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The Paradox of Corporate Globalization: Disembedding and Reembedding Governing Norms

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**THE PARADOX OF CORPORATE GLOBALIZATION:
DISEMBEDDING AND REEMBEDDING
GOVERNING NORMS***

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“You can’t go back and change the beginning, but
you can start where you are and change the ending.”
– Attributed to C.S. Lewis

The political economy of the post-World War II West was shaped by normative understandings and institutional arrangements that scholars describe as embedded liberalism. It coupled governments’ commitments to progressively liberalize trade as well as establish free and stable exchange rates with maintaining adequate domestic policy space, including capital controls, to provide social investments and safety nets, and to buffer economically and socially dislocating effects of liberalization. (Ruggie, 1982). Although largely an Anglo-American design it also captured core interests and concerns of European social democracies and social market economies and formed the basis of the General Agreement on Tariffs and Trade (GATT) and the Articles of Agreement of the International Monetary Fund (IMF). In the industrialized world, this grand bargain led to one of the longest and most equitable periods of economic expansion in history.

When I published the embedded liberalism paper the threat of a “new protectionism” was all the rage among American political economists: the belief that government policies to support domestic stability was eroding their commitments to international economic openness (see, for example, Krauss, 1978). My article concluded on the opposite note: “the foremost force for discontinuity at present is not ‘new protectionism’ in money and trade but the resurgent ethos of liberal capitalism” (Ruggie, 1982, 413). That ethos was soon dubbed neoliberalism.

The precise meaning, scope and provenance of the term neoliberalism remain contested (Braithwaite, 2008; Crouch, 2011; Slobodian, 2018). But in the context of the transformation of Anglo-American capitalism beginning in the mid-to-late 1970s it is generally meant to include weakening regulatory, redistributive and anti-trust policies; outsourcing government functions to

private contractors; offshoring the production of manufactured products and some services; and the ascendance of finance and the financialization of the real economy. Capital mobility and multinational enterprises became central international features of the new neoliberal order. These changes were accompanied by a radical shift in the prevailing conception of the publicly listed corporation: from a “social entity” to a “private property” conception, as William Allen, former Chancellor of the Delaware Court of Chancery, has described it (1992). Maximizing shareholder value, or shareholder primacy, was first popularized by Milton Friedman (1970); it was soon considered to be the overriding if not sole purpose of the corporation by regulatory authorities, business leaders and mainstream investors – the latter in effect becoming the doctrine’s “market enforcers” (Austin, 2019). It also achieved near epistemic closure in business schools and academic corporate law programs. Relatively few other countries embraced all these features outright, but they were internationalized through conditionalities imposed by the global financial institutions, World Trade Organization (WTO) rules, bilateral/regional free trade agreements, and the new and powerful global market forces and actors.

Now fast forward to August 2019. In the heartland of neoliberal capitalism, the U.S. Business Roundtable (BR) issued a new mission statement on “the purpose of the corporation.” The BR comprises the CEOs of some 200 of America’s largest corporations. For more than two decades, each periodic BR update of corporate governance guidelines had endorsed maximizing shareholder value. In contrast, the new mission statement commits signatory CEOs “to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders” (BR, 2019). Later that year, the World Economic Forum announced that “stakeholder capitalism” would be the theme of its upcoming annual Davos confab. Larry Fink, CEO of BlackRock, the world’s largest asset manager, addressed his annual letter to CEOs to the

same theme: “The importance of serving stakeholders and embracing purpose is becoming increasingly central to the way that companies understand their role in society” (Fink, 2019).¹ BlackRock, he added, would begin to consider sustainability risks, largely related to climate change, in its portfolio construction.

There are reasons to view these moves through skeptical lenses.² Undoubtedly the rise of populism on the American political left played a role. Indeed, the *Wall Street Journal* (2019) savaged the BR statement in an editorial entitled “King Warren of the Roundtable,” suggesting that the corporate knights were bowing to Senator Elizabeth Warren, then a Democratic contender in the U.S. presidential race known to be tough on Wall Street. Two Harvard corporate law experts dismissed the statement as a meaningless PR exercise (Bebchuk & Tallarita, 2020). Anand Giridharadas, author of *Winners Take All: The Elite Charade of Changing the World*, saw “well-meaning activities that are virtuous side hustles while key activities of their business are relatively undisturbed” (quoted in Murray, 2019, 12).

Nevertheless, whatever immediate rationales might be in play, given how consequential corporate globalization and shareholder primacy have been to weakening the provision of public goods, social cohesion and broadly shared prosperity that were the aim of the “embedded” part of the postwar compromise, any discussion by corporate leaders of a possible shift toward a more social entity conception of the corporation deserves scrutiny. More than that, behind the BR statement, Davos, and a possibly converted asset manager there is a larger story: for more than two decades, social actors including civil society, workers organizations, elements of the United Nations, some governments, corporate “intrapreneurs,” and socially responsible investors have constructed an ecosystem of norms and policies that constitutes the backstory of the current “re-purposing” debate. This chapter addresses both developments: the “disembedding” of national

capitalism from the postwar normative understandings and institutional arrangements, resulting in the ascendance of corporate globalization and shareholder primacy; and transnational efforts to reembed the corporation in a normative understanding of itself as a social entity, not merely a piece of private property.

The discussion is divided into five parts. To anchor it, the first draws a baseline of corporate globalization and traces key policy measures that created its enabling environment.³ The second identifies the paradox of corporate globalization: at the very height of the recent globalization boom multinationals discovered that their legal license to operate, provided by states, did not in itself translate into a social license. Firms responded by adopting enterprise-wide corporate social responsibility (CSR) as a management tool. Although quite superficial in its early iterations, in retrospect this marked the first step toward systematically engaging stakeholders, if only in the attempt to placate them. The following two sections recap the institutional strategies and cascading effects of two global initiatives intended to narrow the gap between legal and social license: the UN Global Compact, the world's largest corporate engagement platform, and the UN Guiding Principles on Business and Human Rights, the global standard in this space. Both reflect, and contributed to, the further normative evolution through which the corporation came to be viewed – in the end by many firms themselves. The conclusion returns to the current corporate re-purposing debate and reflects on what, if any, contributions it is making to rebalancing market and society, and to people and planet challenges humanity faces today.

