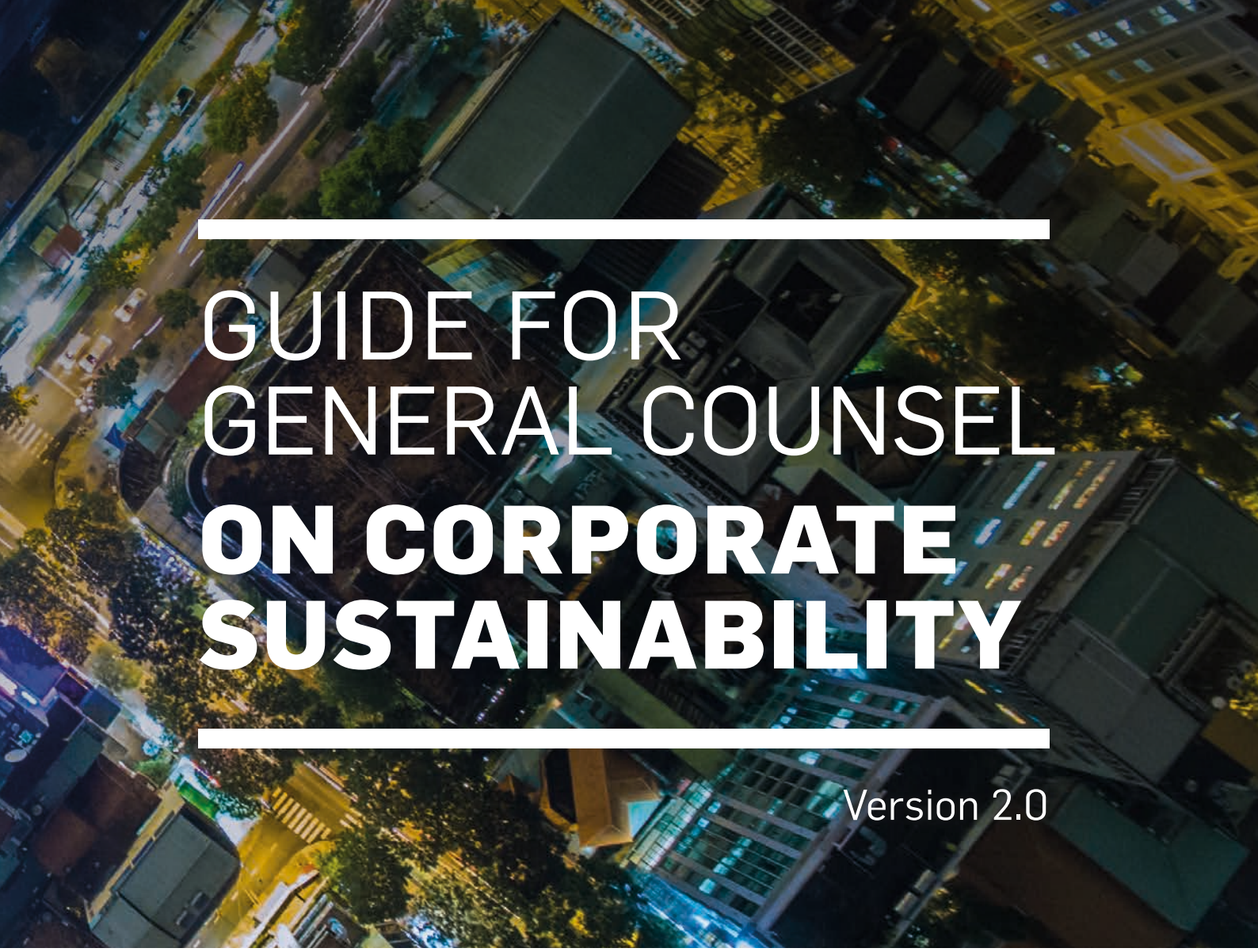

GUIDE FOR GENERAL COUNSEL ON CORPORATE SUSTAINABILITY

Version 2.0

United Nations Global Compact

BerkeleyLaw
UNIVERSITY OF CALIFORNIA
Business in Society Institute

Linklaters

ABOUT THE UNITED NATIONS GLOBAL COMPACT

As a special initiative of the UN Secretary-General, the United Nations Global Compact is a call to companies everywhere to align their operations and strategies with ten universal principles in the areas of human rights, labour, environment and anti-corruption. Launched in 2000, the mandate of the UN Global Compact is to guide and support the global business community in advancing UN goals and values through responsible corporate practices.

