

EMBEDDING GLOBAL MARKETS:

LESSONS FROM BUSINESS & HUMAN RIGHTS

*John G. Ruggie
Harvard University*

*CEL Annual Lecture
Centre for Ethics and Law
University College London
25 February 2015*



THE PROGNOSIS

Governance gaps

- Since the 1980s, new rules enabled vast expansion and deepening of global markets and market actors (trade liberalization, privatization, deregulation, BITs, IP rights, etc.);
- Extractives operate in increasingly difficult (often poorly regulated) environments;
- Measures to deal with externalities (adverse social and environmental impacts) lag behind.
- What can global governance institutions do to narrow/close these governance gaps?

Conventional approaches

1. Create single, overarching international legal regime for MNCs

- UN negotiations on Code of Conduct for Transnational Corporations from mid 1970s to early 1990s; *failed*.
- “Norms on the responsibilities of transnational corporations & other business enterprises with regard to human rights,” late 1990s-2003; *failed*.

2. Self-regulation/voluntary initiatives (CSR)

- Rapid increase at company/industry level, encouraged by many governments and international agencies;
- Limited in number; self-definition of human rights and obligations; lack of external accountability; lack of redress.

3. Extraterritorial jurisdiction by home states

- Limited possibilities; not a general solution.

There is no single silver bullet.

MAKING A DIFFERENCE: REFLECTIONS ON THREE UN INITIATIVES

1. The UN Global Compact

- Expand Cognitive and Institutional Frames

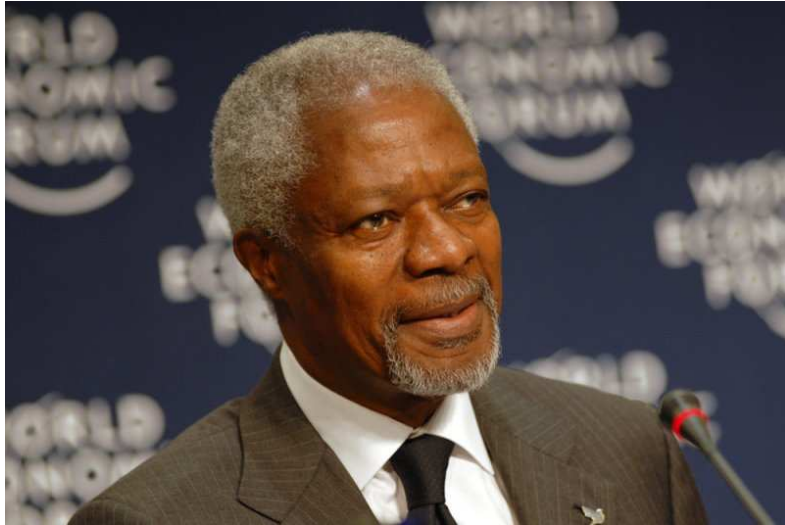
2. The UN Guiding Principles on Business & Human Rights

- Standard Setting through Polycentric Governance

3. A Future UN Business and Human Rights Treaty?

- International Legalization through Precision Tools

I. THE GLOBAL COMPACT



Kofi Annan to assembled business leaders in Davos, January 1999: “If we cannot make globalization work for everyone, in the end it will work for none.”

“Globalization is a fact of life. But I believe we have underestimated its fragility. ...Therefore, I call on you – individually through your firms, and collectively through your business associations – to embrace, support and enact a set of core values in the areas of human rights, labor standards, and environmental practices.”



United Nations Global Compact

The Mission:

The Global Compact pursues two complementary objectives:

1. Mainstream ten principles adapted from UN Declarations and Conventions in business activities around the world (human rights, labor, environment, anti-corruption);
2. Catalyze actions in support of broader UN goals, including the Millennium Development Goals (MDGs).

Corporate participation is initiated by CEO sending commitment letter to UN Secretary-General.

Endorsed by UN General Assembly after the fact.