I. CORPORATE GLOBALIZATION

No international rules or institutions were established in the area of foreign direct investment (FDI) as part of the postwar architecture. Indeed, the distinction between portfolio

investment and FDI was not rigorously conceptualized until Stephen Hymer's seminal MIT doctoral dissertation (Hymer, 1960). Earlier, they had simply been lumped together as capital movements. Hymer presciently conceived of FDI as the platform it would become for international industrial organization, commonly known today as corporate globalization.

What is it?

Convergence around the multinational institutional form for conducting international economic transactions is near-universal. In 1970, there were some 7,000 multinationals; by 2008 they numbered 82,000 (Cool Geography, n.d.; UNCTAD, 2010, xviii). Many operate in more countries and territories than there are UN member states. As a result of complex value chains, by the early 2010s roughly 80% of global trade (in terms of gross exports) was linked to multinationals' production networks (UNCTAD, 2013, 135); trade in intermediate products was greater than all other non-oil traded goods combined (ILO, 2016, 18). Furthermore, one out of seven jobs in the world was estimated to be global value chain related, not counting "informal" and "non-standard" forms of work (ILO, 2015). Multinationals based in emerging market countries have captured ever larger shares of the Global Fortune 500, with China in the lead.

The various entities in the extended enterprise can be linked through a variety of legal forms: subsidiaries and affiliates of the same corporate parent, joint ventures and different types of non-equity relationships (contract manufacturing, licensing, franchising). They can be publicly listed, privately held, or state-owned. And they cut across virtually all sectors of the economy. The rapid expansion of multinationals has declined in recent years, due to investment uncertainties following the 2008 financial crisis; domestic push-back by people left behind; the Trumpian "trade wars" coupled with growing national security restrictions on FDI, aimed at China in particular; and some erosion of competitive advantage vis-à-vis national firms. But

attempts to undo global value chains and “re-shoring” production to the home country are proving to be both costly and ineffective (Blanchard, 2019; Hufford & Tita, 2019; Davies, 2019). Even before the coronavirus outbreak in China, Western firms had begun to diversify their supplier bases to other Asian countries with lower labor costs.

Enabling Environment

No country or company is known to have set out with this model of corporate globalization as its long-term vision and strategic plan. The enabling environment for it was constructed over time by governments. Well-positioned corporations advocated for or simply took advantage of successive steps. The cumulative effect helped create the functional and juridical space for the ascendance of corporate globalization.

During the decade of the 1990s, 94% of all national legislation addressed to the subject of FDI, worldwide, liberalized rules to encourage it (UNCTAD, 2002, 7). But the process began long before. The invention of the Euromarket, an important precursor, dates to the 1950s. As a result of severe financial constraints following the 1956 Suez debacle, London merchant bankers looked for new sources of funds to finance their foreign trade transactions. They found them in dollar deposits held in London by non-resident individuals and entities, including the Soviet Union. Because the transactions involved a foreign currency and foreign parties, they were argued to fall beyond the scope of UK regulations, including capital controls. But by the same reasoning, because they took place in the UK they also fell beyond the regulatory scope of any other state. Two U.S. administrations (Kennedy and Johnson) unsuccessfully opposed the move in the attempt to stem the outflow of the dollar, but the U.S. ultimately gave in and established similar arrangements. Others followed. Known as “international banking facilities,” they

“granted financial market operators [and their corporate clients] more freedom than had been allowed in the preceding half-century” (Helleiner, 1994, 166).

Apart from its direct effects, this case is important for two reasons. First, it served as a precedent in the financial industry’s constant push for international capital mobility, which became the new orthodoxy by the mid-1980s (Abdelal, 2007). Once fully unleashed, the growth and velocity of capital movements were nails in the coffin of the postwar monetary order and hot money was free to surf again. More broadly, the Euromarket helped imprint the ontological and jurisdictional myth that certain “on-shore” transactions took place “off-shore,” which became the premise for a variety of corporate globalization platforms, ranging from export processing zones to tax havens.

In the 1960s, establishing subsidiaries within the common external tariff of what was then the European Economic Community was a major stimulus for American firms investing in Europe. Starting in 1971, a U.S. government agency, the Overseas Private Investment Corporation, began to provide risk insurance and loan guarantees to support U.S. investments in developing countries. Other capital exporting countries and the International Finance Corporation, the World Bank’s private sector arm, did the same. As intended, successive rounds of GATT negotiations expanded international commerce, while also expanding opportunities for multinationals. The Uruguay Round (1986-1994) went further. The scope of “tradeables” was significantly widened to include services. Domestic policy space was constricted by agreements on what constitutes appropriate intellectual property laws as well as sanitary and phytosanitary measures, together with the requirement that any product standards a government introduced be “necessary” and, with exceptions, that they should be based on international standards. Given that few such public international standards existed, this last requirement vastly expanded the

role of private international standard setting bodies, which typically favor industry interests because industry has the requisite technical and resource capacity to shape outcomes (Büthe & Mattli, 2011). The Uruguay Round also established the World Trade Organization, including a rules-based dispute settlement mechanism that provides third-party adjudication of disputes between states – which are often lobbied by industry to file such disputes. The original GATT system had been based on a looser set of norms, interpreted by diplomats who were sensitive to the complexities of the trade-offs in reconciling liberalization with domestic concerns. In contrast, WTO judges were bound more strictly by black letter law (Moon & Toohey, 2018). Many of these provisions were also included in regional and bilateral free trade agreements.

