

FUNDAMENTAL LABOUR STANDARDS  
AND CORPORATE SUSTAINABILITY:  
*AN ANALYSIS OF THE REGULATORY FRAMEWORK  
OF CORE WORKERS' RIGHTS AND ITS INTEGRATION  
IN CONTEMPORARY INTERNATIONAL BUSINESS  
PRACTICE*

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*I. Introduction*

The core of international protection of workers' rights is made up of the Fundamental Labour Standards that were developed in the framework of the International Labour Organization (ILO). These standards, included in the eight fundamental conventions of the ILO are part of public international law, but are also incorporated into a large number of other – public, private, binding and voluntary – instruments that regulate international corporate behavior and form the basis for worker protection in international corporate social responsibility mechanisms. Fundamental Labour Standards (FLS) aim to secure respect for the prohibition of child labour, the prohibition of forced labour, non-discrimination and equal treatment, and freedom of association and collective bargaining. This article examines the scope and content of the FLS, reviews the large diversity of regulatory instruments that apply these standards in relation to the corporate sphere, and analyzes how FLS are addressed at the corporate level in practice.

The relevance of these standards cannot be overstated. Violence against trade union representatives or members and suspension or right-out prohibition of workers' organizations is a

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common problem. Discrimination of vulnerable groups such as migrant workers or ethnic minorities and unequal remuneration for men and women are systemic issues. Millions of workers are trapped in forced labour or “modern slavery” situations and tens of millions of children fall victim to forms of child labour that are hazardous to their health and development, such as work in agriculture, mines or fisheries.<sup>1</sup>

Especially the activities of multinational enterprises (MNEs) are increasingly affecting global public goods<sup>2</sup> including the adherence to the FLS. The activities of MNEs may cause negative externalities that generate global public costs which are not internalized by these companies, such as the social costs of forced labour in their supply chains.<sup>3</sup> The possibility of free-riding behavior and strategic considerations<sup>4</sup> of MNEs in the provision of these global

<sup>1</sup> See, e.g., Int'l Labour Org. [ILO], *Giving Globalization a Human Face*, 101st Session, 2012. For general reports on the scope of the societal issues involved see, e.g., Int'l Labour Org. [ILO], *Freedom of Association in Practice: Lessons Learned, Report of the Director-General, Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work*, ILO, 97th Session 2008; Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, U.N. Doc. A/71/385 (Sept. 14, 2016). With regard to equal treatment see, e.g., Int'l Labour Org. [ILO], *A Quantum Leap for Gender Equality: For a Better Future of Work for All, International Labour Office* (2019). Related to child labour and forced labour see, e.g., Int'l Labour Org. [ILO], *Global Estimates of Child Labour: Results and Trends* (2017); Int'l Labour Org. [ILO], *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (2017).

<sup>2</sup> Iris H-Y Chiu, *Unpacking the Reforms in Europe and UK Relating to Mandatory Disclosure in Corporate Social Responsibility: Instituting a Hybrid Governance Model to Change Corporate Behaviour?* 14 EUR. CO. L. 193, 193 (2017) (discussing how globalization made many issues that require policy intervention a global concern). The lack of provision of such global public goods does not only affect the particular country involved, but also significantly impacts other countries. Global public goods may include “environmental protection, sustainability in the use of planetary resources, adequate standards and protection of certain humanity conditions such as human rights, labour rights and communities, development, addressing the sub-optimal institutions in political economy (such as tax havens and corruption), and social transformations (such as consumerism).”

<sup>3</sup> *Id.*

<sup>4</sup> See generally *id.* at 193-208. (For instance, companies will not be likely to refrain from creating negative externalities when their competitors may persist in doing so.)

public goods may lead to undesirable outcomes and may exacerbate pressing problems for vulnerable groups all over the world. The internalization of these negative effects in the actions of MNEs is the aim of many public and private regulatory instruments and guidelines, nationally and internationally.

There is a wide variety of instruments that include FLS and aim to reduce the global social costs and protect vulnerable workers in today's globalized economy. These include public (binding and voluntary) instruments, guidelines and other initiatives that address countries and companies to include FLS in their sustainability laws, policies and activities. Additionally, there are a large number of initiatives that originate in the private sector. At the level of the company, the corporate board with its substantial discretionary powers in many jurisdictions, and shareholders with their important control rights in many jurisdictions, can have a significant impact on the effectiveness of the normative framework and the extent to which sustainability goals including FLS are pursued at the corporate level.

From a business perspective, FLS are part of corporate sustainability – which is also often denoted as corporate social responsibility (CSR).<sup>5</sup> Corporate sustainability can be defined using two sustainability pillars: environmental and social sustainability. Environmental sustainability ensures the long-term stability and resilience of the ecosystems that support human life; social sustainability facilitates the respect and promotion of human rights and other basic social rights. Consequently, corporate sustainability means that corporations consider environmental and social sustainability when conducting their business operations and activities.<sup>6</sup> Most definitions add a third pillar: economic sustainability, which refers to the economic needs necessary for stable and resilient

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<sup>5</sup> This already gained a lot of attention in 1970 with the (in)famous article of Milton Friedman in the *New York Times*, arguing that “the social responsibility of business is to increase its profits.” See generally Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970.

<sup>6</sup> THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 3 (Beate Sjåfjell & Christopher M. Bruner eds., 2019).

societies.<sup>7</sup> FLS are mainly included in the social sustainability pillar in this framework, but also have important clear links with economic and environmental sustainability.<sup>8</sup>

The terminology used to describe certain social and environmental responsibilities for corporate agents can be a bit confusing. For instance, the UN uses the framework of “Business and Human Rights”, the OECD refers to “International Responsible Business Conduct (IRBC),” while in the private sector “Corporate Social Responsibility (CSR),” “Corporate Sustainability” and “Environmental, Social and Governance (ESG)” are more commonly used terms. Institutional investors<sup>9</sup> in particular often address responsible investing with the term ESG. The UN-backed Principles for Responsible Investment (PRI) that were launched at the New York Stock Exchange in 2006, can be marked as the important start of ESG investing.<sup>10</sup> The social pillar of the ESG notion used by the PRI *inter alia* includes working conditions and employee protection, including direct references to the fundamental labour standards.<sup>11</sup>

<sup>7</sup> See generally *id.*; 6 BEATE SJÅFJELL, UNDERSTANDING THE COMPANY: CORPORATE GOVERNANCE THEORY (Barnali Choudhury & Martin Petrin eds., 2017); Robert Goodland, *The Concept of Environmental Sustainability*, 26 ANN. REV. ECOL. SYST. 1, 1-24 (1995); Becky J Brown et al., *Global Sustainability: Toward Definition*, 11 ENVIRONMENTAL MANAGEMENT: AN INTERNATIONAL JOURNAL FOR DECISION MAKERS, SCIENTISTS AND ENVIRONMENTAL AUDITORS 713-19 (1987).

<sup>8</sup> The ILO explains that, for instance, “working conditions, like those addressed under SDG target 3.9 (deaths and illnesses from hazardous chemicals and air, water, and soil pollution and contamination) are linked to environmental issues.” See *Working Conditions*, ILO, <https://www.ilo.org/global/topics/dw4sd/themes/working-conditions/lang--en/index.htm>.

<sup>9</sup> Institutional investors, including pension funds and insurance companies, hold investments for their beneficiaries, who are the ultimate beneficial owners of their investments.

<sup>10</sup> In early 2005, former United Nations Secretary-General Kofi Annan invited a group of the world’s largest institutional investors to join a process to develop the Principles for Responsible Investment. These PRI explicitly use the term ”ESG.”

<sup>11</sup> See generally *From Poor Working Conditions to Forced Labour – What’s Hidden in your Portfolio? Why Engage?* Principles for Responsible Investment (June 8, 2016), <https://www.unpri.org/esg-issues/social-issues/employee-relations>.

In this contribution, we do not make a substantive distinction between the notions of corporate sustainability, CSR and ESG used in the private sector, and the terminology used in the international initiatives such as IRBC and Business and Human Rights.

Despite the essential role MNEs play in relation to the protection of FLS, the way in which these core workers' rights can be and are included in corporate practice is underexposed. Therefore, this paper not only offers an overview of the scope and content of the FLS and the public, private, binding and voluntary (regulatory) instruments that incorporate those standards in relation to private sector activities, but also assesses how and to what extent private actors take into account FLS. In this practical assessment, there is a special focus on the role of the corporate board and the engagement initiatives of institutional investors and other shareholders, considering the significant impact they have in the global economy.

In order to offer a comprehensive overview of how FLS are included in corporate practice and to get to a more enhanced understanding of how they could be more effectively applied and implemented, the following questions will be dealt with. Firstly: What is the relevance, scope and content of the ILO's fundamental labour standards? For a proper understanding of the application of FLS, it is essential to have an accurate understanding of their substantive meaning. The second section will cover the question which public instruments and initiatives target companies to include FLS in their sustainability policies and activities? Thirdly, we will investigate which private sector sustainability initiatives can be distinguished, with an emphasis on the role of FLS. After this examination of the relevant norms and the public and private instruments in which these labour rights are included and applied, the stage is set for a first empirical analysis of how global companies and shareholders (and in particular institutional investors) include FLS in their policies and actions in practice.

## *II. Fundamental Labour Standards: The Normative Framework*

Fundamental labour standards are derived from standard setting by the International Labour Organization (ILO) and have been developed over the past century. They cover four areas that are regarded as particularly important minimum norms to protect workers globally: (a) the prohibition of child labour; (b) the prohibition of forced labour; (c) non-discrimination and equal treatment; and (d) freedom of association and the right to collective bargaining. These fundamental standards are part of the overall UN human rights framework and are included in virtually all international instruments that aim to regulate corporate behavior in respect of labour rights.<sup>12</sup>

The ILO was created as part of the Versailles Peace Treaty of 1919 and is one of the oldest still active international organizations. After the second world war it became the United Nations first specialized agency. It is the primary institution for creating binding international Conventions and non-binding Recommendations on labour related issues. A unique feature of the ILO is that it has a tripartite system of formal decision-making in which representative of employers, workers and governments together adopt international labour standards.<sup>13</sup> Furthermore, the ILO has a complex but acclaimed supervisory system by which different monitoring mechanisms can be invoked to exert pressure on governments that violate labour standards they have ratified.<sup>14</sup> The ILO does not impose sanctions but rather

<sup>12</sup> Of course, there are more labour standards besides these four that are of great importance to workers worldwide, such as those related to occupational safety and health. The report of the Global Commission on the Future of Work therefore recommended the recognition of health and safety at work as a fundamental principle and right at work. See Int'l Labour Org. [ILO], *Work for a Brighter Future – Global Commission on the Future of Work*, 39 (2019). In June 2019, the ILC acted on that recommendation and adopted a resolution that: “[r]equests the Governing Body to consider, as soon as possible, proposals for including safe and healthy working conditions in the ILO’s framework of fundamental principles and rights at work.” ILO Centenary Declaration for the Future of Work Resolution, at 1 (2019).

<sup>13</sup> See Int'l Labour Org. [ILO], *Rules of the Game: A Brief Introduction to International Labour Standards* 1, 15 (3d ed. 2014).

<sup>14</sup> See generally *The Standards Initiative: Joint Report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations*

aims to resolve conflicts through mediation, dialogue, recommendations, and collaboration. Presently, the ILO has 187 member states and has adopted 190 Conventions, 206 Recommendations and 6 Protocols.<sup>15</sup>

In 1998, the International Labour Conference – the tripartite parliamentary assembly of the ILO – adopted the important "Declaration on Fundamental Principles and Rights at Work." This Declaration identified the four areas mentioned above as fundamental and connected those four areas to eight corresponding conventions, that are designated as "Fundamental Conventions."<sup>16</sup> The Declaration aims to promote universal ratification of these eight Fundamental Conventions and presently, the coverage rate is 92% of the total possible number of ratifications.<sup>17</sup> Additionally, there is a special follow-up system attached to the Declaration by which ILO member states that have not ratified one or more Fundamental Conventions will have to report to the ILO on any relevant changes that may have taken place in their law or practice.<sup>18</sup> The regular reporting obligation for member states that have ratified a Fundamental Conventions is every three instead of the more usual five years. While the Declaration has been criticized by some and praised by others,<sup>19</sup> it is clear that its

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and the Committee on Freedom of Association, GB.326/LILS/3/1 (February 29, 2016). Noteworthy, the Committee on Freedom of Association may deal with complaints regarding violations of the principles of freedom of association even if the member state under review has not ratified the relevant fundamental conventions.

<sup>15</sup> See Normlex, INT'L LABOUR ORG. [ILO], <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::> (last visited Aug. 24, 2020).

<sup>16</sup> Int'l Labour Org. [ILO], *Conventions and Recommendations*, <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last visited Aug. 24, 2020).

<sup>17</sup> *Id.*

<sup>18</sup> ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, INT'L LABOUR CONFERENCE (ILC), 2, Jun. 18, 1998, § 2b at 10.

<sup>19</sup> See generally Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, 3 EUR. J. INT'L L. 457, 457-521 (2004); Philip Alston & James Heenan, Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work, 36 N.Y.U. J. INT'L. L. & POL. 221 (2004); Brian Langille, Core Labour Rights – The True Story (Reply to Alston), 3 EUR. J. INT'L L.

proposed set of four core entitlements has been adopted in a wide spectrum of different instruments that aim to protect labour standards in an international setting. In June 2019, the International Labour Conference adopted the “ILO Centenary Declaration for the Future of Work,” which contains the decision to include a fifth category – safe and healthy working conditions – to the framework of fundamental principles and rights at work in the near future.<sup>20</sup> The inclusion of occupational health and safety standards into the catalogue of fundamental labour standards seems even more desirable and pertinent in light of the current COVID-19 pandemic which poses serious challenges for worker safety.

This section aims to offer a brief overview of the scope, content and relevance of the current Fundamental Labour Standards in order to clarify what the obligations are for actors that commit themselves to these standards.<sup>21</sup>

#### *A. The Prohibition of Child Labour*

According to the most recent statistics of the ILO, 152 million children between 5 and 17 years of age are engaged in child labour and about 73 million of those in hazardous work.<sup>22</sup> The vast majority of child labour occurs in Africa (72.1 million) and Asia and the Pacific (62.1 million). It occurs primarily in the agricultural sector – including fisheries, forestry and livestock herding – but also in services and the industrial sector.<sup>23</sup> It is important to note that of course not all work

<sup>20</sup> 409, 409-437 (2005); Francis Maupain, *Revitalization Not Retreat. The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights*, 3 EUR. J. INT'L L. 439, 439-65 (2005).

<sup>21</sup> ILO Centenary Declaration for the Future of Work Resolution, *supra* note 12.

<sup>22</sup> See generally S.J. Rombouts, *The International Diffusion of Fundamental Labour Standards: Contemporary Content, Scope, Supervision and Proliferation of Core Workers' Rights under Public, Private, Binding, and Voluntary Regulatory Regimes*, 3 COLUM. HUM. RTS. L. REV. 78, 89-175 (2019).

<sup>23</sup> Int'l Labour Org. [ILO], *Global Estimates of Child Labour: Results and Trends*, *supra* note 1, at 5.

<sup>24</sup> *Id.* at 5.

performed by children qualifies as child labour, but only work that “is mentally, physically, socially or morally dangerous and harmful to children” and that interferes with their education.<sup>24</sup> The two Fundamental Conventions that lay down the norms on the prohibition of child labour are the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182).<sup>25</sup>

The Minimum Age Convention calls on states to progressively raise the minimum age for admission to employment and includes three different categories of rules to that effect. The first and foremost category deals with a basic minimum age, which is set at 15 years or the age of completion of compulsory schooling.<sup>26</sup> The second category covers “hazardous work,” which amounts to work that “is likely to jeopardise the health, safety or morals of young persons”. Hazardous work is only allowed for workers older than 18 years of age.<sup>27</sup> Thirdly, Convention 138 contains a possibility to make exceptions for the category of “light work.” This concerns work that is “not likely to be harmful to their health or development” and which does not interfere with their education. Light work is permitted for children between 13 and 15 years.<sup>28</sup> In some cases, limited deviation from these rules is permitted when a country’s “economy and educational facilities are insufficiently developed” or when certain health and safety issues are sufficiently addressed.<sup>29</sup>

The second Convention on child labour, No. 182, is focused on immediate and comprehensive action to effectively eliminate “the worst forms of child labour as a matter of urgency.”<sup>30</sup> There is no flexible minimum age, and the term child applies to all persons below

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<sup>24</sup> See Int'l Labour Org. [ILO], *What is Child Labour?* <http://www.ilo.org/ipec/facts/lang—en/index.htm>.

<sup>25</sup> See generally Int'l Labour Org. [ILO], Minimum Age Convention, *adopted* Jun. 26, 1973; Int'l Labour Org. [ILO], Worst Forms of Child Labour Convention, *adopted* Jun. 17, 1999.

<sup>26</sup> Minimum Age Convention, *supra* note 25, at art. 2, §3.

<sup>27</sup> *Id.* at art. 3, §1.

<sup>28</sup> *Id.* at art. 7, §1.

<sup>29</sup> *Id.* at art. 2, §4; art. 3, §3; art. 7, §4.