UNITED NATIONS GLOBAL COMPACT

8,000+

Business participants

4,000+

Non-business participants

28,000+

Disclosure reports submitted

Stakeholders

- Business
- Industry Associations
- Investors
- Civil Society
- Labour
- Academia
- Government



Global Network

Europe

Latin America

North America

Asia & Oceania

Africa

MENA

160+

Countries

85+

Local Networks



Platforms & Programmes

- Human Rights & Labour
- Women's Empowerment Principles
- Children's Rights and Business Principles
- Child Labour Platform
- Caring for Climate
- CEO Water Mandate
- Food + Agriculture Business Principles
- Anti-Corruption
- Business for Peace
- Business for the Rule of Law
- Business and Education
- Supply Chain Sustainability
- Global Compact LEAD



Business Partnership Hubs

- Water
- Climate and Energy
- Social Enterprise
- Anti-Corruption Collective Action
- UN-Business Partnership



Sister Initiatives

- Global Compact Cities Programme
- Principles for Responsible Investment (PRI)
- Principles for Responsible Management Education (PRME)
- Sustainable Stock Exchanges (SSE)



ASSESSING THE GLOBAL COMPACT

The Standard Critique

- It provides companies with opportunities for “blue-washing”;
- It has admitted companies with “dubious records”;
- It undermines pressure for “binding” standards;
- **“Global Compact with Business ‘Lacks Teeth’:**
<http://www.corpwatch.org/article.php?id=14549>.

Is ‘lacking teeth’ the only appropriate benchmark?

- Assumes that Global Compact is a regulatory instrument;
- But it has no regulatory mandate, was never intended as a regulatory instrument;
- It seeks to create, enlarge, and empower coalitions of the willing.

So how does the Global Compact do that?

ILLUSTRATIVE GLOBAL COMPACT FUNCTIONS

1. Learning Forum

- *Guidance on Responsible Business in Conflict-Affected & High-Risk Areas;*
- *Anti-Corruption Tools Inventory; Human Rights Self-Assessment Tool;*
- *PRIME (Principles for Responsible Management Education—500+ Business & Management Schools)*

2. Promotes Public/Private Partnerships

- *Private Sector lead in Post-2015 Development Agenda*
- *Convenes annual UN Private Sector Forum just before GA session*
- *Business for Peace (post-conflict contributions)*