As noted earlier, no rules governing foreign direct investment were instituted as part of the postwar regimes. And all subsequent initiatives to establish a multilateral agreement, whether to regulate multinationals or protect their interests, failed. In the end, capital exporting countries negotiated bilateral investment treaties (BITs) on an individual country basis. BITs require the state receiving foreign investment (host state) to provide enforceable guarantees to foreign investors from the home state. More than 3,000 BITs are in place today, after an exponential increase in the 1990s. Expropriation without adequate compensation was the original concern, but it and related treaty terms became increasingly elastic over time to include so-called regulatory takings, and ultimately any policies, including environmental, health and labor standards, that a three-person arbitration panel might construe as being “tantamount to expropriation,” with the rules drawn from commercial arbitration (Van Harten, 2005; Muchlinski, 2007; Subedi, 2008). The deeper “social purpose” of BITs – so different from embedded liberalism – was explained by José Alvarez, a U.S. BIT negotiator in the Reagan administration and a distinguished professor of international law: BITs were intended “to

entrench the underlying private law regime necessary to support market transactions – and enable international law to become a force to dismantle [domestic] public law regulations inimical to the market” (Alvarez, 2010, 5-6). BITs generally are in force for fifteen years and then get renegotiated or dropped. Titi (2018) shows that recent generations of BITs provide greater policy space to host governments, no doubt because OECD countries, including the U.S., have ended up on the respondent side of BIT claims with greater frequency.

Finally, the opportunity for states to “commercialize their sovereignty” (Palan, 2009, 56) by becoming tax havens created a significant platform for corporate globalization. Zucman (2018) estimates that in the immediate postwar years there was a mere handful, led by Switzerland and Luxembourg. A study published in 2010 reported 60, with more on the way (Palan, Murphy & Chavagneux, 2010). The largest increment came from various remnants of the British Empire, led by the Cayman Islands. Tax havens offer low to zero taxation to non-residents, they provide strict secrecy, and they have minimal requirements for incorporation. Indeed, most are merely “booking centers.” That is, actual transactions take place elsewhere but are then registered in these jurisdictions, where the parties typically have no physical presence beyond a name plate on the door of a local law firm. “About 50% of all international bank lending and 30% of the world’s stock of Foreign Direct Investment are registered in these jurisdictions” (Ibid, 5). Tax havens greatly augment the ability of multinationals to engage in intra-firm or related party transfer pricing, whether of goods, services, or loans. The ownership of intellectual property frequently is registered in such facilities, its value priced by the multinational itself. So too are foreign profits generated by, say, a U.S. company, which would have to pay taxes if the profits were repatriated. Zucman estimates that more than half of U.S.

companies' foreign profits, which account for a third of their total profits, are "earned" in six low- or zero-tax countries (2018, 195).

The consequences of tax havens coupled with overall corporate tax competition among governments are substantial. Former U.S. Treasury Secretary Lawrence Summers, a leading architect of the recent era of globalization, subsequently concluded: "It is a significant problem for the revenue capacity of states and an immense problem for their capacity to maintain progressive taxation" (quoted in Porter, 2014). In short, tax havens have facilitated and augmented the scale, scope and legal optimization of multinationals' operations. They thereby also drain states' revenue bases, and impose heavier tax burdens on smaller businesses, individuals and families. Domestic safety nets and other public expenditures in home countries suffer as a result, contributing to economic inequality and social resentment.

Principals & Agents

At the very time multinationals were expanding into virtually every jurisdiction across the world, in the U.S. the construct of the corporation underwent a foundational change. From around the time of the New Deal, what Allen (1992) calls the social entity conception of the firm had been the dominant form. Lemann goes further, suggesting that the large U.S. corporation in the postwar era "was the American welfare state" for its millions of employees and their families by providing well-paying life-time jobs, health insurance, as well as retirement and other such benefits (2019, 67).

By the 1980s, however, the private property model resurged.⁴ Already in 1970, Milton Friedman published a widely read article in the *New York Times Magazine*, "The Social Responsibility of Business is to Increase Its Profits." For Friedman the idea that corporations should have a role in addressing larger social issues represented a step on the road to socialism.

Corporate directors and executives, he maintained, are agents intended to serve the interests of their principals, shareholders, which he (mistakenly) considered to be the owners of the listed corporation. If agents wished to spend money on worthy causes, they were free to do so using their own. Friedman's popular writings were intended to promote an ideological agenda. Not so for finance theorists Michael Jensen and William Meckling (1976). In a technical academic paper that has more than 85,000 citations, they took up in formal terms what became known as the "agency problem." Drawing among other sources on the theory of property rights, it addressed the means by which principals can most effectively minimize "agency costs" – literally the monitoring costs and incentives to agents incurred by principals, and in some situations the bonding costs of agents to principals. In the corporate context, their solution was to structure contracts in such a way that agents were led to behave more like principals by bearing financial risks of their own decisions. Maximizing shareholder value emerged from this mix, and by 2001 it was proclaimed as "The End of History for Corporate Law" (Hausman & Kraakman, 2001).

But what accounts for its ultimate dominance, not in theory but practice? Serious stagflation and growing competition stemming from globalization provide contextual explanations. Lynn Stout, a vocal legal critic of shareholder primacy, also suggests several more specific factors (2012, 19-21): it gave the public and the media easy-to-understand soundbites to account for numerous corporate scandals in the 1980s (framed as out-of-control C-Suites); it was employed to justify the junk bond-fueled takeover frenzy at that time; it provided companies and reformers with a simple metric of corporate performance; it prescribed a solution that fit well with the broader influence of "Chicago School" economists and the conservative Law and Economics movement; and, not least, self-interest. The last because one of the main means the

doctrine's proponents advocated reducing agency costs was linking CEO compensation to stock performance – which in practice often came to mean short-term performance. But earnings reports can be easily manipulated. Buying back shares can boost their price. So too can cost-cutting. In turn, that can be achieved by reducing R&D expenditures, capital investments, and offshoring jobs into remote and opaque supply chains. Moreover, through offshoring, corporations in effect decoupled themselves from large parts of their workforce at both ends of their global value chains.

Plus ça change...