<sup>30</sup> Worst Forms of Child Labour Convention, *supra* note 25 at art. 1.

the age of 18.<sup>31</sup> Article 3 is the central provision and describes four categories of "worst forms of child labour": (a) slavery, debt bondage, serfdom and forced labour; (b) child prostitution and pornography; (c) illicit activities such as drug trafficking and production; (d) hazardous work that is likely to harm health and safety of children.<sup>32</sup> While there has been a sharp reduction in the number of instances of child labour since 2000, the problem is still vast in scale.<sup>33</sup>

### *B. The Prohibition of Forced Labour*

Modern slavery can be seen as an umbrella term, that covers forced marriage, human trafficking and forced labour. According to the 2017 Global estimates of modern slavery, approximately 40.3 million people worldwide are victims to modern slavery, the majority of them girls and women. About 24.9 million of those are trapped in forced labour and are being coerced to work as domestic workers, in clandestine factories, on fishing vessels, construction sites, farms and in the sex industry.<sup>34</sup> The majority of victims suffer different forms of coercion such as withholding wages, being prevented to leave the situation and threats of violence, sometimes physical, sexual or directed against family members.<sup>35</sup>

*Forced labour* is prohibited under Fundamental Conventions No. 29 and 105.<sup>36</sup> The topic has been on the agenda of the ILO since its inception and is closely related to the prohibition of slavery, a *Ius Cogens* norm under international law. The 1930 Forced Labour Convention, No. 29, aims to suppress forced or compulsory labour in all its forms. Forced labour is defined in Article 2 as: "all work or service which is exacted from any person under the menace of any

<sup>31</sup> *Id.* at art. 2.

<sup>32</sup> *Id.* at art. 3.

<sup>33</sup> Global estimates of child labour, *supra* note 1, at 11.

<sup>34</sup> Global estimates of modern slavery: Forced labour and forced marriage, *supra* note 1, at 9.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> Forced Labour Convention No. 29, *adopted* on Jun. 28, 1930, 39 U.N.T.S. 55; Abolition of Forced Labour Convention No. 1059, *adopted* on Jun. 25, 1957, entered into force Jan. 17, 1059, 320 U.N.T.S. 291.

penalty and for which the said person has not offered himself voluntarily.”<sup>37</sup> Exceptions to the general prohibition are allowed under five specific grounds of justification: (a) compulsory military service; (b) normal civic obligations; (c) prison labour; (d) work in emergency situations and; (e) minor communal services.<sup>38</sup>

Convention No. 105, adopted in 1957, highlights a number of categories of forced labour that require special care. It is presently ratified by 175 member states and does not replace the older C29 but should be perceived as a complementary instrument with a more limited scope of application.<sup>39</sup> Convention No. 105 was inspired by the 1956 UN Supplementary Slavery Convention,<sup>40</sup> which covered similar issues such as debt bondage, serfdom and child exploitation.<sup>41</sup> It aims to suppress forced labour related to the use of it for: (a) political coercion (b) economic development; (c) labour discipline; (d) punishment for having participated in strikes; and, (e) racial, social, national or religious discrimination.”<sup>42</sup> Article 2 of the Convention calls for the immediate and complete abolition of those specified types of forced labour.<sup>43</sup>

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<sup>37</sup> Forced Labour Convention, *supra* note 36, at art. 2, §1. See also Int'l Labour Org. [ILO], *What is Forced Labour, Modern Slavery and Human Trafficking*, <https://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm> (last visited Aug. 24, 2020).

<sup>38</sup> Forced Labour Convention, *supra* note 36, at art. 2, §2. See Int'l Labour Org. [ILO], *Fundamental Rights at Work and International Labour Standards*, Geneva, 39-44 (2003).

<sup>39</sup> *Id.* at 45-46.

<sup>40</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI), art. 1, *adopted* Sept. 7, 1956, 226 U.N.T.S. See also Lee Slepston, Int'l Labour Org. [ILO], *Forced and Compulsory Labour in International Human Rights Law, International Labour Office*, 2005.

<sup>41</sup> Center for Education Division of Behavioral and Social Sciences and Education & Policy and Global Affairs Division, National Research Council, MONITORING INTERNATIONAL LABOR STANDARDS: TECHNIQUES AND SOURCES OF INFORMATION 138 n.2 (2004).

<sup>42</sup> Abolition of Forced Labour Convention, No. 105, art. 1, *adopted* Jun. 25, 1957, entered into force Jan. 17, 1950, 320.

<sup>43</sup> *Id.* at art. 2.

In 2014, a new protocol to Convention No. 29 was adopted, which aims to bring the old Convention more in line with contemporary forms of forced labour and human trafficking.<sup>44</sup> It is accompanied by a Recommendation (R203)<sup>45</sup> and together these instruments provide detailed guidance on how to address forced labour issues in relation to protection, prevention and compensation. Both instruments take a victim centered and practical approach and offer different possible tools, such as due diligence, education, labour inspection, complaint mechanisms and international cooperation.<sup>46</sup>

The general prohibition of Convention No. 29, coupled with the specific categories from Convention No. 105 and the protocol of 2014 contain the norms that are to be taken into account when combatting situations of forced labour or modern slavery.

### *C. Non-Discrimination and Equal Treatment*

Non-discrimination and equal treatment are well-known themes in international human rights law and a persistent problem in relation to occupation and employment. It occurs in a wide variety of settings, in high, middle and low income countries, in all different sectors and in a variety of types.<sup>47</sup> Discrimination is often a systemic and structural phenomenon that contributes to poverty and exclusion.<sup>48</sup> Multiple discrimination occurs frequently and is particularly severe for its victims (e.g., older female domestic workers

<sup>44</sup> Protocol of 2014 to the Forced Labour Convention, 1930 No. 29, *adopted* Jun. 11, 2014, *entry into force* Nov. 9, 2016, 39 U.N.T.S. 55. *See also* Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), *adopted* Jun. 11, 2014.

<sup>45</sup> Protocol of 2014 to the Forced Labour Convention, *supra* note 44. Forced Labour (Supplementary Measures) Recommendation, *supra* note 44.

<sup>46</sup> Protocol of 2014 to the Forced Labour Convention, *supra* note 44, at art. 2-4.

<sup>47</sup> Int'l Labour Org. [ILO], *Elimination of Discrimination in Respect of Employment and Occupation*, <https://www.ilo.org/declaration/principles/eliminationofdiscrimination/lang--en/index.htm> (last visited Aug. 24, 2020).

<sup>48</sup> Int'l Labour Org. [ILO], *Equality at Work: Tackling the Challenges – Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work Report I(B)* 9, 96th Session, 2007.

from a religious minority group).<sup>49</sup> The two Fundamental Conventions that cover equal treatment are the Discrimination Convention No. 111 and the Equal Remuneration Convention No. 100.<sup>50</sup>

Convention No. 111 urges states to pursue a national policy to eliminate discrimination in respect of employment and occupation. The Convention defines discrimination as: “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”<sup>51</sup> These grounds are not exhaustive and may be expanded – and frequently are – by additional grounds such as disability, HIV status or age.<sup>52</sup> Both direct and indirect discrimination are covered by Convention No. 111. Direct discrimination occurs when policies or rules exclude or give preference to certain individuals explicitly based on the fact that they belong to a specific group, for instance the refusal to hire Muslims.<sup>53</sup> Indirect discrimination occurs when an apparently neutral criterion has the effect of excluding a certain group, for example when setting a specific height requirement in job vacancies and thereby excluding a disproportionate number of women. As the examples illustrate, the Convention also applies to access to employment or vocational training.<sup>54</sup> Exceptions are possible pursuant to Article 1(2) when the inherent requirements of a specific and sufficiently definable job call for differential treatment, such as hiring only men for the role of King Arthur in a movie production.<sup>55</sup>

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<sup>49</sup> *Id.* at 10.

<sup>50</sup> Discrimination (Employment and Occupation) Convention, 1958, No. 111, *adopted* Jun. 25, 1958. Equal Remuneration Convention, 1951, No. 100, *adopted* June 29, 1951. Another important ILO instrument on equal treatment is the Workers with Family Responsibilities Convention, 1981, No. 156, *adopted* June 23, 1981.

<sup>51</sup> Discrimination (Employment and Occupation) Convention, *supra* note 50, at art. 1, §1(a).

<sup>52</sup> Elimination of Discrimination in Respect of Employment and Occupation, *supra* note 47.

<sup>53</sup> *Id.*

<sup>54</sup> Discrimination (Employment and Occupation) Convention No. 111, *supra* note 50, art. 1, §3(b) and (e).

<sup>55</sup> *Id.* at art. 1, §2.

The second Convention, No. 100, deals with one – but nevertheless a highly relevant - principle: equal pay for work of equal value for men and women. The Convention addresses the gender wage gap, a structural problem that is difficult to monitor and differs substantially per sector. According to estimates the global gender wage gap is currently about 20%, which means that women generally earn 20% less than men for work of equal value.<sup>56</sup> In 2017, in the European Union, the gap was approximately 16%<sup>57</sup> and in the US about 17%.<sup>58</sup> Under Convention No. 100, states are held to “promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”<sup>59</sup> The Convention does not stipulate any method for determining the relative value of different types of work,<sup>60</sup> but does include some guidance in Article 2, which states that the principle of equal pay may be applied by national laws or regulations, specific machinery for wage determination and collective agreements.<sup>61</sup> Although the difference between remuneration of men and women has been reduced over time, and “virtually every industrialized country has passed laws mandating equal treatment of women in the labour market,” there is still a persistent gender pay gap in virtually all countries.<sup>62</sup>

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<sup>56</sup> Int'l Labour Org. [ILO], *A Quantum Leap for Gender Equality: For a Better Future for All*, at 14 (2019).

<sup>57</sup> European Commission, The gender pay gap situation in the EU, [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en).

<sup>58</sup> Institute for Women's Policy Research, *Fact Sheet, The Gender Wage Gap: 2017, Earnings Differences by Gender, Race, and Ethnicity* (Sept. 2018).

<sup>59</sup> Int'l Labour Org. [ILO], *Equal Remuneration Convention*, 1951 (No. 100) art. 2, §1, May 23, 1953.

<sup>60</sup> Int'l Labour Org. [ILO], *Rules of the Game: A Brief Introduction to International Labour Standards*, at 41 (2014).

<sup>61</sup> Equal Remuneration Convention, *supra* note 58 at 115, art. 2 §2; see also Martin Oelz et al., *Equal Pay: An Introductory Guide*, INT'L LABOUR ORG. [ILO], (2013); Int'l Labour Org. [ILO], *Guide to International Labour Standards and Rights at Work Concerning Young People*, (2013).

<sup>62</sup> Int'l Labour Org. [ILO], *Global Wage Report 2016/17: Wage Inequality in the Workplace*, at 30 (2016).

*D. Freedom of Association and the Right to Collective Bargaining*

While the three categories of fundamental principles and rights discussed above are mainly substantive in nature, freedom of association and its related right to collective bargaining are mostly procedural rights. As such, they are core values of any labour law or industrial relations system and key components of what is often called “industrial democracy.” Freedom of association is a central human right that is included in many international instruments such as the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The International Covenant on Economic Social and Cultural Rights and several regional human rights instruments.<sup>63</sup> Common problems that occur are the prohibition or suspension of trade unions, discrimination and violence against trade union members, imprisonment or even killings of trade union leaders, and violent suppression of the right to strike.<sup>64</sup> Furthermore, about 60% of the global workers are active in the informal economy and have far fewer opportunities to form or join trade unions or to bargain for better working conditions.<sup>65</sup> Low-wage migrant workers also face structural barriers and in light of their irregular status are often denied freedom of association.<sup>66</sup> Other groups that are disproportionately disenfranchised are women and domestic workers.<sup>67</sup> Rights to freedom of association, collective bargaining and

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<sup>63</sup> See generally European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 155; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123; Org. of African Unity [OAU], *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, June 9, 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III) [hereinafter African Charter on Human and Peoples' Rights].

<sup>64</sup> E.g., Int'l Lab. Org. [ILO], *Committee on Freedom of Association – annual report for the period 2018*.

<sup>65</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Ass'n, U.N. Doc. A/71/385, ¶¶ 19, 21 (Sept. 14, 2016).

<sup>66</sup> See Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Ass'n, U.N. Doc. A/71/385, ¶ 28 (Sept. 14, 2016).

<sup>67</sup> See Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Ass'n, U.N. Doc. A/71/385, ¶¶ 34-49 (Sept. 14, 2016).

peaceful strike are generally regarded as the main means of overcoming power imbalances between workers and employers and securing justice at work by ensuring “that a fair contracting process occurs.”<sup>68</sup> Since not all governments are evenly dedicated to granting substantial decision-making powers to workers’ and employers’ organizations, the Fundamental Conventions that deal with this subject are considered the most controversial of the four areas of fundamental labour standards. Be that as it may, Convention No. 87 has been ratified by 155 member states and Convention No. 98 by 166 as of February 2019.

Convention No. 87 – on the right to freedom of association and the right to organize - puts forward provisions on safeguarding the independence of workers’ and employers’ organizations from governmental interference. Its core provision, Article 2, states that: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”<sup>69</sup> Furthermore, workers’ and employers’ organizations also have the right to draw up their own rules and organize their own administration and activities without any interference by the public authorities and governments should not have the competence to dissolve or suspend them.<sup>70</sup>

Convention 98 – on the right to organize and collective bargaining – takes a slightly different perspective and is more concerned with the relation between management and trade unions as well as the protection of union members against unfair treatment. Acts of anti-union discrimination are prohibited, especially when this would prevent workers from joining trade unions, or when membership would lead to their dismissal, transfer or demotion, or

<sup>68</sup> Brian A. Langille, *Core Labour Rights – The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409, 429 (2005).

<sup>69</sup> Convention Concerning Freedom of Association and Protection of the Right to Organise art. 2, Sept. 7, 1948, 68 U.N.T.S. 17 [hereinafter Freedom of Association and Protection of the Right to Organise Convention].

<sup>70</sup> Freedom of Association and Protection of the Right to Organise Convention, *supra* note 68, art. 3-4.

when they are hindered in participating in union activities.<sup>71</sup> Trade unions and employers' organizations are to be protected against acts of interference, in particular against "acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations."<sup>72</sup> This provision aims at preventing the formation of so-called "yellow unions" which are controlled or manipulated by company management in order to frustrate a fair collective bargaining process. This way, independent organizations are regarded as essential for a proper exercise freedom of association and collective bargaining. The right to peaceful strike action is not included explicitly in either Convention, and although recent years have seen fierce debates within the ILO on this subject,<sup>73</sup> the general position – both in the ILO and in its members domestic systems - is that when workers would not have the right to collective action – under certain conditions<sup>74</sup> – this would severely undermine their trade union rights and their capacity to negotiate balanced collective agreements.

Although pressing problems remain in relation to all Fundamental Labour Standards, the high ratification rate of the eight Fundamental Conventions, together with the identification of the corresponding four areas of fundamental principles and rights at work, have served as a catalyst for their inclusion in a wide range of normative instruments. Those created in the international public sphere in relation to responsibilities of corporate actors are discussed next.

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<sup>71</sup> Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively art. 1, July 9, 1948, 96 U.N.T.S. 257 [hereinafter Right to Organise and Collective Bargaining Convention].

<sup>72</sup> Right to Organise and Collective Bargaining Convention *supra* note 70, art. 2.

<sup>73</sup> Lee Slepston, *Crisis in the ILO supervisory system: Dispute over the Right to Strike*, 29 INT'L J. COMP. LAB. L. INDUS. REL. 199, 200 (March 2013).

<sup>74</sup> Such as restrictions on the right to strike in cases of national emergencies, public services or essential services. See Int'l Labour Org. [ILO], *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association*, ¶¶ 124-52 (6th ed. 2018).

### *III. International Public Instruments*

A growing number of public instruments aim to provide guidance for applying fundamental labour standards at the corporate level. The most widely used and supported instruments are the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines on Multinational Enterprises (OECD Guidelines).<sup>75</sup> Additionally, the ILO has created its own instrument; the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration).<sup>76</sup> The central feature of the UNGPs is that business enterprises are requested to conduct a human rights due diligence process in order to identify and address possible human rights risks in their activities. Both the OECD guidelines and the ILO MNE Declaration have been amended to include this due diligence system. For that reason, this section will firstly describe the key features of the ILO and OECD instruments and afterwards will examine the UNGPs and its functioning in a more detail in order to provide a proper overview of what is expected from the private sector in respect of FLS. Two “high profile” other initiatives of a different nature are also briefly inspected since they explicitly deal with fundamental labour standards and corporate actors: The UN Global Compact and the UN 2030 Agenda for Sustainable Development.<sup>77</sup> Noteworthy, all these instruments have a

<sup>75</sup> See generally Office of the United Nations High Comm'r for Human Rights [OHCHR], *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. HR/PUB/11/04 (2011). See also Org. for Econ. Co-operation and Dev. [OECD], *OECD Guidelines for Multinational Enterprises* (11th ed. 2011).

<sup>76</sup> See Int'l Labour Org. [ILO], TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (March 2017), [hereinafter *MNE Declaration*].

