

Erasmus Platform for Sustainable Value Creation

## Working paper

# Investing in human rights

Overcoming the human rights data problem

Willem Schramade and Jaap Bartels



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Overcoming the human rights data  
problem

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# Executive summary

Across the globe people are continuously affected by business activity. Along with that, issues related to human rights abuse by businesses arise. When looking at business and human rights, the human rights regime is historically aimed towards state-actors and their obligation is to promote and protect the rights of their citizens (Freeman, 2017; International Council on Human Rights Policy, 2002). Today it consists of nine core international human rights treaties and their United Nations (UN) monitoring bodies. Where in the past, states mostly sought to fulfil their duty to protect by calling on business to commit themselves to voluntary initiatives, now, states are moving from voluntary to mandatory human rights due diligence. Namely, Investors are part of the institutional context in which companies are held accountable for human rights in their value chains. Besides due diligence, the standards require investors to embed human rights in all the relevant policies and management systems and identify potential and actual adverse impacts. The identification process should enable them to undertake two key exercises: 1) the determination of investor involvement and 2) the prioritisation of adverse impacts.

Despite clear due diligence expectations towards investors and their investee companies and an increase in legislation to enforce it, human rights abuses by investee companies still exist. Accordingly, we explore four reasons why human rights abuses by investee companies are so persistent and why investors' human rights performance is lacking. The first being, the inherent complexity of global value chains. Also, a lack of integration of human rights in business and insufficient legal enforcement, are considered to be causes for the persistence of human rights abuses among investee companies. Lastly, there exists a problem of inadequate data and limited pressure on corporations by investors. The field of Business and Human Rights (BHR) might alleviate some of the issues related to human rights abuses as it focuses on a clearer commitment in the area of human rights than CSR does.

Additionally, investors are required to identify and prioritise adverse impacts, but find that there is inadequate data and limited pressure on corporations. What's more, investing in human rights is hampered by the fact that most companies do not publish sufficient and/or reliable information on their human rights performance, absence of a standard methodology in order to assess companies' performance on the issue, generalist ESG data providers' limited incentives and resources to gather information and insufficient demand for human rights information as it is not deemed material enough, nor central to investment strategies.

As a response to these hindering factors, initiatives such as the Corporate and Human Rights Benchmark (CHRB) and the Workforce Disclosure Initiative (WDI), have emerged to increase the availability of data on investee companies' responsible business conduct. However, These initiatives and platforms have a common and crucial limitation in their approach: they mostly rely on information provided by companies themselves. The Standards require investors to consult additional sources to verify or triangulate claims by companies regarding their human rights performance. Investors may lack the scale and incentives to that, but specialised human rights data gatherers could fill this gap. Since such specialised human rights data gatherers need funding, they are ideally complemented by specialised human rights investors.

## Introduction

Across the globe people are continuously adversely affected by business activity. Human rights abuses by mining activities are still frequent (Paré and Chong, 2017) and tobacco companies continue to present a serious threat to people's right to health, even employing devious means to get children to smoke (e.g., Van der Eijk *et al.*, 2018). A lot of human rights violations, however, happen out of sight, deep down the value chains, and multiple steps away from the large companies that commission the business activity. There are several reasons for the continuation of human rights abuses by business, such as the complexity of global value chains and the informal sectors involved. Moreover, Corporate Social Responsibility (CSR) efforts have paid relatively little attention to human rights so far (e.g., Wettstein 2012; Fiaschi and Giuliani, 2012; Ramasastry, 2015). In addition, legal enforcement is weak (e.g., Kaleck and Saage-Maass, 2010; Kinley and Navidi, 2013; Ruggie, 2013; Ryngaert, 2018). And investor attention is limited (e.g., Wagemans *et al.*, 2018), putting little pressure on corporations to improve. This poses the problem of how to invest with respect and in support of human rights. In addition to the efforts of governments, families, and civil society, there is plenty of scope for institutional investors to help. Yet typically, institutional investors would claim that human rights are 'not investable'. At best, one can currently invest in companies that supposedly behave relatively better than others, but without sufficient information to validate that, or to know if better is actually good enough. Information on companies' adverse human rights and on their corporate human rights performance is poor. And it hardly feeds into financial and sustainable databases and investment fund considerations.

