ESG, Geopolitics, and Human Rights in Disputed Territories

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ESG, Geopolitics, and Human Rights in Disputed Territories

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JSD, NYU School of Law. The author, an attorney at the International Law Department in the Israeli Ministry of Foreign Affairs, wrote this article while on leave, and is solely responsible for the content of, and views expressed in, this paper and for any errors and omissions. I thank Nadav Shoked, Jesse Fried, Kobi Kastiel, Doreen Lustig, Itai Nixon, Nizan Geslevich-Packin, and Benyamin Moalem for their comments and advice. Special gratitude goes to Joseph H. H. Weiler. I also thank Moshe Friedland and Mary Grow.
ESG, GEOPOLITICS, AND HUMAN RIGHTS IN DISPUTED TERRITORIES

Galia Rivlin

Abstract:

Business enterprises operating in the international sphere face pressing and persistent questions concerning their environmental, social, and governance responsibilities. As the number of disputes escalates worldwide, such questions become more acute. In addition to any voluntary social responsibilities business enterprises may have, a complex legal framework governs business activity in the context of human rights. This framework was designed to address governance shortfalls pertaining to transnational corporations. Business enterprises thus operate nowadays in a web of social standards and legal human rights responsibilities. The human rights responsibilities of business enterprises may be initially associated with forced labor or child labor cases; however, when it comes to disputed territories, other types of rights and considerations come into play that are closely connected to the dispute itself. In the context of disputed territories, especially occupied territories, two distinct questions arise: (1) whether the very presence of business enterprises in such territories is problematic in and of itself; and (2) whether business enterprises operating in disputed territories should be subject to the same human rights framework that applies to businesses operating elsewhere. This article unfolds a comprehensive analysis of these fundamental questions and the complexities they present. It thereby uncovers a number of novel yet pragmatic insights that pave the way toward alleviating the tension among geopolitics, corporate social responsibility, corporate governance, and international law.
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I. INTRODUCTION

In 2019, the Business & Human Rights Resource Centre, an independent non-profit organization, invited Ravensdown, a New Zealand fertilizer company, “to respond to an allegation that it contributes to human rights violations in Western Sahara following a call from the Saharawi community to raise their concerns that companies producing fertilizers in the internationally contested area of Western Sahara props [sic] oppression.” In its response, Ravensdown noted that “[t]his is a complex geopolitical dispute that needs to be resolved at a government level via the UN.” The company also stressed that it was not in a position to weigh conflicting claims by the parties to the dispute:

As a co-operative on the other side of the world, we cannot easily weigh claim and counter claim by the parties to the dispute. Instead we focus on the guidance that has been given by the UN, and the direct operation of the mine from which we import. The UN and OECD guidance tells us to give due care when it comes to considering the mine’s operation. In terms of the mine itself, we visit regularly and we seek regular updates from OCP on employment practice, benefits to local people and investment in health, education and social programmes.

Ravensdown’s example presents some of the challenges business enterprises operating in disputed territories face. Business enterprises operating in the international sphere face challenging questions every day concerning their environmental, social, and governance (“ESG”) responsibilities, as well as their international human rights responsibilities. The former are generally perceived as voluntary corporate initiatives, while the latter are associated with mechanisms of accountability.


4 Id.

5 See FLORIAN WETTSTEIN, BUSINESS AND HUMAN RIGHTS – ETHICAL, LEGAL, AND MANAGERIAL PERSPECTIVES 3 (2022) (elaborating on the distinction between corporate social responsibility (CSR) and business and human rights (BHR) responsibilities, and noting that “... while the CSR discourse is rooted in management and business scholarship in a broad sense, BHR by and large originated in legal scholarship ... BHR tends to focus much more on accountability mechanisms and particularly on the role of binding regulation, while CSR has
As the number of territorial disputes in different regions of the world continues to escalate, such questions become more acute. It is in this setting that the question of corporate responsibility for human rights abuses in disputed territories arises. My aim in this article is to shed new light on some aspects of this question that have not received sufficient attention thus far.

The term “disputed territories” in this article will refer to territories that are subject to either internal or international disputes. The reason I address disputed territories is that they involve special geopolitical determinations and may require business enterprises to take sides in territorial disputes. I mainly focus in this article on more well-known examples of a sub-section of disputed territories, namely, occupied territories. However, at times the very question of occupation may be under dispute. In addition, territories that are not considered as occupied by the international community may still be disputed and may still raise geopolitical issues.

Business enterprises may have their own voluntary social standards, as was manifested following the Russian invasion of Ukraine on February 24, 2022, when numerous businesses stopped all or part of their activities in Russia. In addition to any voluntary social standards, a complex legal framework applies to corporate responsibility for human rights abuses. In some jurisdictions, there is domestic legislation pertaining to business and human rights. In the European Union (EU), there are certain business standards that have become almost synonymous with voluntary, business-led initiatives for the promotion of responsible business practices.


See, e.g., Andrew Sanger, Piercing the State’s Corporate Veil: Using Private Actors to Enforce International Norms, EJIL: TALK! (March 17, 2022), https://www.ejiltalk.org/piercing-the-states-corporate-veil-using-private-actors-to-enforce-international-norms/ (noting that global corporations disengaging from Russia “are not only acting as international norm enforcers at the behest of states. Some companies have disengaged because of new legal restrictions, but for others it is a more amorphous motivation, rooted in economic and reputational risk-analysis, and with social responsibility concerns.”). See, e.g., the French duty of vigilance legislation: Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [law relating to the duty of vigilance of parent companies and ordering companies], Code de commerce [C. com.] [Commercial Code] art. L. 225-102-4 – 102-5 (Fr.). An unofficial translation is available at https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/frances-duty-of-vigilance-law/. See also the German Corporate Due Diligence in Supply Chains Act: Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten [Act on Corporate Due Diligence in Supply Chains], Jul. 16, 2021, Elektronischer Bundesanzeiger [eBAnz] at 46...
reporting directives on environmental impacts and human rights.\textsuperscript{10} There have also been negotiations for an EU directive on Corporate Sustainability Due Diligence in the last few years. However, the future of the negotiations is presently unclear.\textsuperscript{11}

In the international realm, negotiations have been ongoing in Geneva for the adoption of an international legally binding business and human rights instrument following a 2012 UN Human Rights Council (HRC) resolution.\textsuperscript{12} The 2012 resolution established “an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights [“the Open-Ended Intergovernmental Working Group”] . . . . to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”\textsuperscript{13} However, the Open-Ended Intergovernmental Working Group’s attempts to adopt a legally binding instrument have faced resistance from key stakeholders thus far.\textsuperscript{14} In


\textsuperscript{13} Id.

\textsuperscript{14} See, e.g., Sara McBrearty, The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity, 57 HARV. INT’L L. J. ONLINE SYMP. 11 (addressing four main...
addition, business enterprises are subject to human rights responsibilities embedded in certain international instruments. In the context of human rights, the major instrument currently governing corporate activity is the United Nations Guiding Principles on Business and Human Rights (UNGP). The UNGP was designed to bridge governance shortfalls pertaining to the business activity of transnational corporations. It is generally regarded as a set of soft-law standards (i.e., non-legally binding). It expressly states that it does not create new international law obligations. Nevertheless, many experts consider the UNGP “the most authoritative statement” currently addressing the issue of business and human rights.


See, e.g., Sarah Joseph & Joanna Kyriakakis, From soft law to hard law in business and human rights and the challenge of corporate power, 36(2) LEIDEN J. OF INT’L’L L. 335, 336–37 (2023) (describing the UNGP as soft law, and noting that “[h]ard law generally refers to norms which are legally binding. Soft law prescribes norms which are not legally binding. Soft law in some cases is a precursor to the development of hard law norms . . . . However, hard and soft international law are not a perfect binary; rather, international law exists on a spectrum from extreme softness to extreme hardness.”); The two note that Pillar I, the duty of states to protect against human rights abuses by third parties, is “a binding principle in international law”, and that Pillar II is “clearly not binding, and even ‘not-law’.” Id. at 340; Elena Corcione, The Role of Soft-Law in Adjudicating Corporate Human Rights Abuses: Interpreting the Alien Tort Statute in the Light of the UN Guiding Principles on Business and Human Rights, EUR. PAPERS 6(3) 1293, 1294 (2021) (referring to the UNGP’s soft-law character). But see U.N. Office of Hum. RTS., THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE, 13–14, U.N. Sales No. E. 13.XIV.4 (2012), https://www.ohchr.org/sites/default/files/Documents/publications/hr.pubB.12.2_en.pdf [hereinafter Interpretive Guide] (stating that the responsibility to respect human rights is not optional for business enterprises. In many cases, it is already reflected in domestic law and soft-law instruments such as the OECD Guidelines. The Guide notes that a failure to respect human rights may result in “legal, financial and reputational consequences . . . .”).

See also infra note 54 and the text accompanying it (describing the advantages of soft law mechanisms).

See UNGP, supra note 15, at 1 (“Nothing in these Guiding Principles should be read as creating new international law obligations.”).
Numerous key soft-law guidelines and standards have been aligned with the UNGP, including the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (the OECD Guidelines). \(^{21}\) Other notable instruments include the UN Global Compact\(^{22}\) and the OECD Due Diligence Guidance for Responsible Business Conduct.\(^{23}\) Other guides were developed to address business operations in conflict-affected areas.\(^{24}\)


I focus in this article on international soft-law human rights responsibilities pertaining to business activity in disputed territories. I show that ESG standards are not completely disconnected from international soft-law business and human rights responsibilities, despite the fact that the former are associated with management and business scholarship, while the latter are generally associated with legal scholarship. I explore in this context the tension among geopolitics, corporate social responsibility, corporate governance, and international law in disputed territories.

I further contend that although the UNGP is a soft-law framework, the shortcomings of this framework may have serious implications on business enterprises. I bring examples of financial and reputational risks to which business enterprises operating in disputed territories are exposed as a direct consequence of the current soft-law framework. I argue that because of the risks and uncertainties involved in operating in disputed territories, coupled with a fear of possibly being required to engage in geopolitics, some business enterprises may decide that the potential risks of operating in such areas outweigh any possible financial benefits. I further argue that, contrary to what some scholars maintain, such a result could ultimately undermine the very purpose of the existing international business and human rights framework.

When one envisions typical scenarios in which the issue of business and human rights may arise, cases involving violations of workers’ rights may initially come to mind. However, when it comes to disputed territories, other types of activities become relevant. In disputed territories, two distinct questions arise: (1) whether the very presence of business enterprises in disputed territories is, in itself, problematic; and (2) whether business enterprises operating in such areas should be subject to the same requirements as business enterprises operating in non-disputed territories.

On the first question, the traditionally predominant view is that international humanitarian law (IHL) and international human rights law


See WETTSTEIN, supra note 5, at 3 (2022).

Cf. Daniel Aguirre & Irene Pietropaoli, Heightened Human Rights Due Diligence in Practice: Prohibiting or Facilitating Investment in Conflict Affected Areas, 15 J. OF HUM. RTS. PRAC. 541, 542 (2023) (arguing that business enterprises must demonstrate their efforts to avoid doing harm to individuals and also “to the context.” Business enterprises must therefore consider their “very presence in conflict-affected areas.”).

See, e.g., Kassoti, supra note 20, at 315, 317 (writing that “since corporations are not direct holders of international law obligations, the duties of non-recognition and non-assistance do not extend to their activities.” Furthermore, “both Article 49 [of the IV Geneva
(IHRL)\textsuperscript{28} do not directly apply to corporations, and therefore do not bar business enterprises from operating in disputed areas.\textsuperscript{29} In recent years, however, there is a growing academic debate over whether business enterprises are subjects of international law.\textsuperscript{30} The judiciary in some States has also addressed this issue.\textsuperscript{31} In this regard, a distinction should be made

Convention of 1949] and the principle of usufruct are addressed to, and thus create obligations for, states—as they remunerate some of their duties as ‘occupying powers.’”); see also Eva Kassoti & Antoine Duval, Setting the Scene: the Business and Human Rights Perspective, in \textsc{The Legality of Economic Activities in Occupied Territories} 19, 21 (Eva Kassoti & Antoine Duval eds., 2020) (”[T]he prohibition of transfer of an occupying power’s population to the occupied territory (enshrined in Art. 49(6) of IV Geneva Convention), the principle of usufruct, the obligation to respect the right to self-determination, and the obligation to respect the right to permanent sovereignty over natural resources are all addressed to States.”).

See John Ruggie, \textit{Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts}, \textit{\textsc{J}. Int’\textsc{L} W. \\ \textsc{J}. \textsc{M}’. \\ \textsc{J}. \\ Pharma. \\ HI. \\ \textsc{J}. \\ CR. \\ L. } 244, U.N. Doc A/HRC/44/035 (Feb. 19, 2017), https://digitallibrary.un.org/record/594238?ln=en#record-files-collapse-header [hereinafter 2007 Report] (“[W]hile states have been unwilling to adopt binding international human rights standards for corporations . . . they have drawn on some of these instruments in establishing soft-law standards . . . .”).

\textsuperscript{29} See Eugene Kontorovich, \textit{Economic Dealings with Occupied Territories}, \textit{53 COLUM. J. TRANSNAT’L L.} 584, 587 (2015) (“State practice and decisions of important national courts support a fully permissive approach to economic dealings by third-party states or nationals in territories under prolonged occupation or illegal annexation.”), https://www.iijl.org/files/Kontorovich\%20Occupied\%20Territories.pdf; see also Cour d’appel \textsc{CA} [regional court of appeal] Versailles, civ. Mar. 22, 2013, 11/05331 (holding that “[t]he defending companies . . . are not subjects of international law. Since they do not have international personhood, the various norms that the appellant wishes to invoke against them cannot be applied thus.”) (Unofficial translation of the original French text); Rep. of the U.N. Watch, transmitted to the Hum. Rts. Council at Its Forty-Third Session, U.N. Doc. A/HRC/43/NGO/108 (Feb. 28, 2020) (citing legal sources indicating that international law does not prohibit business activity in settlements).

\textsuperscript{30} The question of the application of international law to corporations is often referred to as the question of whether corporations are subjects of international law. See, e.g., Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 178–79 (April 11, 1949) (holding that the United Nations “was intended to exercise and enjoy . . . functions and rights which can only be explained on the basis of the possession of a large measure of international personality”). However, some argue that “calling a corporate entity a ‘subject’ or ‘object’ of international law confuses more than enlightens.” Jose Alvarez, \textit{Are Corporations “Subjects” of International Law}, \textit{9 SANTA CLARA J. INT’T L.} 1, 8 (2011). Theodor Meron, and others following him, suggested using the term “participants” instead of “subjects” or “legal persons” in an attempt to move beyond “the sterile debate as to whether individuals are or are not subjects or objects of international law.” Theodor Meron, \textit{The Humanization of International Law} 353 (2006); see also Jochen A. Frowein, Book Review, \textit{101 AM. J. INT’T L.} 680, 683 (2007) (reviewing \textsc{Theodor Meron, The Humanization Of International Law 317} (2006)); Emeka Duruigbo, \textit{Corporate Accountability and Liability for International Human Rights Abuses Recent Changes and Recurring Challenges}, \textit{6 NW. J. of INT’L HUM. RTS.} 222, 246 (2008); Kassotti, \textit{supra} note 20, at 315.

\textsuperscript{31} On February 28, 2020, the Canadian Supreme Court issued a majority opinion in the case of \textit{Nevsun Resources Ltd. v. Araya}, holding that that “[c]ustomary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not ‘plain and obvious’ to me that the Eritrean workers’ claims against Nevsun based on breaches of customary international law cannot succeed.” \textit{See Nevsun Resources Ltd. v. Araya}, 2020 SCC
between corporate officials and business enterprises as legal entities. For instance, the Rome Statute confers upon the International Criminal Court jurisdiction over corporate personnel as natural persons. The question of whether business enterprises are subjects of international law is, however, more complex. Some maintain, for example, that IHL is binding upon business enterprises as legal entities. Still, it seems that to date, the predominant view remains that IHL and IHRL do not apply directly to business enterprises.