<sup>77</sup> See *The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Oct. 18, 2019); G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015).

voluntary character and do not impose binding legal obligations on the private sector.<sup>78</sup>

#### *A. The ILO MNE Declaration*

The ILO MNE Declaration was adopted in 1977 in response to growing international concern about the conduct of corporations in the developing world. The Declaration is mainly addressed to enterprises and governments – and to a lesser extent also to workers’ and employers’ organizations - and covers diverse themes related to labour standards and social policy. In ILO fashion, it was adopted after a tripartite process in which governments, employers’ and workers’ organizations participated. The purpose of the Declaration is to provide guidance on how enterprises “can contribute through their operations worldwide to the realization of decent work.”

The need for the MNE Declaration is described in its introduction which considers: “the continued prominent role of multinational enterprises in the process of social and economic globalization.”<sup>79</sup> It is based on the principles contained in the ILO’s Conventions and the Declaration on Fundamental Principles and Rights at Work. The Declaration was amended at different moments and most recently, in March 2017, to secure a better alignment with the UNGPs, the 2030 Agenda for Sustainable Development, the Paris climate agreement, and the OECD Guidelines.<sup>80</sup> The latest version of the Declaration includes references to human rights due diligence, grievance mechanisms, access to remedies, and global supply chains.<sup>81</sup>

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<sup>78</sup> A binding treaty on “Transnational Corporations and Other Business Enterprises with respect to human rights,” is being negotiated. *Binding Treaty*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://www.business-humanrights.org/en/binding-treaty> (last visited Oct. 18, 2019).

<sup>79</sup> *MNE Declaration*, *supra* note 75, at V.

<sup>80</sup> *Id.* at 1.

<sup>81</sup> Int’l Labour Org. [ILO], *The ILO MNE Declaration: What’s in it for Workers?* At 4 (2017).

Protection of fundamental labour standards is one of the main goals of the Declaration which reiterates the importance of the fundamental principles and rights at work and states that “all parties should contribute to the realization” of those.<sup>82</sup> Each type of fundamental labour standard is dealt with under separate headings that include instructions for governments and enterprises.

The MNE Declaration calls on governments to “take effective measures to prevent and eliminate forced labour, to provide to victims protection and access to appropriate and effective remedies”<sup>83</sup> and should “provide guidance and support to employers and enterprises.”<sup>84</sup> Enterprises should “take immediate and effective measures within their own competence to secure the prohibition and elimination of forced or compulsory labour in their operations.”<sup>85</sup> In relation to child labour, governments should “develop a national policy designed to ensure the effective abolition of child labour” and enterprises are requested to: “respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour in their operations and should take immediate and effective measures within their own competence to secure the prohibition and elimination of the worst forms of child labour.”<sup>86</sup> Non-discrimination and equal treatment are covered by paragraphs 28-31 by which governments should pursue policies to eliminate discrimination in employment and are to promote the principle of equal remuneration for men and women for work of equal value.<sup>87</sup> Non-discrimination should be a guiding principle for enterprises throughout their operations – without prejudice to affirmative action policies - and “make qualifications, skill and experience the basis for the recruitment, placement, training and advancement of their staff at all levels.”<sup>88</sup>

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<sup>82</sup> *MNE Declaration*, *supra* note 75, ¶¶ 2, 9.

<sup>83</sup> *Id.* at ¶ 23.

<sup>84</sup> *Id.* at ¶ 24.

<sup>85</sup> *Id.* at ¶ 25.

<sup>86</sup> *Id.* at ¶¶ 26-27.

<sup>87</sup> *Id.* at ¶¶ 28-29.

<sup>88</sup> *Id.* at ¶ 30.

The rules laid down in Convention 87 and 98 are also reflected in the MNE Declaration in its chapter on industrial relations.<sup>89</sup> Additionally, the Declaration stipulates that governments should make sure that incentives to attract foreign investment do not impede the exercise of the right to freedom of association.<sup>90</sup> Enterprises should support representative employers' organizations were appropriate, facilitate collective bargaining, and refrain from threats to transfer the undertaking.<sup>91</sup>

The MNE declaration deals with many more labour related issues such as employment promotion; social and employment security; wages, benefits and conditions of work; safety and health; consultation and access to remedies.<sup>92</sup> The Declaration is promoted by several operational tools, such as regional reporting, country level assistance, a helpdesk for business, company union dialogue and an interpretation procedure.<sup>93</sup> While the ILO MNE Declaration is the most comprehensive instrument for multinational corporations in the field of labour rights, its role has been somewhat limited compared to the OECD Guidelines and the UNGPs, which will be discussed next.

#### *B. The OECD Guidelines for Multinational Enterprises*

The OECD has 36 member states – all are generally regarded as high income countries - and focuses on research, cooperation and policy coordination in democracies with market economies in order to “improve the economic and social well-being of people around the world.”<sup>94</sup> The first edition of its Guidelines for Multinational Enterprises was created in 1976, and they have been updated several times, most recently in 2011, to include a new human rights chapter

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<sup>89</sup> See *id.* at 13-15, ¶¶ 48-63.

<sup>90</sup> *Id.* at ¶ 52.

<sup>91</sup> *Id.* at 13, 13-14, ¶¶ 50, 57, 59.

<sup>92</sup> See generally *MNE Declaration*, *supra* note 75.

<sup>93</sup> See *ILO MNE Declaration*, at 21, 21-25.

<sup>94</sup> *Organisation for Economic Co-operation and Development (OECD)*, World Econ. F. (2019), <https://www.weforum.org/organizations/organisation-for-economic-co-operation-and-development-oecd-1ab87c0b-9e80-4a1b-ade3-0257bb675f40>.

and comprehensive guidelines on due diligence and responsible supply chain management.<sup>95</sup> The instrument includes “non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.”<sup>96</sup> The guidelines cover a broad spectrum of topics included in chapters on disclosure, employment and industrial relations, environment, corruption, consumer interests, technology, competition and taxation.<sup>97</sup>

Fundamental labour standards are covered by the first provision of Chapter V of the Guidelines on Employment and Industrial Relations which summarizes the main provisions of the Fundamental Conventions. Enterprises should – within national and international legal frameworks – respect trade union rights including the right to effective collective bargaining,<sup>98</sup> contribute to “the effective abolition of child labour,” and “secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.”<sup>99</sup> Furthermore, they should “contribute to the elimination of all forms of forced or compulsory labour and take adequate steps to ensure that forced or compulsory labour does not exist in their operations.”<sup>100</sup> Their operations should additionally be guided by the “principle of equality of opportunity and treatment in employment” and discrimination – with the exception positive measure to ensure greater equality in fact – should be avoided at all times.<sup>101</sup> The commentary on this chapter affirms that the first paragraph is “designed to echo all four fundamental principles and rights at work” and that these “have been developed in the form of specific rights and obligations in ILO Conventions recognised as fundamental.”<sup>102</sup> Additionally, the OECD Guidelines contain references to other labour

<sup>95</sup> *OECD Guidelines for Multinational Enterprises 2011 Edition 3-4*, OECD (May 25, 2011), available at <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

<sup>96</sup> *Id.* at 3.

<sup>97</sup> *Id.* at 5.

<sup>98</sup> *Id.* at 35, ¶¶ 1(a)-(b).

<sup>99</sup> *Id.* at ¶ 1(c).

<sup>100</sup> *Id.* at ¶ 1(d).

<sup>101</sup> *Id.* at ¶ 1(e).

<sup>102</sup> *OECD Guidelines for Multinational Enterprises 2011 Edition 38*, ¶ 51, OECD (May 25, 2011).

rights and policies such as facilities necessary for collective bargaining, preferred use of local workers and rules governing collective redundancies and transfer of undertaking.<sup>103</sup>

Monitoring the OECD Guidelines is the responsibility of the Investment Committee while at the domestic level states are requested to install a National Contact Point (NCP)<sup>104</sup> which is mandated to promote adherence to the Guidelines and additionally issues “specific instances”, which are decisions on complaints about alleged breaches of the Guidelines.<sup>105</sup> This has led to over 400 reports that aim to clarify interpretations of the Guidelines and try to reconcile the parties to the conflict through mediation.<sup>106</sup>

As mentioned, an important component of the 2011 version of the Guidelines is the requirement that business enterprises should conduct a risk-based due diligence procedure to “identify, prevent and mitigate actual and potential adverse impacts” and “account for how these impacts are addressed.”<sup>107</sup> In order to comprehend the functioning of this procedure, it is necessary to explore the UN Guiding Principles on Business and Human Rights first.

### *C. The UN Guiding Principles on Business and Human Rights*

In 2011, the UN Guiding Principles on Business and Human Rights were unanimously endorsed by the UN Human Rights

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<sup>103</sup> *Id.* at 35-37, ¶¶ 2-7.

<sup>104</sup> *Id.* at 18, ¶ 11.

<sup>105</sup> *National Contact Points (NCPs)*, OECD WATCH, <https://www.oecdwatch.org/oecd-ncps/national-contact-points-ncps/>. (last visited Feb. 2019).

<sup>106</sup> See *Database of specific instances*, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, <http://mneguidelines.oecd.org/database/> (last visited Feb. 2019); See also *Specific instance handling under the OECD Guidelines for Multinational Enterprises*, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, <http://mneguidelines.oecd.org/specificinstances.htm#> (last visited Feb. 2019).

<sup>107</sup> See *OECD Guidelines for Multinational Enterprises 2011 Edition*, *supra* note 101, at 20, ¶10.

Council.<sup>108</sup> The instrument is considered an important step forward in the area of ascribing responsibilities to corporations in relation to human rights violations linked to corporate behavior. The UNGPs incorporate the “Protect, Respect and Remedy Framework” which was developed under the leadership of John Ruggie after three years of extensive research.<sup>109</sup> This framework is the basis for the three pillars of the UNGPs, which are: “(a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.”<sup>110</sup>

The goal of the pillar approach is to clarify the duties and responsibilities of both states and corporate actors in connection to human rights risks related to business activities.<sup>111</sup> An innovative feature of the UNGPs is that they do not include specific human rights norms, but refer to the existing human rights framework. The reason for this is that “[b]usiness can affect virtually all internationally recognized rights. Therefore, any limited list will almost certainly miss one or more rights that may turn out to be significant in a

<sup>108</sup> See U.N. Secretary-General, *Guiding Principles on Business and Human Rights, Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, U.N. Doc. HR/PUB/11/04 (Jun. 16, 2011).

<sup>109</sup> See *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Rep. of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Rep. of the Hum. Rts. Council on Its Eighth Session, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

<sup>110</sup> John Ruggie (Special Representative of the U.N. Secretary General), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31, annex (Mar. 21, 2001).

<sup>111</sup> BEATA FARACIK, IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, 12 (Trans European Policy Studies Association 2017).

particular instance, thereby providing misleading guidance.”<sup>112</sup> The UNGPs do delineate the relevant human rights norms:

An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises.<sup>113</sup>

The explicit reference to the fundamental labour standards of the ILO are both an affirmation that these labour rights are part of international human rights law and indicate that they are particularly important in relation to business conduct.

The UNGPs consist of 31 “foundational” and “operational” principles, each followed by a short commentary that contains further guidance on their application. Principles 11 through 24 elaborate on the corporate duty to respect human rights. This includes the duty to avoid “causing or contributing to adverse human rights impacts through their own activities” and furthermore to “prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts”<sup>114</sup> and – under the OECD Guidelines - encourage suppliers, business partners and subcontractors to apply those same principles of responsible business

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<sup>112</sup> John Ruggie (Special Representative of the U.N. Secretary General), *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶ 6, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

<sup>113</sup> UN Guiding Principles, *supra* note 110, at ¶12.

<sup>114</sup> UN Guiding Principles, *supra* note 109 at ¶13.

conduct.<sup>115</sup> In order to implement this, corporations should conduct a human rights due diligence process, which – according to the UNGPs and the latest guidance of the OECD<sup>116</sup> – includes six main steps. Corporations should (1) embed responsible business conduct into their policies and management systems; (2) identify and assess actual and potential adverse impacts associated with the enterprise's operations, products or services; (3) cease, prevent and mitigate the adverse impacts; (4) track implementation and results; (5) communicate how the impacts are addressed and; (6) provide for or cooperate in remediation when appropriate.<sup>117</sup> Of course it is not always feasible to address all possible adverse impacts, and therefore the corporation may prioritize certain risks based on severity and likeliness of occurrence.<sup>118</sup>

Both the OECD Guidelines and the ILO MNE Declaration have been amended accordingly to include this due diligence process in their structure and to allow for an integrated approach. The UNGPs are a widely supported framework that requires corporate actors to assess risks to fundamental labour standards in their own business as well as in their supply chains and to act on this assessment. The fact that the UNGPs are concise and use clear and simple language makes them comparatively easy to understand and apply.<sup>119</sup> While there is still a lot of work to be done to effectively implement human rights due diligence,<sup>120</sup> the Guiding Principles are presently the most important public tool to assist corporations to respect fundamental labour standards internationally.

<sup>115</sup> OECD, *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES*, 20 (OECD PUBLISHING, 2011).

<sup>116</sup> OECD, *OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT*, 3 (OECD PUBLISHING, 2018).

<sup>117</sup> *Id.* at 21.

<sup>118</sup> *Id.* at 17.

<sup>119</sup> *Id.*

<sup>120</sup> See Anne Trebilcock, *Chapter 6: Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights*, in *RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW* (Adelle Blackett & Anne Trebilcock eds., 2015)

*D. Other Relevant Initiatives: The UN Global Compact and the Sustainable Development Goals*

The three instruments mentioned above all provide guidelines specifically on how corporations could or should prevent fundamental labour rights abuse, as part of a larger human rights due diligence test. While the ILO, OECD, and UN instruments do contain the most important normative guidance on how to safeguard workers' rights, there are a number of other international public initiatives that are also relevant in relation to the protection of fundamental labour standards and the role of corporations. The two most "high profile" and relevant ones are briefly inspected here: the UN Global Compact (UNGC) and the connected overarching UN 2030 Agenda for Sustainable Development, better known as the Sustainable Development Goals (SDGs).<sup>121</sup>

The UN Global Compact was created in 2000 as a business leadership platform for the advancement of sustainable business practices and policies. Based on an initiative by former UN Secretary General Kofi Annan, it sees itself as "the world's largest corporate sustainability initiative"<sup>122</sup> and is dedicated to two central goals. Firstly, the UNGC aims to do business responsibly by aligning operations with human rights, labour rights, environmental protection and anti-corruption measures, and secondly, to take strategic action to promote broader societal goals, including the UN Sustainable Development Goals.<sup>123</sup>

The UNGC operates on the basis of ten central principles, which are derived from The Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, The Rio Declaration on Environment and Development and The

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<sup>121</sup> G.A. Res. 70/1, at 5 (Oct. 21, 2015).

<sup>122</sup> *Who We Are*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc> (last visited Aug. 24, 2020).

<sup>123</sup> *The Ten Principles of the U.N. Global Compact*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Aug. 24, 2020).

United Nations Convention Against Corruption. Principles 3 to 6 match the topics of the fundamental labour standards:

*Principle 3:* Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

*Principle 4:* the elimination of all forms of forced and compulsory labour;

*Principle 5:* the effective abolition of child labour; and

*Principle 6:* the elimination of discrimination in respect of employment and occupation.<sup>124</sup>

The ILO and UNGC are collaborating closely in tackling fundamental labour standards issues.<sup>125</sup> The way in which the participants of the UNGC address these principles is divided into Environment, Social and Governance (ESG) criteria.<sup>126</sup>

The UNGC participants are executives from corporations around the globe and currently, 9,933 companies from 160 countries take part.<sup>127</sup> Participants are to write an annual Communication on Progress (COP), a public disclosure to stakeholders and may be expelled from the Compact if they fail to do so.<sup>128</sup> Currently, the Compact has led to the publication almost 60,000 reports on the application of its principles.

The UNGC is closely concerned with driving awareness and action in support of the SDGs for business worldwide by focusing on

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<sup>124</sup> *Id.*

<sup>125</sup> Int'l Lab. Org. [ILO], *The Labour Principles of the United Nations Global Compact: A Guide for Business / International Labour Office*, 9 (International Labour Office, 2008).

<sup>126</sup> UNITED NATIONS GLOBAL COMPACT, (Apr. 2019).  
<https://www.unglobalcompact.org/>.

<sup>127</sup> *How will I benefit?*, UNITED NATIONS GLOBAL COMPACT (Apr. 2019),  
<https://www.unglobalcompact.org/participation/join/benefits>.

<sup>128</sup> *Delisted Participants*, UNITED NATIONS GLOBAL COMPACT (Feb. 2019),  
<https://www.unglobalcompact.org/participation/report/cop/create-and-submit/expelled>.

communicating best practices, impact and progress on sustainable business action.<sup>129</sup> The Global Compact is an important network for bringing together progressive corporations for joint action on corporate sustainability, including fundamental labour standards. It sees an essential role for businesses in achieving the SDGs and the UNGC thinks it is its responsibility “to be a leading catalyst of the transformations ahead.”<sup>130</sup>

In 2015, the UN General Assembly adopted the resolution “Transforming our World: the 2030 Agenda for Sustainable Development.”<sup>131</sup> The agenda contains a global plan of action for people, planet and prosperity, and succeeds the Millennium Development Goals by setting 17 Sustainable Development Goals and 169 accompanying targets that are to be achieved by 2030. The SDGs have a universal application and are therefore not only relevant for the corporate world, but to everyone. Their overall goal is to “mobilize efforts to end all forms of poverty, fight inequalities and tackle climate change, while ensuring that no one is left behind.”<sup>132</sup> An important component of realizing the SDGs is building and strengthening global partnerships and generating and allocating resources to deal with the global problems effectively.<sup>133</sup> The private sector is considered a major stakeholder and essential to solving these challenges.<sup>134</sup>

A substantial number of the SDGs are related to labour issues, but the most important in relation to fundamental labour standards is Goal (8) which aims to “[p]romote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.”<sup>135</sup> A number of ambitious targets are included that cover fundamental labour standards. Target 8.5 calls for “full and productive

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<sup>129</sup> *Our Global Strategy*, UNITED NATIONS GLOBAL COMPACT (Feb. 2019), <https://www.unglobalcompact.org/what-is-gc/strategy>.