Amid these transformative changes one foundational factor barely budged: the legal recognition of the multinational itself. In a masterful understatement, Larry Catá Backer stated: “From a public law perspective, the framework for the regulation of multinational enterprises can be viewed most charitably as in flux” (2007-2008, 507). Therein lies the keystone of the modern multinational. The integrated “group” of firms that constitutes the multinational as an economic entity is structured *using* the corporate form, but legally is *not* itself a corporation (Robé, 2009). Individual states have authority over whatever separate entities of a multinational are incorporated within their jurisdiction. Only with rare exceptions, such as fraud or the direct involvement by the corporate parent in severe harm by a subsidiary/affiliate, do they have authority over the entire enterprise.⁵

The constitution of global governance has transformed dramatically in the past half century. At the interstate level there is growing fragmentation, making traditional forms of international public governance increasingly difficult: “The 1990s may represent the apex of formal and legalized international law and organization... The turn of the century, in contrast, represents a breaking point” (Pauwelyn, Wessel & Wouters, 2014). At the same time,

multinationals have become part of the global governance system (Ruggie, 2018). They embody an institutional form that is not derivative of sovereignty, like the United Nations or the WTO – or, for that matter, the East India Company of yesteryear. Their institutional foundation lies in a specific structure of property rights, accepted by states in order to participate in and benefit from the international economic order. Nor are multinationals as vulnerable to states as civil society, due to their financial resources, institutional capacities and locational options. Moreover, within bounds they govern themselves – which is not as trite as it may sound when we consider their scale and scope; the number of countries in which many operate; the range of activities they encompass; the private transnational legal orders they have generated; and their capacity to affect workplace conditions, the welfare of communities, and even national economic prospects. Ironically (although Marxists would claim there is no irony in this), corporate globalization, a product of Anglo-American capitalism, significantly accelerated the rise of China together with its geopolitical consequences.

There is no going back to change the beginning. No silver bullet can reverse such a deep and wide systemic transformation. The only way to try and change the end is by identifying strategic points of intervention in what exists and to build on what seems to work. At the very height of the corporate globalization boom, one such point crystallized.

II. STARTING WHERE YOU ARE

Nike was among the first U.S. brands to shift its production overseas. Nike was also among the first to trigger a multi-media, multi-country, and multi-year campaign in the 1990s, protesting worker abuses in its Southeast Asian contractor factories. Local unions began the protests; ultimately, they included U.S. unions, college students sporting the Nike swoosh, and the media in the U.S., Canada, and Europe. The campaign proved so effective that Phil Knight,

founder and CEO, confessed in a 1998 speech at the National Press Club: “The Nike product has become synonymous with slave wages, forced overtime and arbitrary abuse. I truly believe that the American consumer does not want to buy products made in abusive conditions” (quoted in Cushman, 1998). Nike went on to become a leader in developing “corporate social responsibility” practices as a management tool (Zadek, 2004).

At roughly the same time, in the Ogoni territory of Nigeria massive demonstrations were held against oil giant Shell, triggered by the company’s environmental practices degrading the air, farmland and fish-rich streams, coupled with Shell’s alleged complicity with Nigeria’s military dictatorship, which routinely used excessive force against the protesters. After a sham trial for inciting violence, the government executed nine Ogoni leaders while Shell stood meekly by, stating: “A commercial enterprise like Shell cannot and must never interfere with the legal process of any sovereign state” (quoted in Manby, 1999). Sir Mark Moody-Stuart, who went on to become Shell’s non-executive chair, recounts in his memoirs (2014) how the firm was shocked by the negative international reaction against this position. Shell went on to adopt new “business principles” and, like Nike, developed extensive CSR practices.

In short, Nike and Shell discovered that having a legal license to operate in a country, granted by the government, was insufficient to ensure their social license to operate: “tacit consent on the part of society toward the activities of the business” (Demuijnck & Fasterling, 2016). This legitimization challenge was local and transnational at the same time. CSR was the toolbox they developed in response. A form of business self-regulation, CSR witnessed a “phenomenal rise to prominence in the 1990s and 2000s,” both in practice and “almost unique[ly] in the pantheon of ideas in the management literature” (Crane, et al., 2008, 3). CSR was neoliberalism’s answer to the social and environmental externalities it was enabling.

During this rise to prominence, global CSR policies and practices exhibited several common features (Ruggie, 2007; Bondy, Moon & Matten, 2012). They originated in Western Europe and North America. Initially, they were most likely to be adopted by brand-sensitive or community-facing businesses like Nike and Shell, although mimetic and competitive dynamics soon emerged. The standards they set were largely self-defined and often reflected perceived preferences of home markets or even market segments. For example, premium brands like Nike adopted more explicit commitments and more robust practices than value brands like Walmart. Within firms CSR typically was siloed off as a cost center, not integrated into core business functions. Some industry-wide initiatives were established, for example Responsible Care involving large chemical companies following the massive leak of methyl isocyanate gas at a Union Carbide subsidiary in Bhopal India in 1984, which remains the deadliest industrial disaster in modern history. Numerous multi-stakeholder initiatives as well as certification schemes date to the 1990s and early 2000s, but none reached significant scale.

Despite these weaknesses, however, instituting CSR was a first step in the evolution away from a strictly private property conception of the firm, guided by shareholder primacy. The administrations of Bill Clinton and Tony Blair were strong supporters of CSR, consistent with their “third way” governance philosophy. CSR has evolved substantially over time, and every relevant type of social actor has contributed to its evolution. The following section recaps the main strategies and roles of the UN Global Compact, an early mover in this space.

III. GLOBAL COMPACT

In January 1999, then UN Secretary-General Kofi Annan challenged the assembled business leaders in Davos to join him in initiating “a global compact of shared values and principles.”⁶ Globalization is fragile, he said. “The spread of markets outpaces the ability of

societies and their political systems to adjust to them, let alone to guide the course they take.

History teaches us that such an imbalance between the economic, social and political realms can never be sustained for very long.” Don’t wait for every country to adopt laws, he continued; act now, in your own interest. He went on to say:

We have to choose between a global market driven only by calculations of short-term profit, and one which has a human face. Between a world which condemns a quarter of the human race to starvation and squalor, and one which offers everyone at least a chance of prosperity, in a healthy environment. Between a selfish free-for-all in which we ignore the fate of the losers, and a future in which the strong and successful accept their responsibilities, showing global vision and leadership.

He concluded: “I am sure you will make the right choice.”