Although the question of the applicability of IHL and IHRL to business enterprises is, to say the least, under debate, some scholars praise the current business and human rights framework for successfully deterring business enterprises, or having the potential to deter them, from operating in disputed territories, especially in territories that the international community generally regards as occupied. I argue, however, that due to the complexities of the

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32 The United Nations Rome Statute of the International Criminal Court (1998), Art. 25(1). See also, e.g., Regis Bismuth, Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing between International and Domestic Legal Orders, 38 DENVER J. INT’L & POLICY 206, 207 (2010) (“Corporate criminal conduct may . . . be judged in the international arena only throughout the residual criminal responsibility of the natural persons deciding, directing or implementing these activities . . . .”); Salil Tripathi, Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards, 50 POLITICAL 133, 137 (2011) (“While companies cannot be prosecuted, company officials can.”); 2020 UN Report, supra note 6, at 4 ¶ 11 (“Abuse in situations of conflict ‘quickly translates into international criminal responsibility for the individuals concerned.’”).

33 See Australian Red Cross & RMIT University, Doing Responsible Business in Armed Conflict Risks, Rights and Responsibilities 13 (“[H]uman rights are traditionally only binding on governments, while IHL binds State and non-State actors, including individuals. This can include companies, as well as individual managers and staff . . . .”); see also Tripathi, supra note 32, at 137 (2011) (writing that “businesses get protection from, and have obligations under, international humanitarian law”); Bismuth, supra note 32, at 207–210 (“[C]orporations are likely to fall within the scope of IHL . . . .”).

34 See supra notes 28–29 and accompanying text.

35 See Kassoti, supra note 20, at 321 (demonstrating “how the UNGPs have been successful in dissuading companies from carrying out economic activities in the occupied Palestinian territories and in the occupied Western Sahara”); Daria Davitti, Business Actors in Western Sahara – Heightened Obligations and Responsibilities under the UNGP?, in THE LEGALITY OF ECONOMIC ACTIVITIES IN OCCUPIED TERRITORIES 199, 209–210 (Eva Kassoti & Antoine Duval, eds., 2020) (arguing that because the UNGP states that corporations should treat the risk of human rights abuses as legal compliance issues, “[c]ompanies engaged in Western Sahara, therefore, will have to legally reconsider whether the continuation of their activities is indeed possible without incurring civil and criminal liability”). According to Davitti, “[t]he continued involvement in Western Sahara of companies such as Enel, Siemens and Azura, to mention just a few . . . appears to ignore both the home states’ obligation to protect human rights and the companies’ responsibility to respect them as specifically articulated in the UNGP for high-risk contexts.” Id. at 209–10. Cf. Valentina Azarova, Business and Human Rights in Occupied Territory: The UN Database of Business Active in Israeli Settlements, 3 BUS. & HUM. RTS. J. 187, 197–98 (2018) (contending with respect to settlements in the West Bank that “[t]he systematic nature of the human rights abuses that result from the establishment of settlements and their maintenance is such that all business
role business enterprises play in such territories, the answer to the question of whether business enterprises should be discouraged from operating in disputed territories, under the current international framework, is not as straightforward as some maintain.

I present in this regard several overlooked considerations pertaining to the fact that a retreat of business enterprises from disputed territories may cause adverse human rights impacts, in itself, and ultimately undermine the interests of the local population. I suggest that in view of the conflicting considerations that may affect the question of whether business activity should be discouraged in disputed territories, this question should be viewed as a policy question, to be specifically addressed and decided by the international community.

As for the second question, whether businesses operating in disputed territories should be subject to the same requirements as businesses operating in non-disputed territories, the UNGP notes that the risk of gross human rights abuses is heightened in conflict-affected areas.\(^3^6\) The UNGP interpretive guide suggests that heightened due diligence is required in situations of conflict because of the increased risk of gross human rights abuses.\(^3^7\) As aforementioned, I address in this article a sub-section of conflict-affected areas, namely territories that are subjects of a bilateral or multilateral dispute. Even if a high level of care is required from businesses operating in disputed territories, more attention needs to be given to additional complex considerations that come into play in such territories in order to fulfill the purpose of the existing international business and human rights framework. Two additional sub-questions that I present in this context and that challenge more conventional notions in this realm of soft law are (1) whether business enterprises should be required to make geopolitical determinations when operating in disputed territories despite possible conflicting corporate governance considerations; and (2) whether business enterprises are sufficiently equipped to make such determinations. I offer examples of business enterprises that have faced such geopolitical dilemmas.

If business enterprises are not left out of the geopolitical realm, specific pragmatic guidelines should be developed to assist business enterprises faced with geopolitical decisions. More attention would need to be given to possible conflicting corporate governance considerations, and additional methodological guidance would need to be provided with respect to matters such as advice from experts and external sources, addressing possible biases

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operations in or related to settlements contribute to the continuous abuses of human rights resulting from the settlements"). Moreover, according to Azarova, even business activity within Israel may need to be discouraged because of the “integral nature of the Israeli and settlements economies.” Id. at 197.

\(^3^6\) See UNGP, supra note 15, at 8–9 (Principle 7); see also Davitti, supra note 35, at 205 (“[A]ccording to the UNGP ‘high’ risk and armed conflict situations demand special scrutiny by both home and host states, as well as the companies involved.”).

\(^3^7\) See generally Interpretive Guide, supra note 18, at 80.
among such resources, and verifying consistency and transparency on the part of those resources.

Part II of this article will present the international human rights framework that applies to business enterprises. Part III will demonstrate that business enterprises are currently not meeting their human rights due diligence responsibilities, despite the financial costs involved in not meeting such responsibilities. Part IV will examine the costs of operating in disputed territories. Part V will review considerations that may affect the question of whether business enterprises should be discouraged from operating in disputed territories. Part VI will present factors that may affect the question of what type of legal framework should apply to business enterprises operating in disputed territories.

II. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK THAT APPLIES TO BUSINESS ENTERPRISES

A. Governance Shortfalls

States may be unwilling or unable to effectively regulate transnational corporate activity in order to prevent human rights abuses if they are not obligated to do so. This may especially be the case when it comes to transnational corporations (“TNCs”). States hosting TNCs may be afraid of losing foreign investment if they do so, while home States of TNCs domiciled in their territory or jurisdiction may fear that taking action would place them at a competitive disadvantage. Such governance shortfalls are generally viewed as the predominant reason to turn to international law to regulate corporate activity in times of both peace and conflict. As will be further elaborated, in disputed territories such governance shortfalls may be especially challenging.

In 2005, John Ruggie was appointed as the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises. His mandate included an assignment to “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to

38 See Duruigbo, supra note 30, at 246.
40 Id.
41 Id.
42 See Adeyeye, supra note 17, at 158 (2007) (noting that corporate regulation by States via domestic law is inadequate in regulating corporate behavior due to corporate power and influence).
human rights . . . .43 Ruggie referred to such government shortfalls as “governance gaps.”44 In June 2008, Ruggie submitted his final Report to the Human Rights Council (“the 2008 Report”).45 The 2008 Report addressed the challenge of bridging “governance gaps” between “the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.”46

The doctrine of “separate legal personality” (“the corporate veil”) creates its own obstacles in terms of TNCs’ accountability, as demonstrated in a 2014 publication issued by Amnesty International.47 The report maintains that because each separately incorporated member of a corporate group is a separate legal personality,48 there may be difficulties in imputing the liabilities of one member of the group to another.49

Ruggie noted in his 2008 Report that in “conflict zones”, governance shortfalls may be especially difficult to overcome, due to the higher probability of violence and lack of the rule of law.50 These circumstances also create a heightened risk that the host State will be unable or unwilling to prevent business enterprises from violating human rights. At the same time,


44 In his 2006 Interim Report, Ruggie stated that “it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations, especially where host governments cannot or will not enforce their obligations . . . .” John Ruggie, Interim Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 65, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006), http://hrlibrary.umn.edu/business/RuggieReport2006.html [hereinafter 2006 Interim Report]; see also Duruigbo, supra note 30, at 246 (writing that States may be unwilling to regulate their corporations for the benefit of people in other states if international law doesn’t require them to do so); Menno T. Kamminga, Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law in Berlin: Corporate Obligations Under International Law, at 4 (Aug., 17, 2004), https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/75441301/Kamminga_2004_Corporate_Obligations_under_International_Law.pdf (“An accountability gap then occurs if host States are either unable or unwilling to hold companies to reasonable minimum standards . . . .”).

45 See generally, 2008 Report, supra note 16.

46 Id. ¶ 3.


48 See AMNESTY INTERNATIONAL, supra note 47.

49 Id.

50 Cf. 2008 Report, supra note 16, ¶ 47 (Ruggie initially used the term “conflict zones” in his 208 Report, and later used the term “conflict-affected areas” in the UNGP.). See also Davitti, supra note 35, at 205 (writing that governance gaps are highlighted in occupied territories, “where the willingness of the occupying powers [sic] to strengthen its control over occupied territory is matched by the lucrative gains of the various state and non-state actors involved.”).
the home State may choose not to prevent business enterprises from violating
human rights, as there is an unsettled debate over whether it has an obligation
under international law to enact extraterritorial legislation to prevent such
violations.\textsuperscript{51}

In view of the above, governance shortfalls in disputed territories may
require special attention. Ruggie’s UNGP framework was designed to bridge
such shortfalls.\textsuperscript{52} Yet, as will be further elaborated, the framework may also
pose serious challenges to business enterprises operating in disputed
territories that could ultimately undermine its purpose.

\textbf{B. The UNGP}

After his 2005 appointment, Ruggie reviewed various international
human rights instruments and concluded that States have been unwilling thus
far to adopt binding international human rights standards for business
enterprises.\textsuperscript{53} Ruggie described the possible advantages of soft-law
mechanisms compared to legally binding obligations.\textsuperscript{54} In his 2006 Interim
Report, Ruggie stressed that corporations, by their very nature, should not
bear the exact same human rights obligations that States bear.\textsuperscript{55} Ruggie thus
developed a “Protect, Respect and Remedy” framework for business and

\begin{itemize}
  \item \textsuperscript{51} The Commentary to Article 7 of the UNGP notes that “[i]n conflict-affected areas, the
‘host’ State may be unable to protect human rights adequately due to a lack of effective
control. Where transnational corporations are involved, their ‘home’ States therefore have
roles to play in assisting both those corporations and host States to ensure that businesses are
not involved with human rights abuse . . . .” See UNGP, supra note 15, at 9–10. However, the
Commentary to Article 2 states that “[a]t present States are not generally required under
international human rights law to regulate the extraterritorial activities of businesses domiciled
in their territory and/or jurisdiction . . . .” Id. at 3–4; see also Davitti, supra note 35, at 208
(noting that there is still an unsettled debate over “whether a home State has a general duty, in
international law, to regulate the transnational activity of a company registered in its territory
and/or jurisdiction . . . .”). However, at the same time, Davitti argues that it is “uncontroversial
to state that in high-risk contexts . . . home states have a duty to appropriately and effectively
regulate the transnational conduct of business enterprises . . . .” Id.

  \item \textsuperscript{52} Cf. 2008 Report, supra note 16, ¶ 3.

  \item \textsuperscript{53} See 2007 Report, supra note 28, ¶ 44 (“States have been unwilling to adopt
binding international human rights standards for corporations . . . . they have drawn on some of
these instruments in establishing soft-law standards.”).

  \item \textsuperscript{54} According to Ruggie, “[s]oft law is ‘soft’ in the sense that it does not by itself create
legally binding obligations. It derives its normative force through recognition of social
expectations by states and other key actors. States may turn to soft law for several reasons: to
chart possible future directions for, and fill gaps in, the international legal order when they are
not yet able or willing to take firmer measures; where they conclude that legally binding
mechanisms are not the best tool to address a particular issue; or in some instances to avoid
having more binding measures gain political momentum.” Id. at ¶ 45.

  \item \textsuperscript{55} 2006 Interim Report, supra note 44, ¶ 66 (“By their very nature . . . corporations do not
have a general role in relation to human rights like states, but a specialized one.”). In his 2006
Interim Report, Ruggie used the phrase “principled pragmatism.” He believed that in order to
protect human rights, a pragmatic approach needs to be adopted in order to determine what
works in practice. Id. at ¶ 81).

\end{itemize}
human rights, which distinguishes the duty of the State to protect against human rights abuses by third parties; the corporate responsibility to respect human rights (i.e., to refrain from infringing rights of others and to address adverse impacts with which it is involved); and the need for greater access by victims to judicial and non-judicial remedies. This framework was embedded in the UNGP, which was adopted in 2011 by a unanimous vote of the HRC.

The UNGP takes into account the special role that business enterprises play in society and the differences between the social roles of business enterprises and States, while departing from the traditional debate over whether or not corporations are subjects of international law.

The UNGP applies in times of both peace and conflict. It contains specific principles that address situations of conflict. The term “conflict-affected areas” appears, but is not defined, in either the UNGP or its Interpretive Guide. In his 2008 Report, Ruggie initially used the term

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56 See UNGP, supra note 15, at 1 (discussing general principles). See also Joseph and Kyriakakis, supra note 18, at 340 (elaborating on the distinction between Pillar I and Pillar 2).


58 As noted above, Ruggie believed that corporations should not bear exactly the same human rights obligations that States bear. See 2006 Interim Report, supra note 44, ¶ 66. Cf. Rachel Davis, The UN Guiding Principles on Business and Human Rights and Conflict-Affected Areas: State Obligations and Business Responsibilities, 94 INT’L REV. RED CROSS 961, 970 n.15 (2012) (noting that although international human rights instruments generally do not impose the obligation to respect human rights directly on businesses “hence the term ‘responsibility’ rather than ‘duty’, elements of it are often reflected in domestic laws. However, the responsibility to respect exists apart from national laws.”).

59 Cf. Alvarez, supra note 30, at 32 (writing that Ruggie’s soft-law approach is appealing because it departs from “the hierarchical rigidity embedded in demarcating ‘subjects’ and ‘objects’ of international law”).


61 For example, UNGP Principle 7 states that “[b]ecause the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses . . . .” UNGP, supra note 15, at 8. Further, the Commentary to Principle 23 states that “[s]ome operating environments, such as conflict-affected areas may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example) . . . .” Id. at 25 (emphasis added).

62 See Davitti, supra note 35, at 205 (“[T]here is no agreed upon definition of ‘high-risk areas’ and principle 7 and 23(c) of the UNGP only refer to conflict-affected areas and the heightened risk of gross human rights abuses there.”); see also Concept Note from the Geneva Acad. on Int’l Humanitarian L. & Hum. RTS. Rights, Due Diligence: Defining ‘Conflict-affected’ and ‘High-Risk Areas’ (2013), https://www.ohchr.org/sites/default/ files/Documents/Issues/Business/ForumSession2/Events/3Dec.1.SideEventProposal_Geneva Academy.pdf (stating that there is no accepted definition for “conflict-affected and high-risk areas”).
“conflict zones” and referred to the unique circumstances “of sporadic or sustained violence, governance breakdown, and absence of the rule of law” that exist in such territories. As aforementioned, the UNGP notes that the risk of gross human rights abuses is heightened in conflict-affected areas.

The commentary to UNGP 7, which is titled “Supporting business respect for human rights in conflict-affected areas,” specifically notes that all the measures described in UNGP 7 with respect to conflict-affected areas “are in addition to States’ obligations under international humanitarian law in situations of armed conflict, and under international criminal law.”

As noted above, I address in this article a sub-section of conflict-affected areas, namely territories that are subjects of a bilateral or multilateral dispute. I specifically address the case of disputed territories because such situations entail complex and unique determinations. I will now discuss the all-encompassing term “adverse human rights impact” that is used in the UNGP and other instruments aligned with the UNGP.