With more than 9,500 companies and 3,000 non-business signatories based in over 160 countries, and 70 Local Networks, it is the largest corporate sustainability initiative in the world.

For more information, follow @globalcompact on social media and visit our website at unglobalcompact.org.

The UN Global Compact, Linklaters LLP, and UC Berkeley School of Law, with the support and guidance from an advisory group of GCs from Nestlé and other companies, has prepared this *Guide for General Counsel on Corporate Sustainability Version 2.0* (this "Guide").

United Nations Global Compact

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About Linklaters LLP

Linklaters LLP is a leading global law firm, supporting clients in achieving their strategies wherever they do business. With more than 2,600 lawyers spread across 20 countries, the firm uses its expertise and resources to help clients pursue opportunities and manage risk across emerging and developed markets around the world.

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WELCOME LETTERS

The United Nations Global Compact works with businesses of all sizes and from all regions in the world to move corporate sustainability and UN values into the mainstream. As the role of General Counsel has evolved beyond legal compliance and towards corporate sustainability, the UN Global Compact sees them as key change agents on the path to a world that better supports people and planet. And, increasingly, General Counsel are seeing how sustainability plays a role in creating long-term value for a company.

It was therefore very encouraging to see that the first *Guide for General Counsel on Corporate Sustainability,* released in 2015, generated significant interest within the legal profession. In fact, the 2015 guide has been one of the most downloaded publications in the UN Global Compact library. We are equally delighted to see the number of General Counsel and law firms that are engaging in our work since the guide's release, including across our Ten Principles and the Sustainable Development Goals.

Now, four years on, the legislative and sustainability landscape has also evolved, including through the introduction of anti-corruption and modern slavery legislation across various jurisdictions and greater emphasis on environmental, social and governance (ESG) considerations by boards and investors. This has clearly served to strengthen the case for lawyers to develop the skills necessary to advise their clients not only on what is legally permissible, but also on what is socially acceptable.

It is against this backdrop that we are pleased to launch the *Guide for General Counsel on Corporate Sustainability Version 2.0* in partnership with Linklaters LLP, UC Berkeley School of Law's Business in Society Institute and the Advisory Group. We hope this new version serves as a source of reference for lawyers in navigating the complex ESG landscape and continues to serve as a source of inspiration for General Counsel to embrace their crucial role as agents of change in advancing the corporate sustainability agenda.

Lise Kingo, *CEO and Executive Director, United Nations Global Compact*

Throughout history, academics have influenced how companies and markets operate, and we are yet again at a crucial inflection point. Society's expectations of companies are in flux, requiring us to reimagine corporate purpose. This current shift from short-term profit maximization to long-term sustainability means that inside counsel today must not only manage legal risk, but also navigate environmental, social, and governance issues that pose ethical and reputational risks. Through its research and programmes, UC Berkeley School of Law's Business in Society Institute helps define the unique and increasingly central role of legal and compliance professionals in this new landscape.

As part of UC Berkeley, the world's leading public university, supporting the private sector's commitment to solving societal issues is core to our own public mission. In furtherance of that mission, we have continued our collaboration with Linklaters and the United Nations Global Compact to build upon *The Guide for General Counsel on Corporate Sustainability Version 2.0.*

For the past year, UC Berkeley School of Law faculty and student fellows have worked with inside counsel and compliance officers from around the world to analyze and debate emerging sustainability issues. We hope that this Guide serves as a source of reference and continues to inspire corporate counsel to embrace their crucial role as agents of change.