<sup>130</sup> *Id.*

<sup>131</sup> G.A. Res. 70/1, U.N. Doc. A/RES/70/1, at 1 (Sep. 2015).

<sup>132</sup> *The Sustainable Development Agenda*, UNITED NATIONS (Feb. 2019), <https://www.un.org/sustainabledevelopment/development-agenda/>.

<sup>133</sup> G.A. Res. 70/1, ¶ 62 (Oct. 21, 2015); *See also* G.A. Res. 69/313, ¶ 1 (Aug. 17, 2015).

<sup>134</sup> G.A. Res. 70/1, ¶ 67 (Oct. 21, 2015).

<sup>135</sup> G.A. Res. 70/1, at 14 (Oct. 21, 2015).

employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value” by 2030. The purpose of target 8.6 is to substantially reduce youth unemployment by 2020.<sup>136</sup> Target 8.7 covers child labour and forced labour and calls for the immediate eradication of forced labour, human trafficking and modern slavery.<sup>137</sup> Additionally it includes the aspiring objective to “secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.”<sup>138</sup> Target 8.8 includes a general requirement to protect labour rights and occupational health and safety especially for “migrant workers, in particular women migrants, and those in precarious employment.”<sup>139</sup> Within the broad agenda for the future that the SDGs propose, protection of fundamental labour standards is an important goal and the assistance of the private sector is surely needed to realize the ambitious targets.

The UNGPs, ILO MNE Declaration and OECD Guidelines put forward an integrated approach of risk-management and due diligence requirements for the corporate sector in respect of fundamental labour rights. Other global sustainability initiatives also connect corporate responsibilities with the ILO’s Fundamental Conventions of which the UNGC and SDGs are two of the most relevant ones. Having examined an important part of the international public normative regime that aims to guide responsible business conduct in respect of *inter alia* fundamental labour standards, the next section will examine the basic characteristics of corporate sustainability and the relevant private sector initiatives and instruments.

#### *IV. Sustainability Instruments in the Corporate Setting*

To achieve important sustainability objectives including the adherence to FLS, the involvement of corporations is key. Especially

<sup>136</sup> G.A. Res. 70/1, at 19 (Oct. 21, 2015).

<sup>137</sup> G.A. Res. 70/1, ¶ 8.7 (Oct. 21, 2015).

<sup>138</sup> *Id.*

<sup>139</sup> G.A. Res. 70/1, ¶ 8.8 (Oct. 21, 2015).

large MNEs have a profound impact on worker protection in many parts of the world, for example via their supply chains. Regulators and authorities have become increasingly aware of the public costs of environmentally and socially harmful behavior of these companies, resulting in different regulatory initiatives. Many of these initiatives are created in the public sphere as we have seen in section III. However, the (national) private law dimension can also serve to induce companies to become more sustainable and comply with FLS. This dimension does not only include statutory and soft corporate law requirements, but also contains the extent to which corporate boards and shareholders can use their decision-making powers to accomplish corporate sustainability goals. Since private law initiatives are, by their nature, typically national initiatives, this section does not aim to provide a full comparative overview of all FLS related private initiatives worldwide. Rather, it offers a first, non-exhaustive overview of private (soft) law initiatives and instruments that address companies and related corporate actors with the aim to enhance corporate sustainability, including FLS.

Section IV.A discusses a number of important mandatory and soft corporate regulatory initiatives related to corporate sustainability and FLS in particular. Section IV.B and IV.C focus on the company level, where section IV.B explores how the corporate board can play a substantial role in promoting corporate sustainability goals by using its discretionary powers. Section IV.C considers the shareholder level, in particular institutional investors, and their impact on corporate sustainability, including their responsible investment efforts. Next, several multi-stakeholder initiatives that were developed to monitor corporate compliance with sustainability standards including FLS are discussed in IV.D. These initiatives do not only form a response to the lack of stakeholder involvement in the determination of the corporate sustainability policy at the company level, but also provide useful directions and guidelines for companies to develop their corporate sustainability reporting and engagements. This way, the following section aims to provide some clarity in relation to the content and large diversity of private sector sustainability instruments that are currently in use.

### *A. The Private Legal Framework*

Whereas in some jurisdictions corporate law entails virtually no provisions to foster corporate sustainability and leaves it all to the discretionary powers of the corporate board and private actions of shareholders (*cf. infra*, sections IV.B and IV.C), in other jurisdictions especially mandatory non-financial transparency requirements in corporate reporting are nowadays a particularly often-used tool to stimulate proper conduct of companies. This paragraph will flag a number of noteworthy legal instruments.

In California, companies have to comply with the California Transparency in Supply Chain Act. The California legislature found that “[s]lavery and human trafficking are crimes under state, federal, and international law; that slavery and human trafficking exist in the State of California and in every country, including the United States; and that these crimes are often hidden from view and are difficult to uncover and track.”<sup>140</sup> The 2012 Act aims to provide consumers with relevant information in order for them to make better decisions about their purchases and obliges large retailers and manufacturers to be transparent about their efforts to combat modern slavery and trafficking.<sup>141</sup>

Another regulatory initiative that focuses on transparency is the European Directive 2014/95/EU on non-financial reporting.<sup>142</sup> This Directive, which needed to be implemented into the national laws of the European Member States by 6 December 2016,<sup>143</sup> plays a key role in accurate and transparent corporate reporting on non-financial matters “relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters”<sup>144</sup> The Directive requires particular European companies with more than 500 employees to provide a non-financial

<sup>140</sup> *The California Transparency in Supply Chains Act*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE (Apr. 2019), <https://oag.ca.gov/SB657>.

<sup>141</sup> *Id.*

<sup>142</sup> Council Directive 2014/95, art. 1, 2014 O.J. (L 330) 1, 4 (EU).

<sup>143</sup> *Id.* at 8.

<sup>144</sup> *Id.* at 4.

statement on the aforementioned matters included in the management report. The Directive's aim is to achieve greater business transparency and accountability on social and environmental issues, and to help companies move from merely compliance with legal requirements to active enhancement of their responsible business conduct. Preamble 7 of the Directive contains an explicit reference to the ILO conventions as regards information that can be included in the non-financial statement.<sup>145</sup>

Another example is the UK Modern Slavery Act 2015. Although this act does not directly refer to the ILO conventions and related international public instruments, it is of course closely connected to the discussed international prohibition on forced labour, especially to the ILO's 2014 Protocol to the Forced Labour Convention C29. The Act recognizes that companies are exposed to modern slavery risks through their own operations and complex supply chains that outsource (parts of) the production processes. Article 54 ("Transparency in supply chains, etc.") of the Modern Slavery Act directly impacts the corporate sector with its transparency requirement. More specifically, companies that have an annual turnover of more than £36 million in their supply chains and carry (part of) their business in the UK, need to disclose a slavery and human trafficking statement. This statement must be disclosed on the website of the company (if the company has a website ex section 7 of article 54). In this statement, companies need to include the steps they are taking to address modern slavery in their business and supply chain. Paragraph 5 of the provision indicates that the statement may include information about

- (a) the organisation's structure, its business and its supply chains;
- (b) its policies in relation to slavery and human trafficking;
- (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

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<sup>145</sup> See generally *Member State Implementation of Directive 2014/95/EU*, CSR EUROPE & GRI, (2017).

- (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
- (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;
- (f) the training about slavery and human trafficking available to its staff.

Provision 54(11) sets out that the duties “are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction”<sup>146</sup> and thus failure to comply may lead to an unlimited fine for companies (but not necessarily has to). Moreover, one may note that it is sufficient for compliance for a company to state that it has taken no steps to ensure that slavery and human trafficking is not taking place in its supply chains. A report that investigates the first year of disclosure efforts under the Modern Slavery Act by FTSE-100 companies finds that “there is a welcome cluster of leading companies taking robust action, such as Marks & Spencer, Sainsbury (J) and Unilever, while the majority show a lackluster response to the Act at best.”<sup>147</sup> The key recommendations in this report for the UK government include, *inter alia*, to improve monitoring and enforcement mechanisms and publish accessible information regarding company compliance.<sup>148</sup> In addition, companies should prioritize modern slavery as part of the strategic agenda, work together with their peers to investigate common (supply chain) modern slavery risks, and raise awareness among their suppliers and conduct due diligence in their operations and supply chains.<sup>149</sup> Lastly, investors are

<sup>146</sup> Modern Slavery Act 2015, C. 30, §54 (UK); *see also* Court of Session 1988, C. 36, §45 (UK) (for specific performance of a statutory duty).

<sup>147</sup> *First Year of FTSE 100 Reports Under the UK Modern Slavery Act: Towards Elimination?*, BUSINESS & HUMAN RESOURCE CENTRE (Oct. 17, 2017).

<sup>148</sup> *Id.* at 3.

<sup>149</sup> *Id.*

invited to engage with companies on modern slavery matters and reward good practices.<sup>150</sup>

Similar efforts are undertaken in other countries. France has enacted a law that establishes a duty of vigilance for corporations with respect to forced labour and other human rights concerns.<sup>151</sup> Companies are required to identify the risks of their – and their subsidiaries' and subcontractors' – activities, and address those.<sup>152</sup> The law incorporates a system of due diligence demands similar to the discussed model of the UNGPs and OECD Guidelines. In the Netherlands, a proposed bill specifically targets child labour.<sup>153</sup> The proposal requires corporations to implement a duty of care in relation to goods and services that are potentially linked to child labour. Should the company neglect its duties, an administrative fine can be imposed and board members could even face criminal charges.<sup>154</sup>

Although hard law provisions on corporate duties in relation to FLS, including the aforementioned examples, are on the rise, they remain the exception. As described above, the majority of instruments have a softer or more voluntary nature. Important soft law instruments in many countries are corporate governance codes. Corporate governance codes, distinguished from corporate codes of conduct, described in section IV.4, contain best practices regarding the system by which (listed) companies are directed and controlled.<sup>155</sup> Usually,

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<sup>150</sup> *Id.*

<sup>151</sup> Loi 2017-399 du 21 Février, 2017 Devoir de vigilance des sociétés mères et des sociétés commanditaires [Law 2017-399 of February 21, 2017 on Duty of Care of Parent Companies and Ordering Companies], [National Assembly] (Feb. 21, 2017), <http://www.assemblee-nationale.fr>.

<sup>152</sup> Cassidy Slater, *How the French are Tackling Modern Slavery*, HUMAN RIGHTS FIRST (Mar. 24, 2017), <https://www.humanrightsfirst.org/blog/how-french-are-tackling-modern-slavery>.

<sup>153</sup> Initiatiefvoorstel-Kuiken Wet zorgplicht kinderarbeid [Initiative Proposal for the Child Labor Duty of Care Act] FIRST CHAMBER OF THE PARLIAMENT (Feb. 7, 2017), [https://www.eerstekamer.nl/wetsvoorstel/34506\\_initiatiefvoorstel\\_kuiken](https://www.eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_kuiken).

<sup>154</sup> Wet Zorgplicht Kinderarbeid [Child Labor Due Diligence Law] 7 Februari 2017, 3,4 (Neth.).

<sup>155</sup> Defined in Adrian Cadbury, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE (Burgess Science Press, 1992), explaining the UK Cadbury Code was the first corporate governance code and is

the provisions in these codes are incorporated in mandatory statutory corporate law or listing rules using a comply-or-explain regime; companies can either comply or deviate from the best practices in these codes, but in the latter case companies have to explain in their annual report why particular principles are not followed and how they address these matters. Often, these codes also contain provisions concerning the relationship between the company and various stakeholders. For instance, in the Netherlands, the Dutch Corporate Governance Code 2016<sup>156</sup> contains “long-term value creation” as its first key principle, stating that “the management board should develop a view on long-term value creation … and should formulate a strategy in line with this.”<sup>157</sup> The Dutch Corporate Governance Code states that attention should also be paid to “any other aspects relevant to the company and its affiliated enterprise, such as the environment, social and employee-related matters, the chain within which the enterprise operates, respect for human rights, and fighting corruption and bribery.”<sup>158</sup> Here, the DCGC 2016 explicitly refers to the European

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considered the start of modern corporate governance); *see also* Klaus J. Hopt, *Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 1 (2011).

<sup>156</sup> The Dutch Monitoring Committee Corporate Governance (MCCG) published a report on how the DCGC 2016 was established and how they handled the responses to the consultation round. Dutch Corporate Governance Code Monitoring Committee, Proposals for Revision and Responses (Dec. 8, 2016), <https://www.mccg.nl/?page=4747>. During the consultations, the Committee received 107 responses, of which 88 are publicly available on the Committee’s website. *Id.* The responses were provided by different stakeholder categories, including for example institutional investors, interest groups and NGOs, law firms and private investors. *Id.*

<sup>157</sup> Following the Dutch Corporate Governance Code, long-term value creation entails: “act[ing] in a sustainable manner by focusing on long-term value creation in the performance of their work. Long-term sustainability is the key consideration when determining strategy and making decisions, and stakeholder interests are taken into careful consideration. Long-term value creation also requires awareness and anticipation of new developments in technology and changes to business models. Maintaining a sufficient level of awareness of the wider context in which the enterprise affiliated with the company operates, contributes to continuing success, and is therefore in line with the company’s interests.” *The Dutch Corporate Governance Code (Unofficial Translation)* 43, CORPORATE GOVERNANCE CODE MONITORING COMMITTEE (Dec. 8, 2016), <https://www.mccg.nl/?page=4738>.

<sup>158</sup> *Id.* at 13.

Directive 2014/95/EU<sup>159</sup> and the OECD Guidelines for Multinational Enterprises.<sup>160</sup>

To conclude, although corporate sustainability matters have traditionally been part of the corporate strategy exclusively within the discretionary powers of corporate boards, recently, several national and regional hard law initiatives have been developed, that oblige corporations to investigate possible violations of labour standards throughout their supply chain. These initiatives include due diligence and reporting requirements similar to and based on the UNGPs and OECD Guidelines. Additionally, national corporate governance codes, considered soft-law, may include sustainability requirements for corporations. The next section will investigate the special powers and impact the corporate board has in pursuing sustainability goals.

### *B. The Role of the Corporate Board*

The corporate board has a crucial role in determining the strategy and the direction of the corporation in virtually all corporate law frameworks around the world.<sup>161</sup> Generally speaking, there are two classical types of board structures all over the world: the one-tier board and the two-tier board structure.<sup>162</sup> In a one-tier board, as the name already indicates, all directors are part of the same board. These directors can be executive directors who direct the company and engage in its daily management and determine the corporate strategy,

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<sup>159</sup> *Supra* note 141 (as regards disclosure of non-financial and diversity information by certain large undertakings and groups). See also I. Chiu, *Disclosure Regulation in Corporate Social Responsibility- (New) Legalisation and New Governance Implications*, in THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 6, at 521-536 (for an in-depth analysis of this new disclosure obligation).

<sup>160</sup> See *OECD Guidelines for Multinational Enterprises 2011 Edition*, *supra* note 95.

<sup>161</sup> REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (3<sup>rd</sup> ed. 2017).

<sup>162</sup> Paul L. Davies & Klaus J. Hopt, *Corporate Boards in Europe—Accountability and Convergence*, 61 AM. J. COMP. 301, 301-76 (2013) (explaining in detail the type of corporate board structures around the world).

and non-executive directors who monitor the behavior of the executive directors on behalf of shareholders.<sup>163</sup> In a two-tier board, the supervisory board members have a comparable function to the non-executive directors in an one-tier board, although they are formally separated from the so-called management board members. Although there has been a convergence between these two typical board structures,<sup>164</sup> the one-tier board structure is usually dominating in countries with the Anglo-American legal tradition such as the UK and the US. For instance, in the UK, this structure is the prescribed board system.<sup>165</sup> The mandatory German model is usually seen as the typical two-tier board system, with its *Vorstand* (the management board), and its *Aufsichtsrat* (the supervisory board) with direct employee involvement via employee board representatives. China also requires a two-tier board system with a supervisory and a management board for its companies. In several other countries, both board models are allowed.<sup>166</sup>

Corporate board members in both board systems possess substantial discretionary powers to control and pursue sustainability goals, including FLS. In virtually all jurisdictions, board members need to adhere to their duties of care and loyalty; directors are considered fiduciaries that need to act in accordance with standards of due care and in good faith and with due regard to the interest of the company. Since business decisions are in nature risky, there are high standards for director liability in virtually every jurisdiction. These high standards are contained in the business judgment rule, a rule that

<sup>163</sup> *Id.* (elaborating on other corporate actors such as employees).