The Global Compact (GC) went live in June 2000. Today, it is the largest international corporate engagement platform, with some 10,000 business participants from 160 countries, including every major emerging market economy (despite “delisting” 4,000 over the years for not submitting annual progress reports). Upon its launch, the *Christian Science Monitor* editorialized that it was the UN’s “the most creative reinvention to be seen yet” (CSM, 2000). A year later the Nobel Peace Prize was awarded jointly to Annan and the UN as a whole for their role in “international mobilization aimed at meeting the world’s economic, social and environmental challenges,” and to Annan specifically for “bringing new life to the organization” (Norwegian Nobel Committee, 2001).

There is a substantial academic literature on the GC. But much of it is framed around the premise that it was meant to be a regulatory instrument (Rasche, 2009). It was not.⁷ Initially, it had no intergovernmental mandate and no resources apart from Annan’s “charismatic authority,”

in Weberian terms – or, as U.S. Ambassador Richard Holbrooke described him, “the rock star of international diplomacy.” Below, I highlight four key roles the GC has performed in advancing the move toward a social entity conception of the corporation.

Hypernorms

As noted, CSR spread rapidly in the 1990s, especially among large Western firms. They discovered the need for a social license to operate not only locally but also, as illustrated by the Nike and Shell campaigns, in the global sphere. The GC aimed to more closely align their self-regulatory standards and practices with broadly accepted international norms, and to do so at scale. In essence, the GC promoted a set of hypernorms: norms that are sufficiently fundamental and universally acknowledged that they can serve as a basis for establishing, guiding and evaluating lower-order norms (Donaldson & Dunfee, 1999).

This had two components. The first was to frame CSR policies and practices in terms of ten principles drawn from the Universal Declaration of Human Rights, the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work, the 1992 Rio Earth Summit Declaration, and the UN Convention against Corruption, all of which were widely approved by governments. As Annan put it at Davos: “You can use these universal values as the cement binding together your global corporations, since they are values people all over the world will recognize as their own.” The second was promoting business involvement, individually and in partnership with other social actors, in meeting business-relevant UN objectives, such as the Millennium Development Goals and their successor, the Sustainable Development Goals.⁸

There is little systematic evidence of why firms chose to be early participants; correlational studies are weak and superficial. My own observations are that Western firms concerned about social license issues sought some authoritative framework for their CSR

policies – but one that did *not* involve direct regulation. Some also may have perceived first mover advantages. Two considerations appear to have been key drivers for emerging economy-based firms. The first was signaling to global markets that they were “safe” as suppliers or joint venture partners. The other was to help induce greater dynamism into the typically highly bureaucratized business/government nexus in their own countries. China permitted even state-owned enterprises to participate; the CEO of Sinopec served a term as Vice-Chair of the GC board (which the Secretary-General chairs). Infosys was the first Indian company to sign up. Its website states: “In our journey of over 37 years, we have catalyzed some of the major changes that have led to India's emergence as the global destination for software services.”

Intrapreneurs

To participate in the GC, CEOs are required to submit a public commitment letter to the Secretary-General. Once in place, the ongoing role of the GC is to support and expand CSR communities of practice within, among and around firms, framed by the ten principles and broader UN policy aims. The GC does so through in-person and online learning forums. Participants address common challenges, share experiences, and identify best practices on the broad array of CSR issues, ultimately reconceiving CSR itself in terms of social and environmental sustainability. Consulting firms, seeing a business opportunity, engaged early.

Again, no systematic data exists measuring the impact on practice. But for the Compact's fifteenth anniversary a Norwegian consultancy conducted a survey of business participants. One question asked was in which areas the Compact had played an important role for them. 60% of respondents agreed or strongly agreed with “Motivating our company to advance broader UN goals and issues (e.g., poverty, health, education);” 65% did so for “Guiding our corporate sustainability reporting;” 66% for “Driving our implementation of sustainability policies and

practices;” and 48% for “Shaping our company’s vision” (DNV-GL, 2015, 15). One never knows how accurately such surveys reflect reality, but these responses do suggest movement toward a social entity conception of the firm.

Local Networks

From the outset the GC promoted the formation of national networks.⁹ Not surprisingly a Nordic Network was the first, but India and Brazil were not far behind. Some 60 such networks exist, although not all are equally active. European companies are over-represented, U.S. firms under-represented. More than half are in non-OECD countries. All are self-funded, and several have established themselves as legal entities. National networks serve as a link between the global and the local, facilitating the transmission of ideas and experiences in both directions. They provide peer learning opportunities, and periodically convene at workshops for all national networks. They also engage in domestic policy dialogues and broadly contribute to political support for the GC and its mission.

Incubator

The GC has used its UN perch to develop and spin off initiatives that were not yet commonly on the mainstream CSR agenda. For example, Caring for Climate, launched in 2007, was jointly convened with the UN Framework Convention on Climate Change and the UN Environment Program; CEOs of some 370 firms committed to disclosing carbon emissions and reduction targets. The CEO Water Mandate, also established in 2007 with comparable goals, was spun off to a nonprofit.

The most consequential such initiative involved investors. The term ESG investing was introduced in a GC report, “Who Cares Wins: Connecting Financial Markets to a Changing World,” prepared for Annan’s launch of the Principles for Responsible Investment (PRI) at the

New York Stock Exchange in 2006. PRI became an independent non-profit entity. Signatories (asset owners, managers, service providers) commit to supporting ESG investing, being active shareholders, and seeking ESG disclosures from companies in which they invest. Today PRI's 2,800 signatories collectively manage \$80 trillion.