Amelia Miazad, *Professor and Founding Director, Business in Society Institute, UC Berkeley School of Law*

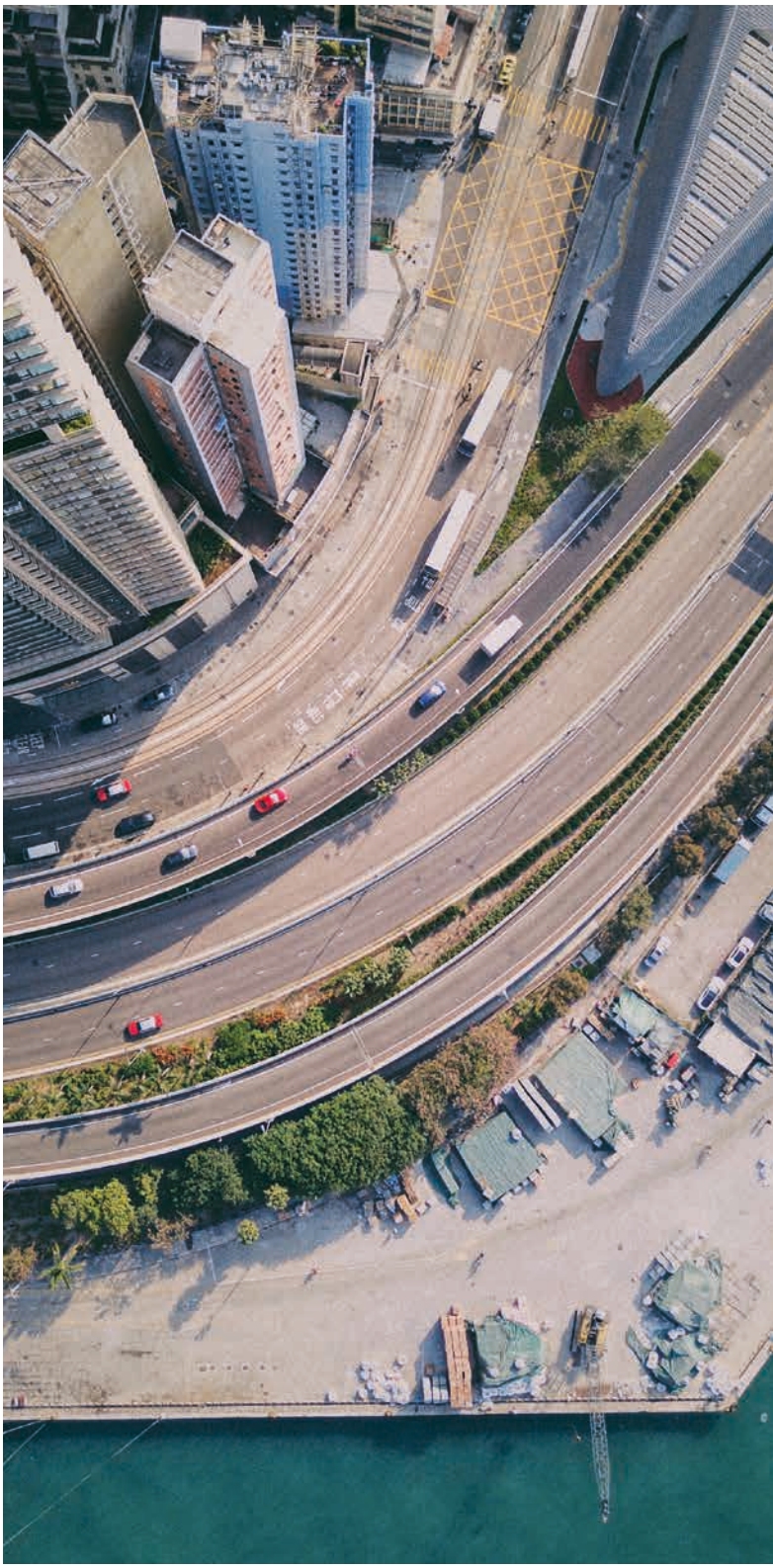
We are thrilled to have been supporting the United Nations Global Compact and the Advisory Group in the development of this *Guide for General Counsel on Corporate Sustainability Version 2.0* and to continue our collaboration with UC Berkeley.

Since the first guide was published in 2015, corporate sustainability has leapt up the commercial and political agenda. There is a renewed focus on environmental, social and governance (ESG) issues which, as well as being important to long-term business success, are increasingly the subject of incoming regulatory and investor requirements. General Counsel (GC) have a critical role in helping their organizations to engage with this changing landscape and to meet fast developing stakeholder expectations.