<sup>164</sup> *Id.*

<sup>165</sup> More specifically, “in the UK, the Companies Act 2006 remains silent about the board system.” ANNE LAFARRE, THE AGM IN EUROPE: THEORY AND PRACTICE OF SHAREHOLDER BEHAVIOR 94 (Emerald Publishing, 1st ed. 2017); “However, UK companies operate with a one-tier board system, and this is also the system that the CA 2006 assumes to be in place. Following Davies, 2013:723.” *Id.*

<sup>166</sup> For instance, “French law allows for a one-tier board or a two-tier board system,” and thus “allows companies to choose their structure.” *Id.* at 66. “Article L.225-57 FCC states that the memorandum and articles of association of public companies may stipulate that they shall be governed by the provisions of the subsection on the two-tier board structure (L.225-57 to L.225-90-1). The default rule is the one-tier board structure.” *Id.* at 94.

“varies from one jurisdiction to another.”<sup>167</sup> For instance, in Delaware, the business judgment rule is “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interest of the company.”<sup>168</sup> In Germany, section 93(1) of the *Aktiengesetz* stipulates that “there is no violation of the duty of care if the director who makes a business decision may reasonably believe that he or she acts, on the basis of adequate information, in the interest of the company.”<sup>169</sup> As a result, directors generally have substantial discretionary powers in their corporate decision-making, including those related to pursuing sustainability goals. Decisions that include no conflicts of interests and that are carefully considered usually face low liability risks.

However, political and cultural considerations also play an important role in corporate decision-making. Especially in more shareholder-oriented jurisdictions like the U.S., external forces such as the market for corporate control that allows a corporate rider to take over a company with underperforming corporate management, may make pursuing shareholder value more attractive, to directors who wish to retain their board position, than pursuing an expensive corporate sustainability strategy. In other jurisdictions such as for instance Germany, with its substantive labour involvement,<sup>170</sup> or for instance China, with larger government involvement, the interests of other stakeholders may play a larger role in the decision-making processes of the corporate boards.<sup>171</sup>

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<sup>167</sup> *Supra* note 162.

<sup>168</sup> *Lewis v. Aronson*, 466 A.2d 375 (Del. Ch. 1983) (following the definition offered in ANDREAS CAHN & DAVID C. DONALD, COMPARATIVE COMPANY LAW (2010)).

<sup>169</sup> *Supra* note 162, at 345. One may note that the German Business Judgment Rule, in contrast to the rules used in Delaware, does not create a presumption in favor of directors.

<sup>170</sup> German co-determination rules imply that the supervisory board consists of shareholder representatives and employee representatives.

<sup>171</sup> One may note that, as shown by the two examples of the business judgment rule, directors need to subordinate their own interests to the interests of the company. The “interests of the company,” however, can be understood differently in different jurisdictions. In stakeholder-oriented jurisdictions such as for example Germany and

An important instrument for board members to promote corporate sustainability are corporate codes of conduct. These documents, which are also part of the empirical analysis in section 5 of this paper, could be defined as ethical guidelines for (multinational) corporations with a global scope. Since the 1990s, there has been a substantial increase in the use of such codes.<sup>172</sup> Corporate codes of conduct contain norms and standards on environmental issues, human rights, ethical conduct guidance, good governance, the rule of law and labour standards. As regards labour standards, corporate codes of conduct may aim to fill the gap between the level of labour standards in the host state and what the company itself perceives as an acceptable level of protection.<sup>173</sup> According to the ILO, “these codes are no substitute for binding international instruments”; however, they may “play an important role in spreading the principles contained in international labour standards.”<sup>174</sup>

While they differ in composition and competences, and deal with different political and cultural factors, all different types of corporate boards generally have profound discretionary powers to pursue sustainability policies. As will be illustrated in Part V of this article, many of their codes of conduct and sustainability policies include references to FLS.

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the Netherlands, “the interests of the company” also usually includes the interests of different stakeholders, including employees, creditors and other involved parties. In more shareholder-oriented jurisdictions, including for instance the US and the UK, “the company” is usually understood as the aggregate of shareholder’s interests (but in bankruptcy situations, boards usually need to act in the interest of the creditors).

<sup>172</sup> Marcus Taylor, *Race You to the Bottom ... and Back Again? The Uneven Development of Labour Codes of Conduct*, 16 NEW POL. ECON. 445, 446 (2011).

<sup>173</sup> Ruben Zandvliet & Paul van der Heijden, *The Rapprochement of ILO Standards and CSR Mechanisms: Towards a Positive Understanding of ‘Privatization’ of International Labour Standards*, in GLOBAL GOVERNANCE OF LABOUR RIGHTS: ASSESSING THE EFFECTIVENESS OF TRANSNATIONAL PUBLIC AND PRIVATE POLICY INITIATIVES 170, 185 (2015).

<sup>174</sup> Int’l Labour Org. [ILO], INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS: HOW INTERNATIONAL LABOUR STANDARDS ARE USED (2019), <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm>.

### C. Shareholder Engagement

Current research shows that shareholders nowadays play an important role in advocating corporate sustainability.<sup>175</sup> As discussed above, the corporate board has important discretionary powers in virtually all jurisdictions. Nevertheless, shareholders can use their selection, exit and control rights to put pressure on corporate management.<sup>176</sup> Some research shows that investors use selection and exit mechanisms to influence corporate sustainability performance.<sup>177</sup> For instance, impact funds, or social responsible funds, screen companies and only buy shares in those firms with sustainability performance above a certain level.<sup>178</sup> Shareholder control rights (“voice”<sup>179</sup>) include voting rights for decision-making in shareholder meetings, question rights and information rights. In many jurisdictions, shareholders are not only able to approve management proposals in shareholder meetings, but, subject to particular legal requirements, shareholders may also put their own proposals on the meeting’s agenda. In addition to these legal control rights, especially institutional investors and large shareholders often have the

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<sup>175</sup> See Elroy Dimson et al., *Active Ownership*, 28 REV. FIN. STUD. 3225, (2015); Alexander Dyck et al., *Do Institutional Investors Drive Corporate Social Responsibility? International Evidence*, 131, J. FIN. ECON. 693 (2019); Jody Grewal et al., *Shareholder Activism on Sustainability Issues* (Harv. Bus. Sch. Working Paper, 2016), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:27864360>.

<sup>176</sup> See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (establishing the seminal distinction between exit and loyalty). In addition, especially in common law countries, we see several cases in which civil actions are brought by shareholders. *Kasky v. Nike*, 27 Cal. 4<sup>th</sup> 939 (2002) may be referred to with respect to FLS. In this early case, it was argued that Nike had made “false statements and/or material omissions of fact” in its code of conduct as regards labor rights in its supply chain. *Id.* The Supreme Court of California held that CSR commitments should be regarded as commercial speech, which is subjected to an increased level of scrutiny. *Id.* See also Zandvliet & van de Heijden, *supra* note 173.

<sup>177</sup> Alexander Dyck et al., *supra* note 175.

<sup>178</sup> Brad M. Barber et al., *Impact Investing* (July 14, 2017) (unpublished working paper, University of California).

<sup>179</sup> See Hirschman, *supra* note 176 (1970).

opportunity to engage with the corporate board and higher management during private engagements and road shows.<sup>180</sup>

Institutional investors are important actors in many jurisdictions nowadays.<sup>181</sup> For instance, Gillan and Stark mention that the ownership by institutional investors grew from 6.1% in 1950 to over 50% by 2002.<sup>182</sup> Furthermore, a recent report by the OECD shows that the assets of institutional investors are equal to 118.9 percent of GDP in the US in 2017.<sup>183</sup> Through the incorporation of sustainability concerns into their decisions and the use of their legal and practical control rights, these particular powerful shareholders have become more involved with sustainability around the globe.<sup>184</sup> For example, ExxonMobil's management was defeated in its 2017 Annual General Meeting of shareholders (AGM) when shareholders voted in favor of a shareholder proposal related to reporting on global

<sup>180</sup> See Stuart L. Gillian & Laura T. Stark, *A Survey of Shareholder Activism: Motivation and Empirical Evidence*, CONTEMP. FIN. DIG. (1998); Joseph A. McCahery, Zacharias Sautner, & Laura T. Starks, *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors*, 71 J. FIN. 2905 (Dec. 1, 2016). In their research on the engagement behaviour of institutional investors, McCahery, Sautner and Starks found that 63 percent of their 143 respondents ("mostly very large institutional investors") stated that they engaged in private direct discussions with management in the past five years, and 45 percent stated that they engaged in private discussions with corporate boards outside of management presence.

<sup>181</sup> See Jan Fitchner, Eelke M. Heemske, & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298-326 (2017).

<sup>182</sup> Stuart L. Gillan & Laura T. Starks, *Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A Global Perspective* (Weinberg Ctr. for Corp. Governance, Working Paper No. 01, 2003), <https://ssrn.com/abstract=439500>. The authors refer to Board of Governors of the Federal Reserve System, 2003. Board of Governors of the Federal Reserve System, 2000, Flow of Funds Accounts of the United States: Annual Flows and Outstanding (Washington, D.C.).

<sup>183</sup> See Organisation for Economic Co-operation and Development [OECD], OECD Institutional Investors Statistics, at 12, OECD PUB. (2018).

<sup>184</sup> In particular, climate change is high on the agenda of institutional investors, being very supportive of climate change (shareholder) proposals. *2017 Proxy Season Review*, PROXPULSE, at 3 (Sept. 2017). See also Attracta Mooney, *Activists Don Sustainability Cloak to Whip Up Support*, FIN. TIMES (May 13, 2018), <https://www.ft.com/content/b74d2adc-2b8e-11e8-97ec-4bd3494d5f14>.

climate change measures.<sup>185</sup> Recently, it was announced by Eumedion, a Dutch corporate governance forum including many large institutional investors such as Blackrock, that it will push Shell to use its influence with the Brunei government to press for the improvement of lesbian, gay, bisexual and transgender rights.<sup>186</sup> Shell scored 100% in the Human Rights Campaign Corporate Equality Index 2018 which rates U.S. companies on LGBTQ equality.<sup>187</sup>

The biggest three global institutional investors are Blackrock, Vanguard and State Street Global Advisors (“State Street”).<sup>188</sup> Recent research by Bebchuk and Hirst shows that each of these biggest three institutional investors currently hold stakes in over 17,000 portfolio companies worldwide.<sup>189</sup> These three institutional investors together hold 18.3 percent of the shares in the S&P 500 companies, almost 10 percent of the FTSE-100 companies, almost 9 percent of the ASX-200 companies and 6 percent of the Euro Stoxx companies.<sup>190</sup> Blackrock, Vanguard and State Street are index funds that automatically track an index of stocks and follow a model of low-cost passive investing in contrast to high-cost active funds. However, despite their passive investment strategy, they are able to exert considerable influence over the board.<sup>191</sup> Anecdotal evidence suggests that these passive institutional investors’ engagement efforts are mainly concentrated on ESG issues.<sup>192</sup> For instance, Larry Fink, the CEO and Chairman of

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<sup>185</sup> Steven Mufson, *Financial Firms Lead Shareholder Rebellion Against ExxonMobil Climate Change Policies*, THE WASHINGTON POST (May 31, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/05/31/exxonmobil-is-trying-to-fend-off-a-shareholder-rebellion-over-climate-change/>.

<sup>186</sup> Anna Gross & Owen Walker, *Shell Faces Pressure on Gay Rights Over Brunei Venture*, FIN. TIMES (Apr. 25, 2019), <https://www.ft.com/content/3e506390-5f8d-11e9-b285-3acd5d43599e>.

<sup>187</sup> Best Place to Work 2018 for LGBTQ Equality, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/best-places-to-work-2018> (last visited Apr. 2019).

<sup>188</sup> Giovanni Strampelli, *Are Passive Index Funds Active Owners? Corporate Governance Consequences of Passive Investing*, 55 SAN DIEGO L. REV. 803 (2018).

<sup>189</sup> Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029 (Dec. 2019).

<sup>190</sup> 2018 Review of Shareholder Activism, LAZARD’S SHAREHOLDER ADVISOR GROUP (Jan. 2019).

<sup>191</sup> *Supra* note 188, at 804.

<sup>192</sup> *Id.* at 825.

BlackRock, announced in the company's 2018 annual letter that BlackRock will increase its focus on social responsibility issues.<sup>193</sup>

Many new regulatory initiatives that aim at increasing corporate sustainability focus on these institutional investors. For instance, the Principles for Responsible Investment (PRI, supported by the UN) offer guidelines to institutional investors and asset managers on how to promote corporate sustainability without interfering with their fiduciary duties (*cf. supra*, Introduction section). The PRI contain six main principles on ESG issues including human rights and labour standards,<sup>194</sup> and has over 2,300 signatories, including Blackrock, State Street and Vanguard.<sup>195</sup> In addition to this global Responsible Investment Initiative, the European Union has launched its Sustainable Finance Initiative. In 2016, the High-Level Expert Group on Sustainable Finance ("HLEG") was started, tasked with developing a comprehensive EU strategy on sustainable finance. Consequently, in January 2018 the final report<sup>196</sup> of the HLEG was

<sup>193</sup> See Andrew R. Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018), [www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html](http://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html).

<sup>194</sup> These are:

Principle 1: We will incorporate ESG issues into investment analysis and decision-making processes.

Principle 2: We will be active owners and incorporate ESG issues into our ownership policies and practices.

Principle 3: We will seek appropriate disclosure on ESG issues by the entities in which we invest.

Principle 4: We will promote acceptance and implementation of the Principles within the investment industry.

Principle 5: We will work together to enhance our effectiveness in implementing the Principles.

Principle 6: We will each report on our activities and progress towards implementing the Principles.

*About the PRI*, PRINCIPLES FOR RESPONSIBLE INVESTMENT <https://www.unpri.org/pri/about-the-pri> (last visited Oct. 16, 2019).

<sup>195</sup> See *id.*; see also PRI REPORTING FRAMEWORK 2 (PRI Ass'n., 2017).

<sup>196</sup> Final report of the High-Level Expert Group on Sustainable Finance, EUROPEAN COMMISSION FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL

published, including important recommendations that form the basis of the Commission's action plan on financing sustainable growth which was adopted in March 2018.<sup>197</sup> Following this action plan, the EC presented a package of three proposed legislative measures in May 2018, as a follow-up to its action plan on financing sustainable growth.<sup>198</sup> These measures include firstly, a proposal for a regulation on the establishment of a framework to facilitate sustainable investment, secondly, a proposal for a Regulation on disclosures related to sustainable investments and sustainability risks together with amending Directive (EU) 2016/2341, and thirdly, a proposal for a Regulation amending Regulation (EU) 2016/1011 on low carbon benchmarks and positive carbon impact benchmarks.<sup>199</sup>

These aforementioned proposed regulatory initiatives fit the current emphasis on institutional investors and asset managers in the European framework. More specifically, the revised Shareholder Rights Directive (Directive (EU) 2017/828), which needs to be implemented in the laws of the EU Member States by July 2019, focuses, *inter alia*, on institutional investors and their stewardship role to promote sustainable companies. In Preamble paragraphs 16 and 17 of this Directive, it is indicated that:

- (16) Institutional investors and asset managers are often not transparent about their investment strategies, their

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MARKETS UNION (Jan. 31 2018), [https://ec.europa.eu/info/publications/180131-sustainable-finance-report\\_en](https://ec.europa.eu/info/publications/180131-sustainable-finance-report_en).

<sup>197</sup> *Commission action plan on financing sustainable growth*, EUROPEAN COMMISSION FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION (Mar. 8, 2018), [https://ec.europa.eu/info/publications/180308-action-plan-sustainable-growth\\_en](https://ec.europa.eu/info/publications/180308-action-plan-sustainable-growth_en).

<sup>198</sup> These proposed measures aim at: “[i]] establishing a unified EU classification system of sustainable economic activities (‘taxonomy’)[; ii]] improving disclosure requirements on how institutional investors integrate environmental, social and governance (ESG) factors in their risk processes[; iii]] creating a new category of benchmarks which will help investors compare the carbon footprint of their investments.” *Commission legislative proposals on sustainable finance*, FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION (May 24, 2018), [https://ec.europa.eu/info/publications/180524-proposal-sustainable-finance\\_en](https://ec.europa.eu/info/publications/180524-proposal-sustainable-finance_en).

<sup>199</sup> See *id.* (proposing Regulations and Directives).

engagement policy and the implementation thereof. Public disclosure of such information could have a positive impact on investor awareness, enable ultimate beneficiaries such as future pensioners optimise investment decisions, facilitate the dialogue between companies and their shareholders, encourage shareholder engagement and strengthen their accountability to stakeholders and to civil society.

(17) Institutional investors and asset managers should therefore be more transparent as regards their approach to shareholder engagement. They should either develop and publicly disclose a policy on shareholder engagement or explain why they have chosen not to do so. The policy on shareholder engagement should describe how institutional investors and asset managers integrate shareholder engagement in their investment strategy, which different engagement activities they choose to carry out and how they do so. [...].