This lack of data is very problematic, first and foremost for affected people, since human rights ought to be protected and respected in line with international ratified human rights treaties to allow people to live with dignity. It's also problematic from a wider societal perspective, since society would benefit from more justice, more equality, a better educated workforce, and a bigger middleclass. Countries where such institutions are stronger tend to have stronger economies and stronger social fabric (e.g., Acemoglu and Robinson 2012). Companies should be concerned too: they run high business and reputational risks if they don't ensure responsible business conduct in their value chain as this is increasingly becoming a consumer concern as well. Moreover, businesses would benefit from better societal outcomes such as a better educated workforce and a bigger middle class with the spending power to purchase their products. All of this makes it a concern for investors as well, in particular for universal owners such as large pension funds or insurers that are invested in most of the global economy. And it is even of concern to investors who take a more strictly financial perspective: given societal shifts, better financial performance is to be expected from companies that are better prepared for operating in more sustainable ways, including their performance on human rights (e.g., Khan *et al.*, 2016). Any investor who is able to identify and invest in such companies (or avoid the losers), should benefit.

This article is set up as follows. The next section gives an overview of the evolution of the field of Business and Human Rights. We do not intend to give an exhaustive summary but aim to set the expectations towards respecting human rights. This is followed by an analysis of the reasons why data and performance on human rights continue to disappoint. We subsequently sketch the conditions for an environment in which these issues are solved or at least mitigated.

## Business and Human Rights - A framework in development

The human rights regime is historically aimed towards state-actors and their obligation to promote and protect the rights of their citizens (Freeman, 2017; International Council on Human Rights Policy, 2002). Today it consists of nine core international human rights treaties and their United Nations (UN) monitoring bodies. Participation by states in the treaty system has expanded tremendously in terms of ratifications, the numbers of produced reports, individual cases, meetings of the treaty bodies and the generation of national legislation, which had a positive effect on a multitude of domestic legal and

political systems (Bayefsky, 2001). The governance gap created by globalisation caused a growing awareness and focus on how states should protect their citizens from adverse impacts by transnational companies. There is also more emphasis on the independent responsibility of transnational companies to respect human rights.

### Limits to voluntary initiatives

In the past, states mostly sought to fulfil their duty to protect by calling on business to commit themselves to voluntary initiatives. An example is the UN Global Compact launched in 2000 by former UN Secretary General Kofi Annan (International Council on Human Rights Policy, 2002). It counts ten principles, covering human rights, labour rights, the environment and anti-corruption. The success of voluntary initiatives has been limited however. In an investigation of three voluntary codes, Doane and Holder (2007) find “violations of all three of the codes, even by company leaders whose rhetoric and policies purport to support the aims of the codes; a catch-22 situation, where market drivers contradict the principles of voluntary codes; and a failure to enforce sanctions for violations of the codes under the established governance schemes; governments fail to support the codes sufficiently to enable their full implementation and enforcement.” Similarly, an evaluation of the Dutch state’s Responsible Business Conduct (RBC) Agreement policy<sup>1</sup> concluded that it has “not observed a reduction in negative impacts in global value chains as a result of the RBC agreements”. This was due to factors such as not setting a minimum standard, falling short on incentivising companies and weakness in monitoring - even though the agreements were based on the OECD guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights (UNGP) (Bitzer et al., 2020).

### UNGP

In 2011, UN Human Rights Council adopted the UNGP. This is an important milestone in the advancement of business respecting human rights. Although still voluntary, it is a comprehensive framework to protect, respect and remedy. It consists of 31 principles and has become the first globally accepted standard to set the expectations of states and companies on what they should do to address adverse human rights impacts by business. Most importantly, the UNGP show companies how to do effective ongoing human rights due diligence. In addition, the UNGP emphasizes the need for remedy and special attention to vulnerable groups such as children (United Nations, 2011).

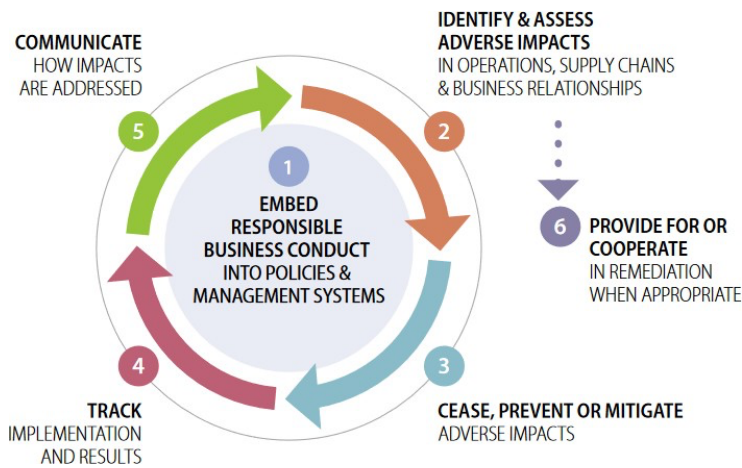
Right after their adoption, the UNGP were integrated in the OECD guidelines for Multinational Enterprises and contributed to numerous pieces of sectoral guidance and the more general *Due Diligence Guidance for Responsible Business Conduct* (OECD, 2018). One could argue that such guidance further operationalises the UNGP and give step by step instructions to businesses on how to shape and improve their responsible business conduct.