The first guide reflected the developing role for GCs in this area and explored the importance of sustainability to long-term business success. It also highlighted aspects of corporate sustainability which at that time remained relatively untapped by many lawyers. In developing this Guide we have had the opportunity to engage in depth with GCs from around the world on the topic of corporate sustainability.

This second Guide responds to the widespread growth in interest in sustainability and the growing demand from the legal community for practical guidance on how to integrate sustainability considerations into business as usual. It collects together practical guidance from GCs and expert practitioners on core elements of sustainability, including business integrity, ESG and fiduciary duties, human rights and supply chain risk management, the role of grievance mechanisms, and ways in which businesses can respond to crisis situations. We hope GCs will find it useful in supporting their organizations to operate in a sustainable, socially responsible way, delivering long-term value for their stakeholders.

Charlie Jacobs, *Senior Partner and Chairman, Linklaters LLP*



EXECUTIVE SUMMARY

We believe the case is made. It is now time for General Counsel to deliver upon it.

We believed it was true when we published our 2015 guide and believe that it continues to be true today: General Counsel (GC) are better placed, better equipped and increasingly able to drive change and deliver value to their organizations through an increased focus on corporate sustainability.

When we explained this in our 2015 guide, it was clear that we had struck a chord. GCs were enthusiastic about corporate sustainability, but they also highlighted the need for practical guidance on how to embed it in their organization's DNA. What do good practices look like and how do you achieve tangible results?

This 2019 Guide seeks to support GCs by examining five areas in more detail, providing practical tips and strategies for success inspired by the GCs who participated in its development.

- **Corporate Sustainability and Business Integrity.** How can GCs embed corporate values and responsible business conduct within their organizations to help ensure corporate sustainability?
- **Corporate Sustainability and Fiduciary Duties.** How can businesses successfully integrate environmental, social and governance (ESG) factors into decision-making processes?
- **Human Rights and Supply Chain Diligence.** How can GCs respond to ever greater calls to consider the sustainability of their companies' supply chains by conducting human rights due diligence?
- **Corporate Sustainability and Grievance Mechanisms.** How can grievance mechanisms form part of responsible business processes and contribute to securing corporate sustainability?
- **Challenges to Corporate Sustainability — Managing a Crisis.** How can GCs use sustainability principles to help prevent, prepare for, navigate through and recover from a crisis?

We believe that the future of this discussion is not one that focuses on the nature of the value proposition, but instead focuses on equipping GCs with the tools necessary to deliver upon it. We hope this Guide fosters meaningful conversation amongst GCs and helps them champion good practices within their own organizations. GCs should "shout from the rooftops" about those that are most innovative, value enhancing and/or effective.

Welcome to the *Guide for General Counsel on Corporate Sustainability Version 2.0*.

Tom Shropshire, *Partner*
Linklaters LLP

Guide for General Counsel on Corporate Sustainability Version 2.0

01_ CORPORATE SUSTAINABILITY AND BUSINESS INTEGRITY

Many organizations aspire to take an approach to doing business that ensures not only compliance with laws and regulations, but also a commitment to "do the right thing". Often the first step in operationalizing business integrity is articulating and communicating corporate values and behavioural expectations which can serve as a "lighthouse", especially in times of crisis.

Generating "buy-in": Value-driven compliance programmes
Businesses embed business integrity into their day-to-day operations through compliance programmes. GCs report a resurgence of "values-based" programmes, which can help address a broader range of complex challenges or developments which the business has not been able to foresee.

Strong leadership: Setting the right tone from the top
Business leaders, including GCs, should champion and exhibit their organization's values to reinforce a culture of ethical behaviour and compliance.

Fostering a culture of continuous learning and improvement
Ensuring that everyone is aware of, understands, values and internalizes business integrity is always a challenge. GCs can play an important role in helping articulate the legal and other risks the organization may face if business integrity is not front of mind.

Problem-spotting: The role of grievance mechanisms and whistleblowing
Grievance mechanisms and whistleblowing provide a clear and structured way to report business integrity concerns and are an important risk management tool for businesses.

How are we doing? Measuring the effectiveness of compliance culture
Just because no compliance issues have been identified, it does not mean they do not exist. A multi-pronged approach to measuring compliance culture is needed which might include self-assessments, refresher training and engagement with external stakeholders to test perceptions.