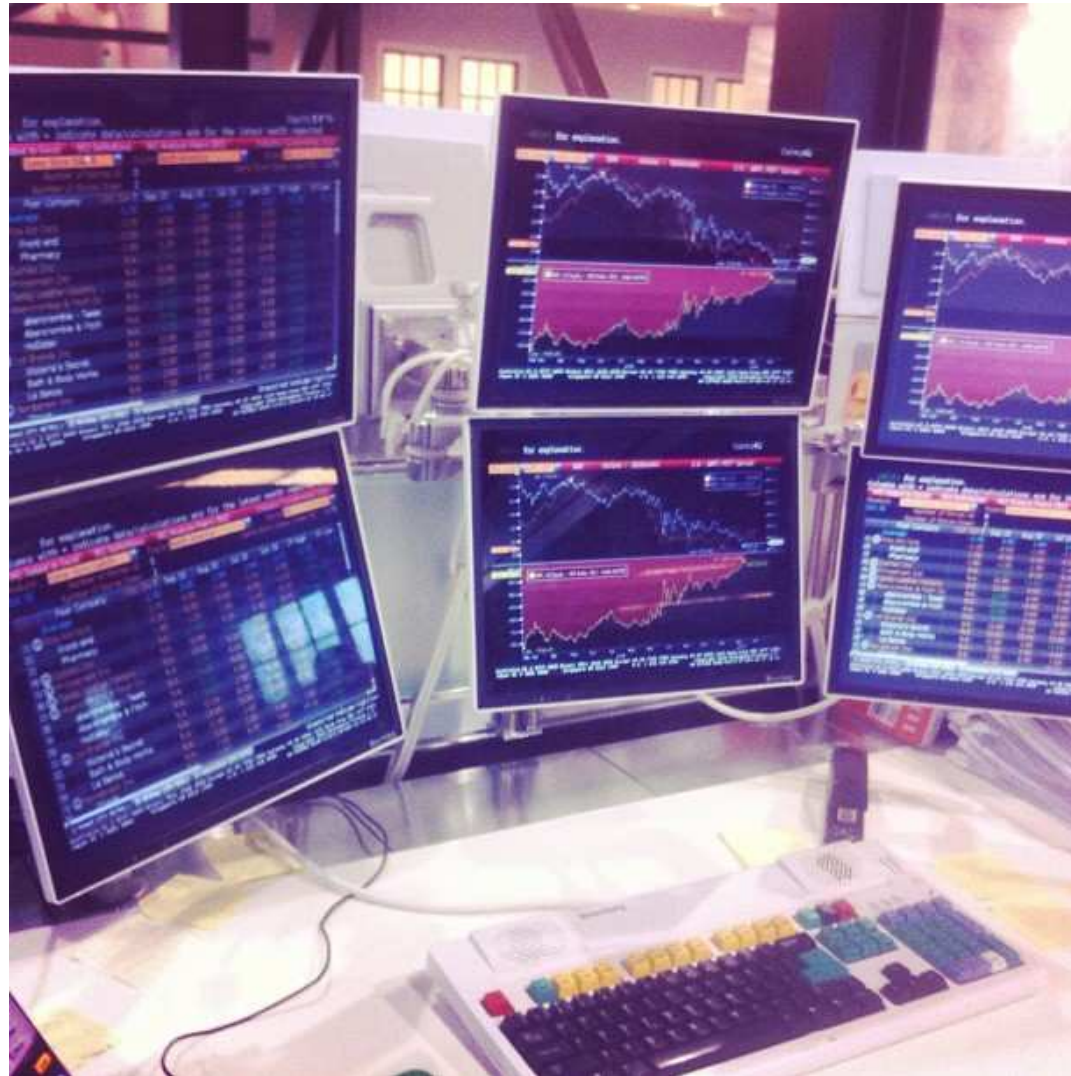
3. Generates Innovative Spinoffs

- ***Principles for Responsible Investment***

As of January 2015, 1,325 investment institutions, with assets under management of US\$ 45 trillion; incorporate ESG issues into investment analysis and decision-making processes, and into ownership policies and practices.

- ***Caring for Climate***

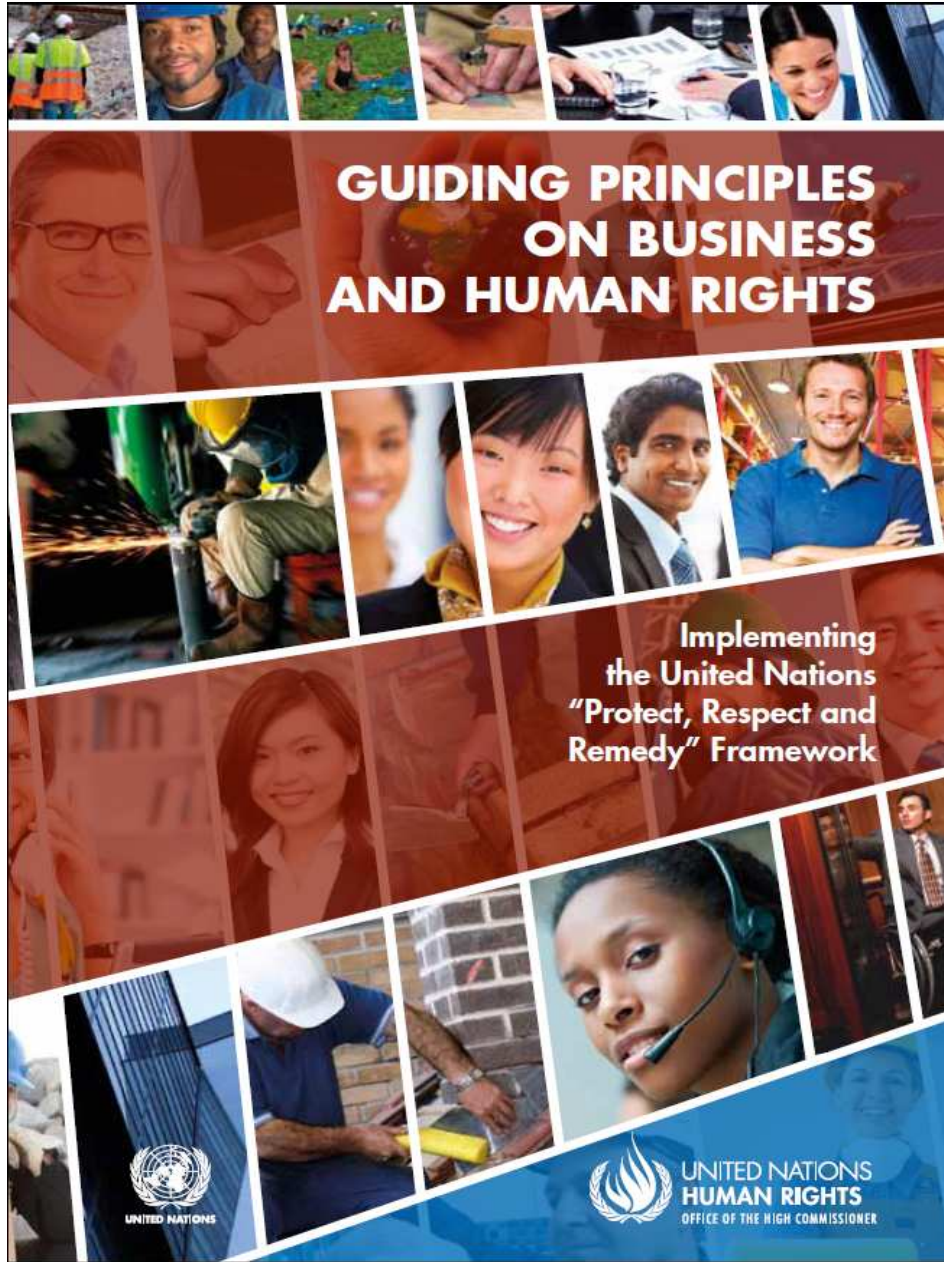
Endorsed by nearly 400 CEOs from 60 countries; set internal carbon prices, advocate for public carbon pricing policies.