ESG strategies combine metrics of firms' environmental, social, and corporate governance practices with financial analytics in portfolio construction. By the end of 2018, ESG investing accounted for one-quarter of all assets under management globally. For several years the increase was incremental. It turned up like a hockey stick after the 2008 financial crisis. In the U.S., it increased 38% between 2016 and 2018, in what *Barron's*, the business magazine, called the "Trump Bump" (Fonda, 2018). The 2019 net inflow almost quadrupled over the prior year (Flood, 2020). By 2020, shares in companies with the highest ESG ratings were trading at a 30% premium over the lowest performers (Temple-West, 2020a); as of mid-March 2020, ESG funds were more resilient than others in the face of unprecedented market volatility (Temple-West, 2020b). To date, ESG investing has heavily been driven by institutional investors, such as large pension funds. A retail boost is expected from millennials (born 1981-1996), who are on track to receive a \$30 trillion wealth transfer from their baby boomer parents and who, according to consultancy reports, have strong preferences for ESG investing (Ruggie & Middleton, 2019).¹⁰

In sum, through the lens of the Global Compact we can see the trajectory of real-economy firms and capital market actors gradually assessing and addressing broader social and environmental issues. The GC's own contributions are four-fold: it was an early mover; it promoted international public norms as focal points for the practice and contestation around business self-regulation; it created a global learning forum for practitioners; and it operates at

global and national levels. Also, as a Secretary-General's initiative funded primarily by voluntary contributions from governments, it is not as constrained by intergovernmental politics as other UN entities. Over time the "organizational ecology" (Abbott, Green & Keohane, 2016) in this space has become far more densely populated, diverse and specialized. Thus, while the GC retains considerable convening power it now serves primarily as a knowledge aggregator, and it promotes business support for the Sustainable Development Goals.

IV. GUIDING PRINCIPLES ON BUSINESS & HUMAN RIGHTS

A very different UN-based initiative also entered the fray in 1999: the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights." The Norms originated in an independent subsidiary body of the then UN Commission on Human Rights (now Council). Aiming to become the basis for a binding international treaty, the Norms' most far-reaching features were to impose human rights obligations on multinationals directly under international human rights law; and within enterprises' "sphere of influence," to attribute to them essentially the same obligations states have under human rights treaties they have ratified: "to promote, secure the fulfillment of, respect, ensure respect of and protect human rights." Advocacy groups were strongly supportive, but the Norms had few if any champions among governments and were vehemently opposed by international business. When the draft text was presented to the Commission for approval in 2004 it reacted coolly: thanking the Sub-Commission for its "work" but not the product; granting that the text contained "useful elements and ideas;" but adding that the Commission had not requested it, that the text had no legal standing, and that no monitoring of corporate conduct be undertaken (UN, 2004). Instead, in 2005 it adopted a resolution asking the Secretary-General to

appoint a Special Representative (SRSG) to “identify and clarify” existing standards and best practices, and to make recommendations. Annan appointed me to the post.¹¹

When it came time to deliver my final recommendations in 2011, I made only one: that the Council “endorse” the 31 Guiding Principles (UNGPs), each with Commentary, that I had developed over the course of the mandate.¹² The Council did so unanimously (UN, 2011). This marked the first time the UN human rights machinery had issued any authoritative guidance for states and business enterprises on their respective obligations regarding business and human rights; it also marked the first time it “endorsed” a normative text on any subject that governments did not negotiate themselves.¹³ The endorsement elevated the UNGPs beyond pure voluntarism, into the domain of “soft law.”¹⁴

Below, I summarize three core features in the development of the UNGPs and note some of the cascading effects the UNGPs have generated.¹⁵

Multiperspectival Framing

The UNGPs are based on the observation that corporate conduct at the global level is shaped by three distinct governance systems. The first is the system of public governance and law, domestic and international. The second is civil governance, involving stakeholders adversely affected by business enterprises and those acting in their behalf, employing various social compliance mechanisms such as campaigns, lawsuits, and engagement with firms. The third is corporate governance, which reflects elements of the other two (unevenly, to be sure). The challenge was to formulate a normative framework within which the three governance systems become more closely aligned in relation to business and human rights and begin to play mutually reinforcing roles from which significant cumulative change could emerge.

To foster that alignment, the UNGPs draw on the different discourses and rationales that reflect the different roles the three governance systems play in shaping corporate conduct. For states the emphasis is on the legal obligations they have under the international human rights regime to protect against abuses by third parties, including business, as well as policies that are consistent with and supportive of meeting those obligations. For businesses, beyond compliance with applicable laws the UNGPs focus on the social expectation that they manage the risk of involvement in human rights abuses, which requires that companies act with due diligence to avoid infringing on the rights of others and address harm where it occurs. For affected individuals and communities, the UNGPs stipulate ways to further their right to remedy through access to judicial and non-judicial means, which both states and companies have roles in ensuring. The product was the three-pillar “Protect, Respect and Remedy” framework of differentiated yet complementary responsibilities.

This framing avoided the long-standing doctrinal debate over whether business enterprises can be duty bearers under international human rights law (Alvarez, 2011). The UNGPs state that businesses should look to a core set of international legal instruments as an authoritative enumeration, not of binding international human rights *laws* that might apply directly to them, but of human *rights* they could adversely impact. That framing also made it possible for countries that had not ratified key international human rights conventions, including China and the U.S., to endorse the Guiding Principles and to reference them in their own national policies and guidance to companies.

Reflexive Rulemaking

Hierarchical public regulation is a rarity at the global level. But giving free rein to self-regulation generates mounting social and environmental externalities. Even in domestic society,

in situations where top-down rulemaking is problematic the challenge, as sociologist of law Gunther Teubner argued some time ago, is to “create the structural premises for decentralized integration of society by supporting integrative mechanisms within autonomous social subsystems” (1983, p, 255). This requires two steps: providing the autonomous subsystems with the necessary guidance and tools; and creating integrative mechanisms among them.

Thus, the UNGPs stipulate that for a company to “respect” human rights it needs to have systems in place whereby it can know and show that it does. A policy commitment is necessary but insufficient. It also requires a human rights due diligence process to identify, prevent, mitigate and account for the way it addresses its human rights risks and impacts. Guiding Principle 17 defines the process, and UNGPs 18-21 elaborate its components. This was welcomed by companies, including corporate counsel whose remit includes standard forms of due diligence and risk management. A Harvard Business School case quotes Sybil Veenman, General Counsel of the world’s largest global gold mining company at the time, who explained: “The GPs were the first thing companies had to tell them *how* to respond to these issues...The issues you face are unpredictable, and it’s hard to know how to tackle them. The GPs were a starting point and gave our efforts some legitimacy” (Henderson & Hsie, 2015, 9).