### Figure 1. OECD guidelines on human rights

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<sup>1</sup> There international RBC agreements were agreed for the Dutch banking sector in 2016, the insurance sector in 2018 and the pension fund sector in 2019. While the banking agreement was implemented in 2019, the agreements in the pension fund and insurance sector are still being implement.





Source: OECD 2018, 2019.

## Paradigm shift to mandatory human rights due diligence

There is an ongoing paradigm shift of states moving from voluntary to mandatory human rights due diligence. This shift is driven by an increased understanding of the role of business in respecting human rights; a growing awareness that voluntary measures alone are not enough; more interaction between state and non-state actors; and improved guidance for business on how to respect human rights. The paradigm shift is most noticeable in Europe, where at least 14 countries are discussing, developing or already have some kind of mandatory human rights due diligence law<sup>2</sup>. Developments at the European Union (EU) level are also picking up pace. The European Commission (EC) published a report in January 2020 on regulatory options at EU level for broad mandatory due diligence legislation (Smit et al., 2020)<sup>3</sup>. This was followed by a briefing called “Towards a mandatory EU system of due diligence for supply chains” in October 2020, stating the followed voluntary approach “is considered largely insufficient” (European Parliament, 2020). And in March 2021 the European Parliament adopted a resolution calling for binding EU regulation on corporate human rights and environmental due diligence. The EC subsequently announced that it will present its legislative proposal later this year. These are all precursors to EU legislation. Since the EU is a regulatory superpower that exports its rules (the ‘Brussels Effect’, Bradford, 2020), the effect will mostly likely be experienced by corporates and investors on a global scale. So far, developments at the international level have been less fast paced but in the same direction. In 2014 a new attempt was pushed with the start of a discussion to develop a ‘Binding treaty’<sup>4</sup> (United Nations, 2014). The treaty is heavily discussed (e.g., Backer, 2015; Bilchitz, 2016; Cassel, 2018; Cassell and Ramasastry, 2016; De Schutter, 2016; Ramasastry, 2015; Ruggie, 2014; Thielborger and Ackermann, 2017) and its negotiations are still ongoing<sup>5</sup>. Nevertheless, the trend is clear: the pressure on businesses is mounting to structurally improve the way they address adverse human rights impacts throughout their value chain.

## Expectations towards investors

Investors are part of the institutional context in which companies are held accountable for human rights in their value chains. The UNGPs and OECD guidelines (from now on mentioned as the Standards) are increasingly recognised amongst investors, yet a thorough understanding and implementation is still a challenge. To support businesses in integrating this new standard the OECD published several pieces of sectoral guidance. For financial institutions the OECD developed the *Responsible Business*

<sup>2</sup> Business & Human Rights Resource Centre (2020)

<sup>3</sup> During the presentation of the findings in April 2020, EU justice commissioner, Didier Reynders, stated that the European Commission commits to introducing rules for mandatory environmental and human rights due diligence for business.

<sup>4</sup> Discussion on a binding treaty started in June 2014 at the 26<sup>th</sup> session of the UN Human Rights Council with the adoption of a resolution drafted by Ecuador and South Africa.

<sup>5</sup> The Sixth session of negotiations took place in October 2020. It is expected that the Chair-Rapporteur shall present a third revised draft text this year, which will form the basis for further negotiations.

*Conduct for Institutional Investors* (OECD, 2017) and *Due Diligence for Responsible Corporate Lending and Securities Underwriting* (OECD, 2019). To ensure a common understanding of the framework used in this article, important expectations and recommendations stemming from the afore mentioned guidance will be clarified.