C. The All-Encompassing Definition of the Term “Adverse Human Rights Impact”

UNGP 11 asks business enterprises to “avoid infringing on the human rights of others and . . . address adverse human rights impacts with which they are involved.” UNGP 12 asks business enterprises to respect all internationally recognized human rights. The commentary to UNGP 12 explains that “[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.” The commentary also elaborates on additional standards that may apply to

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63 2008 Report, supra note 16, ¶ 47. The term “conflict zones” seems to be interchangeable with the term “conflict-affected areas,” which was later used by Ruggie in the UNGP. However, it is difficult to determine if that is indeed the case because Ruggie did not define the term “conflict-affected areas” in the UNGP. See also Andreas Graf & Andrea Iff, Respecting Human Rights in Conflict Regions: How to Avoid the ‘Conflict Spiral’, 2 BUS. & HUM. RTS. J. 100, 109, FN 3 (2017) (defining conflict-affected areas as “regions where violent conflict is ongoing, where the risk of conflict outbreak is high, or where societies are emerging from violent conflict.”). Graf and Iff further note that such areas “are often characterized by a history of human rights violations by various public actors, a business culture of ‘high risk–high gain’ capitalism and a lack of economic perspectives of large parts of the population. Moreover, government regulation in these contexts is often weak or non-existent.” Id. at 110.

64 See UNGP, supra note 15, at 8–9 (Principle 7).
65 Id., at 9–10 (commentary to Principle 7).
66 UNGP, supra note 15, at 13 (Principle 11). See also OECD GUIDELINES, supra note 21, at 25 (likewise stating that enterprises should “address adverse human rights impacts with which they are involved”).
67 UNGP, supra note 15, at 13 (Principle 12). The commentary to UNGP 12 states that “[b]ecause business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights . . . .” Id. at 13–14.
68 Id.
business enterprises, such as UN instruments that address the rights of individuals belonging to specific groups or populations. In situations of armed conflict, the commentary states that enterprises should also respect the standards of IHL.  

The UNGP Interpretive Guide states that “an adverse human rights impact” occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.” The OECD Guidelines note that “enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights. In practice, some human rights may be at greater risk than others in particular industries or contexts . . . .”  

Because the UNGP encompasses all business enterprises and all business activities, and refers to all recognized human rights, anything and everything could in practice be described as an adverse impact, creating much uncertainty with respect to the scope of business enterprises’ human rights responsibilities.  

UNGP 17 states that “[i]n order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence.” UNGP 17 further clarifies that human rights due diligence must go “beyond simply identifying and managing material risks to the company itself . . . .”  

UNGP 18 asks business enterprises to “identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.”  

According to UNGP 22, “[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.” Business enterprises are not required to provide remediation for adverse impacts that they have not caused or contributed to, but which are nevertheless directly linked to their “operations, products, or services by a business relationship.”

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69 Id.  
70 Interpretive Guide, supra note 18, at 5.  
71 OECD GUIDELINES, supra note 21, at 26, ¶ 45.  
72 See, e.g., BUSINESS REFERENCE GUIDE, supra note 22, at xix. (“[E]nterprise’s human rights risks are the risks that its operations pose to the enjoyment of human rights by others. This is separate from any risks that involvement in human rights impact may pose to the enterprise . . . .”).  
73 UNGP, supra note 15, at 17 (Principle 17).  
74 Id. at 18 (commentary to Principle 17). The UNGP Interpretive Guide states that “human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances . . . to meet its responsibility to respect human rights.” Interpretive Guide, supra note 18, at 6.  
75 UNGP, supra note 15, at 19 (Principle 18).  
76 Id. at 24 (Principle 22).  
77 Id. at 24–25 (commentary to Principle 22).
However, they are still considered liable for such impacts for as long as “the abuse continues” if they remain in the relationship.78

When it comes to disputed territories, the vagueness of the term “adverse impacts” is especially troubling, as business activity in such territories may raise complex geopolitical determinations. The all-inclusive definition of the term in the Interpretive Guide of the UNGP79 raises the question of whether every business activity in disputed territories should be regarded as an “adverse impact” merely due to its location.

In the case of occupied territories, such questions become even more acute. The distinction between geopolitics and legal questions becomes blurred. For instance, should the purchase of fertilizers that contain phosphates extracted from an occupied territory be regarded as an adverse human rights impact80 Or the opening of a plant in an occupied territory that employs individuals from both parties to the dispute?81

As noted above, Ruggie believed that corporations, by their very nature, should not bear the same human rights obligations that States bear.82 Yet, by using the all-encompassing term “adverse human rights impacts,” Ruggie may have opened the door for requiring business enterprises to make geopolitical determinations that were traditionally left to States under IHL and IHRL. The case of disputed territories demonstrates the challenges business enterprises may encounter when they are asked to determine whether their activities create or contribute to adverse human rights impacts.

D. Heightened Corporate Due Diligence in Disputed Territories

The UNGP Interpretive Guide refers to the need to conduct heightened due diligence in conflict-affected areas.83 According to the guide, “[t]he risks of involvement in gross human rights abuse tend to be most prevalent in contexts where there are no effective government institutions and legal protection or where there are entrenched patterns of severe discrimination. Perhaps the greatest risks arise in conflict-affected areas.”84 The UNGP itself

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78 Id. at 21–22 (commentary to Principle 19).
79 See Interpretive Guide, supra note 18, at 5 (defining “adverse human rights impact” as an action that “removes or reduces the ability of an individual to enjoy his or her human rights”).
82 See 2006 Interim Report, supra note 44, ¶ 66.
83 Interpretive Guide, supra note 18, at 80.
84 According to the Interpretive Guide, “such contexts should automatically raise red flags within the enterprise and trigger human rights due diligence processes that are finely tuned and sensitive to this higher level of risk.” Id.
does not expressly require heightened due diligence, but it emphasizes the increased risk that business enterprises will be involved with gross abuses of human rights in such areas, and it asks States to “effectively address this heightened risk, including through provisions for human rights due diligence by business.”

The OECD Guidelines explicitly state that “[i]n the context of armed conflict or heightened risk of gross abuses, enterprises should conduct enhanced due diligence in relation to adverse impacts, including violations of international humanitarian law.” A 2020 report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (“the 2020 UN Report”) called for heightened due diligence on the part of corporations operating in conflict-affected areas. In 2022, the UNDP and the Working Group on the issue of human rights and transnational corporations and other business enterprises issued a joint guide on Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts (“the 2022 UNDP Guide”). The 2022 UNDP Guide likewise maintains that heightened human rights due diligence should be performed in conflict-affected contexts.

According to the 2022 UNDP Guide, business enterprises in conflict-affected areas should take into account three distinct features of such contexts: First, conflict will always create adverse human rights impacts. Thus, any business activity in such areas necessarily entails some type of a linkage to adverse human rights impacts. Second, businesses operating in a conflict-affected area will never be neutral even if they do not take a side in the conflict. Third, businesses should respect IHL in addition to IHRL. The 2022 UNDP Guide further maintains that “[a]s the risk of gross human rights abuses is heightened in conflict-affected contexts, businesses

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85 UNGP, supra note 15, at 9–10 (commentary to Principle 7); see also Davitti, supra note 35, at 205 (arguing that “according to the UNGP ‘high’ risk and armed conflict situations demand special scrutiny by both home and host states, as well as the companies involved.”).
86 OECD GUIDELINES, supra note 21, at 26, ¶ 45.
87 See 2020 UN Report, supra note 6, at 4–5 ¶ 13. See also Aguirre & Pietropaoli, supra note 26, at 3 (noting that the higher the risk, the more heightened due diligence is needed).
89 Id. at 13.
90 Id. at 10 (stating that “conflict will always create adverse negative impacts on human rights. Therefore, causing, contributing or being directly linked to armed conflict and other situations of widespread violence always means causing, contributing or being directly linked to human rights abuses.”).
should carry out heightened human rights due diligence . . . .” The 2022 UNDP Guide asks business enterprises to understand how their business activity interacts with a conflict in a particular context. Businesses are asked to examine not just whether their activity has an adverse impact on human rights, but whether it has an impact on the conflict as well. In order to do so, business enterprises are asked to “delineate the profile of the conflict and its actors, causes and consequences . . . .”

The 2020 UN Report also elaborates on three main steps that businesses should take when conducting conflict-sensitive heightened due diligence. First, they should “identify the root causes of tensions and potential triggers . . . that can affect conflict . . . .” Second, businesses should “map the main actors in the conflict and their motives, capacities and opportunities to inflict violence . . . .” Third, businesses should “identify and anticipate” the ways in which their own operations, products, or services impact upon or create social tensions among various groups.

Yet, as will be further elaborated, when it comes to the particular case of disputed territories, it may be extremely challenging for business enterprises to make such assessments about the dispute, its root causes, and its actors. Business enterprises may find themselves in the midst of heated geopolitical debates and face determinations that were traditionally left to States. They may also find themselves in conflict with their corporate governance duties when making such determinations.

III. BUSINESS ENTERPRISES ARE NOT MEETING THEIR HUMAN RIGHTS DUE DILIGENCE RESPONSIBILITIES

Although the definition of due diligence seems straightforward, in practice there is some evidence to suggest that business enterprises are confused about what their human rights responsibilities entail. In 2014, three years after the adoption of the UNGP, the Economist Intelligence Unit (“EIU”) published an analysis (“Economist Report”), titled “The Road from

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91 Id. at 13.
92 Id. at 23.
93 2022 UNDP GUIDE, supra note 88, at 23 (stating that businesses need to “identify their impact on the conflict”); See also 2020 UN Report, supra note 6, at 10–11, ¶ 41, ¶ 48 (noting that “[a]ctivities linking businesses to conflict are often not perceived as salient human rights issues and therefore might be ignored or under prioritized in standard human rights impact assessments.” Yet, “acting in an apparently human rights-compatible way might in fact fuel conflict dynamics.”). See also Aguirre and Pietropaoli, supra note 26, at 5–7 (stating that a business enterprise needs to assess “the impacts of its presence on the conflict” even where its activity does not have any adverse human rights impact.).
94 Id.
95 2020 UN Report, supra note 6, at 10, ¶ 46.
96 Id. at 10, ¶ 47.
97 Id. at 11, ¶ 48.
98 See UNGP, supra note 15, at 17–22 (Principles 17-19).
Principles to Practice – Today’s Challenges for Business in Respecting Human Rights.” The Economist Report examined levels of respect for human rights among businesses around the world. It contained the results of a global survey of nearly 900 CEOs. The Economist Report found that “corporate acceptance of a responsibility to respect human rights is widespread, but so is confusion about what that responsibility means in practice.”

In 2017, John Ruggie and John Sherman addressed an article written by Jonathan Bonnitcha and Robert McCorquodale in which the latter two contended that there is confusion among practitioners about the concept of human rights due diligence. Ruggie and Sherman wrote that in their own work with a variety of stakeholders for whom the human rights due diligence process provided a much needed roadmap, they found that “conducting human rights due diligence can be difficult, especially in complex global value chains, but not because of confusion about its meaning under the Guiding Principles.” Perhaps the two are correct and in the time that has passed since the Economist Report was published, business enterprises have learned what human rights due diligence means. If that is the case, there is still a need to understand why recent studies continue to show that business enterprises do not fully adhere to their human rights responsibilities in practice.

For instance, a study on due diligence conducted by the European Commission’s Directorate-General for Justice and Consumers in 2020 indicated that corporate risk assessment processes continue to “focus on the risks to the company rather than the risks to . . . external risk holders which are actually or potentially affected,” despite guidance, such as the UNGP.

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100 The Report found that companies overwhelmingly perceive a responsibility to respect human rights. Id. However, companies were still learning what their human rights responsibilities mean in practice. Id. The main barriers to addressing human rights were lack of understanding of responsibilities (30%), lack of resources (27%), and lack of training and education for all employees (25%). Id.


103 See Ruggie & Sherman, supra note 101, at 925.


106 Id.
and the OECD Guidelines, “which clarifies that the relevant risks for due diligence must extend beyond the risks of the company to those who are affected (the rights-holders).”

A 2021 report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (“the 2021 UN Report”), which took stock of the first decade of the UNGP, also found that a large percentage of business enterprises do not meet their human rights due diligence responsibilities. According to the 2021 UN Report, “studies, benchmarks, and ratings” from the last decade indicate that although progress has been made, there is “room for more progress.”

In 2022, a Corporate Human Rights Benchmark assessed “127 companies in the food and agricultural products, ICT and automotive manufacturing sectors on their human rights performance.” (“2022 Benchmark”).110 “The average score overall was 17.3%. Only one company scored above 50%, and 104 companies (82%) scored below 30%.”111 The 2022 Benchmark found that “on average, company score improvements are low.”112 According to the 2022 Benchmark, in the decade since the UNGP was adopted, “the pace at which companies are improving on these key aspects of respecting human rights is simply too slow, and it is clear that embedding human rights within companies remains a major challenge.”

Do business enterprises fail to carry out their human rights responsibilities robustly because the UNGP is a soft-law instrument that lacks enforcement mechanisms, and they care only about shareholder

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107 Id; see also EU Commission’s Proposal, supra note 11, at 2 n.8.
109 Id.
113 Id.
114 Id.
115 The preamble of the EU Commission’s Proposal notes that “[v]oluntary action does not appear to have resulted in large scale improvement across sectors . . . . Certain EU companies have been associated with adverse human rights and environmental impacts, including in their value chains.” EU Commission’s Proposal, supra note 11, at 2.
116 See Zamfir supra note 39, at 5; The treaty process can serve as a catalyst for effective reforms at domestic levels, BUS. & HUM. RTS. RES. CTR.: OPINION (Sep 2, 2015), https://www.business-humanrights.org/en/blog/the-treaty-process-can-serve-as-a-catalyst-for-effective-reforms-at-domestic-levels/ (“Since the adoption of resolution HRC/29 in June 2014, States have – on numerous official occasions – recognized the lack of measures taken to effectively implement the UN Guiding Principles on Business and Human Rights. Civil society organizations, such as FIDH, continue to document the limits and shortcomings of the Guiding Principles. Most importantly, there’s a growing acknowledgement . . . of the need to pay greater attention to the ‘forgotten pillar’, in other words to adopt measures to ensure victims can access justice and obtain remedy.”); Press Release, Business and Human Rights:
maximization? That is, are their public statements regarding stakeholder governance (“stakeholderism”) only for show, as recent empirical analysis in the United States reveals? Or do they fail to meet their human rights responsibilities fully because the UNGP creates uncertainty regarding terms such as “adverse human rights impacts”? The answer may be a combination of the two speculations. Furthermore, in disputed territories, the term “adverse human rights impacts” may require business enterprises to make geopolitical decisions that they would rather steer clear of even at the cost of not meeting their human rights responsibilities.

When examining why business enterprises fail to meet such responsibilities fully, it is important to note that although the UNGP lacks enforcement mechanisms, it can have substantial financial implications. Enterprises operating in disputed territories are exposed to numerous financial and reputational risks that are a direct consequence of the current soft-law framework, in addition to the financial risks pertaining to their operations in these areas.


116 See Lucian Bebchuk & Roberto Tallarita, The Illusory Promise of Stakeholder Governance, 106 CORNELL L. REV. 91 (2020) (providing empirical data suggesting that “recent commitments to stakeholderism were mostly for show rather than a reflection of plans to improve the treatment of stakeholders,” and arguing that, because corporate leaders have strong incentives not to protect stakeholders beyond what would serve shareholder value, acceptance of stakeholderism should not be expected to produce material benefits for stakeholders”); see also Lucian Bebchuk & Roberto Tallarita, Was the Business Roundtable Statement Mostly for Show? – (2) Evidence from Corporate Governance Guidelines, HARVARD.EDU: CORPORATE GOVERNANCE (Aug. 18, 2020), https://corpgov.law.harvard.edu/2020/08/18/was-the-business-roundtable-statement-mostly-for-show-2-evidence-from-corporate-governance-guidelines/.

117 A recent example of a theoretical change is the Business Roundtable statement (“BRT Statement”) on corporate purpose, which was signed in August 2019 by CEOs of 181 U.S. public companies. The BRT Statement moved away from a “shareholder primacy” and “shareholder maximization” doctrine. The BRT Statement is available at: https://opportunity.businessroundtable.org/ourcommitment.