Preamble paragraph 19 adds that “[a] medium to long-term approach is a key enabler of responsible stewardship of assets. The institutional investors should therefore disclose to the public, annually, information explaining how the main elements of their equity investment strategy [...] contribute to the medium to long-term performance of their assets.” Accordingly, article 3g stipulates that institutional investors and asset managers should develop and publicly disclose an engagement policy that shall, *inter alia*, “describe how they monitor investee companies on relevant matters, including strategy, financial and non-financial performance and risk, capital structure, social and environmental impact and corporate governance.”<sup>200</sup>

In the U.S., there is the Employee Retirement Income Security Act (“ERISA”) of 1974, a federal law that sets the minimum standards for private sector retirement and health plans. The Employee Benefits Security Administration (‘EBSA’) that is part of the U.S. Department of Labor (“DOL”) is responsible for enforcing the fiduciary

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<sup>200</sup> Council Directive 2017/828, art. 3g, 2017 O.J. (L 132/1) 1(a) (EU).

responsibility provisions of ERISA. There is a wide discussion on whether fiduciary duties would preclude the incorporation of ESG issues in investment strategies.<sup>201</sup> Lately, it seems that there is a general consensus that the fiduciary duty in fact requires investors to consider long-term value drivers including ESG factors.<sup>202</sup>

An example of existing soft regulation that puts emphasis on the long-term engagement and stewardship of institutional investors is the UK Stewardship Code, which outlines principles for institutional investors.<sup>203</sup> A final and related initiative worth mentioning is the Framework for US Stewardship and Governance that was launched by ISG on 31 January 2017 as a direct response to the lack of formal governance guidelines and a stewardship code for institutional investors in the U.S. The Framework outlines a set of six fundamental stewardship principles for institutional investors.<sup>204</sup>

Shareholders can use different tools to exert (substantial) influence over decisions regarding corporate sustainability policies. Institutional investors have a particularly powerful position in this

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<sup>201</sup> See Brian Tomlinson, *ESG and Fiduciary Duties: A Roadmap for the US Capital Market*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Nov. 1, 2016), <https://corpgov.law.harvard.edu/2016/11/01/esg-and-fiduciary-duties-a-roadmap-for-the-us-capital-market/>.

<sup>202</sup> See Rory Sullivan et al., *Fiduciary Duty in the 21st Century*, UNITED NATIONS ENVIRONMENT PROGRAMME FINANCE INITIATIVE (Sept. 2015); However, also consider the change in “tone” in the last DOL Field Assistance Bulletin (FAB) No. 2018-01 under the Trump administration, stating that “[f]iduciaries must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision. It does not ineluctably follow from the fact that an investment promotes ESG factors, or that it arguably promotes positive general market trends or industry growth, that the investment is a prudent choice for retirement or other investors. Rather, ERISA fiduciaries must always put first the economic interests of the plan in providing retirement benefits. A fiduciary’s evaluation of the economics of an investment should be focused on financial factors that have a material effect on the return and risk of an investment based on appropriate investment horizons consistent with the plan’s articulated funding and investment objectives.” U.S. DEPT. OF LABOR, FIELD ASSISTANCE BULLETIN No. 2018-01 (2018).

<sup>203</sup> See UK STEWARDSHIP CODE (2020), <https://www.frc.org.uk/investors/uk-stewardship-code>, which recently revised the 2012 UK Stewardship Code.

<sup>204</sup> See *The Principles*, INVESTOR STEWARDSHIP GROUP, <https://isgframework.org/stewardship-principles/> (last visited Apr. 2019).

respect and several recent legal initiatives therefore aim to guide responsible investment policies of these important actors. Having discussed the internal corporate actors – the board and shareholders - and their role in promoting sustainability policies, the next paragraph will survey a number of relevant mechanism, instruments and initiatives that not (fully) integrated in the corporations. A number of these external bodies and organizations are explicitly committed to promoting FLS in the corporate setting.

To sum up, shareholders can also play an important role in increasing corporate sustainability and current research shows that they are increasingly doing so. Regulators and current initiatives pay more and more attention to the role of institutional investors in sustainable companies. These investors can use their selection rights to include sustainable companies in their investment portfolio (impact investment), and, more importantly, can use their control rights to advocate corporate sustainability goals. In section V, a practical analysis is carried out to see whether institutional investors indeed incorporate the FLS in their engagement policies presently.

#### *D. Stakeholder Organizations and Other Private Initiatives*

In response to the fact that corporate codes of conduct are often established unilaterally, by the corporate board, and without substantial stakeholder engagement or supervision, multi-stakeholder initiatives were developed in which third parties monitor compliance with the standards.<sup>205</sup> These multi-stakeholder initiatives also provide essential directions and guidelines corporate boards and managers can use for their corporate sustainability efforts. The model of these multi-stakeholder platforms generally revolves around three components: a standard-setting body, the formulation of clear standards - in the case of labour rights, usually at least the FLS - and a procedure for measuring the standards.<sup>206</sup> Additionally, there are other organizations that are related to multi-stakeholder initiatives and also focus on CSR

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<sup>205</sup> Stuart C. Carr et al., *Redesigning Enforcement in Private Labour Regulation: Will It Work*, 155 INT'L LAB. REV. 1, 438 (2016).

<sup>206</sup> *Id.* at 439.

responsibilities in a global context. These initiatives come in different forms; some focus on standardization, others more on certification or on reporting.<sup>207</sup> This section will survey a number of these mechanisms and organizations to illustrate the variety of private sector initiatives that aim to secure FLS.

A first example is the International Organization for Standardization (ISO), a non-governmental organization that creates a wide variety of voluntary standards for industry to “support innovation and provide solutions to global challenges.”<sup>208</sup> ISO has concluded a memorandum with the ILO to secure that standards created by the ISO in the framework of social responsibility are in line with ILO standards.<sup>209</sup>

The Global Reporting Initiative is another international network that aims to “create social, environmental and economic benefits for everyone”<sup>210</sup> through global reporting on sustainability standards which are developed with multi-stakeholder participation.<sup>211</sup> A central goal of the GRI is to contribute to an ongoing stakeholder dialogue and as such it is “embedded in a broader societal context.”<sup>212</sup> It was created in 1997 and currently 93% of the world’s largest 250 corporations report on their sustainability performance.<sup>213</sup> The GRI400 standards contain specific provisions on each of the fundamental labour standards.<sup>214</sup>

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<sup>207</sup> Mollie Painter-Morland, *Triple bottom-line reporting as social grammar: integrating corporate social responsibility and corporate codes of conduct*, 15 BUS. ETHICS, A EUROPEAN REVIEW 352 (2006).

<sup>208</sup> *About us*, INT’L ORG. FOR STANDARDIZATION, <https://www.iso.org/about-us.html> (last visited Oct. 20, 2019).

<sup>209</sup> *Int’l Org. for Standardization (ISO)*, INT’L LAB. ORG., [https://www.ilo.org/empent/Informationresources/WCMS\\_101255/lang--en/index.htm](https://www.ilo.org/empent/Informationresources/WCMS_101255/lang--en/index.htm) (last visited Oct. 20, 2019).

<sup>210</sup> *About GRI*, GRI, <https://www.globalreporting.org/information/about-gri/Pages/default.aspx> (last visited Oct. 20, 2019).

<sup>211</sup> *Id.*

<sup>212</sup> *Supra* note 207.

<sup>213</sup> *Supra* note 210, at 152.

<sup>214</sup> See generally *GRI Standards Download Center*, GRI, <https://www.globalreporting.org/standards/gri-standards-download-center/?g=2e665774-b78b-462e-a357-c32638c9324f> (last visited Oct. 20, 2019)

SA 8000 is a multi-stakeholder organization that developed standards for social certification for factories and other organizations in the field of workplace accountability.<sup>215</sup> The standards are seen as “an overall framework that helps certified organizations demonstrate their dedication to the fair treatment of workers across industries and in any country.”<sup>216</sup> The SA 8000 standard reference the norms of the ILO Fundamental Conventions as well as social standards contained in the Universal Declaration of Human Rights.<sup>217</sup> The certified organizations currently number more than four thousand facilities and cover over two million workers worldwide.<sup>218</sup> More specialized multi-stakeholder initiatives,<sup>219</sup> that focus mainly on labour rights protection, are the Worker Rights Consortium, the Fair Wear Foundation and the Ethical Trading Initiative.<sup>220</sup>

Further noteworthy and recent initiatives are the Dutch International Responsible Business Conduct Agreements (IRBC

(refer to *GRI 406: Non-discrimination 2016*, *GRI 407: Freedom of Association and Collective Bargaining 2016*, *GRI 408: Child Labor 2016*, and *GRI 409: Forced or Compulsory Labor 2016*).

<sup>215</sup> *SA8000® Standard*, SOC. ACCOUNTABILITY INT'L, <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1689> (last visited Oct. 20, 2019).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* The current standards is: SA8000:2014. See *Soc. Accountability 8000 Int'l Standard*, SOC. ACCOUNTABILITY INT'L (Jun. 2014), [http://sa-intl.org/\\_data/n\\_0001/resources/live/SA8000%20Standard%202014.pdf](http://sa-intl.org/_data/n_0001/resources/live/SA8000%20Standard%202014.pdf).

<sup>218</sup> *SA8000 Certified Organisations Certification Statistics*, SOCIAL ACCOUNTABILITY ACCREDITATION SERVICES, <http://www.saasaccreditation.org/certfacilitieslist> (last visited Nov. 13, 2019).

<sup>219</sup> Other more general and well-known multi-stakeholder initiatives are developed in the framework of sustainable commodity use. E.g., The Forest Stewardship Council (FSC), the Round Table on Sustainable Palm Oil (RSPO), and the International Committee on Mining and Metals (ICMM).

<sup>220</sup> See ETHICAL TRADING INITIATIVE, <https://www.ethicaltrade.org/> (last visited Nov. 13, 2019); see also FAIR WEAR, <https://www.fairwear.org/> (last visited Nov. 13, 2019); WORKER RIGHTS CONSORTIUM, <https://www.workersrights.org/> (last visited Nov. 13, 2019). Other well-known multi-stakeholder initiatives exist in the framework of sustainable commodity use. Examples are: The Forest Stewardship Council (FSC), the Round Table on Sustainable Palm Oil (RSPO), the Round Table on Sustainable Soy (RTRS) and the International Committee on Mining and Metals (ICMM).

Agreements). These are sectoral CSR partnerships between businesses, the government, trade unions, employers' organizations, and NGOs, that aim to improve circumstances in a number of risk areas – chiefly in relation to the environment, labour and human rights - and that seek to provide solutions to problems that occur in transnational business activities which may be difficult for corporations to solve on their own.<sup>221</sup> The special feature of these multi-stakeholder agreements is that there is a mix of public and private actors involved in their development. Presently, there are agreements in, e.g., the garments and textile sector, banking, the gold sector, insurances, and sustainable forestry, while other agreements are still being negotiated.<sup>222</sup> All the IRBC Agreements take the ILO's fundamental standards and the core UN Human Rights Covenants as their normative basis and they incorporate the risk-based due diligence system of the OECD Guidelines and the UNGPs.<sup>223</sup> While Dutch companies only cover a small section of the global market, the IRBC Agreements may serve as an example for other international sectoral public-private partnerships.

Another instrument created by the private sector that deserves special attention is the Global Framework Agreement (GFA) or International Framework Agreement (IFA). The special feature of GFAs is that they are a product of international collective bargaining, and are therefore supported by representatives of both workers and employers. They are binding for the parties involved and the main rights included in GFAs are the fundamental labour standards. GFAs are negotiated between a transnational corporation and a Global Union Federation (GUF) with regard to labour standards in order to establish “an ongoing relationship between the parties and ensure that the company respects the same standards in all the countries where it

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<sup>221</sup> IRBC Agreements, AGREEMENTS ON INT'L RESPONSIBLE BUS. CONDUCT, <https://www.imvoconvenanten.nl/en> (last visited Nov. 13, 2019).

<sup>222</sup> *Id.*

<sup>223</sup> *How is an agreement concluded?*, AGREEMENTS ON INT'L RESPONSIBLE BUS. CONDUCT, <https://www.imvoconvenanten.nl/en/why/werkwijze> (last visited Nov. 13, 2019).

operates.”<sup>224</sup> IndustriALL, one of the main GUFs explains in its Guidelines for GFAs that: “A Global Framework Agreement must explicitly include references and recognition of the rights reflected by the ILO in its Conventions and jurisprudence, as well as the rights included in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.”<sup>225</sup>

Approximately 120 GFAs have been concluded by the five major GUFs and they all refer to fundamental labour standards; most of them also contain clauses on applicability to the supply-chains of transnational corporations.<sup>226</sup> Additionally, many GFAs refer to the Universal Declaration on Human Rights, the UNGPs, the UN Global Compact, the ILO MNE Declaration and the OECD Guidelines for Multinational Enterprises.<sup>227</sup> Most GFAs contain a complaint procedure, which may include a mediation or arbitration mechanism.<sup>228</sup> Nevertheless, no hard sanctions are provided by the agreements, which means that there are limited options for the parties to enforce the GFA. This means that in cases of non-compliance, the

<sup>224</sup> *Int'l Framework Agreements: a global tool for supporting rights at work* (2007), INT'L LAB. ORG., [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_080723/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_080723/lang--en/index.htm) (last visited Nov 16, 2019).

<sup>225</sup> *Guidelines for Global Framework Agreements (GFAs)*, INDUSTRIALL GLOBAL UNION, at 1 (2014).

<sup>226</sup> See, e.g., Felix Hadwiger, *Global framework agreements: Achieving decent work in global supply chains Background Paper*, INT'L LAB. OFF. (2015), at 17, 18. The five big GUFs are: IndustriALL, the Building and Wood Workers' International (BWI), UNI Global Union, the International Union of Food Workers (IUF), and the International Federation of Journalists (IFJ).

<sup>227</sup> *Id.* at 18-19.

<sup>228</sup> See, e.g., FRAMEWORK AGREEMENT BETWEEN SKANSKA AND IFBWW, EUROPEAN COMMISSION [2001], [http://ec.europa.eu/employment\\_social/empl\\_portal/transnational\\_agreements/Skanska\\_FrameworkAgreement\\_EN.pdf](http://ec.europa.eu/employment_social/empl_portal/transnational_agreements/Skanska_FrameworkAgreement_EN.pdf), (explaining that “[i]f agreement regarding interpretations and applications of this agreement cannot be reached in the application group, the issue will be referred to an arbitration board comprising two members and an independent chairman. Skanska AB and the IFBWW will each appoint one member, and the chairman will be appointed through mutual agreement. Arbitration board rulings are binding for both parties. The original Swedish version of this agreement will apply in all parts to all interpretations of the agreement.”)

Global Union Federation can merely issue a public warning, raise awareness or, as a last resort, terminate the contract.<sup>229</sup>

Currently, there is a wide variety of international CSR initiatives with a global or sectoral scope. Most initiatives aim to include a broad range of stakeholders to grant their sustainability requirements sufficient legitimacy. Many of these initiatives contain references to fundamental labour standards in relation to the social section of their CSR standards and some of them focus predominantly on FLS.

#### *V. FLS in Corporate Practice*

Having examined the scope and content of the fundamental labour standards (section II), and the public and private regulatory instruments that aim to foster corporate sustainability and the integration of FLS in global supply chains (sections III and IV), this section analyses how FLS are addressed by companies and shareholders in practice. More specifically, using text mining techniques and a framework of FLS keywords that is outlined in the next section (section V.A), available corporate sustainability information - for a first selection of companies and institutional investors - is investigated. First of all, it is examined whether, to what extent and how companies incorporate FLS in their corporate documents, including the annual reports, sustainability reports and corporate codes of conduct (section V.B).<sup>230</sup> Afterwards, analysis

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<sup>229</sup> Hadwiger, *supra* note 226, at 25.

<sup>230</sup> Various other studies examined the use of references to FLS in corporate documents, including corporate codes before. See, for instance, Zandvliet et al., *supra* note 172; Janelle Diller, *A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labeling and Investor Initiatives*, 138(2), INT'L LAB. REV., 116 (1999); Int'l Labour Org. [ILO], OVERVIEW OF GLOBAL DEVELOPMENTS AND OFFICE ACTIVITIES CONCERNING CODES OF CONDUCT, SOCIAL LABELLING AND OTHER PRIVATE SECTOR INITIATIVES ADDRESSING LABOUR ISSUES, GB.273/WP/SDL/1, (1998); Kathryn Gordon & Maiko Miyake, *Deciphering Codes of Conduct: a Review of their Contents*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT, No. 1992/2, (1999); Michael Urminsky, *Self-Regulation in the Workplace: Codes of Conduct, Social Labeling and Socially Responsible Investment*, (Int'l Labour Org., Mgmt. Corp. Citizenship,

shows to what extent and how shareholders use their decision-making rights in general meetings to pursue respect for the FLS; here, we consider shareholder proposals related to FLS using data from the Proxy Insight database<sup>231</sup> (section V.C). Lastly, because of their current important role in corporate governance, special attention will be paid to a selection of institutional investors and the inclusion of FLS in their engagement policies (section V.D).

#### *A. FLS Keyword Framework*

The FLS keywords outlined below in Table 1 are based on sections II-III of this article. In addition to a general category including terms like “ILO” and “FLS,” four categories that cover the four areas of minimum norms to protect workers globally are formulated, including i) the prohibition of child labour; ii) the prohibition of forced labour; iii) non-discrimination and equal treatment; and iv) freedom of association and the right to collective bargaining (*cf. supra*, section II).