The previous version of the Guide for General Counsel on Corporate Sustainability is available at https://www.unglobalcompact.org/docs/publications/Guide_for_General_Counsel.pdf

02_ CORPORATE SUSTAINABILITY AND FIDUCIARY DUTIES

Concepts of fiduciary duty or investor duties, including loyalty, care and prudence, exist in most jurisdictions. Increasingly, investors, regulators, non-governmental organizations (NGOs) and other stakeholders are seeking the integration of environmental, social and governance (ESG) factors into investment decision-making processes based on the notion that sustainable decision-making and investing supports responsible business practices.

A shifting regulatory landscape
New regulations are driving change in this area. In addition, NGOs have also been building the case for ESG factors to play a greater role in fulfilling fiduciary duties, as reflected in the development of new voluntary standards and increasing business convergence around them.

Clarifying expectations: Consider an ESG policy
An ESG policy can help ensure that asset owners and asset managers factor ESG considerations into investment decisions consistently, in a clearly defined way that can be tracked, measured and evidenced. Similarly, board-level ESG policies can help ensure that ESG features prominently on the corporate agenda and proper consideration is given to ESG factors in corporate decision-making processes.

Up to speed? Help fiduciaries stay one step ahead
GCs can play a vital role in ensuring that decision-makers are kept abreast of ESG-related legal and other developments, providing focused, decision-useful inputs and seeking external advice where necessary. They are also well placed to advise on when it is appropriate to seek advice from external advisors with particular expertise (e.g. a human rights or environmental specialist).

Aim high: Continuously improve and incentivize ESG-based governance
GCs are well placed to make the case for investing in independent reviews of ESG governance mechanisms to identify areas where risks might be better mitigated. Human resources teams may be able to assist in assessing how to incentivize employees and managers who engage with ESG commitments.

03_ HUMAN RIGHTS AND SUPPLY CHAIN DILIGENCE

Traditional methods of supply chain risk management have focused on commercial aspects of procurement and on contingency planning. However, against a backdrop of increasingly globalized and complex supply arrangements, stakeholder expectations have evolved and the regulator landscape is shifting.

Know your supply chain: Map suppliers to better understand human rights risks
A key part of managing human rights risks is to ensure the business has a sufficiently well-developed picture of its supplier landscape to be able to understand which parts it should subject to further scrutiny and so that appropriate risk management systems and processes can be applied where they are needed most.

A fresh perspective: Conducting due diligence through a human rights lens
In this context, human rights due diligence involves an assessment of actual and potential human rights impacts within the supply chain. This is an assessment through the lens of salient risks to rights holders, not simply a review of whether a particular human rights issue may be a material risk to the business. The two may align, but this will not always be the case.

What next? Addressing impacts
There will be times when the business will need to address adverse impacts or use any leverage it has available to encourage others to do so. Remedy, in this context, can take a variety of forms and so specialist (including local) input may be required to ensure any response is appropriate.

04_ CORPORATE SUSTAINABILITY AND GRIEVANCE MECHANISMS

A grievance mechanism is a non-judicial process established or supported by a company through which complaints or concerns about business integrity, compliance, human rights and other issues can be raised. Grievance mechanisms can take many forms, adopt a broad scope or focus on a specific issue and can serve a range of purposes.

The business case: An important part of the risk management toolkit
Grievance mechanisms form part of responsible business processes. Providing a transparent and easily accessible means whereby affected persons can be heard and/or access remedy can reduce the risk of social volatility, litigation, and reputational damage. They can also support an organization's social licence to operate and help create a stable, secure and sustainable environment in which to do business.

Where to start? Designing a grievance mechanism
Soft law standards provide a framework for the development of grievance mechanisms and help businesses stay on track when doing so. For example, the UN Guiding Principles on Business and Human Rights establish effectiveness criteria for all non-judicial grievance mechanisms designed to address adverse human rights impacts.

Listen carefully: The important role of stakeholder engagement
Consulting with relevant stakeholder groups in relation to the design of non-judicial grievance mechanisms can be critical to ensuring they are accessible, supported and used by those for whose benefit they are provided.

Take stock: Measure effectiveness and make changes
Grievance mechanisms should be a source of continuous learning. Performance and effectiveness should be regularly monitored and assessed to ensure they remain effective, relevant and in use.