118 See supra note 116.

119 See Interpretive Guide, supra note 18, at 13–14 (noting that a failure to respect human rights “may hamper an enterprise’s ability to recruit and retain staff, to gain permits, investment, new project opportunities or similar benefits essential to a successful, sustainable business.”)
IV. THE COSTS OF OPERATING IN DISPUTED TERRITORIES

A. Divestment Decisions, ESG Rankings, and Complaints before NCPs for the OECD

Some business enterprises may find financial opportunities in operating and investing in conflict-affected areas. However, business enterprises increasingly must take into account the heightened risk of adverse human rights impacts in disputed territories, quite apart from the risks to their own operations. This risk of adverse human rights impacts carries with it financial risks for business enterprises in terms of various ESG metrics, even though the current business and human rights framework is mostly based on soft law. For instance, investors may add businesses operating in disputed territories to their divestment lists, citing the current business and human rights framework as a significant parameter in their decisions. ESG rating bodies may flag such businesses as having the potential to be involved in human rights violations. They may be subjects of complaints submitted to National Contact Points (“NCPs”) that serve as an implementation mechanism for the OECD Guidelines. And they may become targets of pressure led by boycott movements and political activists.

Banks and investment funds often cite soft-law instruments such as the UN Global Compact, the UNGP, and the OECD Guidelines when deciding to divest from business enterprises. For example, in June 2021, KLP, the Norwegian pension fund, excluded 16 companies from its investment portfolios as part of a due diligence-based divestment. KLP said that it had previously excluded companies with links to the West Bank Barrier or the Israeli settlements. KLP further stated that it “has considered whether the companies’ links to and operations in the West Bank could constitute an unacceptable risk of violating KLP’s guidelines, including contributing to human rights abuses and serious violations of the rights of the individual in

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120 John Bray & Antony Crockett, Responsible Risk-Taking in Conflict-Affected Countries: The Need for Due Diligence and the Importance of Collective Approaches, 94 INT’L REV. RED CROSS 1069, 1072 (2012).

121 In his 2008 Report, Ruggie stated that, “[i]t is well established that some of the most egregious human rights abuses, including those related to corporations, occur in conflict zones.” See 2008 Report, supra note 16, ¶ 47.

122 The 2020 EU Commission study on due diligence through the supply chain found that “[d]ivestment was the least selected due diligence action by both business and general respondents. The study did not, however, address the particular case of disputed territories. EUR. COMM’N, STUDY ON DUE DILIGENCE REQUIREMENTS THROUGH THE SUPPLY CHAIN 221 (2020), https://data.europa.eu/doi/10.2838/39830.

123 See generally OECD GUIDELINES, supra note 21, at 3, 13, 56–57.

situations of war and conflict.” KLP also commented that under the UNGP, “[c]onflict and political turmoil constitute a particularly high risk of human rights violations. Companies with operations in areas of conflict must therefore exercise a particularly high level of care to avoid becoming involved in human rights abuses.”

Another example pertains to businesses with ties in Western Sahara. On January 2, 2017, Danske Bank, a Scandinavian bank, included in its exclusion list the OCP Group, along with Potash Corp., Incitec Pivot, and Innophos Holding, due to their involvement “in importation of natural resources sourced in conflict with human rights norms.” The advocacy group Western Sahara Resource Watch (“WSRW”) reported that the latter three companies imported phosphate from Western Sahara through deals with OCP for the production of fertilizers. OCP continued to appear on Danske Bank’s 2022 list of investment restrictions due to “human rights issues.” Danske Bank’s 2022 responsible investment policy cited the UN Global Compact, the UNGP, and the OECD Guidelines among its external standards. These are just a few examples of exclusion decisions based on the current soft-law business and human rights framework.

125 Id.
126 Id.
129 Id.
130 See INVESTMENT RESTRICTIONS, supra note 127.
131 See, e.g., id. (citing the UN Global Compact and the OECD Guidelines among the criteria affecting its investment restrictions).
Another financial risk of operating in disputed territories may be a low ranking by ESG ranking bodies following violations of the UNGP. An example of such a risk was highlighted by Morningstar Inc.’s (“Morningstar”) decision to discontinue a human rights information service offered by a subsidiary, following an investigation into claims of anti-Israel bias. On June 2, 2022, Morningstar’s Executive Chairman Joe Mansueto and Chief Executive Officer Kunal Kapoor published a letter stating that Morningstar had decided to discontinue the human rights information service, Human Rights Radar (“HRR”), of its subsidiary Sustainalytics. Morningstar acquired Sustainalytics in 2020. Questions about HRR soon followed from JLens. JLens suspected that Morningstar supported the anti-Israel Boycott, Divestment, and Sanction (“BDS”) campaign and included it in its “do not invest list.” In response, Morningstar began a review in 2021 and created a working group headed by the law firm White & Case to conduct an independent investigation of these allegations.

White & Case noted in its report that Sustainalytics’ products focus, among other things, on whether or not business enterprises adhere to the current dominant business and human rights soft-law instruments. For example, the Global Standards Screening (“GSS”) product focuses on international principles” such as those set out by the UNGP and the OECD Guidelines. See also Kassoti, supra note 20, at 321–25 (describing additional decisions of funds and banks to divest from corporations operating in the West Bank and East Jerusalem as well as Western Sahara, citing the UNGP as a relevant source upon which they based their decisions); Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises, OHCHR Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory 12 (June 6, 2014), https://www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf [hereinafter 2014 UN Report] (presenting examples of business enterprises “that have decided to disengage from relationships or activities associated with the settlements in the OPT due to the risks involved.”).
violations, or risk of violations, of soft-law instruments such as the UN Global Compact, the UNGP, and the OECD Guidelines.\(^\text{140}\) The HRR team evaluates, \textit{inter alia}, companies’ human rights management, based on the UNGP.\(^\text{141}\) Furthermore, “[t]he HRR team’s assessment of an issuer’s human rights policy corresponds to specific UNGP requirements.”\(^\text{142}\)

According to the White & Case report, Sustainalytics employees specializing in human rights issues developed guidelines “for GSS analysts on how to apply the screening analysis to the Israeli/Palestinian conflict areas and other conflict regions.”\(^\text{143}\) The guidance document on “Occupied Territories” covered “the Israeli/Palestinian conflict areas as well as other occupied / disputed territories including Western Sahara, Tibet, Puntland-Somaliland, the South China Sea, Yemen, and the territories involved in the Guyana-Venezuela conflict.”\(^\text{144}\) The White & Case report noted, \textit{inter alia}, that “[t]he document’s position is that in occupied territories where human rights are being systematically violated, any business activity in that region is connected to the violations in some direct or indirect way.”\(^\text{145}\) Thus, Sustainalytics’ basic premise was that any such business activity is connected to a human rights violation. As noted above, the 2022 UNDP Guide also maintains that conflict will always create adverse human rights impacts, and that any business activity in such areas necessarily entails some type of a linkage to adverse human rights impacts.\(^\text{146}\) Yet, if other ESG ranking bodies rely on similar premises, every corporation operating in occupied territories is exposed to the possibility of a poor ESG ranking, irrespective of the nature of its business activity.

Business enterprises operating in disputed territories are also exposed to the risk of being the target of complaints submitted to NCPs for the OECD Guidelines.\(^\text{147}\) Because the UNGP has substantially been incorporated into the OECD Guidelines, businesses can be brought before an NCP for the OECD Guidelines as a result of adverse impacts that may be traced to their supply chains.\(^\text{148}\) Although this is only a soft-law mechanism, an NCP’s decision could potentially have reputational consequences that could result

\(^\text{140}\) Id.

\(^\text{141}\) Id. at 62.

\(^\text{142}\) Id. According to the White & Case report, “[i]n particular, HRR looks at whether an issuer has committed itself to avoid complicity in human rights abuses by third parties, and to go beyond national legislation where the rule of law is lacking and/or falls short of best practice as defined by the relevant UNGP.” Id.

\(^\text{143}\) Id. at 78–79.

\(^\text{144}\) Id. at 80.

\(^\text{145}\) Id.

\(^\text{146}\) 2022 UNDP GUIDE, supra note 88, at 10.

\(^\text{147}\) See generally OECD GUIDELINES, supra note 21, at 3, 13, 56–57.

\(^\text{148}\) See, \textit{e.g.}, infra footnotes 284–286 and the text accompanying them.
in financial penalties, such as consumer boycotts and inclusion in investors’ divestment lists.

The examples above demonstrate that divestment decisions, as well as ESG ranking decisions, examine, among other things, whether business enterprises adhere to dominant soft-law instruments, such as the UN Global Compact, the UNGP, and the OECD Guidelines. It is therefore somewhat surprising that despite the financial costs involved in disregarding their human rights responsibilities in disputed territories, business enterprises generally fail to meet these responsibilities (in both disputed and non-disputed territories). Perhaps the financial gains of operating in disputed territories still outweigh the costs of not meeting these obligations. Yet, the accumulated costs of not complying with the current soft-law framework may at some point become seriously detrimental to business enterprises. Alternative answers may be that business enterprises are too uncertain about the content of their human rights responsibilities; or that in the context of disputed territories, they prefer to steer clear of the type of geopolitical decisions that they are asked to make under the UNGP.

In view of the financial risks and uncertainties involved in operating in disputed territories, perhaps coupled with fear of being required to engage in geopolitics, some business enterprises may decide to silently boycott disputed territories, as will now be elaborated.

B. Silent Boycotts

How does one know if a business enterprise decides not to operate in disputed territories because it does not want to be involved in geopolitics, because it fears financial penalties for failure to adhere to the UNGP and related soft-law instruments, or both? A silent boycott, for the purpose of this article, may be defined as a decision by a business enterprise to refrain from any business activity in a disputed territory, without publicly announcing its decision. The boycott decision may be a result of fear of being subject to negative reputational or financial consequences, or reluctance to be engaged in geopolitics. It may also be made for ethical reasons. The decision not to make the boycott decision public may be a result of fear of possible repercussions from those supporting the other party to the dispute.

A silent boycott may be impossible to prove. Companies may be afraid to publicly state their true motives due to anti-boycott laws or may fear being perceived as taking sides in a political debate. Still, there are occasional indications of boycotts. The reports that follow may serve as examples.

In August 2015, the Financial Times reported that Transdev, a French company half owned by Veolia, sold its shares in City Pass, the concession company for the Jerusalem Light Rail Transportation (“JLRT”) project in East Jerusalem, and in Connex Jerusalem, the company that runs the trains.\(^\text{149}\)

JLRT runs mainly within the 1949 Armistice Line, with some portions running through East Jerusalem. It serves Jews and Arabs alike.\textsuperscript{150}

The BDS movement tried to dissuade business enterprises from taking part in the project.\textsuperscript{151} According to the \textit{Financial Times}, supporters of the movement to boycott Israel claimed victory in their campaign, while Transdev insisted that its decision to sell its shares in the JLRT “was purely strategic.”\textsuperscript{152} The \textit{Financial Times} noted that “Veolia had been pressed over many years, and in several countries, by activists from the ‘Boycott, Divestment and Sanctions’ or BDS movement targeting Israel.”\textsuperscript{153}

Another example concerns G4S, a British-based security firm. The company provided “screening and other services to a number of Israeli organizations, including CCTV cameras installed in Tel Aviv, screening equipment used in the prison system, and security for courts.”\textsuperscript{154} In March 2016, the \textit{Times of Israel} reported that G4S was selling its business operations in Israel. The on-line news source noted that G4S “said it was doing so for ‘commercial reasons’ and not because of a boycott movement against Israel.”\textsuperscript{155} However, the \textit{Times of Israel} noted that G4S “has been the target of a years-long campaign by activists calling for boycott, divestment and sanctions against Israel.”\textsuperscript{156} The \textit{Times of Israel} further reported that:

\begin{quote}
[t]he company’s dealings with Israel, especially over the Green Line, have prompted a number of government and educational bodies to boycott G4S in recent years. In 2013, the company announced it would partially divest from Israel in response to tension over its West Bank operations. Citing its own ethics policy, G4S said it would let expire contracts to provide screening equipment at the Ofer Military prison near Ramallah, at West Bank checkpoints and at a police station in the contentious E-1 area east of Jerusalem. Those contracts expired in 2015.\textsuperscript{157}
\end{quote}

G4S was also the target of a complaint filed with the UK NCP for the OECD Guidelines. The complaint referred to equipment and services provided by G4S to Israeli government agencies and other customers in

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\textsuperscript{150} For detailed information on the JLRT lines, see generally https://jet.gov.il/en/about-network/.
\textsuperscript{152} See Reed, supra note 149.
\textsuperscript{153} \textit{Id.}
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.}
\end{flushright}
several locations, such as checkpoints on the West Bank, the Ofer prison, a checkpoint at the border between Israel and Gaza, and several detention centers in Israel. The complaint may have added to the pressure the company felt to cease its aforementioned operations. In 2023, the BDS movement reported that G4S decided to sell all its remaining business in Israel, and stated that “[t]his victory comes after human rights campaigns caused G4S serious ‘reputational damage’ and some lucrative investments and contracts.”


159 The UK NCP found that “there are adverse human rights impacts associated with the facilities and locations referred to in the complaint. None of the information reviewed by the UK NCP suggested that G4S staff or equipment play a direct part in these impacts.” See Final Statement from UK National Contact Point for the OECD Guidelines for Multinational Enterprises regarding G4S, supra note 158 at ¶ 41. However, the UK NCP noted that, “the OECD Guidelines oblige G4S to undertake due diligence across its operations, considering these impacts.” Id. at ¶ 42. The NCP further held that “G4S has focused too narrowly on deciding whether or not it is justified in continuing to hold contracts referred to in the complaint.” Id. at ¶ 69. Yet, the OECD Guidelines “do not contemplate this as the first or only option . . . .” Id. at ¶ 70. Rather, the focus should be “on how to address impacts, and not whether they need to be addressed.” Id. According to the NCP, until G4S “publicly communicates” the actions it took to address the impacts it was allegedly linked to, the NCP “considers that its actions are not consistent with its obligation under Chapter IV, Paragraph 3 of the OECD Guidelines to address impacts it is linked to by a business relationship.” Id. at ¶ 76. Finally, the NCP made the following recommendations:

a) That G4S considers how it may be able to work with business partners in Israel to support action to address adverse impacts referred to in the complaint;

b) That G4S communicates to stakeholders and business partners any actions it is taking in regard to the issues raised in the complaint;

c) That G4S implements across its operations a contract approvals process that includes assessment of human rights risks and application of mitigations . . .

Id. at ¶ 80.

In a follow-up statement released in July 2016, the UK NCP noted that “G4S’s report to the NCP does not identify any actions taken specific to the issues in the complaint.” See UK National Contact Point, Follow-Up Statement from UK National Contact Point for the OECD Guidelines for Multinational Enterprises, regarding Lawyers for Palestinian Human Rights complaint to UK NCP about G4S ¶ 21 (July 7, 2016), https://www.gov.uk/government/publications/lawyers-for-palestinian-human-rights-complaint-to-uk-ncp-about-g4s. The NCP therefore concluded that G4S had not implemented the two specific recommendations mentioned above (recommendation (a) and (b)). Id. However, the NCP noted that G4S’s report to the NCP indicated that G4S implemented the NCP’s third and more general recommendation (recommendation (c) mentioned above). Id. at ¶ 22.

160 Palestinian BDS National Committee, Bowing to BDS pressure: G4S to divest
Although these examples do not prove that the Transdev and G4S decisions were impacted by a fear of being involved in geopolitics and the uncertainty surrounding the content of their obligations under the current business and human rights soft-law framework, they demonstrate the pressures and the reputational and financial risks to which companies operating in disputed territories are exposed. These factors may lead business enterprises to decide that the risks of operating in disputed territories outweigh the benefits.

As will be further elaborated, a withdrawal of business activity from disputed territories may not necessarily be an optimal result. In order to examine whether business enterprises should be discouraged or even barred from operating in disputed territories, it is important to examine what international law has to say about the question. Other considerations also come from the realm of corporate governance.

