The board is responsible for strategic development and risk oversight. It is essential that the board participate in order to ensure that a business model is promoting development.

2. A board of directors can take the following steps to ensure that it has capacity to evaluate and revise its strategy and operations to promote development:[3]

   i. Determine whether oversight for development contribution plans is assigned to the board as a whole or a specific board committee;
      a. If assigned to a specific committee, decide whether it is a standing committee or one created for the specific purpose of identifying ways to promote development;
      b. Ensure that members of the board committee also serve on other key board committees, such as audit committee and nominating committee, to ensure that high-level policies align with those created by the committee overseeing development contribution plans;

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[3] BUS. ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 5 (2016), available at https://www.businessroundtable.org/policy-perspectives/corporate-governance/principles-of-corporate-governance; *see generally* Kish Parella, *International Law in the Boardroom,* 108 CORNELL L. REV. 101, 119-125, 127-144 (June 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4045579; CERES, LEAD FROM THE TOP: BUILDING SUSTAINABILITY COMPETENCE ON CORPORATE BOARDS 16 (2017), available at https://www.ceres.org/resources/reports/lead-from-the-top.

c. If assigned to a standing committee, ensure that development contribution plans are prioritized. There is a risk that many "public policy" or "sustainability" board committees have broad committee charters with a mandate to oversee issues ranging from diversity and inclusion to privacy to GHG emissions. It is important to ensure that development contribution analysis is explicitly identified as part of the committee's responsibilities;
d. Identify how frequently the board committee will consider development contribution issues and report to the entire board. Alternatively, identify how frequently the full board will consider development contribution issues if oversight is assigned to the board in its entirety;
e. Identify the information that the directors will need in order to create, approve, or oversee development contribution plans, including educating themselves on international agreements, guidelines and other institutions and understanding the scope of the business's operations;
f. Establish reporting lines throughout the business that ensures that vital information is collected, analyzed, and presented to the board on a regular basis so that it can create, approve, or oversee development contribution plans; and
g. Ensure that at least one director has relevant experience, training, or knowledge in subject areas critical to formulating and implementing a development contribution plan.

ii. Boards of directors may not make these changes quickly or voluntarily. The following actors, incentives, and mechanisms may encourage boards to adopt development contribution plans:

a. Stakeholders (investors, employees, consumers, NGOs, government actors, lenders) can encourage boards of directors to make one or more of these changes through *education* and *action*.

b. Stakeholders can educate directors and other management on the opportunities associated with development contribution plans and the risks with not having one. For example, investors have engaged businesses on the ways that their human rights violations can lead to reputational, operational, and legal risks to the business.[4] This education may occur through direct engagement or through the

[4] *See generally* Kish Parella, *Investors as International Law Intermediaries: Enforcing Human Rights through Shareholder Activism*, 45 SEATTLE U. L. REV. 41 (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3912125.

shareholder resolution process that requests information on how management is addressing these risks.

c. Stakeholders can also take action that encourages boards to make these changes.[5] For example, NGOs have engaged in strategic litigation against many companies that have highlighted the human rights risks posed by their operations and that have led to significant reputational risks (and motivated shareholder action). Media outlets have also highlighted the ways that corporate conduct (including business models) pose dangers to people and the planet. Government actors can encourage boards to make these changes directly by mandating requirements or mandating disclosures regarding the same.

d. Stakeholder action does not operate in isolation. Instead, one stakeholder's acts may precipitate another's response. The willingness of management to change depends on stakeholder characteristics, such as power, legitimacy, and urgency; whether the issues raised concern a business's identity and organizational values or its strategic priorities; and the relationships between different stakeholder groups, among other factors.

e. It is important that stakeholders identify both opportunities and risks associated with promoting development (or failing to do so). The categorization of opportunity versus risk may be important for determining both *resource allocation* within a business (what resources and how much) and *responsibility allocation* (which units within the company and at what level). The allocation of responsibility and allocation may be vital for ensuring successful implementation of development contribution plans.[6]

f. For example, businesses in the life sciences sectors adopted many UN SDGs because of the alignment of these SDGs with their mission, identity, and overall strategy. This may also prove true for companies in other sectors. The incentive to contribute to development is that it helps to distinguish themselves in various markets for key resources: labor markets (employees); capital markets (investors); consumer goods and services market (consumers), and so forth.[7]

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5 *See generally* Kish Parella, "The Symbiosis between International Law and Corporate Governance" *in* A RESEARCH AGENDA FOR CORPORATE LAW (Christopher Bruner & Marc Moore (eds.) 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4169855.

6 Kish Parella, *International Law in the Boardroom,* 108 CORNELL L. REV. 101, 164-165 (June 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4045579.

7 *Id.* at 145-150.

g. Businesses may also contribute to development when it offers opportunities for growth, including introducing new products or services; expanding market share; gaining critical resources, or reaching new stakeholder groups.[8]

h. Alternatively, stakeholders can demonstrate how a failure to contribute to development can create risks to businesses that compromise their ability to achieve strategic, operational, and other objectives.

8 *Id.*