05_ CHALLENGES TO CORPORATE SUSTAINABILITY — MANAGING A CRISIS

Many organizations face unexpected challenges from time to time, but a "crisis" can be defined as a sudden or previously unidentified risk that threatens to significantly damage an organization's economic value or licence to operate. Crises can have broad roots, often driven at least in part by failure to operate ethically and sustainably.

Building resilience: Establish strong culture and values
Organizations that have integrated sustainability considerations into their business strategy can typically better protect against, respond to, and bounce back from a crisis.

Plan ahead: How will you respond?
Having an agreed high-level plan for management and information-sharing in a crisis and mapping out actions for the first stage of response is also very useful in supporting an efficient and appropriate reaction. Practising the roll-out of these plans regularly and participating in regular crisis simulations is very valuable.

The first 72 hours: Effective management of the initial response
The first phase of a crisis typically involves some basic first steps and a great deal of work on communication. Organizations are now expected to communicate with key stakeholders publicly and very quickly in the event of a crisis.

Moving on: Investigation, reporting and remediation
From both an internal and external perspective, it is important to establish the root cause of any crisis. At this point businesses typically turn their attention to conducting an investigation, reporting the results of that investigation and remediating any problematic conduct.

Do not waste a valuable opportunity: Learn lessons towards continuous improvement
Once a business has survived a crisis, it is necessary to rebuild its reputation and brand, assess how the crisis was handled and identify improvements to aid risk management and pre-crisis preparation. Ultimately, having an ingrained sustainability culture will have a positive multiplier effect in how a business is able to avert and/or deal with a crisis.

01_CORPORATE SUSTAINABILITY AND BUSINESS INTEGRITY

What is business integrity?
Many organizations aspire to take an approach to doing business that ensures not only compliance with laws and regulations, but also a commitment to "do the right thing". Often the first step in operationalizing business integrity is articulating and communicating corporate values and behavioural expectations which can serve as a guide, especially in times of crisis. These values help a business conduct itself responsibly, reinforcing its social licence to operate and ensuring its long-term sustainability. Put simply: business integrity makes good business sense.

Practical tip: Corporate sustainability starts with a company's value system and a principles-based approach to doing business. Responsible businesses enact the same values and principles consistently across jurisdictions and know that good practices in one area do not offset harm in another. By incorporating the Ten Principles of the UN Global Compact into strategies, policies and procedures, and establishing a culture of integrity, companies are not only upholding their basic responsibilities to people and the planet, but also setting the stage for long-term success.

Why is business integrity topping the corporate agenda?
Stakeholders, including investors, employees, clients, consumers and NGOs are increasingly demanding that organizations conduct their business with greater integrity, purpose and transparency. This is evident in the rise of investor engagement on corporate sustainability and corporate culture (including through shareholder activism), the evolution of "soft" law into regulation and enforcement action, and increased litigation. Given these growing risks, boards and GCs must treat business integrity seriously to ensure that their organizations act responsibly and continue to be attractive investment prospects, credible business partners, and professional employers.

Practical tip: Monitor the legal landscape and stakeholder expectations, and benchmark against peers at regular intervals to keep abreast of all relevant business integrity developments.

Embedding business integrity within an organization
One important way for businesses to embed integrity into their day-to-day operations is through compliance programmes. These provide the tools to identify problems at an early stage which facilitates intervention and remediation.

The governance of compliance programmes varies widely, but even when the compliance function is distinct from the legal function, the input of GCs is essential. GCs and their teams can identify not only complex legal requirements, but also emerging industry standards and societal norms that could evolve into applicable regulations or pose risks to the business.

GCs have identified a number of successful approaches to embedding business integrity within compliance programmes to ensure corporate values are given centre stage.

"Values-based" compliance programmes

Historically, many compliance programmes have been designed to encourage and embed good behaviours that support compliance with specific legal requirements. More recently, GCs report a resurgence of "values-based" compliance programmes. These centre around a clear articulation of the organization's values, which are integral to the programme (rather than sitting alongside or supplementing it). Often these are expressed in a general code of ethics or similar document which codifies the organization's core expectations and commitments. This is then supplemented by policies on specific subjects, reflecting a combination of legal requirements and good behaviours (e.g., anti-corruption, human rights, finance and taxation, personal data processing, customs and sanctions).