V. IS THE VERY PRESENCE OF BUSINESS ENTERPRISES IN DISPUTED TERRITORIES PROBLEMATIC IN AND OF ITSELF?

A. International Law and Business Activities in Disputed Territories

On February 12, 2020, the Office of the OHCHR published the Database of 112 business enterprises involved in certain activities relating to Israeli settlements in East Jerusalem and the West Bank (“the Database”). In United Nations Human Rights Council resolution 31/36, the Council defined the Database by reference to a list of economic activities compiled in 2013 by an international fact-finding mission on Israeli settlements (“2013 Report”). Some of the activities listed in the 2013 Report were completely from apartheid Israel, BDS movement (June 1, 2023), https://bdsmovement.net/BDS-G4S-Victory.


geographically connected to settlements, while others supported their existence.\textsuperscript{164}

The Database raised important questions regarding the role of international law in regulating business activities in disputed territories. It is arguable that the activities listed in the 2013 Report may be invoked against enterprises in other disputed or occupied areas, even though the Database does not purport to be a legal document.\textsuperscript{165} Business enterprises may find the mere possibility of inclusion in such databases a reason not to operate in disputed territories because of potential reputational and financial implications, apart from the question of whether the activities listed in the Database should be discouraged under the UNGP and the OECD Guidelines.

UNGP 19 states that “[w]here a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.”\textsuperscript{166} In addition, “[w]here a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.”\textsuperscript{167} UNGP 19 also addresses cases in which a business enterprise does not contribute to an adverse human rights impact, but that impact “is directly linked to its operations, products or services by a business relationship.”\textsuperscript{168} In such cases, the commentary to UNGP 19 states that the enterprise should consider terminating its business relationships with such entities if it “lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage.”\textsuperscript{169} The commentary further declares that “for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.”\textsuperscript{170}

The UNGP does not expressly prohibit business activity in disputed or, in particular, occupied territories.\textsuperscript{171} It does, however, clarify that in

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\textsuperscript{164} See Kassoti & Duval, supra note 27, at 20; see also Report of the Independent International Fact-Finding Mission, supra note 163, ¶ 96 (“[I]nformation gathered by the mission showed that business enterprises have, directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements.”).

\textsuperscript{165} See Kassoti & Duval, supra note 27, at 21.

\textsuperscript{166} UNGP, supra note 15, at 20–21 (Principle 19).

\textsuperscript{167} Id.

\textsuperscript{168} Id.

\textsuperscript{169} Id. at 22 (commentary to Principle 19).

\textsuperscript{170} Id.

\textsuperscript{171} The commentary to UNGP Principles 12 and 23, which address, \textit{inter alia}, the responsibility of business enterprises in situations of conflict, does not include any prohibition
situations of armed conflict, business enterprises should respect the standards of IHL. Furthermore, UNGP 23(c) states that business enterprises should “[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.” The commentary to UNGP 23 further states that “[s]ome operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors.” The OECD Guidelines likewise note that “in situations of armed conflict enterprises should respect the standards of international humanitarian law.”

B. What Should Respect for Human Rights Entail Under the UNGP?

The 2020 UN Report notes that “[t]here may come a point at which a business faces a decision to suspend or terminate its activities in or linked to a conflict-affected context.” The 2022 UNDP Guide states that in such a case, business enterprises need to consider “whether the adverse impacts of the decision to exit or suspend the operations outweigh the benefits.” In general, a decision to exit a conflict-affected area (including disputed territories), while respecting human rights (as well as IHL in situations of armed conflict), should be based on the particular circumstances of the situation at issue. For instance, business enterprises may consider exiting from areas that are under a sanctions regime.

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173 UNGP, supra note 15, at 25 (Principle 23(c)).

174 Id. at 25–26 (commentary to Principle 23). The commentary further states that “Business enterprises should treat this risk as a legal compliance issue . . . .” Id. at 25.

175 OECD GUIDELINES, supra note 21, at 26, ¶ 45. Some scholars maintain that business enterprises operating in conflict-affected areas should also follow international criminal law. See Aguirre & Pietropaoli, supra note 26, at 8 (the two bring an example of a French company that has been charged in U.S. courts “with complicity in war crimes and crimes against humanity during the Syrian civil war.”).

176 2020 UN Report, supra note 6, at 14, ¶ 64.

177 2022 UNDP GUIDE, supra note 88, at 35.


179 2022 UNDP GUIDE, supra note 88, at 35 (stating that “[t]he conclusion of the due diligence exercise by a business may lead to the decision to not engage, relocate, suspend or terminate its activities in or linked to a conflict-affected context.”). See also Aguirre & Pietropaoli, supra note 26, at 8.

180 The UNDP 2022 Guide states that “[t]he imposition of sanctions may be a useful
However, as noted above, in disputed territories a question arises of whether the very presence of business enterprises is problematic, in and of itself. Some praise the UNGP for discouraging businesses from operating in disputed territories, despite the fact that the traditional predominant view is that international law does not prohibit such operations.

One must wonder whether the international community would have adopted the UNGP, had it known that it would be employed in a manner that would dissuade business enterprises from operating in disputed territories. Perhaps the UNGP was adopted by a unanimous vote because it was not perceived as legally binding. The fact that negotiations for the adoption of an international legally binding business and human rights instrument have been going on for years without success may prove that the international community is not ready to apply binding human rights obligations directly to business enterprises. During negotiations for such a binding instrument, several States have raised concerns about the direct applicability of international human rights obligations to business enterprises.

\[\text{181 Cf. Aguirre & Pietropaoli, supra note 26, at 12 (examining whether the mere presence of a business enterprise in a conflict-affected area may be considered as problematic, in and of itself.)} \]

\[\text{182 See, e.g., Kassoti, supra note 20, at 321 (submitting that “the UNGPs have been successful in dissuading companies from carrying out economic activities in the occupied Palestinian territories and in the occupied Western Sahara”); Davitti, supra note 35, at 209–10 (“The continued involvement in Western Sahara of companies such as Enel, Siemens and Azura, to mention just a few . . . . appears to ignore both the home states’ obligation to protect human rights and the companies’ responsibility to respect them as specifically articulated in the UNGP for high-risk contexts.”).} \]

\[\text{183 See supra notes 28–29 and the text accompanying them.} \]

\[\text{184 Cf. Adeyeye, supra note 17, 160–61 (2007) (“Under a State-centered approach to international law, the primary sources of international law – treaty law and customary law – would still be needed for the creation and imposition of direct corporate responsibility on MNCs [multinational corporations] . . . . States should sign treaties which would directly hold corporations responsible . . . . The chances of direct corporate responsibility for human rights violations being included under customary international law is [sic] very slim, because major powers in international law are unable to agree on the need and parameters for such responsibility.”).} \]

\[\text{185 The UNGP was adopted after a failed attempt at the Human Rights Commission in 2003 to adopt the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The Norms were not legally binding. But “they were written in the language of obligation . . . .” See Joseph & Kyriakakis, supra note 18, at 339.} \]

\[\text{186 See, e.g., McBrearty, supra note 14 (addressing several challenges pertaining to the proposed treaty. The first concerns “the direct enforcement of human rights norms against corporations, rather than states,” which represents “a fundamental theoretical departure from traditional human rights practice.”).} \]

\[\text{187 The United States, for example, noted it has “serious substantive concerns throughout the text [of the UN draft treaty] in its opening statement in the 9th Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business} \]
2014, Ruggie predicted that negotiations would go on for years without reaching agreement on an all-inclusive treaty that would directly bind business enterprises. While negotiations for an internationally legally binding business and human rights instrument are ongoing, the international community may want to take this opportunity to examine considerations

Enterprises with respect to Human Rights. It also stressed that “[t]o receive broad state support, a treaty must allow states flexibility to achieve their goals, rather than dictate only one way. The United States has not been alone in our concerns regarding the draft treaty. Many stakeholders, including a considerable percentage of States that are home to the world’s largest transnational corporations, have pursued only limited participation in these negotiations.” See General Statement of the United States of America, The U.S. Government’s Opening Statement for the BHR Treaty Negotiations (October 23, 2023). In a previous statement released ahead of the sixth session of the OEIGWG, the United States raised doubts regarding the possibility of applying direct human rights obligations to corporations: “[W]e remain concerned with the draft Legally Binding Instrument’s (LBI) imposition of binding obligations with respect to regulation of business . . .” See Statement by the United States of America as delivered by Catherine Peters at the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises (October 25, 2021), https://geneva.usmission.gov/2021/10/25/un-geneva-us-opening-ended-working-group-on-transnational-corporations-and-other-business-enterprises/. The United Kingdom raised similar doubts, stating that “the requirement of mandatory due diligence in domestic law is not necessarily desirable . . . . States should be entitled to use a ‘smart mix’ of legal and voluntary measures to regulate businesses in their jurisdiction, according to their particular circumstances.” See Statement by the Government of the United Kingdom of Great Britain and Northern Ireland, 9th Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (October 23, 2023), available at: https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session9/oral-statements. Australia noted that “an International Legally Binding Instrument should be legally clear, realistically implementable and broadly supported.” Australia further emphasized that “[a]s it is drafted, the proposed treaty cannot provide a practical and principled approach to avoid and address adverse effects of business activities on human rights. A divisive and ambiguous legally binding instrument with potentially limited ratification by UN member states would detract from broader, more coherent implementation of theUNGPs by states and businesses, and would therefore be counter-productive to business and human rights protections going forward.” See Australian Statement, Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises, ninth session, October 23–27, 2023, available at: https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session9/oral-statements. Japan similarly emphasized that “it is a fundamental prerequisite that internationally legally binding instruments regarding business and human rights are realistic, effective, and well balanced to ensure that many States can agree on their basic contents.” According to Japan, “[t]o achieve this when formulating such instruments, it is necessary to have a wider range of relevant States and stakeholders discuss any proposed drafts and to undertake a consensus-building process, which would build upon the UNGPs, during the drafting process. However, the current draft is not sufficient to meet this prerequisite.” See Statement concerning the process to elaborate a “Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises” (Japan), available at: https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session9/oral-statements.

affecting the question of whether business activity in disputed territories should be discouraged and make a conscious decision on this issue.

C. The Risk of Exacerbating Disputes and Entrenching Occupations

It has been argued that business enterprises operating in disputed territories may exacerbate disputes, 189 entrench occupations, 190 and hinder the self-determination of local communities. 191 For instance, in 2010, a UN Global Compact publication noted that business enterprises may negatively impact conflicts by “hiring or consulting with one group of local stakeholders while ignoring the rest, unintentionally benefiting one group over another which can foster grievances between communities.” 192 Furthermore, “[w]ell meaning social investment projects may undermine a government’s role in providing basic services. And poorly-trained security forces might use excessive force around company assets resulting in human rights abuses.” 193

When it comes to occupied territories, there is also a risk of entrenching the occupation. One may further argue that allowing business activity in occupied territories might blur the distinction between sovereignty and occupation, and lead to the “normalization” of the occupation. Arguments of this sort have been raised with regard to the merging of HRL into IHRL 194 and the application of Israeli law to settlers in the West Bank. 195

In January 2019, Amnesty International released a report in which it argued that digital tourism companies such as Airbnb, Booking.com, Expedia, and TripAdvisor facilitate the entrenchment of Israel’s presence in

189 See, e.g., UN Global Compact & PRI, Guidance on Responsible Business in Conflict-Affected and High-risk Areas: A Resource for Companies and Investors (2010), https://www.unpri.org/download?ac=1724 (“[I]n some cases, companies may negatively impact their own operations and their activities may exacerbate conflict or instability – even if their intentions are for the best.”).

190 See, e.g., Azarova, supra note 35, at 193–94 (“[B]usiness play a prominent role not only in Israel’s settlement enterprise, but also in other ongoing occupations . . . . In such environments, business contribute to the economy of settlements, further the expansion of settlement industrial zones and production facilities . . . . and contribute to the diversion of land and other natural resources . . . .”).

191 See Kassoti & Duval, supra note 27, at 21 (referring to the case of Western Sahara and noting the “enabling role played by business actors involved in this territory, especially in terms of entrenching the occupation and hindering the self-determination of the people of Western Sahara, the Sahrawi”).

192 See, e.g., UN Global Compact & PRI, supra note 189.

193 Id.


195 See Marti Koskenniemi, Occupied Zone – “A Zone of Reasonableness?” 41 ISR. L. REV. 13, 37 (2008) (arguing that the “extension of Israeli jurisdiction in personal or functional terms to the settlers undermines the distinction between sovereignty and occupation . . . .” Koskenniemi warns that this could wipe out “the sense of its exceptionality.” Id. at 38).
the West Bank by advertising listings in the area.\footnote{196} According to this line of argument, any business activity in occupied territories should be seen as contributing to adverse human rights impacts, because, according to IHL, occupations should be temporary.\footnote{197}

Western Sahara Resource Watch likewise argues that “[d]oing business with Morocco in the part of Western Sahara that is illegally occupied strengthens the occupation.”\footnote{198} According to WSRW, business activity in the territory “contributes financially to the occupation;” “provides job opportunities for Moroccan settlers;” and “lends a sign of political legitimacy to Morocco’s illegal military presence in the territory.”\footnote{199} WSRW “therefore works to pressure involved businesses to withdraw.”\footnote{200}

When it comes to settlements in occupied territories, the assessment of whether an adverse impact has occurred or may occur is even more complex. A 2014 UN Report addressing the implications of the UNGP in the context of the Israeli settlements states that when carrying out human rights due diligence, businesses operating in settlements need to take into account “[t]he illegal status of the settlements under international law and information available in the public domain about human rights abuses related to the settlements.”\footnote{201} According to the report, business enterprises operating in settlements, or in connection with settlements, need to show that their actions do not support the settlements’ existence. They also need to demonstrate their efforts to prevent or mitigate adverse impacts, including, where necessary, by terminating their business activity.\footnote{202}

Several prominent NGOs and academics\footnote{203} argue that any economic involvement in settlements “runs contrary to the business responsibility to respect human rights,”\footnote{204} and accordingly call “for immediate termination of these activities.”\footnote{205} As noted above, in June 2021, KLP excluded sixteen

\footnotesize{\begin{itemize}
  \item 198 See the Western Sahara Resource Watch’s website, available at: https://wsrw.org/en/about-us.
  \item 199 Id.
  \item 200 Id.
  \item 201 2014 UN Report, supra note 132, at 11.
  \item 202 Id.
  \item 203 See Antoine Duval, \textit{Offside? Challenging the Transnational Legality of Israeli Football Activities in the Occupied Palestinian Territories}, in \texttt{THE LEGALITY OF ECONOMIC ACTIVITIES IN OCCUPIED TERRITORIES} 213, 216–18 (Eva Kassoti & Antoine Duval, eds., 2020); see also Azarova, \textit{supra} note 35, at 193–94.
  \item 204 See Duval, \textit{supra} note 203, at 216–18.
  \item 205 Id. Duval refers to a line of academics and NGOs that produced papers and reports on
\end{itemize}}
companies from its investment portfolios after finding that “there is an unacceptable risk that the excluded companies are contributing to the abuse of human rights in situations of war and conflict through their links with the Israeli settlements.”\(^\text{206}\) KLP seems to have held the view that any services catering to settlements should be brought to an end.\(^\text{207}\) The fund stressed in its assessment that there are companies “whose deliveries make the settlements attractive places to relocate to and that enable the settlers to maintain a modern lifestyle.”\(^\text{208}\)

This also seems to be the view of Human Rights Watch (“HRW”). In a 2016 report, HRW stated that “the only way settlement businesses can avoid or mitigate contributing to abuses in line with their responsibilities under the UN Guiding Principles is by ending their operations in settlements or in settlement-related commercial activity.”\(^\text{209}\)

When the question arose of whether the Federation Internationale de Football Association (“FIFA”) should allow the Israeli Football Association (“IFA”) to hold matches inside settlements, HRW claimed that by allowing the IFA to hold such matches, “FIFA is engaging in business activity that supports Israeli settlements.”\(^\text{210}\) HRW also argued that the Israeli settlements’ football clubs “are run by nonprofit associations founded for that purpose,”\(^\text{211}\) and that “the associations explicitly seek to promote the settlements by providing recreational services to attract visitors and new residents, contributing to the further transfer of Israeli civilians into the West Bank.”\(^\text{212}\) Furthermore, according to HRW, “these clubs provide part-time employment to some residents of the settlements during the season, making them a more

the responsibility of corporations that support the existence of the Israeli settlements. Duval cites a report issued by Human Rights Watch, according to which “any adequate due diligence would show that business activities taking place in or in contract with Israeli settlements . . . contribute to rights abuses, and that business cannot mitigate or avoid contributing to these abuses so long as they engage in such activities.”\(^\text{213}\) Id. (citing Occupation, Inc.: How Settlement Business Contribute to Israel’s Violations of Palestinian Rights, HUM. RTS. WATCH (Jan. 19, 2016), https://www.hrw.org/news/2016/01/19/occupation-inc-how-settlement-businesses-contribute-israelis-violations-palestinian).