EVERY FINANCIAL PROFESSIONAL HAS ONE

ANALYTICAL REPRISE

- 1. Expands cognitive and institutional horizons;**
 - 2. Establishes, connects and supports communities of practice;**
 - 3. Seeks to leverage their influence within firms and beyond;**
 - 4. Helps “normalize” corporate responsibility discourse in North and South.**
- These are “horizontal” institutional processes and activities (engage, expand), not “vertical” (impose, police);**
 - The Global Compact is a “guide dog” not a “watch dog.”**
 - How well does it do these things? Makes a great thesis topic!**



II. STANDARD SETTING THROUGH POLYCENTRIC GOVERNANCE

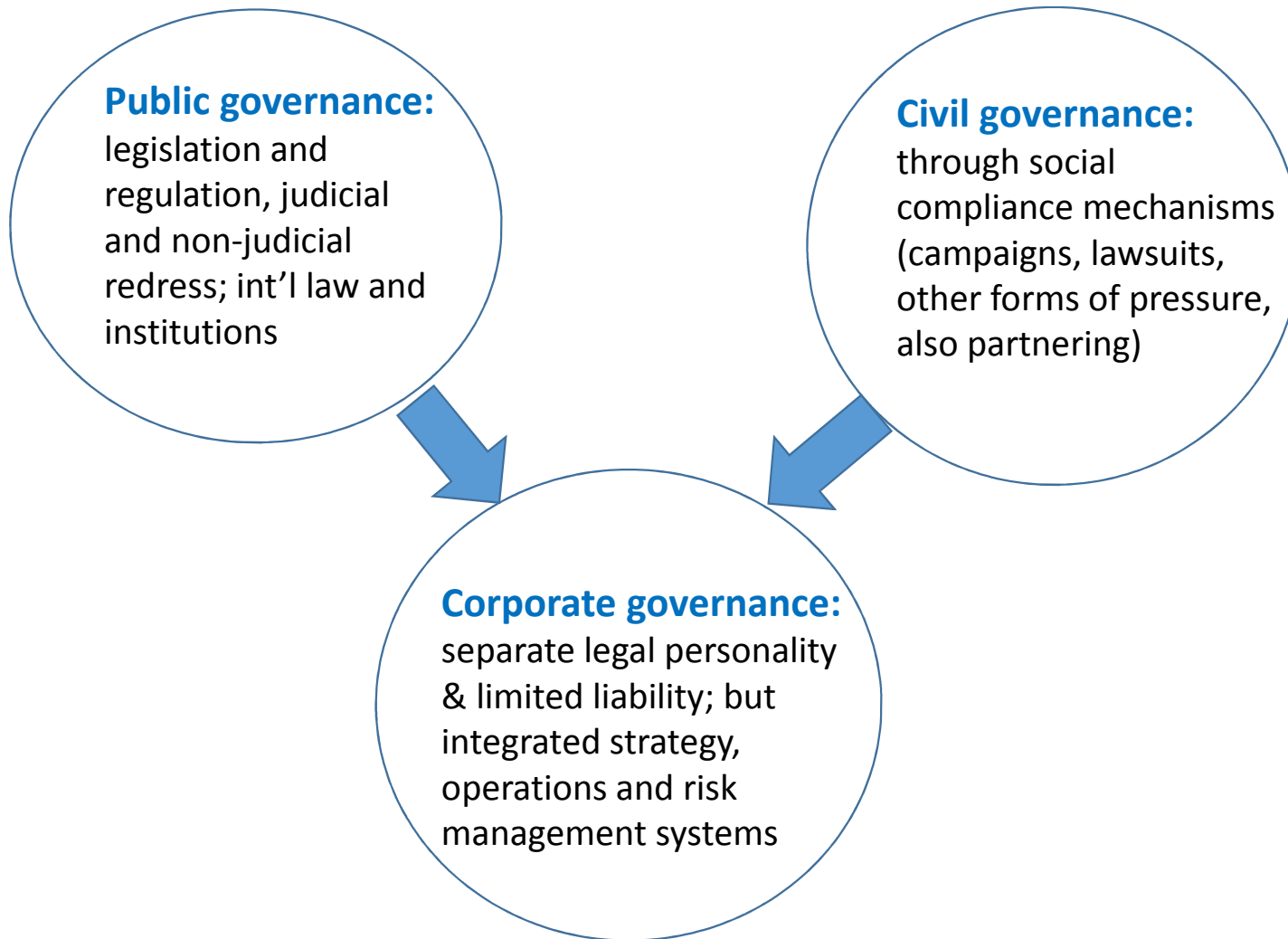
- Governments rejected the “Norms” but wanted to keep the issue alive.
- UN Commission on Human Rights (now Council) adopted “special procedure” mandate in 2005.
- Asked Secretary-General to appoint mandate holder.