### Due diligence as a continuous process

Where investors generally see due diligence as a process conducted prior to making certain investment decisions, the Standards perceive due diligence as a *continuous* process for identifying, preventing, mitigating and accounting for actual or potential adverse impacts on society and the environment throughout the investment value chain (OECD, 2017). Indeed, it goes beyond simply identifying and managing material risks to investors themselves. This outward facing approach to risk - in which the impacts for affected parties are independently considered next to financial or commercial impacts - may represent a paradigm shift to some investors. However, in many cases there will be a strong correlation between the potential financial risks and responsible business conduct (RBC) risks<sup>6</sup> associated with investments. In addition, the due diligence framework is designed in a way that is complementary across business relationships. The OECD (2018) emphasises that “As long as all entities in the investment value chain carry out due diligence and communicate about it to the other entities in the value chain who are relying on that due diligence, then the due diligence does not need to be duplicated. However, it will be for each entity in the value chain to judge the quality and reliability of due diligence undertaken by others in the value chain and whether supplementary action is needed.”

### Determining investor involvement

The Standards require investors to take several steps in the due diligence cycle as presented in figure 1. Investors should embed human rights in all the relevant policies and management systems and identify potential and actual adverse impacts. The identification process should enable them to undertake two key exercises: 1) the determination of investor involvement and 2) the prioritisation of adverse impacts. Investor involvement can be categorised into three categories, in that an investor can:

- **Cause** an adverse impact through its business operations (for example towards their employees);
- **Contribute** to an adverse impact through an investment activity or a business relationship if it causes, facilitates or incentivise another entity (e.g. investee company) to cause an adverse impact;
- Be **directly linked** to an adverse impact through the operations, products or services by an investee company or business relationship.

The involvement of an investor shapes its responsibilities towards addressing the adverse impact. In cases where an investor would cause or contribute to an adverse impact, the investor is required to cease and mitigate the adverse impact and provide remediation. The majority of cases however, falls in the third category, where investors are directly linked to an adverse impact due to a minority shareholder relationship with an investee company that causes or contributes to the adverse impact. Investors are then required to use their leverage, alone or in collaboration with others, to influence the investee company to prevent or mitigate the adverse impact. In addition, the investee company is required to remedy the victims.

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<sup>6</sup> The OECD guidelines use the term RBC risk instead of the more commonly used ESG risk in the financial sector. RBC risk refers specifically to the risk of adverse impacts with respect to the issues covered by the OECD Guidelines. The OECD mentioned that there might be some difference in scope between ESG and RBC risks and recommends investors to assess the differences to ensure they understand the overlaps and differences.



An investor's involvement in an adverse impact is not static. It may change over time depending upon the degree to which the investor could or should have known about such adverse impacts; whether it facilitated or incentivised adverse impacts; and the extent and the quality of any measures the investor has taken to seek to prevent, mitigate and/or remedy the adverse impact. This includes all activities it has taken, but also those it has not taken and should have.

The responsibility of preventing and mitigating the adverse impact cannot shift from an investee company to the investor. But it is possible that an investor's responsibility increases as the investor fails to take the necessary measures to identify and address an adverse impact.<sup>7</sup>

### Prioritising adverse impact

Investors may invest in hundreds or even thousands of companies, creating a vast universe of potential and actual adverse impacts to identify and address. The standards recognise that not all adverse impacts can be responded to at once. Investors are allowed to prioritise identified adverse impacts based on their severity. The severity of an impact is determined on three criteria (OECD, 2017):

- **Scale** refers to the gravity of the adverse impact.
- **Scope** concerns the reach of the impact, for example the number of individuals that are or will be affected or the extent of environmental damage.
- **Irremediable character** means any limits on the ability to restore the individuals or environment affected to a situation equivalent to their situation before the adverse impact.

The most severe impacts should be addressed first, while the less severe impacts should be addressed over time. The ranking of severe impacts will be specific to each individual investor depending on the investment portfolio and the identified adverse impacts.

### Engagement and divestment

Based on their prioritisation investors should undertake action to prevent and mitigate potential and actual adverse impacts. Investors have a diverse toolset of potential actions to do so. Active investors can engage with the investee company to exert leverage to mitigate the adverse impact. Passive investors can redesign the investment strategy to avoid investments with highly severe impacts. Divestment is typically seen as an option of last resort or reserved for the most severe adverse impacts, but investors might have an exclusion policy that dictates otherwise. Since divesting could exacerbate adverse impacts, investors are required to assess potential adverse impacts when deciding to divest.

It is crucial to account for the way in which adverse impacts are addressed. Investors can do so by tracking the performance of their own due diligence performance and impacts - and thus the performance of investee companies - and by communicating the results.