\(^{206}\) See KLP, supra note 124.

\(^{207}\) Id.

\(^{208}\) Id.


\(^{211}\) See Israel/Palestine: FIFA Sponsoring Games on Seized Land, supra note 210.

\(^{212}\) Id.
attractive place to live by providing supplementary income close to home.\textsuperscript{213}

It seems that Amnesty International, WSRW, KLP, and HRW hold the view that in situations of occupation, and especially in cases of settlements, the very presence of business enterprises is problematic, in and of itself. This line of argument does not seem to depend on whether a business enterprise serves or employs both parties to the dispute in occupied territories, or whether it provides essential services, such as food or electricity.\textsuperscript{214} When analyzing such concerns, it is important also to examine whether discouraging corporate activity in disputed territories, and especially occupied territories, may, in itself, result in negative human rights impacts.

\textbf{D. \textit{A Withdrawal of Business Activity from Disputed Territories May, in Itself, Result in Negative Human Rights Impacts}}

Although some prominent scholars and NGOs believe that a withdrawal of business activity from disputed territories may be a positive outcome of the current framework,\textsuperscript{215} it is important to remember, especially in situations of occupation, that halting business activity may be detrimental to the interests of the local population. While irresponsible business activity may escalate occurrences of violence or jeopardize political settlements,\textsuperscript{216} business enterprises can also contribute positively to the communities in which they operate by improving local infrastructure, creating employment and educational opportunities,\textsuperscript{217} and helping unite communities.\textsuperscript{218} Business enterprises may also help bring the parties to a conflict together and have an

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\textsuperscript{213} Id.
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\textsuperscript{214} For instance, Rami Levy Chain Stores Hashikma Marketing 2006 Ltd., an Israeli retail supermarket chain, appeared in the Database because of its West Bank locations. See 2020 Database, \textit{supra} note 161, at 8, ¶ 31; 2023 Database Update, \textit{supra} note 161, at 6.
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\textsuperscript{215} See \textit{supra} note 35 and sources therein.
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\textsuperscript{216} Bray & Crockett, \textit{supra} note 120, at 1070 (2012).
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\textsuperscript{217} See, e.g., UN Global Compact & PRI, \textit{supra} note 189, at 6. The guide states that: [T]he private sector can make a meaningful contribution to stability and security in conflict-affected and high-risk areas. Commercial activities have direct and indirect positive impacts by creating job opportunities, generating revenues that advance economic development and recovery, making sustainable investments in cities and towns, creating inclusive hiring policies that build good relations between ethnicities and communities.
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\textsuperscript{218} See, e.g., Tripathi, \textit{supra} note 32, at 133 (2011) (noting that “[t]here are several positive examples of the role businesses have played in zones of conflict. Some business leaders in Sri Lanka have helped bring communities together, and taken active steps to recruit people who have given up arms. Similarly, businesses in Zimbabwe, South Africa, and Angola have played a role in helping the warring parties come together for negotiations.”) See also Graf & Iff, \textit{supra} note 63, at 124 (nothing that while business enterprises “can entrench divisions if they privilege certain groups over others, they can also be used to build bridges between groups.”).
\end{flushright}
important role in peacebuilding, by creating opportunities for them to work and interact with each other.\footnote{Bray & Crockett, supra note 120, at 1072 (2012).}

As noted above, the 2020 UN Report and the 2022 UNDP Guide ask business enterprises to examine not just whether their activity has an adverse impact on human rights, but whether it has an impact on the conflict itself.\footnote{See supra note 93 and the text accompanying it.} Such a requirement could, in practice, mean that enterprises should take into account positive effects that their activities may have in disputed territories.\footnote{See Graf & Iff, supra note 63, at 120–22 (suggesting a conflict-sensitive human rights due diligence approach which would take into account positive human rights impacts of business activity in such areas, not just negative ones). The 2020 UN Report starting point is somewhat different. Despite the fact that the UNGP focuses on adverse impacts of business activity on human rights, and not on possible positive impacts of such activity, the Report suggests moving beyond “a static assumption that business is good for peace through its presence, and instead assess and act upon the impacts – both positive and negative – that business has in conflict and peace.” 2020 UN Report, supra note 6, at 9, ¶ 36.}

When WSRW questioned Siemens Gamesa about its operations in Western Sahara, the company’s reply pointed out positive contributions to the local communities:

We still believe that an improvement of energy infrastructure, especially based on renewable energies, will bring real value to communities and people. In our projects we follow a ‘hire-locals-first’-policy. In fact, jobs have resulted for people that are originally from the region. Besides, Siemens Gamesa is currently investing in targeted community projects, such as local health, clean drinking water, access to energy, as well as educational and environmental projects. Those projects are defined via a participatory approach of the local population.\footnote{See Letter from Dr. Markus Tackle, CEO of Siemens Gamesa Renewable Energy, to Ms. Eyckmans, Coordinator at the W. Sahara Res. Watch (Nov. 16, 2018), https://wsrw.org/files/dated/2018-12-04/2018.11.16_siemensgamesa-wsrw.pdf; see also Submission of Anne Herzberg, supra note 2, at 15.}

Similarly, Business & Human Rights Resource Centre asked Heidelberg Cement company whether its quarrying activities in the West Bank accorded with humanitarian law.\footnote{See E-mail from Salma Houerbi, MENA Regional Researcher at the Bus. & Hum. Rts. Res. Ctr., to Andreas Schaller, Dir. Grp. Commc’n, Heidelberg Cement (May 8, 2019), https://media.business-humanrights.org/media/documents/files/documents/Heidelberg_Cement_response.pdf.; see also Submission of Anne Herzberg, supra note 2, at 16.} The company noted in its response that its activities produced substantial advantages for the local Palestinian population:

\footnote{See supra note 6 and the text accompanying it.}
From Heidelberg Cement’s perspective, the quarrying activity is compatible with international humanitarian law as it produces substantial advantages for the local Palestinian population and at the same time it hardly affects the raw material reserves . . . the local Palestinian population benefits especially from the creation of attractive jobs in a region that is otherwise characterized by high unemployment and long-term economic stagnation . . . . In addition, employees benefit from state-of-the-art trainings, which open up new career opportunities and from healthcare organized by Hanson Israel. Palestinian and Israeli employees work together in intercultural teams, which also open up informal channels of cultural exchange that foster mutual understanding. This is especially important in a situation where contact between the different ethnic groups has become very limited, if not non-existent, throughout the last decade with increasing anti-normalization campaigns worsening the situation. The quarrying itself impacts existing raw materials reserves only by less than 0.01% per year . . . opening and operating the quarry under these circumstances is compatible with international humanitarian law as it prevents a socio-economic downturn in the region without compromising the existing raw material reserves in the area.225

Indeed, the act of terminating business ties in disputed territories may, in itself, result in adverse impacts.226 The ICRC maintains that “[a] withdrawal of business enterprises from conflict zones may also be undesirable: countries struggling to overcome the torments of armed conflict need economic development and private investment.”227 Some scholars contend that the most important role of businesses in such areas is to advance economic growth,228 as there is little prospect of lasting conflict resolution without economic development.229

As noted above, UNGP 19 addresses, inter alia, cases in which a business enterprise does not contribute to an adverse human rights impact, but that impact “is directly linked to its operations, products or services by a

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226 See Rep. of the U.N. Watch, supra note 29 (“The Guiding Principles suggest that a business can ‘consider’ withdrawing from a conflict-area in limited circumstance where it makes an internal business decision that it cannot protect human rights. Even then, the business must examine the ‘adverse human rights impact’ of withdrawing.”).


228 Bray & Crockett, supra note 120, at 1070.

229 Id.
In such cases, the enterprise should consider terminating its business relationships with such entities if it “lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage.” Yet it should also “[take] into account credible assessments of potential adverse human rights impacts of doing so.

An example of such potential adverse impacts concerns the JLRT. In December 2019, the Committee of Solidarity for the Arab Cause filed a complaint before the Spanish NCP against a Spanish corporation that formed a consortium with an Israeli construction company. The consortium was selected to complete the JLRT, and to take care of the operation and maintenance of two lines in the project. The Spanish NCP noted in its assessment of the complaint that there are “both national and international provisions that specify that working in occupied Palestinian territory and/or settlements has ‘negative human rights consequences.’” Yet, the dispute over the status of East Jerusalem has remained unsettled for years, with no end in sight. It is therefore not at all evident that halting all business activity in East Jerusalem would benefit the Palestinians residing there. Discouraging infrastructure development projects such as the JLRT, which are meant to serve and employ both parties to the dispute, could be detrimental, as residents would be deprived of basic infrastructure that could ease their daily lives, facilitate interaction, and provide job opportunities.

Following the 2020 publication of the Database, some of the companies included raised similar arguments. For example, Kelsey Roemhildt, a spokeswoman for General Mills, wrote in an email to the website The Hill that the company’s manufacturing facility in the Atarot Industrial Park in the West Bank “provides job security and employment for Palestinians who make up 50 percent of its workforce. ‘Many of the plant’s Palestinian workers have been employed at the facility for several years, working alongside Israeli colleagues.’

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230 UNGP, supra note 15, at 20–21 (Principle 19).
231 Id. at 19 (commentary to Principle 19).
232 UNGP, supra note 15, at 19 (commentary to Principle 19).
233 Comité de la Solidaridad con la Causa Árabe v. Construcciones y Auxiliar de Ferrocarriles (CAF), Spanish National Contact Point for the OECD Guidelines for Multinational Enterprises, Case E-00009, at 3 (May 25, 2022), https://www.oecdwatch.org/download/33527/?tmstv=1689777853 [hereinafter Spanish NCP Case].
234 Id. at 16.
235 Cf. Association France-Palestine Solidarité ‘AFPS’ v. Société ALSTOM Transport SA, Cour d’appel Versailles, 11/05331 (Mar. 22, 2013) (“It has even been acknowledged that the establishment of a means of public transport falls within the remit of the administration of an occupying power (the construction of a metro in occupied Italy), such that construction of a tramway by the State of Israel would not be prohibited.”) (unofficial translation of the original French text).
The OECD Guidelines refer to disengagements from business relationships as “a last resort” in cases of “failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact.” In such cases, business enterprises are asked to “take into account potential social, environmental and economic adverse impacts related to the decision to disengage.” They are also asked to disengage in a responsible manner by “seeking meaningful consultation with relevant stakeholders in a timely manner and where possible, by taking reasonable and appropriate measures to prevent or mitigate adverse impacts related to their disengagement.”

The 2020 UN Report and the 2022 UNDP Guide state that when deciding to exit a conflict-affected area, businesses should plan a clear exit strategy, take into account potential consequences, and “develop mitigation strategies.” Such strategies may include giving proper notification to affected stakeholders, ensuring that staff continue to receive income if business activity is only temporarily suspended, and developing measures to “mitigate the loss of employment.” These are important strategies. However, in reality, it may not always be possible to mitigate the permanent loss of employment or continue to pay staff when a business cannot foresee if or when it will be able to resume its activity in a disputed territory. An additional risk is that business enterprises conclude that operating in disputed territories is too risky and burdensome under the current business and human rights framework. In such a scenario, it is possible that only business enterprises that are oblivious to human rights would agree to operate in such territories.

An illustrative example is that of SodaStream’s former West Bank plant. SodaStream, which sells home fizzy drink machines, was the target of international protests due to the location of its plant. It announced in 2014 that it was closing the factory for financial reasons. In September 2015, the

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237 OECD Guidelines, supra note 21, at 19 ¶ 25.
238 Id.
239 See 2020 UN Report, supra note 6, at 14, ¶ 64–65; 2022 UNDP GUIDE, supra note 88, at 36, 55.
240 See 2020 UN Report, supra note 6, at 14, ¶ 65; 2022 UNDP GUIDE, supra note 88, at 36.
241 Id.
242 Id.
243 Cf. Aguirre & Pietropaoli, supra note 26, at 543 (noting that “[t]he additional impacts and associated mitigation measures may dissuade responsible businesses” in conflict-affected areas. This could potentially leave host states “with businesses unconcerned with human rights or conflict.”) The 2022 UDP Guide states that when transferring ownership, businesses need to assess “the human rights capacities of the buyer” and request “that the buyer put specific human rights-related policies and procedures in place.” 2022 UNDP GUIDE, supra note 88, at 55. Yet, some business enterprises may leave an area without transferring ownership at all. It is not clear whether alternative mitigation measures exist in such a scenario.
244 See SodaStream, supra note 81.
Guardian reported that the BDS movement claimed the decision was a result of the movement’s pressure. Yet, when SodaStream left, the immediate result was that its West Bank employees lost their jobs. According to the Guardian, SodaStream chief executive Daniel Birnbaum “has accused his company’s critics of antisemitism and hurting the interests of the Palestinian workers they claim to protect as it shuts down its factory in the West Bank and moves to Israel’s Negev Desert.” It is doubtful that the permanent loss of jobs in such cases can be mitigated.

It may thus be unwise to assume that the very presence of businesses in disputed territories, including occupied territories, necessarily undermines the rights of the local population. Discouraging all business activity in such territories, under the current international business and human rights framework, may actually be detrimental to their economic interests.

This analysis suggests that the question of whether business activity should be discouraged in disputed territories should be viewed as a policy question, to be specifically addressed and decided by the international community.

If business enterprises are not categorically be discouraged from operating in disputed territories, a separate question is what rules should apply to them when they operate in such territories. Two sub-questions that arise are whether business enterprises should be required to make geopolitical determinations when conflicting corporate governance considerations arise, and whether they are equipped to make such determinations.

VI. SHOULD BUSINESS ENTERPRISES OPERATING IN DISPUTED TERRITORIES BE SUBJECT TO THE SAME HUMAN RIGHTS FRAMEWORK THAT APPLIES TO BUSINESSES OPERATING ELSEWHERE?

A. Geopolitics and Corporate Governance

When examining whether business enterprises operating in disputed territories should be subject to the same human rights framework that applies to businesses operating elsewhere, it is important to take into account certain corporate governance considerations, namely considerations that pertain to the relationship between corporations and their shareholders.

245 Id.
246 Id.
247 Cf. Aguirre & Pietropaoli, supra note 26, at 549 (noting that at times, “it may be beneficial for a responsible business to remain in a conflict-affected area despite the risk of conflict or human rights impacts.”).
248 See Adeyeye, supra note 17, at 158 (writing that “[t]raditional notions of corporate governance are based on the twin models of shareholder primacy and shareholder maximization. The main objective of these models is to increase the wealth of shareholders, within the limits of the company’s resources and capabilities . . . . Corporate responsibility in...
corporate governance notions of shareholder primacy and shareholder maximization are now considered by some as inadequate to address corporate violations of human rights, especially when it comes to transnational corporations. Recent scholarship revisiting the question of the purpose of public business corporations examines whether corporations should also promote the welfare of stakeholders and society at large. The renewed attention to the question of the purpose of corporations has impacted the ongoing discourse regarding the content of ESG standards.

In disputed territories, the discourse revolving around notions such as stakeholder capitalism and ESG entails complex corporate governance challenges. Even if one accepts the premise that the purpose of business enterprises goes beyond shareholder maximization, it is not obvious that business enterprises should be required to make geopolitical decisions traditionally left to States. For one thing, corporate shareholders are not necessarily homogeneous groups, especially when geopolitics is involved. There may be conflicting interests among shareholders, or disagreements over which side in a conflict should be supported.