SECRETARY-GENERAL APPOINTS JOHN RUGGIE SPECIAL REPRESENTATIVE ON ISSUE OF HUMAN RIGHTS, TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES

- Initial mandate was modest: to “identify and clarify” applicable standards and best practices; the concepts of “corporate complicity” and “corporate spheres of influence”; make recommendations;
- Made only one recommendation at the end of mandate in 2008: Proposed “Protect, Respect & Remedy” Framework; *welcomed* by Human Rights Council; extended mandate another three years to “operationalize” the Framework;
- Developed Guiding Principles on Business and Human Rights through extensive international consultations, research and pilot projects; *endorsed* by Council in 2011, an unprecedented step.

THE FOUNDATION: POLYCENTRIC GOVERNANCE



THE CHALLENGE: ALIGNING THE THREE GOVERNANCE SYSTEMS BEHIND AUTHORITATIVE NORMATIVE FRAMEWORK AND POLICY GUIDANCE

To foster that alignment, the GPs draw on the different discourses and rationales that reflect the different social roles these governance systems play in regulating corporate conduct.

- For **states**, emphasis is on the legal obligations they have under the international human rights regime to protect against human rights abuses by third parties, including business, as well as cross-government policy rationales that are consistent with, and supportive of, meeting those obligations.
- For **businesses**, beyond compliance with legal obligations, the GPs focus on the need to manage the risk of involvement in human rights abuses and address harm where it does occur.
- For **affected individuals and communities**, further empowerment through the GPs to realize a right to remedy.

The 31 Guiding Principles and Commentary spell out meaning and implications of the Protect, Respect and Remedy Framework for law, policy and practice.

Take Pillar 2 as an example.

THE “WHAT” FOR BUSINESS

Responsibility to Respect

- Involves knowing and showing that the enterprise is avoiding causing or contributing to adverse human rights impacts through its own operations and business relationships, and addressing such impacts when they occur.