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Working Paper No. 1, 2001); Isabelle Schömann, *Corporate Social Responsibility: A Threat or an Opportunity for the Trade Union Movement in Europe?* Transfer 3/2004, Brussels, 2004; John G. Ruggie, *Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey*, (Int'l Labour Org., Working Paper No. 28, 2006.)

<sup>231</sup> See PROXY INSIGHT, <https://www.proxyinsight.com/about/overview/> (last visited in April 2019) (Proxy Insight contains information on global shareholder voting).

Table 1: FLS Keyword Categorization Framework<sup>232</sup>

<b>Categories</b>	<b>Keywords</b>
1. FLS general	fundamental_labour; fundamental_labor; fundamental_labour_standards; fundamental_labor_standards; fls; international_labour_organisation; international_labour_organization; international_labor_organisation; international_labor_organization; ilo; ilo_convention; fundamental_principles_and_rights_at_work; rights_at_work; fundamental_principles; rights_at_work; workers'_rights; workers_rights; worker_rights; labour_rights; labor_rights
2. Prohibition of Child Labour	minimum_age_convention; worst_forms_of_child_labour; the_effective_abolition_of_child_labour; child_labour; child_labor; minimum_age
3. Prohibition of Forced Labour	forced_labour; forced_labor; forced_labour_convention; abolition_of_forced_labour_convention; abolition_of_forced_labour;the_elimination_of_all_forms_of_forced_or_compulsory_labour; compulsory_labour; compulsory_labor; forced_labour_convention
4. Non-discrimination and Equal Treatment	non-discrimination; discrimination; equal_treatment; equal_remuneration ; equal_remuneration_convention; discrimination_convention; discrimination_(employment_and_occupation)_convention; the_elimination_of_discrimination_in_respect_of_employment_and_occupation
5. Freedom of Association and the Right to Collective Bargaining	freedom_of_association_and_protection_of_the_right_to_organise_convention; right_to_organise_and_collective_bargaining_convention; freedom_of_association; right_to_organise; right_to组织;

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<sup>232</sup> These keywords are retrieved from the four FLS and the eight fundamental ILO conventions that correspond to the four FLS.

	the_right_to_collective_bargaining; right_to_collective_bargaining; collective_bargaining
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The framework in Table 1 is used to search the corporate documents (section V.B), shareholder proposals (section V.C), and institutional investor engagement documents (section V.D). For the shareholder proposals, the resolution texts disclosed in the Proxy Insight database are examined.<sup>233</sup> The methodology and results are outlined below.

### *B. MNEs and FLS in Practice*

Several publicly available documents from a selection of 97 large listed companies that are part of the Euro Stoxx or Nasdaq indices around the world are examined.<sup>234</sup> In this sample, 36 companies are incorporated in the US and 59 companies are incorporated in a European member state or Switzerland. One company is incorporated in the Cayman Islands, but has its headquarters in China (the company Baidu Inc.). Another company that is incorporated in Jersey also has its headquarters in China (Glencore Plc).<sup>235</sup> For these 97 listed companies, all publicly available

<sup>233</sup> The search was finished in March 2019.

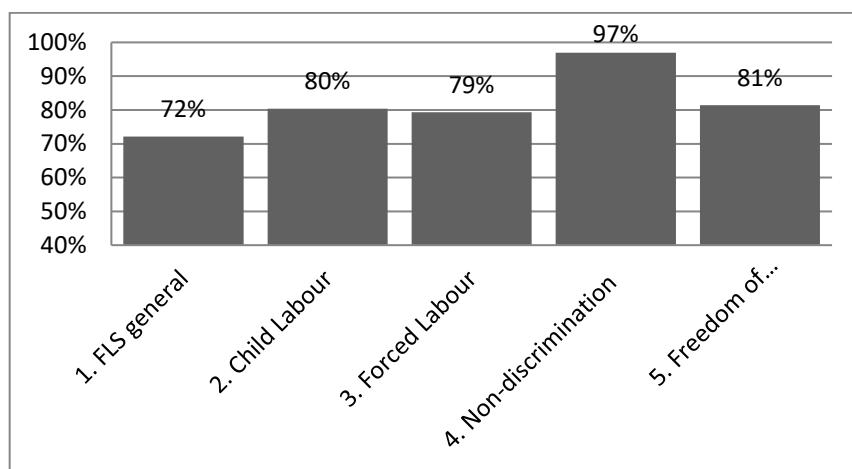
<sup>234</sup> The sample selection was made in the following way: an initial sample of the 100 largest listed companies that are part of either the Euro Stoxx index or the Nasdaq index was identified (measured by market value on 5 March 2019). Afterwards, three companies were removed from the sample for the following reasons. First of all, Unilever was included twice in the initial sample because of its dual listing in the UK and the Netherlands (respectively, Unilever Plc and Unilever NV). Since these companies use an integrated reporting structure, we only included one of these companies in our sample. Second, Christian Dior SE is the holding company of LVMH SE; we therefore included these two companies as a single observation in our analysis (denoted as LVMH). Third, major assets of Twenty-First Century Fox Inc. were acquired by Walt Disney. Since the company was split up, we also deleted this company from our initial sample. The authors can be contacted for a list of companies included in the sample. See PROXY INSIGHT, *supra* note 230.

<sup>235</sup> Sample information: The Global Industry Classification Standard (GICS) sector for 16 of the companies in the sample is “Consumer Staples.” In addition, 15 companies are part of the “Information Tech” sector. 15 companies of the “Health

sustainability information is retrieved that is i) published in the annual report; ii) in a separate sustainability report published on the corporate website, and/or; iii) suppliers' code of conduct or other corporate codes. For each corporate report, the latest available version is used.<sup>236</sup> Where possible, we also include publicly available corporate codes of conduct in our analysis (*cf. supra*, section IV. C).

The analysis of the retrieved corporate documents from the 97 large listed companies provides the following results as shown in Figure 1.

*Figure 1: FLS Reporting by Companies (in %)*




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Care" sector, and 14 companies of the "Consumer Discretionary" sector. Other sectors that are present in the sample are "Communication Services" (11 companies); "Financials" (11 companies); "Industrials" (6 companies); "Materials" (5 companies); "Energy" (4 companies) and "Utilities" (3 companies). The average market capitalization for the 100 companies is 125.71 billion USD, with a median of 78.03 billion USD and a standard deviation of 158.27 billion USD. The largest companies in our sample are Microsoft Corp. (861.3 billion USD) and Amazon.com Inc. (833.16 billion USD). The smallest are the Italian company Intesa Sanpaolo SpA (43.13 billion USD) and the German company Henkel AG & Co KGaA (42.85 billion USD). *Id.*

<sup>236</sup> Data collection period: March 2019.

The corporate documents show that FLS are included and referred to in different ways. 70 (or 72 percent) of the 97 companies mention at least one FLS general keyword in their latest corporate documents. Of these companies, a vast majority directly refer to the ILO (65 companies in total).<sup>237</sup> As regards the four specific areas of the FLS, using the keywords determined in Table 1, we find that 78 companies explicitly refer to the prohibition of child labour and 77 companies to the prohibition of forced labour. Most companies refer to non-discrimination and equal treatment (94 in total). Lastly, 79 companies refer to freedom of association and the right to collective bargaining.

If we assign a score of one for every FLS category a company refers to at least once as outlined in Table 1, we find an average sample score of 4.1 with a standard deviation of 1.35; this means that on average, companies refer to four out of the five FLS categories as determined in Table 1 (*cf. supra*, section V.A). A vast majority of the companies refers at least once to all five categories (59 companies in total, or 61 percent). In contrast, for only two companies in the sample, there were no references found. These companies are Automatic Data Processing Inc. and Netflix Inc. In addition, Amazon.com Inc., Booking Holdings Inc., Pernod Ricard SA and UBS Group AG only refer to the category ‘Non-discrimination and Equal treatment’. In its Code of Conduct, UBS Group AG for instance states that “[w]e do not tolerate any kind of discrimination, bullying or harassment”<sup>238</sup> And, in its ‘Doing what is right’ code, Vodafone addresses the principle of non-discrimination several times.<sup>239</sup>

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<sup>237</sup> FLS general keywords include: “international\_labour\_organisation,” “international\_labour\_organization,” “international\_labor\_organisation,” “international\_labor\_organization,” “ilo,” or “ilo\_convention.”

<sup>238</sup> *The Way We Do Business: Code of Conduct and Ethics*, UBS GROUP, 11 (2018).

<sup>239</sup> Vodafone includes questions and answers (Q&A) in its Code of Conduct, including the following question and corresponding answer: “Q: A colleague is recruiting a new team member. I am concerned that they may be discriminating against certain candidates. Should I challenge them? A: You are right to raise your concern as we will not tolerate any form of discrimination. Urge your colleague to discuss the selection criteria with their local HR team. If there is no change then you

34 companies explicitly refer to the 1998 ILO Declaration on Fundamental Principles and Rights at Work. For example, in its 2018 sustainability and responsibility addendum to the annual report, Diageo Plc states that “[a]s a demonstration of our commitment, we are a signatory to the UN Global Compact and the UN Women’s Empowerment Principles, and we will act in accordance with the UNGP. Our Human Rights Global Policy is also guided by the International Labour Organization’s Declaration on Fundamental Principles and Rights to Work. By committing to these international frameworks, we are dedicated to enriching the workplace. We act with integrity, in compliance with local law, and we respect the unique customs and cultures in the communities in which we operate.” And, in its Supplier Sustainability Policy (2017), BMW Group AG states that “[i]t is crucially important to the BMW Group that all business activities take account of the company’s social responsibility towards its own employees and society. This applies both to the BMW Group itself and its suppliers. All suppliers are called upon to observe the principles and rights set forth in the guidelines of the UN Initiative Global Compact (Davos, 01/99) and the “Declaration on Fundamental Principles and Rights at Work” (Geneva, 06/98) adopted by the International Labour Organisation (ILO) and to align their due diligence process with the requirements of the “UN Guiding Principles on Business and Human Rights.” Whereas Diageo Plc and BMW Group AG provide some explanation on their incorporation of the Fundamental Principles and Rights at Work, most companies simply list the different international standards and principles.<sup>240</sup>

Some companies clearly link the fundamental labour standards to some of the other initiatives that were examined in this article. Glencore for instance, couples the fundamental labour standards as included in the Global Compact to specific SDG’s in its 2018 approach to sustainability,<sup>241</sup> which “explains our full thinking on sustainable development, from the underlying principles and values

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should raise the issues with your line manager or local HR team.” *Doing What is Right, THE VODAFONE CODE OF CONDUCT* 31 (2018).

<sup>240</sup> E.g., BP SUSTAINABILITY REPORT, 38 (2017).

<sup>241</sup> *Our Approach to Sustainability*, GLENCORE, 44 (2018).

upon which we base all our activities, to the details of our approach to the issues that affect our operations.”<sup>242</sup>

Volkswagen’s code of conduct refers explicitly to a number of international instruments that contain FLS. Besides the Declaration on Fundamental Principles and Rights at Work and the ILO MNE Declaration, the code refers to the OECD Guidelines and the principles of the UNGC.<sup>243</sup> The company explicitly mentions that “[w]e act in accordance with the applicable requirements of the International Labor Organization. We recognize the basic right of all employees to establish trade unions and labor representations. We reject all deliberate use of forced or compulsory labor. Child labor is prohibited. We heed the minimum age requirements for employment in accordance with governmental obligations.”<sup>244</sup> Additionally, Volkswagen commits to its “Social Charter,” a normative document exclusively focused on labour rights which proclaims respect for the FLS as its basic goal.<sup>245</sup>

Fortunately, corporations sometimes work together with the ILO on specific issues. Inditex participates in Alliance 8.7, an initiative linked to SDG 8 (Decent Work and Economic Growth),<sup>246</sup> which brings together corporations, governments and civil society organizations with the goal of eradicating forced and child labour.<sup>247</sup> Inditex has furthermore concluded a Global Framework Agreement with UNI Global Union in 2009, which also contains commitments towards FLS.<sup>248</sup> It has also signed a public private partnership with the ILO to promote and strengthen FLS in the cotton industry “and to contribute to the sustainability of the supply chain down to the last link.”<sup>249</sup> Another similar partnership was signed with regard to the

<sup>242</sup> *Id.* at 1.

<sup>243</sup> The Volkswagen Group: Code of Conduct (Pol.), 23.

<sup>244</sup> *Id.* at 7.

<sup>245</sup> *Id.* at 23; See also *Declaration on Social rights and Industrial Relations at Volkswagen of 6/06/2002 as revised on 11/05/2012* at 23 (May 11, 2012).

<sup>246</sup> ALLIANCE 8.7, <https://www.alliance87.org/>.

<sup>247</sup> *Annual Report 2017*, INDITEX 32 (June 2018).

<sup>248</sup> *Id.* at 63.

<sup>249</sup> *Id.* at 75.

improvement of working conditions in the textile sector of São Paulo.<sup>250</sup>

Another example concerns the precarious situation of construction workers in Qatar, especially in relation to forced labour.<sup>251</sup> The ILO assisted in the negotiation of an international framework agreement between Building and Woodworkers' International (BWI), the French construction company VINCI and its joint venture QDVC. The agreement was signed at the headquarters of the ILO in Geneva in November 2017 and focuses on ensuring decent work and preventing forced labour situations in the Qatar construction sector, for instance, by making sure that workers have secure lockers to store personal belongings such as identity papers, by issuing official permits for workers who want to leave the country (for whatever reason), and by fighting debt bondage through stricter control over recruitment agencies in India, Bangladesh and Nepal.<sup>252</sup> It allows for inspections and audits that focus on labour migration and recruitment practices, working conditions, living conditions and subcontractors' practices on workers' rights.<sup>253</sup> This agreement is another example of how FLS could be improved on the ground when different stakeholders decide to act together.

### *C. Shareholder Proposals Concerning FLS*

With the FLS keywords framework as presented in Table 1 (*cf. supra*, section V.A), 68 shareholder proposals could be identified from the Proxy Insight database. The proposals were submitted to general meetings of companies in Canada, Japan, Ireland, Switzerland, Sweden and the U.S. More specifically, 54 of the shareholder proposals were submitted to U.S. general meetings. Most proposals

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<sup>250</sup> *Id.* at 83.

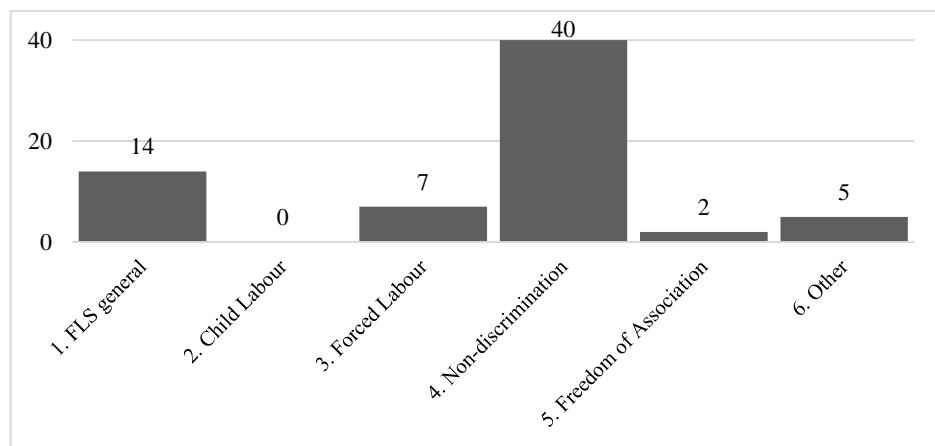
<sup>251</sup> Migrant workers in Qatar suffered from forced labour conditions under the so-called "Kafala" system of sponsorship. See, e.g., Lee Swepston, *Concentrated ILO Supervision of Migrant Rights in Qatar*, 1 INT'L LAB. RTS. CASE L. 317 (2015).

<sup>252</sup> 2017 Workforce-Related, Environmental and Social Information, VINCI 214.

<sup>253</sup> BWI-VINCI-QDVC Joint Audit Report, BWI-VINCI-QDVC 5 (Jan. 8-9, 2019).

took place in 2011 (12 in total), in 2013 (10) and in 2014 (10). An overview of the findings per category presented in Figure 1 below:

*Figure 2: FLS-Related Shareholder Proposals*



As shown in Figure 2, most FLS-related shareholder proposals are related to the area Non-discrimination and Equal Treatment (40 in total). All but one of these proposals were added to the agenda of U.S. general meetings. During 19 U.S. general meetings taking place from 2011-2016, the resolution “Amend EEO [Equal Employment Opportunity] Policy to Prohibit Discrimination Based on Sexual Orientation and Gender Identity” was added to the agenda. For example, during the 2014 AGM of ExxonMobil Corp., the New York State Common Retirement Fund added this proposal to the agenda, arguing that “Exxon Mobil Corporation does not explicitly prohibit discrimination based on sexual orientation and gender identity in its written employment policy. Over 90% of the Fortune 500 companies have adopted written nondiscrimination policies [...], as have more than 95% of Fortune 100 companies. [...] We believe that corporations that prohibit discrimination on the basis of sexual orientation and gender identity have a competitive advantage in recruiting and retaining employees from the widest talent pool.”<sup>254</sup>

<sup>254</sup> *Notice of 2014 Annual Meeting and Proxy Statement*, EXXONMOBIL 64-65 (Apr. 11, 2014).