### A complex reality to achieve results

Given the clear due diligence expectations towards investors and their investee companies and an increase in legislation to enforce it, why do human rights abuses by investee companies continue? Ruggie (2008) claims that "the root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces and

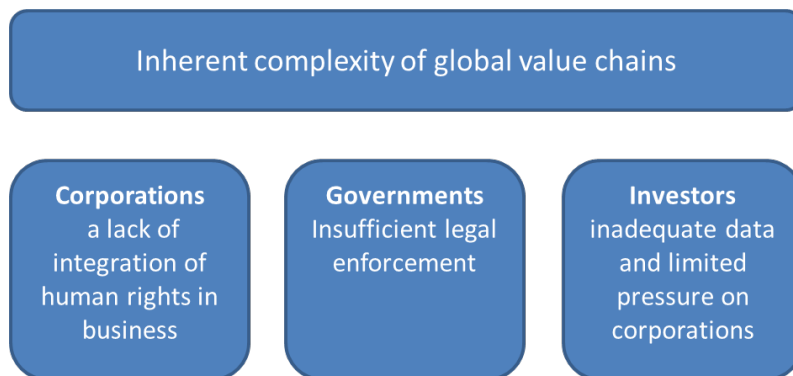
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<sup>7</sup> An example of such a case in the context of corporate lending is now under investigation at the Dutch National Contact Point. In the complaint filed by Friends of the Earth it is argued that "due to the high degree of foreseeability of the harmful impacts and ING's failure to actually mitigate or decrease the risk of impacts and continued provision and renewal of loans of a substantial total amount to these clients, ING has come to be in a position of contributing substantially to ... specific adverse environmental, human rights, and labour rights impacts caused by ING's palm oil clients Noble Group Ltd., Bolloré Group/Socfin Group S.A., and Wilmar International Ltd. or their subsidiaries". ING responded by expressing its willingness "to explain or elaborate on [its] approach, either directly to Friends of the Earth or through the NCP". The Dutch NCP accepted the complaint on 20 January 2020 (NCP, 2020).

actors, and the capacity of societies to manage their adverse consequences." Accordingly, we explore four reasons why human rights abuses by investee companies are so persistent and why investors' human rights performance is lacking:

- 1) Inherent complexity of global value chains
- 2) Corporations: a lack of integration of human rights in business;
- 3) Governments: Insufficient legal enforcement;
- 4) Investors: inadequate data and limited pressure on corporations;

**Figure 2. Why abuses of human rights by business continue**



Source: the authors

### 1. Inherent complexity of global value chains

Companies are part of complex networks of business actors involved in up- and downstream flows of products and services in globally dispersed multi-tier value chains that cross national borders, jurisdictions and sectors. Mapping business relationships in such a value chain is a demanding task, and “many companies have limited visibility of their supply chain information, have a poor understanding of their capabilities for capturing and reporting this information and have not overtly considered their supply chain information disclosure strategy” as Marshall *et al.* (2016) mention. It therefore comes as no surprise that various studies (Grimm *et al.*, 2014; Hofmann *et al.*, 2018; Hutchins and Sutherland, 2008; Lukas, 2012; Lukas *et al.*, 2010; Marshall *et al.*, 2016; Smit *et al.*, 2020) show that companies struggle to address adverse human rights impacts. Companies face challenges achieving transparency in their own value chain due to for example suppliers’ unwillingness to disclose information about their own suppliers (e.g., Smit *et al.*, 2020). It gets even worse in certain contexts, for example when the informal sector<sup>8</sup> is part of the value chain – such as the garment supply chain in the largely informal economy of India. Companies may find it impossible to establish linkages with actual producers due to non-factory-based production and subcontracting (Venkatesan, 2019). In addition, because of the absence of regulation and protection in the informal sector, workers have an increased chance to experience human rights abuses such as modern slavery, child labour, human trafficking, absence of a living wage, but also less obvious adverse impacts like a limitation of political participation (Miller, 2006). The challenges for investors are compounded by the presence of hundreds if not thousands of investee companies in their portfolio, which implies the relevance of all of the value chains in which the investee companies are active.

#### *Analysing root causes in context*

Human rights abuses typically do not manifest in isolation but in the context of systemic challenges, such as the informal sector. Therefore, the UNGP Interpretive Guide advises to investigate the ‘root causes’ of human rights abuses and to identify *why* and *how* the impact occurred. Though it might be

<sup>8</sup> The ILO (2018) shows that 60% of the global population works in the informal sector; that it is a major challenge for sustainable development; and that it has a harmful effect on workers’ rights.

more demanding for companies and investors, a root cause analysis does improve the understanding of deeper contextual factors of risk. It can thus help improve the effectiveness at both the ex-ante and ex-post stages of human rights due diligence (Mares, 2018). In practice, NGOs observe that mitigation measures taken by companies often move the abuse to other parts of the value chain instead of actually solving it, since its root causes are not addressed. They are convinced that solutions are feasible but complex and that the support of local partners with in-depth local knowledge is required to achieve results in complex global value chains.