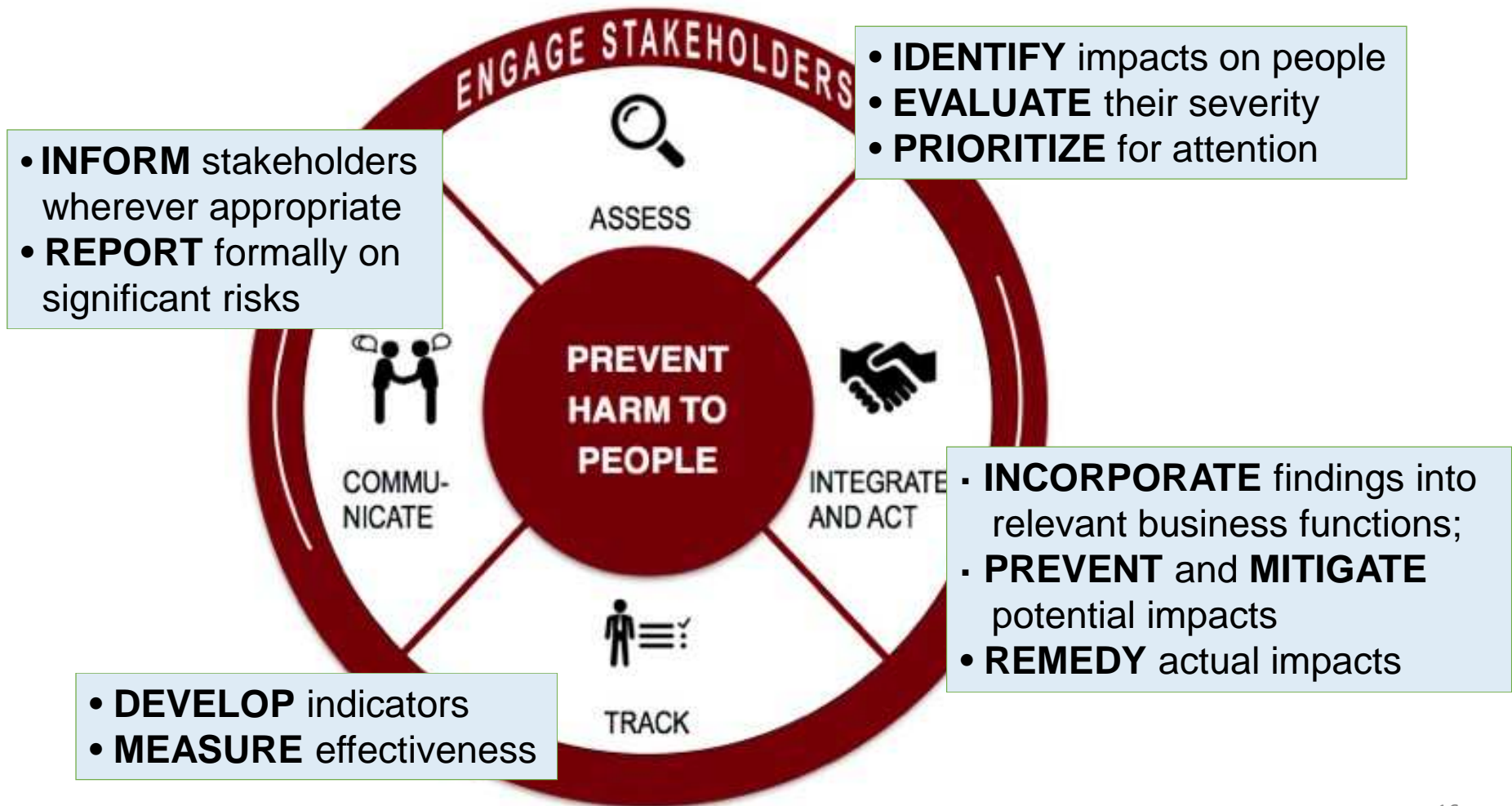
All internationally recognized rights

- Beyond applicable laws, viewed as an authoritative enumeration of human rights businesses can harm.

By all business enterprises

- Irrespective of size, sector, operational context, ownership and structure.

THE "HOW" FOR BUSINESS: Elements of Human Rights Due Diligence



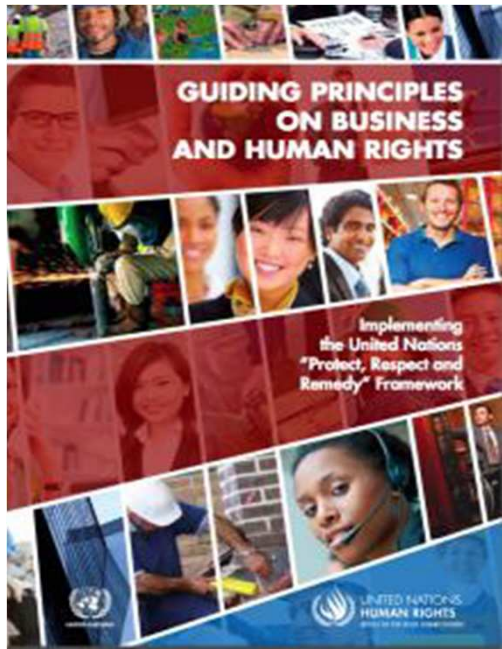
IMPLICATIONS FOR BUSINESS

If an Impact is...	Then the Business should...
CAUSED by a business...	<ul style="list-style-type: none">• Remediate the harm• Take steps to prevent its continuation or recurrence
CONTRIBUTED to by a business...	<ul style="list-style-type: none">• Contribute to remediation of the harm• Take steps to prevent its continuation or recurrence• Seek to use its leverage to encourage others who contributed to the harm to do the same
LINKED to a business's operations, products or services...	<ul style="list-style-type: none">• No responsibility to remediate• Forward-looking responsibility to seek to use its leverage with its business relationships to prevent the impact from continuing or recurring

DIFFERENT FORMS OF REMEDY

- Providing remedy for a harm can take a number of forms: apologies, restitution, rehabilitation, financial or non-financial compensation, as well as punitive sanctions.
- GPs identify obstacles to judicial remedy and urge states to address them.
- Also promote alternative dispute resolution mechanisms; GP31 spells out legitimacy and effectiveness criteria;
- Can be state-based (e.g., domestic labor tribunals; OECD NCP system); GPs stipulate that cooperation by companies is part of their responsibility to respect;
- Can also be company-based;
- Effective company grievance mechanisms can:
 - Address certain issues early and directly; identify and redress systemic issues;
 - Serve as a significant complement to whatever legal regime evolves, just as they do at the domestic level in even the most robust legal systems.