The board of ExxonMobil recommended its shareholders to vote against, because it “believe[d] the proposal is unnecessary”<sup>255</sup> The proposal was defeated at the 2014 AGM of ExxonMobil with 80.5 percent against.<sup>256</sup>

Other proposals concerned for example amendments to the EEO policy to prohibit discrimination based on the applicant’s health status (during the 2011 general meeting of Johnson & Johnson). In contrast, no shareholder proposals were related to the prohibition of child labour. The five FLS proposals that are included in the category ‘other’ are related to worker safety (four) and minimum pay (one). Interestingly, in the category “FLS general” one can find six shareholder proposals that are explicitly referring to the adoption of ILO standards or an “ILO Based Code of Conduct.”<sup>257</sup> Five of these proposals are put on the agenda of U.S. general meetings; one is on the agenda of an Irish company.<sup>258</sup>

Proxy Insight only provides voting data for 28 of these 68 shareholder proposals. A vast majority is defeated; only the FLS shareholder proposal at the 2016 general meeting of J.B. Hunt Transport Services Inc. concerning “Amend EEO Policy to Prohibit Discrimination Based on Sexual Orientation and Gender Identity” was adopted with 54.7 percent of the votes in favor, despite the recommendation of the board to vote against this proposal.<sup>259</sup>

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<sup>255</sup> *Id.* at 65.

<sup>256</sup> *Summary of 2014 Proxy Voting Results, EXXONMOBIL* (file available from author upon request).

<sup>257</sup> According to the Proxy Insight database, this terminology was used with a shareholder proposal at the 2009 AGM of Archer Daniels Midland Company, the 2011 AGM of Kroger Co. and the 2013 AGM of Family Dollar Stores Inc. PROXY INSIGHT, <https://www.proxyinsight.com/>.

<sup>258</sup> Unfortunately, we were not able to retrieve additional information about these shareholder proposals that took place in the 2009-2013 period.

<sup>259</sup> J.B. Hunt Transport Services Inc.’s Annual Report 2015. Trillium Asset Management, LLC on behalf of the Conny Lindley Revocable Living Trust, added this proposal to the 2016 agenda. Trillium Asset Management is “*an employee-owned investment management firm with \$2.5 billion in assets under management [that] integrates Environmental, Social, and Governance (ESG) factors into the investment process as a way to identify the companies best positioned to deliver strong long-term performance.*” See *About us*, TRILLIUM ASSET MANAGEMENT,

Last of all, it is noteworthy that although shareholder proposals are commonly used in the US, due to costly formal ownership requirements this is not the case in several other countries, including EU Member States.<sup>260</sup> However, this does not necessarily imply that in these countries activist shareholders do not foster FLS; for instance, in the Netherlands, VBDO (the investor association for sustainable development in the Netherlands) often poses questions in Dutch AGMs related to the FLS.<sup>261</sup>

#### *D. Institutional Investors' FLS Engagement*

For the analysis of institutional investor engagement policies, a sample of 35 institutional investors is used for which the latest engagement policies and other available documents are retrieved from the Proxy Insight database.<sup>262</sup> In addition, since of these 35 institutional investors, 33 are signatories to PRI - and are required to

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<https://trilliuminvest.com/socially-responsible-investment-company/> (last visited Apr. 2019).

<sup>260</sup> See, e.g., Nickolay Gantchev & Mariassunta Giannetti, *The Costs and Benefits of Shareholder Democracy*, EUR. CORP. GOVERNANCE INST. (2019); Peter Cziraki, Luc Renneboog & Peter G. Szilagyi, *Shareholder Activism Through Proxy Proposals: The European Perspective*, 16 EUR. FIN. MGMT. 738 (2010).

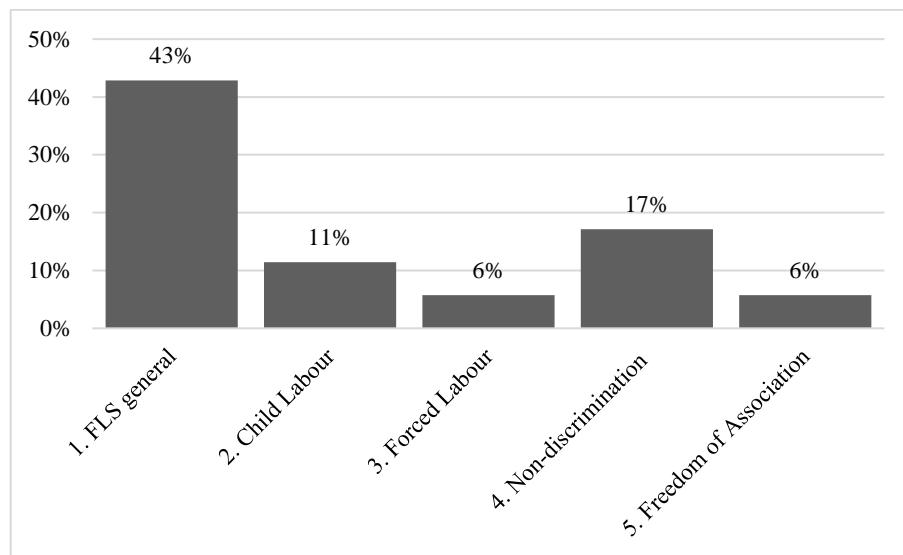
<sup>261</sup> For instance, for several years one of the focal points of VBDO was ‘living wage’ and therefore their representatives asked several critical questions to board members of different Dutch listed companies. In the 2016 AGM of Heineken, the representative of VBDO posed question related to living wage: “VBDO encourages the use of a living wage. With this we mean that you pay a wage that is enough for the employee and for the people who depend on the employee to meet all the basic needs. You clearly state that you want to pay a fair wage. This may relate to living wages, but I do not know, so my question is actually: how do you define a fair remuneration? Is that indeed in the neighborhood of a living wage, as we use it? Do you intend to include that living wage in the supplier’s code? And of course we always want you to report on that. Do you intend to do that?” (translation of the authors). *Heineken N.V. General Meeting of Shareholder D.D.*, HEINEKEN 15 (Apr. 21, 2016).

<sup>262</sup> This sample of 35 institutional investors was retrieved from the ownership structure disclosures of the 97 companies research in section V.2. More specifically, the institutional investors with the largest ownership stakes in these 97 companies were selected (with ownership stakes of 5 percent or larger) to retrieve a representative global sample for this first practical overview.

report publicly on their responsible investment activities each year, the latest RI transparency reports were also included in the text analyses.<sup>263</sup> These 35 institutional investors have combined assets under management of 33.44 trillion USD and include the big three passive investment funds Blackrock, Vanguard and State Street. The average amount of assets under management is 955.5 billion USD with a standard deviation of 1.3 trillion. The largest institutional investor in the sample is Blackrock with assets under management of 6300 billion USD.<sup>264</sup>

The overview in Figure 3 shows that, in contrast to the reporting practices of the companies examined in section V. B, most institutional investors do not (yet) explicitly address FLS:

*Figure 3: FLS Reporting by Institutional Investors (in %)*



<sup>263</sup> Note that for seven of these 33 institutional investors, there was no report available yet, as these investors signed the PRI only recently. See *About the PRI, PRINCIPLES FOR RESPONSIBLE INVESTMENT*, <https://www.unpri.org/about-the-pri>.

<sup>264</sup> All data in this section of the research are retrieved from Proxy Insight in the beginning of April 2019.

Figure 3 shows that although 43 percent of the institutional investors in our sample uses one or more of the keywords in the FLS general category, significantly fewer institutional investors also explicitly address one or more of the FLS dimensions. Moreover, whereas the average sample score for companies is 4.1 (*cf. supra*, section V.B), we find an average score of only 0.8 for the 35 institutional investors, with a standard deviation of 1.3. Only two institutional investors report on all the five categories as defined in Table 1 above; CalPERS and Norges Bank. These institutional investors are the sole investors mentioning “Forced Labour” (category 3.) and the “Freedom of Association” (category 5.). In addition, CalPERS and Norges Bank are – in contrast to the other institutional investors that remain silent about these matters - explicitly referring to the 1998 ILO Declaration on Fundamental Principles and Rights at Work. For example, in its Governance & Sustainability Principles 2018 document, CalPERS states that “[n]o harmful labor practices or use of child labor. In compliance, or moving toward compliance, with the International Labor Organization (ILO) Declaration on the Fundamental Principles and Rights at Work.”<sup>265</sup> CalPERS also explicitly refers to the freedom of association and the elimination of all forms of forced labour in its principles on Human Capital

<sup>265</sup> Next, CalPERS states that:

- Productive Labor Practices encompasses:
  - a. ILO ratification: Whether the convention is ratified, not ratified, pending ratification or denounced.
  - b. Quality of enabling legislation: The extent to which the rights described in the ILO convention are protected by law.
  - c. Institutional capacity: The extent to which governmental administrative bodies with labor law enforcement responsibility exist at the national, regional and local levels.
  - d. Effectiveness of implementation: Evidence that enforcement procedures exist and are working effectively and evidence of a clear grievance process that is utilized and provides penalties that have deterrence value.

*CalPERS’ Governance & Sustainability Principles*, CALPERS 35, <https://www.calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf> (last modified Sept. 2019).

Management Practices.<sup>266</sup> Whereas CalPERS extensively addresses several dimensions of the FLS, other large institutional investors only marginally to these fundamental principles. For instance, in its Responsible Investment Transparency Report 2018, Blackrock only provides a general reference to social sustainability matters including FLS: “[s]ocial issues that are considered include, but are not limited to, asset manager labour rights, local labour rights, health and safety policies and training, on-site fatalities or accidents, local community impacts, local community engagement and conservation issues relating to local historic, heritage or cultural resources.”<sup>267</sup>

The findings for this illustrative sample of 35 institutional investors show that whereas almost half of the institutional investors refer to the FLS in general, far fewer refer to the specific FLS dimensions. Nonetheless, the two institutional investors that already address all dimensions extensively – CalPERS and Norges Bank – could contribute to setting a global standard for other institutional investors.

#### *VII. Concluding Remarks*

The Fundamental Labour Standards of the ILO contain a basic set of workers’ rights with a worldwide scope. They have been developed over the past century and continue to be highly relevant in today’s globalized economy. FLS address pressing societal issues related to child labour, forced labour, equal treatment and freedom of association. These four areas correspond to eight Fundamental Conventions adopted by the ILO that have been ratified by the vast majority of ILO Member States. The fundamental standards are also at the center of the 1998 Declaration on Fundamental Principles and Rights, an important document that does not only require all ILO Member States to respect, promote and realize those standards, but is also often used as a key reference in public and private sources dealing with corporate sustainability and social responsibility. Designating

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<sup>266</sup> *Id.* at 22.

<sup>267</sup> RI Transparency Report 2018 Blackrock, PRINCIPLES FOR RESPONSIBLE INVESTMENT 194, 215 (2017).

and recognizing a specific core of minimum standards for the international protection of workers' interests makes it easier to integrate these basic entitlements coherently in an increasing number of instruments that specifically appeal to corporate actors' responsibilities to secure workers' rights. While there certainly are many important workers' rights besides the FLS – e.g., norms related to occupational safety and health, adequate living wages or social security schemes – the fundamental norms do serve as an adequate and practical vantage point for protecting employees, and a number of vulnerable groups in particular.<sup>268</sup>

A number of these instruments are developed in the international public realm and seek commitments from companies to respect labour and human rights while other initiatives are created by corporate actors themselves or developed in the private sector. In the public sphere, we reviewed three voluntary instruments that specifically address responsibilities of multinational enterprises in respect of FLS. The ILO MNE Declaration, the UNGPs and the OECD Guidelines not only contain references to the fundamental standards themselves, but also contain procedures to secure respect for those standards by means of risk-based human rights due diligence processes. Other global initiatives that explicitly refer to FLS are the UN Global Compact, a network of corporate leadership, and the overarching framework of the 2030 Agenda for Sustainable Development (which includes the SDGs).

While the FLS were developed in the public sphere, there are more and more private law and private sector initiatives that include and apply those standards. Diverging terminology is used to describe these initiatives, such as Corporate Social Responsibility ("CSR"), Corporate Sustainability, and Environmental, Social and Governance ("ESG"). Some hard law initiatives are developed at the domestic level, such as the California Transparency in Supply Chain Act and the UK Modern Slavery Act. However, international regulation of corporate sustainability responsibilities is still mainly voluntary in

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<sup>268</sup> See Int'l Labour Office [ILO], Resolution on the ILO Centenary Declaration for the Future of Work (2019), ¶ 1.

nature. A number of the most relevant private sector initiatives were examined.

There are different international and domestic initiatives focusing on companies and their shareholders, such as particular non-financial disclosure requirements for companies; for instance, the UK Modern Slavery Act 2015 and the Principles for Responsible Investment. At the company level, corporate codes of conduct are developed as an attempt to prevent a race to the bottom by providing adequate standards at the level of the multinational enterprise itself. However, the alleged underlying motives for adopting these codes have been the focus of much criticism, such as that they are merely “insulation against bad publicity,”<sup>269</sup> are only used as window-dressing, suffer from a western or first world bias, lack any real oversight and are created without stakeholder engagement.<sup>270</sup> Furthermore, these codes can be used to compete with other companies, to claim the moral high ground and this way gain an increase in market share.<sup>271</sup> Some of these issues may be addressed by adherence to more modern initiatives, such as multi-stakeholder initiatives and Global Framework Agreements, that contain, e.g., independent third party audits or are the product of international collective bargaining, which increases their support and democratic legitimacy.

Considering that most regulatory initiatives still address corporate sustainability responsibilities in a voluntary way, the behavior and efforts of corporate actors at the company level are important. Therefore, the role of the most important corporate actors in promoting sustainability initiatives was assessed. Developing corporate strategy, and therefore also initiating sustainability activities, is a competence that belongs primarily to the corporate board. Fortunately, corporate sustainability is increasingly on the agenda of these boards and their businesses. For instance, 93 percent of the 1,000 CEOs worldwide indicate that sustainability is key to

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<sup>269</sup> Marcus Taylor, *supra* note 172, at 448.

<sup>270</sup> Mollie Painter-Morland, *supra* note 206, at 354-55.

<sup>271</sup> Marcus Taylor, *supra* note 172, at 448.

success in the 2013 UN Global Compact Accenture CEO study.<sup>272</sup> Corporate boards generally have profound discretionary powers to pursue sustainability policies. However, it is not only the corporate board, but also shareholders that can play an important role in increasing corporate sustainability and the promotion of FLS. There is more and more attention for institutional investors, who can use their selection rights to include sustainable companies in their investment portfolio (impact investment), and, more importantly, can use their control rights to advocate corporate sustainability goals. A recent example is the pressure Shell faces to use its influence to advocate equal rights in Brunei given its own focus on LGBTQ equality in its corporate sustainability policy.<sup>273</sup>

Using an illustrative dataset with the latest corporate (sustainability) documents of 97 companies and 35 of their institutional investors worldwide, we analyzed reporting of these private actors in relation to FLS. The data indicate that corporate boards indeed pay substantial attention to FLS in their corporate activities. On the other hand, while virtually all institutional investors in our exploratory research sample are a member of the PRI, most investors do not yet explicitly take into account FLS in their engagement transparency documents. Nevertheless, two institutional investors explicitly refer to the ILO Declaration on Fundamental Principles and Rights at Work, and mention all four FLS dimensions separately. This may encourage other institutional investors to follow their example and integrate FLS more robustly in the engagements of these important shareholders. The 68 shareholder proposals show that, although not very often, shareholder activists do actively engage with companies about FLS-related matters.

Most sustainability policies of corporations take FLS as the vantage point for the protection of workers' rights. While the FLS were developed in the realm of public international law, they have found their way into an increasing number of private sector sustainability initiatives. This article has tried to sketch – in a

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<sup>272</sup> Jennifer Lee et al., *The UN Global Compact-Accenture CEO Study on Sustainability 2013*, UNITED NATIONS GLOBAL COMPACT 11.

<sup>273</sup> Anna Gross & Owen Walker, *supra* note 186.

preliminary manner – a relevant selection of the different instruments that include and apply these standards and has analyzed their incidence in corporate sustainability and engagement policies. Recognition of FLS in sustainability policies may be a first step towards improved corporate and stakeholder action. For a better understanding of this dynamic field, much more research is needed. Future projects could focus on the implementation in practice of these sustainability commitments as well as on their enforceability using qualitative text analysis and inductive case studies. Important questions include what kind of action do corporations undertake in fact – next to more “passive” recognition of norms as a “box-ticking” activity – to promote respect for the FLS, and to what extent can they be held accountable for violations and negative impacts in their own activities and in their supply chains? Additionally, quantitative text analyses of corporate documents, engagement policies and other relevant information could be carried out to cover a broader, worldwide range of corporations and institutional investors. This project provided an illustrative analysis as a first step in bringing about a better connection between theory and practice. The large number of instruments currently dealing with FLS and the international private sector is encouraging, but their effective implementation on the ground remains one of the key challenges for creating a sustainable global economy.