The UNGPs’ due diligence provisions embody two “integrative mechanisms.” One calls for meaningful consultation by companies with affected individuals and communities, including in the context of company-community grievance mechanisms. Where that is not possible, consultation should take place with other credible stakeholders. Second, the human rights due diligence provisions serve as a focal point for governments to promote or require business respect for human rights.

Recursive Dynamics

Buhmann attributes part of the UNGPs' success to the process legitimacy of how they were developed (2012a, 2012b). She is correct that extensive research, inclusive consultations and transparency mattered.¹⁶ But equally important was engaging standard setting bodies beyond the UN human rights machinery: individual governments, the OECD (corporate responsibility, corporate governance), International Finance Corporation (project finance), ISO (private standard setting), UNCITRAL (investor/state arbitration rules), the EU, as well as professional organizations such as the International Bar Association (IBA). Halliday and Shaffer use the term “recursivity” to describe “the dynamic interplay of cycles of normmaking within and between transnational and national lawmaking forums and sites of implementation...Each recursive cycle has a constrained logic in that it is affected by what came before it” (2015, 38). Extended to *all* regulatory processes, not only lawmaking, their concept captures well the development and cascading effects of the UNGPs.

For example, the OECD incorporated the UNGPs' Pillar II (corporate responsibility to respect) into its Guidelines for Multinational Enterprises, which provide for a complaints mechanism but had lacked a human rights chapter. It also published several human rights due diligence guides for different business sectors and operational contexts. The European Commission issued a new CSR directive calling for “risk-based due diligence,” as well as a non-financial reporting directive referencing the UNGPs. ISO aligned the human rights chapter of its social responsibility standard (ISO 26000) with the UNGPs. The IFC included the expectation that companies receiving project loans must “respect” human rights; its standards are tracked by 100 private project finance institutions. Several national export credit agencies did the same. All can affect the cost of capital.

Governments in some two-dozen countries globally have published National Action Plans on implementing the UNGPs, which notably require a whole-of-government approach; more are in process. Several European countries and Australia have adopted anti-slavery legislation drawing on the UNGPs due diligence provisions. France has adopted a “duty of vigilance” law covering not only French multinationals but also others with a significant business presence in France. A Chinese mining association affiliated with the Ministry of Commerce advised the overseas operations of its members to “ensure that all operations shall be in line with the UN Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project” (CCCMC, 2015). A coalition of Swiss NGOs has collected enough signatures to warrant a national referendum on mandatory due diligence; debates over a similar requirement are taking place in several other European governments, prompting discussion of an EU-wide approach. Moreover, the UNGPs “have helped to sustain and accelerate a continued global growth in legal claims by affected stakeholders against companies...Also relevant is the use of human rights due diligence as a defense to such claims” (Sherman, 2020, 23).

Beyond official bodies, leading businesses have adopted human rights policies. In 2015 Unilever became the first multinational to issue a free-standing human rights report. The IBA issued official guidance of what the UNGPs mean for business lawyers. The concept of human rights as such is not yet well understood in the mainstream investment community, but most of the “S” elements typically included in ESG templates in fact are well-established human rights issues: workers’ rights, health and safety, non-discrimination and diversity, community relations, and responsible R&D involving human subjects.

The UNGPs have also begun to move into sports organizations. FIFA (Fédération Internationale de Football Association), the governing body of the world’s most popular sport,

has endorsed the UNGPs, amended its statutes accordingly, included human rights criteria in the bidding requirements for the 2026 Men's World Cup, and established a credible external human rights advisory board.¹⁷ Implementation vis-à-vis its network of regional confederations and national associations remains a significant challenge. But FIFA together with its local partners and the Building and Woodworkers' International (2020) has used its leverage with Qatari authorities to improve migrant worker conditions at 2022 World Cup sites. For its part, the International Olympic Committee has recruited a former UN High Commissioner for Human Rights and Shift, the leading center of expertise on the UNGPs, to advise it (Shift, 2020).

Through these multiple "recursive" processes a transnational regulatory ecosystem is emerging in the business and human rights space. Systematic evidence of change in corporate human rights practice is scarce. The largest data base, the Corporate Human Rights Benchmark (2019), tracks a mere 200 firms, coding self-reporting from firms' websites against 100 categories in six thematic areas; almost everyone scores poorly. A survey of firms covered by the EU non-financial reporting directive indicates that half provide specific information on risks and practices, although they are not required to use common metrics (Bloomer & Koefler, 2019). In the U.S. the majority of shareholder resolutions introduced at firms' 2019 annual general meetings addressed environmental and social issues; human rights ranked second after climate change (Flow, Hailey & Sayed, 2020). Anecdotally, a well-regarded legal observer gives his overall impression: "The year 2019 continued the clear, if uneven, long-term trend toward greater business responsibility to respect human rights and to face accountability for missteps" (Cassel, 2020). In sum, here too one sees movement toward more of a stakeholder or social entity conception of the firm.

V. CONCLUSION

Corporate globalization has been the most transformative geoeconomic development of the past half century, and shareholder primacy its force multiplier. Their combination brought enormous benefits to people and countries well positioned to seize the new opportunities. But that their unfettered expansion would also disrupt social fabrics and overtax natural capital was not only predictable, it was predicted. In his January 1999 Davos address, Kofi Annan warned that unless globalization develops stronger social and environmental pillars it will remain vulnerable – “vulnerable to backlash from all the ‘isms’ of our post-cold-war world: protectionism; populism; nationalism; ethnic chauvinism; fanaticism; and terrorism.”

Governments were slow to respond to this challenge, encouraging and endorsing voluntary and soft-law standards but not leading through more robust legislative and regulatory means.¹⁸ The resulting governance deficit generated widespread political polarization, heightened by the most human form globalization – massive flows of refugees, asylum seekers and other migrants. In turn, the polarization imposed significant stress on traditional governing coalitions in the most heavily affected countries, in some cases leading to a surge in illiberalism.