## 2. Corporations: A lack of integration of human rights in business

Scherer and Palazzo (2011) argue that “under the conditions of globalization, the strict division of labour between private business and nation-state governance does not hold any more. Many business firms have started to assume social and political responsibilities that go beyond legal requirements and fill the regulatory vacuum in global governance”. However, that responsibility seems to be taken in other fields than human rights. Wettstein (2012) observes that human rights have not played an overwhelmingly prominent role in Corporate Social Responsibility (CSR) in the past. Fiaschi and Giuliani (2012) find that corporations practicing CSR appear less likely to be involved than non-adopters in the worst human rights abuses, but more likely than non-adopters to be involved in other types of “less serious” abuse. They also find that while adoption of CSR seems to reduce direct corporate involvement in abuses, it has no such effect on indirect abuses allegedly committed by complicit third parties such as suppliers.

### *BHR goes beyond CSR*

The field of Business and Human Rights (BHR) focuses on a clearer commitment in the area of human rights than CSR does. Ramasastry (2015) argues that BHR is, “in part, a response to CSR and its perceived failure”, and that “BHR is a distinct field with expectations that measure company actions in light of key universal human rights concepts not simply voluntary codes or principles.” In contrast, she argues that “CSR is portrayed as important to the competitiveness of enterprise. The concept is meant to bring benefits in terms of risk management, cost savings, access to capital, customer relationships, human resource management, and innovation capacity”. Indeed, CSR seems to be instrumental to the corporate objective of shareholder value. The focus on shareholder value seems to be a major underlying cause of corporate negligence within value chains. It is what Mayer (2018) calls the corporate model of ‘rape and pillage’, since all concerns are secondary to the goal of maximizing the corporation’s share price. Mayer argues that for corporations to systematically create positive societal value, they should be run for purpose, not just for shareholders. That means that they focus on doing what they are good at, say provide a certain good or service, and treat all stakeholders decently. Profit then becomes a result of delivering value, rather than an objective for which all else is sacrificed. For purposeful companies, human rights are a core obligation to respect, wherever they operate. The goal should be to do no harm, and where harm is caused, one should provide a meaningful remedy to victims. This is also consistent with the social boundaries of Raworth’s (2017) doughnut and the concept of integrated value that encompasses not just financial value but social and ecological value as well (Schoenmaker and Schramade, 2019a).

## 3. Governments: Insufficient legal enforcement

Another aspect is governments’ failure to ban human rights abuses committed either in their jurisdictions or by corporations headquartered in their jurisdictions. According to Ratner (2001), a governance gap often arises when a government is unwilling or unable to provide its citizens with access to remedies for human rights violations caused by businesses. This especially applies to transnational enterprise. Host countries are rarely able to hold transnational corporations accountable for the host country activities of their suppliers, while home country regulations are more reliant on market discipline through transparency and reporting rather than direct liability. Kinley and Navidi (2013) conclude that “neither regime provides sufficient incentives to eliminate human rights abuses”.

Kaleck and Saage-Maass (2010) argue that : “Although substantial international criminal law is well prepared to tackle corporate misbehaviour, enforcement mechanisms, available both at the international as well as the national level, are insufficient.” Ryngaert (2018) observes that “in the implementation of the UN Guiding Principles on Business and Human Rights, little emphasis has been put on criminal law as a mechanism to hold corporations to account.” He adds: “from a liability perspective, involvement of corporations in overseas human rights abuses often results from negligent behaviour rather than direct perpetration.” He argues that the main challenge is to establish jurisdiction and liability with regard to corporate involvement in human rights violations in transnational value chains. This is consistent with the observed paradigm shift by states towards developing legal instruments and mandatory adherence to human rights by companies. Recent signs point to a possible shift in the judicial system where parent companies’ duties of care to foreign claimants are put in practice. The Dutch Court of Appeal was the first court to rule that RDS, the Shell group parent company, incurred a duty of care to farmers in the Niger Delta that suffered from oil leakages. Shortly afterward, the UK Supreme Court concluded in the *Okpabi v. Shell* case that it is at least arguable that RDS had a duty of care towards the inhabitants of the Ocale and Bille communities in Nigeria, confirming its decision in *Vedanta v. Lungowe*, and allowing the case to proceed in English courts.