IMPLEMENTATION THROUGH DISTRIBUTED NETWORKS



OECD Guidelines
for Multinational Enterprises



ONE PLATFORM, MANY APPS

Governments

- Section 1502 Dodd-Frank legislation;
- Reporting requirements for US investors in Burma;
- New EU non-financial reporting requirements and conflict minerals regulations;
- China adopting parallel standards for overseas investments (e.g., mining); promoting ISO26000;
- National Action Plans (EU, US, several developing countries including Colombia);
- New Canadian CSR policy for mining sector.

Business

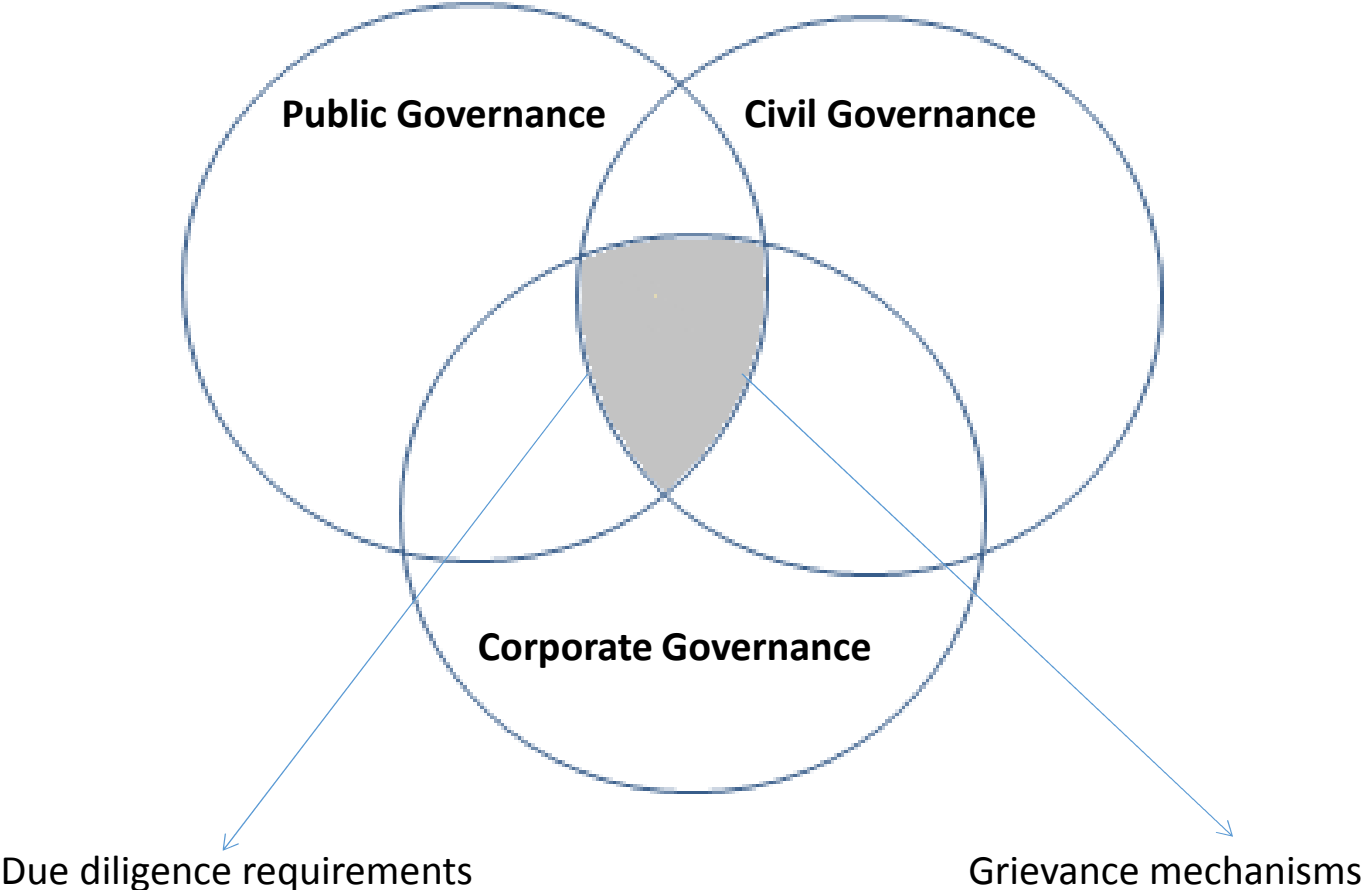
- Endorsement by international business associations (IOE, ICC, ICMM, IPIECA);
- Scores of companies aligning policies and practices with GPs.