At times, there may be a tension between a corporation’s social policy and its governance duties. Such was the case in the recent Ben & Jerry’s decision to stop selling ice cream in the West Bank and East Jerusalem. On July 19, 2021, Ben & Jerry’s announced that it would not renew its agreement with its Israeli licensee, Avi Zinger, at the end of the following year. The company international law focuses on stakeholder primacy . . . For the purposes of international regulation, the principles guiding traditional corporate governance are inadequate.”

249 Id. See also Tripathi, supra note 32, at 134 (writing that “[l]aws usually do not bar economic activity in zones of conflict (unless sanctions have been applied). Some companies will therefore continue to operate in zones of conflict. They take risks because their primary aim is to make a profit for their shareholders. This is not to suggest that profit motive is detrimental. But it is important to remember that companies are not expected to be driven by other considerations.”).


251 Id.


253 Id. (noting with respect to the case of Ben & Jerry’s that “Unilever will also be under pressure to answer how it plans to reconcile Ben & Jerry’s responsibility for its social mission with the overall responsibility the Unilever board has for management of risk.”).

explained that it believed that “it is inconsistent with our values for Ben & Jerry’s ice cream to be sold in the Occupied Palestinian Territory (OPT).” It further stated that it would stay in Israel in a different type of arrangement. However, in practice, any arrangement that would have allowed Ben & Jerry’s to distinguish between Israeli citizens on the basis of their place of residence would probably have been impossible, as it would violate Israeli law.

Following Ben & Jerry’s announcement, numerous states in the United States with anti-boycott laws initiated “proceedings to divest from or sanction Unilever,” Ben & Jerry’s parent company. A month after the announcement, it was reported that Unilever’s market capitalization had fallen by almost $14 billion.

In March 2022, Zinger sued Unilever and Ben & Jerry’s in the United States, arguing that his contract termination was unfair, as it required him to take steps that would violate Israel’s laws. On June 29, 2022, Unilever announced that “it has reached a new arrangement for Ben & Jerry’s in Israel which will ensure the ice cream stays available to all consumers.” Unilever decided to settle the lawsuit with Zinger by selling him Ben & Jerry’s business in Israel. However, the agreement specified that Zinger could use Ben & Jerry’s logo only in Hebrew or Arabic, not in English.

On July 26, 2022, the Wall Street Journal reported that “Unilever PLC’s chief executive [Alan Jope] said he wanted Ben & Jerry’s to avoid geopolitics.” According to the report, Jope said that “[t]here is plenty for Ben & Jerry’s to get their teeth into on their social justice mission without straying into geopolitics.” He further stated that “[b]rands should focus on tackling issues where they have a long-term record.” According to Jope, “For Ben & Jerry’s, those issues are the climate emergency and social justice.”

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255 How Ben & Jerry’s Ended up at War with Itself, supra note 254.
256 Id.
258 Id.
259 Id.
260 How Ben & Jerry’s Ended up at War with Itself, supra note 254.
262 How Ben & Jerry’s Ended up at War with Itself, supra note 254.
264 Id.
265 Id.
266 Id.
Such disagreements between a parent company and its subsidiaries may involve issues of corporate governance.267 Indeed, in the case of Ben & Jerry’s, not all shareholders were in favor of the 2021 announcement.268 The disagreement exposed the complexity of mixing business and geopolitics, even when a subsidiary of a corporation supposedly does so of its own will.269 A commentator noted that “[i]n ESG terms, Ben & Jerry’s decision not to renew the contract of its Israeli licensee was described by the company as an ‘S’ [social] decision. The irony is that its ‘social mission’ is likely to prompt a heavy-hitting response by investors in its parent, Unilever, on governance, or ‘G’, grounds.”270

If one concludes that business enterprises should not be forced to make geopolitical decisions when conflicting corporate governance concerns arise, it is also important to emphasize that one should likewise conclude that business enterprises should be free to choose sides in situations of dispute if

267 See, e.g., Adeyeye, supra note 17, at 158 (2007) (writing that “traditional notions of corporate governance are based on the twin models of shareholder primacy and shareholder maximization . . . the duties of those appointed by the shareholders are owed exclusively to the latter”).

268 On June 15, 2022, Law360 reported that the City of St. Clair Shores Police and Fire Retirement System, an investor in Unilever on behalf of anyone who purchased or acquired Unilever American depository receipts between September 2, 2020, and July 21, 2021. According to the report, “[t]he suit asserted violations of the Securities Exchange Act of 1934 and claims Unilever . . . omitted from its disclosures that the Ben & Jerry’s board had authorized the boycott.” See Katryna Perera, Unilever Faces Investor Suit Over Ben & Jerry’s Israel Stance, Law360 (June 15, 2020) (reporting on the class action case of City of St. Clare Shores Police and Fire Retirement System v. Unilever PLC, 1:22-cv-05011 (S.D.N.Y. June 15, 2022)), https://www.law360.com/articles/1503285/unilever-faces-investor-suit-over-ben-jerry-s-israel-stance. Law 360 noted that the plaintiff claimed that “Unilever had ‘ample reason to conceal’ the Ben & Jerry’s board’s boycott resolution.” Id. On September 6, 2023, Chief Investment Officer reported that the lawsuit was eventually dismissed. The U.S. District Court for the Southern District of New York found that “Unilever was not required to disclose the boycott because, while Unilever retained operational control over the boycott decision, it did not make the decision—the Ben & Jerry’s board did, apparently against Unilever’s wishes.” Michael Katz, Michigan Pension Loses Lawsuit Against Unilever Over Ben & Jerry’s Israel Boycott, Chief Investment Officer (September 6, 2023), According to the court, Unilever “had no reason to believe that the resolution would be adopted or implemented in a way that was contrary to Unilever’s wishes.” City of St. Clare Shores Police and Fire Retirement System v. Unilever PLC, 1:22-cv-05011 (S.D.N.Y. August 29, 2023) In fact, “the resolution was never adopted, and its proposal was avoided by selling the Israeli Ben & Jerry’s business.” Id.

269 On December 15, 2022, Unilever announced that its litigation with the board of Ben & Jerry’s over the sale of its Israeli ice cream business had “been resolved.” See, e.g., Richa Naidu & Jessica DiNapoli, Unilever says litigation with Ben & Jerry’s board has ‘been resolved,’ Reuters (Dec. 15, 2022), https://www.reuters.com/business/retail-consumer/unilever-says-litigation-with-ben-jerry-s-board-has-been-resolved-2022-12-15/.

270 See Harris, supra note 252. According to Harris, “[i]n 2021, group governance beats subsidiary social policy.” Id. Harris further writes that “[r]isk management cannot be limited to managing the risk after the fact. Unilever surely has the power to manage entirely predictable risk before it crystallises [sic]. A share price dip, likely legal consequences in multiple jurisdictions and franchisee wrath were all entirely foreseeable risks.” Id.
no conflicting corporate governance considerations arise.

In addition to the difficulties entailed in determining whether business enterprises should be required to take part in geopolitics in view of the potential complex corporate governance dilemmas, there is also the question of whether business enterprises are sufficiently equipped to make the necessary determinations, to which I now turn.

B. Are Business Enterprises Well-Equipped to Make Geopolitical Determinations in Disputed Territories?

In situations of dispute, questions arise as to which party is in the wrong. It may be argued that such complex, often geopolitical, determinations should be left in the hands of States. The 2020 UN Report states that “businesses should strive to maintain impartiality.”271 The Report notes that:

[B]usinesses cannot be neutral actors in a conflict context. This does not mean that businesses should not try to be impartial, including by consistently demonstrating independence from government-led or armed group-led efforts and avoiding any activity or public statement that may be construed as supporting either side of the conflict or as excusing their abuses.  

The 2022 UNDP Guide similarly states that businesses should attempt to maintain impartiality.273 Such statements may sound easy enough to apply, but in practice, making a distinction between neutrality and impartiality may not be easy, and it is not evident that business enterprises are well-positioned to make such determinations. As aforementioned, when it comes to disputed territories, and especially occupied territories, some believe that the very presence of business enterprises in such territories is problematic.274 Yet, a decision to retreat from a disputed territory, or not to conduct any business activity in it to begin with, may be interpreted as supporting one side of the conflict. Business enterprises operating in disputed territories (or deciding to retreat from such territories) thus run the risk of being perceived as neither neutral nor impartial, because of their very presence in (or withdrawal from) such territories.

When Ravensdown, the New Zealand fertilizer company, was questioned about its operations in Western Sahara, as mentioned in the article’s introduction, Ravensdown made it clear that it was not in a position

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271 2020 UN Report, supra note 6, at 13, ¶ 60.
272 Id. at 13–14. The 2020 UN Report further explains that “[b]usinesses are not neutral actors; their presence is not without impact. Even if business does not take a side in the conflict, the impact of their operations will necessarily influence conflict dynamics.” Id at 10 ¶ 43.
273 2022 UNDP GUIDE, supra note 88, at 44.
274 See supra note 35 and accompanying text.
to weigh conflicting claims by the parties to the dispute there. Siemens Gamesa, owned in part by Siemens AG, made a similar statement about its Western Sahara operations. Responding to a WSRW question about the renewal of a contract to operate a wind power plant there, Siemens Gamesa stressed that it does not want to take part in such geopolitical decisions:

We have also stated to you in the past that Siemens Gamesa does not take a stance or make judgments on issues of international public law. We are aware that the region of Western Sahara is disputed with the United Nations considering the zone as a “non-self governing territory” since 1963. We support the position of the international community and the UN, which have expressed hope for a peaceful resolution to outstanding issues.

One may argue that when operating in disputed territories, business enterprises implicitly already support “the de facto situation on the ground and, therefore . . . [are] inevitably taking a side in a lively political dispute.” However, a business enterprise may find the task of questioning the status quo much more challenging than moving forward based on the de facto situation. In view of the complexity of such determinations, it is not obvious that business enterprises should be required to make decisions that are usually left to States when doing business in disputed territories.

Business enterprises may also face serious pragmatic challenges when trying to respect international law, and specifically IHL, in disputed territories. They may not always have access to the knowledge (and when small-cap corporations are involved, perhaps to the resources) that States have in order to adhere to IHL principles, and therefore may find such a burden impractical.

A recent case concerning the JLRT project demonstrated the complexity of asking business enterprises to make such determinations. Several transnational corporations that planned to take part in the project were urged by the BDS movement not to participate. Complaints against such

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275 See supra notes 3–4 and accompanying text.
276 See Letter from Dr. Markus Tackle, supra note 223; see also Submission of Anne Herzberg, supra note 2, at 15.
277 Cf. Duval, supra note 203, at 228–29 (noting that when the FIFA council decided to refrain from imposing any sanctions on the Israeli Football Association, it “implicitly supported the de facto situation on the ground”).
278 See Submission of Anne Herzberg, supra note 2, at 3–5 (referring to challenges business enterprises may encounter when attempting to adhere to IHL, such as identifying the type of armed conflict at issue; addressing possible conflicts between IHL and IHRL; identifying the occurrence of IHL violations; and gaining access to factual information that is often within the exclusive domain of militaries). Id. at 5.
companies were submitted to NCPs for the OECD Guidelines.\textsuperscript{280} Specifically, in the Spanish NCP case concerning the JLRT in East Jerusalem mentioned above, the NCP recommended that the Spanish corporation participating in the JLRT project write a report examining the project’s social impact on the occupied territories.\textsuperscript{281} Yet, it is doubtful whether a business enterprise has the knowledge and tools to determine the social impact of a light rail project on occupied territories.

Another example demonstrating the complexity of such decisions is a complaint filed against the UK-based company JC Bamford Excavators Limited ("JCB"). In December 2019, Lawyers for Palestinian Human Rights (LPHR) filed a complaint against JCB with the UK NCP for the OECD Guidelines. The complaint alleged that JCB’s products were used in the demolition of Palestinian properties and in settlement-related construction that caused “adverse human rights impacts.”\textsuperscript{282} LPHR’s main argument was that the adverse impacts were directly linked to JCB because it had a business relationship with Comasco.\textsuperscript{283} LPHR quoted the NGO Who Profits and alleged that “[o]ver the years, rulings of the Israeli High Court of Justice accepted the Israeli authorities’ reasoning and allowed demolitions for a variety of ‘security needs’.”\textsuperscript{284}

The UK NCP stated that the main question before it was “whether JCB products used for demolition . . . can be traced back to JCB because of its contractual relationship with Comasco.”\textsuperscript{285} The NCP found that “the products used for alleged adverse human rights impacts as depicted in the photographs and videos could have come from multiple sources.”\textsuperscript{286} Nevertheless, the NCP held that JCB failed to carry out human


\textsuperscript{281} See Spanish NCP Case, supra note 233, at 18.


\textsuperscript{283} Statement from UK National Contact Point for the OECD Guidelines for Multinational Enterprises, regarding Lawyers for Palestinian Human Rights complaint to UK NCP about JCB, GOV.UK, ¶ 9.1, (Nov. 12, 2021), [hereinafter Statement from UK National Contact Point for the OECD Guidelines for Multinational Enterprises regarding JCB].

\textsuperscript{284} See LPHR Complaint, supra note 282 at ¶ 3.9.

\textsuperscript{285} See Statement from UK National Contact Point for the OECD Guidelines for Multinational Enterprises regarding JCB, supra note 283 at ¶ 9.2.

\textsuperscript{286} Id.
rights due diligence in its supply chain.\textsuperscript{287}

Demolitions of structures that are considered illegal by the Israeli government are subject to judicial scrutiny, as the LPHR noted. Had JCB conducted human rights due diligence, should it have questioned the rulings of the Israeli judiciary, following LPHR’s allegations? It is not obvious that a business enterprise should be required to make such determinations.

The commentary to UNGP 11 notes that the responsibility of business enterprises to respect human rights “exists over and above compliance with national laws and regulations protecting human rights.”\textsuperscript{288} Yet, as the above example demonstrates, the task of determining whether such a conflict exists may not be an easy one.\textsuperscript{289} One may argue, in reply, that business enterprises can engage with relevant stakeholders and seek the advice of experts when making geopolitical determinations. The next section will provide a critical analysis of this argument.

C. Engaging with Stakeholders and Seeking the Advice of Independent Experts

The UNGP and the OECD Due Diligence Guidance suggest that business enterprises engage with relevant stakeholders in order to better grasp risks to human rights.\textsuperscript{290} The 2020 UN Report asks business enterprises operating in conflict-affected areas “to get a sense not only of the facts but of the perception of the situation by different stakeholders.”\textsuperscript{291} In complex environments, businesses are asked to listen to “people’s different stories”\textsuperscript{292} in order to understand “how people see themselves and others”\textsuperscript{293} and “even

\textsuperscript{287} Id. at ¶ 9.4.
\textsuperscript{288} UNGP, supra note 15, at 13 (commentary to Principle 11); see also 2014 UN Report, supra note 132, at 11 (noting that even if business enterprises operating in the settlements are complying with domestic Israeli laws, their responsibility to respect human rights takes priority over compliance with national laws.).
\textsuperscript{289} The UNGP Interpretive Guide acknowledges the complexity of such a task, and notes that “[i]f there is a direct conflict of requirements, the challenge is to find ways of honouring [sic] the principles of internationally recognized rights. As with other issues, there is no blueprint for how to respond.” Interpretive Guide, supra note 18, at 78. One possible strategy suggested by the Guide is to “seek clarification from the Government or local authorities about the scope of the conflicting requirement and even to challenge it.” Id. Another suggested strategy is to “engage with relevant stakeholders.” Id. However, the next section demonstrates the challenges business enterprises may face in disputed territories when trying to engage with relevant stakeholders or seek the advice of experts.
\textsuperscript{290} See, e.g., UNGP, supra note 15, at 19 (Principle 18) (stating that in order to “gauge human rights risks,” business enterprises should consult “with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation”); see also the OECD Guidelines, supra note 21, at 15 (suggesting meaningful engagement with relevant stakeholders “in order to provide opportunities for their views to be taken into account. . . .”).
\textsuperscript{291} See 2020 UN Report, supra note 6, at 11–12 ¶ 53.
\textsuperscript{292} Id.
\textsuperscript{293} Id.
how some people may be manipulating stories to achieve certain goals.