#### 4. Investors: inadequate data and limited pressure on corporations

Investors are required to identify and prioritise adverse impacts, but detailed data on adverse human rights impacts is missing. This starts with poor data provision by companies. Self-reported information on human rights abuses by companies is often biased, insufficient to assess its severity and unreliable due to lack of verification through independent third parties or inaccurate auditing. For example, Judd and Kuruvilla (2020) show that information given to auditors who inspect factories in the apparel industry is often inaccurate. It’s most notable in China and India where over half of the 31.652 conducted factory audits in a seven year period contained unreliable or falsified information. Lukomnik, Kwon and Welsh (2018) found that while 78% of the S&P 500 companies issue a sustainability report, only 3% of those reports stated that the environmental *and* social performance data was externally verified. An example of a specific case is that of Wilmar. Labourers interviewed by Amnesty (2016) show human rights violations continued in Wilmar’s chain, in spite of the company’s efforts in building an impressive reporting system on human rights abuses.

As there is significant risk that the information companies publish on their performance is inaccurate and unreliable, this undermines the notion of complementarity on which due diligence in the investment value chain is based. In addition, information provided by generalist ESG data providers (such as Sustainalytics, MSCI, etc.) is often from company sources and thus integrates the same inaccuracy and unreliability. While generalist ESG data providers might include other sources, such as news reports and NGO reports, which could provide some degree of triangulation, they comes with their own limitations, such as capturing a specific moment in time<sup>9</sup> and being incomplete to meet international standards. In regions with limited freedom of expression, association and peaceful assembly, such as in (semi) authoritarian countries like China, Russia, etc., the possibility to gather and triangulate human rights information becomes even worse. In addition, the typical company report by an ESG ratings agency fails to notice many such adverse impacts by companies, and if it does mention them, it only gives a brief description, without full clarity on the scale, scope and irremediable character of the adverse impact. These limitations are exacerbated by other methodological limitations observed by Kotsantonis and Serafeim (2019), such as the tendency to rate relative performance only, i.e. versus other companies, which can make poor performers look good if the others perform even worse. Fiaschi *et al.* (2020) argue that for ESG data providers to deliver reliable

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<sup>9</sup> This is of specific importance when there is an ongoing potential or actual adverse impact and the impact continues after the publications of the news article or report. The news article or report could be an important source to flag the impact but is no longer up-to-date and can therefore no longer be used to fully determine its severity.

human rights data, they should “use comparable or homogeneous corporate wrongdoing raw data and similar methodologies to derive indices. Unfortunately, these requirements are seldom met, which casts doubt on the reliability of such validations.”

Unfortunately, the poor quality of human rights data is matched by investors’ lack of integrating human rights in their investment practices. Most investors simply do not regard the topic as material with regard to their investment case. For example, research by Share Action shows that most asset managers say that they consider human rights important, but that more than 80% have a weak policy or no policy at all on the subject<sup>10</sup>. The lack of interest is also reflected in the relatively small number of active engagements with investee companies vis-à-vis the total amount of investee companies. Wagemans *et al.* (2018) conclude that the full engagement potential is not achieved, not even in the relatively advanced Dutch pension fund sector. Moreover, integration of the topic into investment decisions at the fund level is typically lacking. Exceptions are funds that focus on these issues, but these tend to be private equity or private debt funds that fund small and medium-sized enterprises, not public equity ones that invest in MNEs and can challenge those MNEs. Interest could pick up if there were more scope for investors to pursue social returns. Currently, the vast majority of the financial system is focused on achieving short-term financial returns based on quantitative models, efficient markets thinking and long investment chains (Schoemaker and Schramade, 2019b). Ideally, social impact returns would be added as a third dimension to the traditional financial risk and return dimensions (Sardy and Lewin, 2016). In addition, it would help to have new structures that fill the gap between small social impact funds and large asset owners (Schoemaker and Schramade, 2019c).