Other Stakeholders

- Trade unions, NGOs, SRIs use for advocacy purposes.
- IBA Guidance for in-house and external counsel.

The Guiding Principles are becoming embedded in the regulatory ecosystem for business and human rights, and their place in this ecosystem has begun to expand from the international to the national and local spheres.

EARLIEST UPTAKE



ANALYTICAL REPRISE

- 1. The GPs draw on the fact and the dynamics of polycentric governance;**
 - 2. Avoid voluntary/mandatory dichotomy in favor of “smart mix” of mutually reinforcing measures (interaction among three pillars);**
 - 3. Engage new communities of practice (corporate lawyers were critical);**
 - 4. Aimed for “thick consensus” rather than “thin consent” (socially legitimated, politically authoritative, soft-law standard);**
 - 5. Implementation through distributed networks; cascading effects.**
- The result? Significant uptake; new requirements and tools; partial legalization;**
 - “Not the end, but the end of the beginning.”**

III. INTERNATIONAL LEGALIZATION

United Nations

A/HRC/RES/26/9



General Assembly

Distr.: General
14 July 2014

Original: English

Human Rights Council

Twenty-sixth session

Agenda item 3

Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Resolution adopted by the Human Rights Council

**26/9 Elaboration of an international legally binding instrument on
transnational corporations and other business enterprises with respect
to human rights**

HRC Resolution 26/9:

- Main proponents are Ecuador and South Africa, plus Bolivia, Cuba and Venezuela; only plurality of votes in HRC; supported by “treaty alliance” of some 600 NGOs; U.S. and EU announce non-participation.
- Seeks to establish an overarching international legal framework governing multinationals under international human rights law through a single treaty instrument;
- Excludes national firms, so the international brands and retailers that sourced apparel products from local suppliers in Rana Plaza would have been covered by the treaty, but not the locally owned factories in which some 1,200 workers were killed.
- The issues are too complex and interests too divergent for effective governance through single comprehensive international treaty instrument;
- Fragmentation of international law (“regime collisions”);
- Global geopolitical changes increase centrifugal forces (by 2025 half of the GF500 companies will be in “emerging market” countries);
- Would have to be pitched at so high a level of generality as to be of no use to real people in real places.
- Unless the parameters are fundamentally altered, most likely outcome is: (1) replay of 1970s Code of Conduct negotiations; or (2) equivalent to Migrant Workers Convention (not ratified by single receiving country).
- Affected individuals and communities deserve better.

THE PRECISION TOOL ALTERNATIVE

- Target specific governance gaps.
- I have advocated a focus on “gross abuses” as an early target:
 - The severity of the abuses involved;
 - The underlying prohibitions in relation to natural persons already enjoy widespread consensus among states yet there remains considerable confusion about how they should be implemented in practice when it comes to legal persons (think post-Kiobel Alien Tort Statute);
 - The knock-on effects for other aspects of the business and human rights agenda would be considerable (as was the case with the ATS).
- Other possibilities exist (Professor Erika George, for example, proposes global transparency regimes).
- What’s important is to get away the illusion that some overarching, all-inclusive treaty is (1) feasible and (2) would make much of a difference where it matters most: in the daily lives of people.
- In the meantime, widen and deepen implementation of GPs to reduce the incidence of corporate-related human rights harm;
- Keep pushing for meaningful “due regard to impact on society” in corporate law;
- Provide adequate “policy space” for *bona fide* social and environmental improvements in IIAs.

TAKE-AWAYS

- “Principled pragmatism” has generated step-by-step progress:
 - From “cognitive and institutional expansion”
 - To “soft-law standard setting”
 - To potential “further international legalization”
- We still have a long way to go to set business/society relations right;
- What can be accomplished at the international level is tightly constrained by self-regarding states and pressures of global markets;
- But in the area of business and human rights we have also covered a good distance in the past 15 years;
- By drawing lessons from what works and what doesn’t we can and must do better in the next 15.
- To all of the students here tonight, I’m counting on you!