The 2022 UNDP Guide states that meaningful consultation with relevant stakeholders is “an essential element of due diligence.” To better understand the causes of a conflict, its actors, and dynamics, the Guide encourages business enterprises to “monitor social media as a useful tool.” Yet, when it comes to complex disputes in which both parties present convincing territorial claims, businesses may find it difficult to assess conflicting voices on social media and elsewhere.

The UNGP further encourages businesses to seek the advice of experts when conducting human rights due diligence. In cases in which a business enterprise considers terminating its relationship with an entity responsible for adverse impacts because it lacks the leverage to prevent or mitigate the entity’s adverse impacts and is unable to increase its leverage, the enterprise is also encouraged to consult with an independent expert before deciding how to respond.

Both the UNGP Interpretive Guide and the 2020 UN Report recommend business enterprises consult with credible external sources when they find the task of assessing risks in conflict-affected territories difficult. The 2014 UN Report likewise states that when operating in conflict-affected areas,

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294 Id.

295 Id. The 2022 UNDP GUIDE, supra note 88, at 40. See also Aguirre & Pietropaoli, supra note 26, at 2, 5 (stating that business activity in conflict-affected areas entails consultation with a wider range of stakeholders. Businesses should consult not just with those whose human rights might be affected, but also with those impacted by the conflict.).

296 2022 UNDP GUIDE, supra note 88, at 53.


298 UNGP, supra note 15, at 21–22 (commentary to Principle 19).

299 Id.

300 The UNGP Interpretive Guide suggests business enterprises refer to credible external sources when operating in conflict-affected areas, such as civil society organizations, Governments, and national human rights institutions. Interpretive Guide, supra note 18, at 80–81. The Interpretive Guide also suggests referring to “independent, trusted expert advice” when approaching complex situations with no obvious or easy solutions.” Id. at 51. The 2020 UN Report asks businesses to “seek advice from embassies and investment and trade-related functions to receive conflict-sensitive advisory services and tools to assist them in respecting human rights in conflict-affected settings.” 2020 UN Report, supra note 6, at 22, ¶ 106. The 2022 UNDP GUIDE also suggests consultation with relevant experts in certain conflict situations. For instance, in order to assess the lawfulness of the use of force by States, the UNDP Guide notes that Businesses “should seek adequate guidance, including from their home state and relevant experts.” 2022 UNDP GUIDE, supra note 88, at 29.
businesses may need to consult with credible independent experts.\textsuperscript{301} Because it may be difficult in such environments to consult with potentially affected persons, the report advocates for a cautious approach when identifying “legitimate representatives of potentially affected persons and recognized experts.”\textsuperscript{302} Businesses are also encouraged to seek guidance from their home State, civil society, and international organizations.\textsuperscript{303}

The OECD Guidelines suggest that NCPs, too, may “seek advice from relevant authorities, and/or representatives of the business community, worker organisations [sic], other non-governmental organisations [sic], and relevant experts.”\textsuperscript{304}

However, it is not clear what a business enterprise should do, having consulted with a wide range of stakeholders and credible external sources, when such sources offer conflicting evidence or possibly biased advice. Such a scenario is especially plausible when complex and long-lasting territorial disputes are at issue. Leading international legal experts may side with different parties. Business enterprises may also be subject to pressure from civil society organizations and activists trying to promote their own geopolitical agendas. Investors may be confronted with unregulated ESG rankings. Even international bodies such as the UN Human Rights Council, which issued the Database of business enterprises operating in the West Bank and East Jerusalem, are considered by many as highly political.\textsuperscript{305}

An example of the risk of relying on biased experts or sources when determining what amounts to an adverse impact was recently highlighted in the aforementioned White & Case investigation initiated by Morningstar.

While White & Case found “no evidence that Sustainalytics’ products engaged in ‘pervasive or systemic bias’ against Israel,”\textsuperscript{306} White & Case did find that HRR exhibited bias in its outcomes “by overrepresenting firms linked to the Israeli-Palestinian conflict.”\textsuperscript{307} Furthermore, “[i]t also sometimes used inflammatory language and failed to provide sourcing attribution clearly and consistently.”\textsuperscript{308}

White & Case further found that HRR “focus[ed] disproportionately on the Israeli/Palestinian conflict areas relative to other ‘high-risk’ countries and conflict areas covered by the product,”\textsuperscript{309} and that HRR “lack[ed] an

\textsuperscript{301} 2014 UN Report, supra note 132, at 10.
\textsuperscript{302} Id.
\textsuperscript{303} Id.
\textsuperscript{304} OECD Guidelines, supra note 21, at 59.
\textsuperscript{305} See, e.g., WHITE & CASE REPORT, supra note 139, at 73 (stating that “Sustainalytics employees criticized the UN High Commissioner’s report” and “claimed that it did not meet the standards of Sustainalytics research and methodologies, which Sustainalytics viewed as more closely aligned to international law and standards.”).
\textsuperscript{306} See A Letter from Joe Mansueto and Kunal Kapoor, supra note 134.
\textsuperscript{307} Id.
\textsuperscript{308} Id.
\textsuperscript{309} WHITE & CASE REPORT, supra note 139, at 103.
independently developed methodology as well as procedural safeguards needed to ensure transparency and objectivity.”

In addition, White & Case found “scattered instances of processes and procedures that can be improved to address and mitigate the potential for implicit or confirmation bias.”

Another issue that was revealed in the White & Case report concerned the reliance of ESG ranking bodies on possibly biased media coverage. When examining Sustainalytics’ Controversies Research product, White & Case found that “within the sixty companies rated for a human rights-related controversy of Category 3 or higher . . . thirty featured an incident involving what Sustainalytics tags as ‘Occupied Territories/Disputed Regions.’”

The Israeli/Palestinian conflict was a factor in twenty-one of those thirty ratings. The White & Case report suggested that this may be a result of the fact that the Israeli-Palestinian conflict receives “a disproportionate amount of media attention.”

If other ESG ranking bodies likewise rely heavily on media coverage when ranking business enterprises, business enterprises operating in widely publicized disputed territories with relatively free media access may be automatically subject to low ESG rankings.

The White & Case report offered a rare opportunity for an inside look at the methodology employed by Sustainalytics. Responsible Investor reported that the investigation “could have implications for the broader ESG data industry, according to market participants.”

Following the investigation, Morningstar acknowledged that it could not fulfill its mission when “investors have reason to question whether our research and ratings uphold the principles of independence, transparency, and long-term

310 Id. at 102.
311 See A Letter from Joe Mansueto and Kunal Kapoor, supra note 134.
312 According to the White & Case report, “Sustainalytics’ Controversies Research assesses business risk, specifically a company’s level of exposure in ESG-related incidents and events, and the adequacy of the company’s management of these issues.” WHITE & CASE REPORT, supra note 139, at 37.
313 Id. at 91. According to the Report, “[t]he specific Category scale for events assessment is as follows: Category 1 (Low), Category 2 (Moderate), Category 3 (Significant), Category 4 (High), and Category 5 (Severe).” Id. at 40 n. 149.
314 Id. at 91.
315 Id.
316 See Morningstar Financial Services Firm Urged to Take Action to Ensure All Products Are Free of Anti-Israel Bias, COMBAT ANTI-SEMITISM (July 19, 2022), https://combatantisemitism.org/cam-news/morningstar-financial-services-firm-urged-to-take-action-to-ensure-all-products-are-free-of-anti-israel-bias/ (arguing that “simply equating reputational risk to how, and the frequency with which, an event is covered by the media—including biased media sources—invariably leads to higher risk scoring for companies that do business in Israel”).
thinking.” However, at the same time, Morningstar noted that the White & Case report found “no evidence Sustainalytics products recommended or encouraged divestment from Israel” and “no evidence of pervasive or systemic bias against Israel across Sustainalytics products, including the Sustainalytics ESG Risk Rating.” Some argued in reply that the White & Case report’s conclusions did not match the actual findings of the report and that the report was not sufficient to eliminate anti-Israel bias. Additional evidence was provided by the Foundation for Defense of Democracies to support allegations of pervasive bias.

The White & Case report demonstrated potential difficulties businesses and investors may face when seeking external advice in the absence of regulation addressing the manner in which experts reach their conclusions concerning disputed territories. As the report suggested, there is a need for procedural safeguards to ensure transparency and objectivity on the part of external sources and experts.

On October 31, 2022, Morningstar’s Chairman and CEO announced additional planned actions to address such concerns. On February 7, 2024,

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318 See A Letter from Joe Mansueto and Kunal Kapoor, supra note 134.
319 Id. See also WHITE & CASE REPORT, supra note 139, at 5.
320 Richard Goldberg, How to Curb Anti-Israel Bias Inside ESG Risk Ratings, Foundation for Defense of Democracies (FDD) (June 17, 2022), https://www.fdd.org/analysis/2022/06/17/how-to-curb-anti-israel-bias-inside-eg-risk-ratings; See also letter sent by the Jewish Federations of North America and other Jewish organizations to Morningstar’s executive chairman Mansueto and Chief Executive Officer Kapoor (July 15, 2022), https://cdn.fedweb.org/fed42/2/Morningstar%2520July%252015%2520Final.pdf (urging Morningstar to “take additional measures to . . . eliminate anti-Israel bias in all Sustainalytics’ products and practices . . . .”).
321 In November 2022, Richard Goldberg, a Senior Advisor at FDD, provided new information on Sustainalytics based on direct access to its client platform, various documents; and “more than two months of weekly 90-minute dialogue sessions . . . with senior Sustainalytics officials.” His analysis revealed, inter alia, that: “Sustainalytics has negatively rated companies doing business in Israel or territories controlled by Israel based solely on the fact that the companies do business in such areas”; “Sustainalytics has adopted core assumptions about the Israeli-Palestinian conflict that are biased against Israel”; Sustainalytics contacted companies that were “targeted by the BDS campaign” and effectively threatened “that a failure to change course would result in Morningstar advising investors not to invest in the company.” In addition, “Sustainalytics has relied on anti-Israel and antisemitic sources to justify anti-Israel assumptions . . . .” Richard Goldberg, How to Assess Changes in Morningstar Sustainalytics ESG Ratings, FDD (November 21, 2022), https://www.fdd.org/analysis/2022/11/21/how-to-assess-changes-in-morningstar-sustainalytics-egs-ratings/
322 WHITE & CASE REPORT, supra note 139, at 102.

The ongoing conflict between Israel and the Palestinians remains among the most complex and controversial disputes in today’s world. Due to its contentious nature, it remains heavily scrutinized and highly litigated. Business entities that choose to operate in this area understand that this is an intensely political dispute with weighty historical baggage. They must operate under difficult circumstances and under great scrutiny based on differing legal and policy judgments. They should nevertheless be held to the same standards of corporate responsibility and action as any other companies operating anywhere else in the world. History suggests that resolution of such conflicts can only be achieved through negotiations between the parties directly involved. Therefore, the ultimate disposition of these territories may look different than the status quo ante. In the interim, companies should be assessed with methodological consistency, analytical rigor, and objectivity based on the highest professional standards.^[325]


[^325]: Id. at 3. The Independent Experts Initial Report recommended that Morningstar take the following steps:

1. Repeal the ‘Occupied Territories/Disputed Regions’ incident type along with accompanying guidance;
2. Adopt appropriate guidance related to the Society – Human Rights event indicator;
3. Refine procedures for assessing the Materiality and Impact of incident reporting to minimize risk of anti-Israel bias;
4. Mandate that Controversy Ratings be based on defined human rights violations, including enhancement of internal Sustainalytics processes;
5. Incorporate additional legal expertise, including consideration of appointing a designated legal expert under the authority of Morningstar’s Chief Legal Officer, to advise analysts and Oversight Committees on relevant human rights law, legal aspects of corporate human rights compliance, and jurisprudence;
6. Guidance Documents should prohibit reference to countries not implicated in a particular event or incident in narrative descriptions or rating justifications; and,
The Independent Experts Report stressed the importance of assessing business activity in disputed areas with methodological consistency and objectivity. The Report concluded that “Sustainalytics should eliminate the ‘Occupied Territories/Disputed Regions’ incident type. Doing so would fortify Sustainalytics’ ESG research and controversy ratings against concerns of anti-Israel bias.” The Report further held that “[c]orporate obligations to protect against human rights abuses cannot be reduced to simple geographic parameters. The ‘Occupied Territories/Disputed Regions’ incident type shifts analytical focus onto geographic circumstances rather than functional evaluation of corporate human rights practices.” Furthermore, “this incident type remains susceptible to manipulation and inconsistent application across disparate geographic areas and conflict zones.” According to the Report, “business entities should not be held responsible for human rights consequences simply by virtue of presence in a specific area.”

A functional evaluation of corporate human rights practices, rather than a geographical one, may be a way to avoid geopolitical biases in many instances. However, it would require a preliminary policy decision as to whether the mere presence of business enterprises in disputed territories is problematic.

I will now present a brief overview of suggested strategies that may help address some of the aforementioned issues going forward.

D. Possible Strategies Going Forward

As noted above, if the international community concludes, as a matter of policy, that business enterprises should not be categorically discouraged from operating in disputed territories, the next question is what rules should apply to them when they operate in such territories. In view of the above analysis, it may be time for the international community to reexamine the current business and human rights framework and determine whether it should continue to require business enterprises to make geopolitical determinations in disputed territories. If the answer to this question is affirmative, changes in the current framework should be explored in order to

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7. Enhance guidance and quality oversight to ensure consistency and accuracy of ratings assumptions and language within and across Sustainalytics product lines.

Id. at 7.


326 The Independent Experts Initial Report, supra note 324, at 5.
327 Id. at 7.
328 Id.
329 Id. at 7–8.
assist business enterprises facing such determinations.

If business enterprises are required to make geopolitical determinations in disputed territories, while conducting conflict-sensitive heightened due diligence, specific pragmatic guidelines should be developed to assist them. More attention would need to be given to conflicting corporate governance considerations. Additional methodological guidance would need to be provided with respect to matters such as advice from experts and external sources, addressing possible biases among such resources, and verifying consistency and transparency on the part of those resources.

The aim of this article was to shed new light on difficult questions pertaining to business activity in disputed territories, not to offer conclusive answers. However, the challenges presented strongly suggest that the UNGP, and other instruments aligned with it, do not capture the complex geopolitical considerations involved. The international community may thus need to make conscious decisions on whether the UNGP should be employed in a manner that discourages business activity in disputed territories and whether business enterprises should be involved in geopolitical determinations traditionally left to States.

VII. CONCLUSION

The current international soft-law business and human rights framework was designed to bridge governance shortfalls that allow business enterprises to escape liability for acts that impact the rights of others. Yet, in disputed territories, it has opened the door to requiring business enterprises to make geopolitical determinations with respect to rights that are at the heart of the dispute. It is not evident that business enterprises should be required to make decisions that were traditionally left to States under international law, nor is it clear that they are sufficiently equipped to make such determinations.

Furthermore, there is empirical data suggesting that business enterprises fail to meet their human rights responsibilities under the existing international framework. In disputed territories, governance shortfalls make such failures especially troubling. However, corporate failures to meet their human rights responsibilities, despite the potential financial penalties, may not necessarily be due to a lack of enforcement mechanisms. Rather, business enterprises may not be capable of making the types of decisions they are currently asked to make in disputed territories, or they may face serious conflicting corporate governance considerations when operating in such territories.

Responsible business enterprises may ultimately decide to steer clear of disputed territories altogether, possibly because of the geopolitical challenges analyzed in this article and the fear of divestment decisions or low ESG rankings. While some may welcome this outcome, this article has shown that the question of whether business enterprises should be discouraged from operating in such territories is more complex than some
believe. Discouraging business activity in disputed territories could potentially undermine the very purpose of the existing international business and human rights framework. While negotiations for an international legally binding business and human rights instrument are ongoing, the international community may want to take this opportunity to reexamine the case of disputed territories.