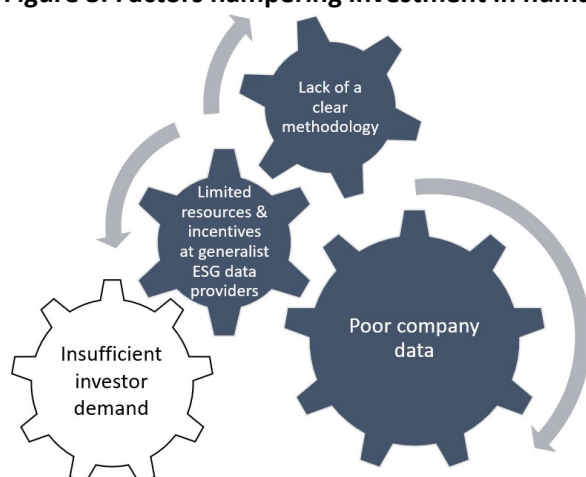
In sum, investing for human rights is hampered by the following factors:

1. Most companies do not publish sufficient and/or reliable information on their human rights performance, nor have a strategy on it. This makes it difficult to engage on it;
2. There is no standard methodology yet to assess how well companies perform on the issue;

In addition, and underlying this:

3. Generalist ESG data providers have limited incentives and resources to start gathering this information;
4. There is insufficient demand for human rights information since it is not deemed material enough, nor central to investment strategies.

**Figure 3. Factors hampering investment in human rights**



Source: the authors

<sup>10</sup> Share Action (2020). Point of No Returns Part II – Human Rights An assessment of asset managers’ approaches to human and labour rights. <https://shareaction.org/wp-content/uploads/2020/05/ShareAction-Human-Rights-Report-2020-Final.pdf>

## Towards solutions

Some investors have identified shortcomings in their investment practices with regards to respecting human rights and try to strengthen their responsible investment practices. Increasing the availability of data on investee company' responsible business conduct for example is done by initiatives such as the Corporate and Human Rights Benchmark (CHRB) and the Workforce Disclosure Initiative (WDI). The CHRB and the WDI provide an annual benchmark that scores investee companies on respectively their human rights performance and workforce metrics disclosure. In addition, the UN-supported Principles for Responsible Investment (PRI), the Investor Alliance for Human Rights and the Platform Living Wage Financials (PLWF) provide a platform for investors to collaborate and improve responsible investment practices. These initiatives and platforms have their merits and play an important role in improving the respect for human rights by investors.

### Existing initiatives are limited by dependence on company disclosure

These initiatives and platforms have a common and crucial limitation in their approach: they mostly rely on information provided by companies themselves. And they only, if at all, assess the quality and reliability of due diligence undertaken by the companies based on the companies' policies. Hence, they don't account for those that actually endure the adverse business impacts, such as labourers, local community members or other rights holders - those that should be at the centre of due diligence, as pointed out by the UNGP. Indeed, the CHRB does include allegations of human rights abuses from other sources such as media and NGOs but the included allegations are very few in numbers, even for notoriously poorly performing companies. Even worse, top ranking companies cause severe human rights abuses, raising questions about deficiencies in the methodology of these benchmarks, as pointed out by Maher (2020) in several cases.

### Towards deeper data gathering

The Standards allow for a complementary due diligence approach if the reliability of the due diligence can be assessed and found to be credible. This contrasts with the current practice of limiting this assessment to policies or a few included allegations. The Standards require investors to consult additional sources to verify or triangulate claims by companies regarding their human rights performance. Investors may lack the scale and incentives to that, but specialised human rights data gatherers could fill this gap. They could do in-depth research in cooperation with locally operating NGOs; and produce information that does meet the above sketched requirements, and feed that back to investors, either directly or through databases. Since such specialised human rights data gatherers need funding, they are ideally complemented by specialised human rights investors. Such investors would invest not just for financial returns but explicitly aim for better human rights outcomes as well. They would invest in a concentrated portfolio of transnational companies whom they carefully scrutinise on human rights and engage with – using information from the human rights data gatherers as well as feeding back information towards them. This would also allow investors to incorporate the voice of the affected rights holders, and truly invest in human rights.

## Conclusions: moving towards and enabling environment

The four systemic and sectoral challenges explain investee companies and investors' lacking human rights performance. Admittedly, the systemic challenge is too big for investee companies and investors to solve by themselves, since they cannot unilaterally reduce the complexity of global value chains, and cannot fix insufficient legal enforcement. However, the other two challenges are in their sphere of influence.<sup>11</sup> Companies can adopt a BHR approach, and investors can stimulate them to do so. Since investors currently have insufficient incentive to do, a way out might be the creation of new structures

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<sup>11</sup> One could argue that legal enforcement is in the sphere of influence of investee companies and investors, because they could lobby governments for stronger legislation on responsible business conduct, including its enforcement.



that do have those incentives to provide solutions for the identified challenges. First, dedicated human rights investors who put their reputation at stake will be committed to holding investee companies accountable. Second, dedicated human rights data gatherers can solve or at least mitigate the data problem and would be natural partners to dedicated human rights investors.

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