Today, the scale mismatch between the global private and public domains is narrowing from both directions. The rapid expansion of corporate globalization has plateaued; it is unlikely to be fully restored any time soon post-COVID-19. The construct of the corporation itself is in flux again. Markets are pricing in more of the external costs of corporate operations; ESG investing is becoming a market-moving factor; and leading corporates have moved well beyond traditional CSR to take more seriously the relationship between their own sustainability and that of the social and natural environments in which they operate. The repurposing debate noted at the outset of this chapter is not mere virtue-signaling; it is an indicator of directional change,

even if not a final destination. The Global Compact and the Guiding Principles reflect, and have contributed to, this shift – the latter also in the domain of public governance.

The trajectory of corporate law and securities regulation is tending toward greater recognition of stakeholder interests. The decarbonization of economies is on the policy agenda of most countries that account for the bulk of greenhouse gas emissions. In the U.S., it is reinforced at state levels, and in the case of Europe by the European Commission and Parliament. Climate change deniers in national officialdom are finding it increasingly difficult to dismiss as random the horrific episodes of wildfires, floods, droughts, and extreme weather events engulfing their countries. Income inequality and social stratification resulting from winners-take-all economic practices are at the very center of political debates, especially in the heartland of liberal capitalism. One hopes, and expects, that the moves toward a social entity conception of the corporation will also renew governments' recognition that their role is to govern, and to govern in the public interest, as they did when this story began.

Endnotes

¹ None of these statements propose a precise meaning of “serving” stakeholders or taking them “into account.” At bottom they express an exhortation to move beyond the constricted principal-agent construct of corporate governance and acknowledge that forms of capital other than financial also affect the success of the corporation.

² Signatories of the BR statement included the CEOs of Boeing, whose corporate culture the *New York Times* described as “broken,” as revealed by the 737 Max crisis, “with senior executives having little regard for regulators, customers and even co-workers” (Gelles, 2020); as well as Johnson & Johnson, which around the time of the statement an Oklahoma judge ordered to pay the state \$572 million for carrying out “false, misleading, and dangerous marketing campaigns,” fueling the opioids crisis and causing “exponentially increasing” rates of addiction and deaths (Hoffman, 2019).

³ Legally, the commonly used term “multinational corporation” is a misnomer. The economic entity of the multinational uses the corporate form to connect the separate legal entities that comprise its global operations. Those entities are linked to a “corporate parent,” which is also a separate legal entity (Robé, 2009, 2016). Therefore, the term I use is multinational enterprise or firm—or simply “the multinational.” The OECD Guidelines for Multinational Enterprises, first adopted in 1976, employ a minimalist definition: “They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways” (OECD, 2011). For the sake of simplicity, I also include non-equity relationships between buyers (such as retailers) and their suppliers, as well as contract-based production networks (as for parts and assembly of consumer electronics and automobiles).

⁴ I say “resurged” because it had been the dominant form when the main players were natural persons who came together for the purposes of capital formation, before corporations expanded nationally, required professional managers, and sourced capital from dispersed investors.

⁵ For nearly two decades beginning in 1996, U.S. federal courts allowed foreign plaintiffs to bring civil suits against multinationals, whether U.S.-based or not, under the Alien Tort Statute. This is a provision of the Judiciary Act of 1789, granting U.S. federal courts jurisdiction for human rights abuses in violation of international law or a U.S. treaty. Plaintiffs and multinationals settled several cases before the U.S. Supreme Court shut the door on the statute’s applicability of to corporations.

⁶ <https://www.un.org/sg/en/content/sg/speeches/1999-02-01/kofi-annans-address-world-economic-forum-davos>. Full disclosure: at the time I was Annan’s Assistant Secretary-General for Strategic Planning, with oversight responsibility for creating the Global Compact. I worked with Georg Kell, who became the GC’s Executive Director for its first fifteen years.

⁷ See Ruggie (2001, 2002) and Kell & Ruggie (2001).

⁸ The Millennium Development goals were developed in tandem with the GC; they expired in 2015 and were succeeded by the broader Sustainable Development Goals.

⁹ In addition to the Global Compact website, I draw on visits to local networks in Australia, Brazil, Canada, China, Japan, and several European countries.

¹⁰ I discuss short-term obstacles to ESG investing, such as poor data quality, in Ruggie (forthcoming, 2020).

¹¹ For an extensive discussion of the mandate, see Ruggie (2013).

¹² For the full text see *Guiding Principles on Business and Human Rights*. <https://www.business-humanrights.org/en/un-guiding-principles>.

¹³ The normal affirmations are to “take note,” “take note with appreciation,” or “welcomes.”

Getting to endorsement involved extensive consultations with governments, including at Foreign Ministers’ level, led by Norway, the mandate’s lead sponsor.

¹⁴ Soft law refers to international instruments that derive their normativity from broad political consensus but do not in themselves have legally binding force. Notable examples include the Universal Declaration of Human Rights and the Paris Climate Agreement.

¹⁵ On norm cascading, see Finnemore and Sikkink (1998).

¹⁶ The mandate produced more than 100 research reports, and convened some 50 international consultations with governments, international standards setting bodies, civil society experts, indigenous groups, corporate lawyers, company CEOs and Boards, investor groups, and site visits to local operations and communities. I reported annually to the Human Rights Council and the UN General Assembly and met with regional groups in both. All research and consultation reports were posted on the Business & Human Rights Resource Centre website (<https://www.business-humanrights.org/>), the most widely used information platform for researchers and practitioners.

¹⁷ In addition to its corruption problems, FIFA was under pressure from advocacy groups, commercial sponsors, and unions over the use of essentially bonded labor from South and Southeast Asia to construct facilities for the 2022 World Cup in Qatar. FIFA asked me to produce a human rights risk profile and make recommendations (Ruggie, 2016).

¹⁸ The Kyoto Protocol might be thought of as an exception, but in fact it contributed to political polarization. Building on a phrase by Olmstead and Stavitsky (2011), it was too fast, too binding, too asymmetrical in its obligations of past and emerging emitters, and it would have accomplished too little.

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