Practical tip: GCs have said that they find it helpful to frame communications and guidance to employees and counterparties in ways that are simple and relatable, and which reflect and reiterate corporate values and the culture of the business.

"I am convinced that compliance policies are necessary but not sufficient. Companies must foster a culture of business integrity, relying on their employees' and business leaders' ownership. To that end, we have drawn up and implemented value-driven policies which resonate with the employees' beliefs and empower their personal engagement. We also promote a 'walk the talk' and open culture throughout the company, ensuring honest and practical discussions at all levels, bottom-up and top-down, on the challenges encountered."

Ritva Sotamaa, *Chief Legal Officer and Group Secretary at Unilever*

Building blocks of an effective compliance programme

1. Culture and Messaging: Tone from the top, applied and understood across the business

2. Internal Controls: Written code/policies/procedures communicated and used

3. Oversight: Assigned responsibility, autonomy and resources

4. Risk Assessments: Periodic assessment of risks and programme performance

5. Education: Training and continuing advice

6. Incentives and Discipline: Performance metrics, incentives and discipline

7. Business Partners Due Diligence: Screening and ongoing review

8. Confidential Reporting and Investigation: Consistent reporting and investigation processes

9. Measure and Adapt: Review and continuous improvement

10. Transactional Checks: Pre-acquisition due diligence and post-acquisition integration

11. Maintaining Accurate Books and Records

GCs have found that a values-based approach can help address a broader range of complex challenges or developments that the business has not been able to foresee. Centring compliance expectations around core values can give teams a point of reference when navigating the myriad rules, advice and practical problems they may encounter during their day-to-day operations. It can also help bridge geographical, sectoral and functional differences in approach, ensuring greater consistency of behaviour across the organization.

"When Falabella relaunched its integrity programme a couple of years ago, it started with an extensive survey of 25,000 of their employees to test perceptions, concerns and cultural differences. A professor of economics helped the business to analyse the results. This exercise highlighted potential gaps and areas of focus, enabled a deeper understanding of the meaning of values for employees and informed the targeted communications that would help foster a culture of integrity among the workforce."

Gonzalo Smith, *Chief Legal Officer and Corporate Governance Officer at Falabella S.A.*

The "tone from the top"

Compliance programmes cannot function as they should without a consistent and clear "tone from the top" (the messaging and behaviours by an organization's most senior management). Business leaders, including GCs, should champion and exhibit their organization's values to reinforce a culture of ethical behaviour and compliance. If senior leaders explicitly or implicitly encourage employees to play close to (or cross over) the line then odds are that short-term profits are prioritized over the longer term value of the business. GCs report that senior managers are typically required to attend business integrity training, participate in committees or other fora, and perform against business integrity key performance indicators and incentives. They are typically involved to some extent in the planning and execution of these initiatives and have valuable insights they can share with their colleagues based on examples of both good and bad behaviours.

Practical tip: GCs have highlighted that while messaging is important, "walking the talk" at both a senior level and within middle management is critical.

Corporate values are everyone's responsibility and must resonate with employees

Organizations must ensure that the corporate values at the heart of their compliance programmes resonate with employees. This is key to ensuring that there are no significant gaps between the business's expectations and commitments and behaviours on the ground.

Employee engagement and participation should be a key element in the design of any values-based compliance programme.

While GCs certainly have a key role as "custodians of the corporate conscience", ownership of corporate values is not the responsibility of a particular team or function. Every member of the organization must own them personally and take responsibility for ensuring they behave in accordance with them.

Practical tip: Some businesses have found that recognizing and rewarding good behaviours has a motivating effect within their employee base. For example, some companies have started programmes in which staff can nominate colleagues so that their good practices can be recognized and celebrated within the business.

Fostering a culture of continuous learning and improvement

Ensuring that all those working within an organization are aware of and adopt business integrity as a state of mind is always a challenge. There is a responsibility for educating teams about programmes, the values and requirements that underpin it, as well as equipping them with the tools to implement it in practice. This responsibility typically sits with functions such as compliance, human resources and legal. GCs can play an important role in helping articulate the legal and other risks the organization may face if business integrity is not front of mind.

"The best way to set the 'tone from the top' is to have leaders deliver ethics messages personally — messages about integrity are powerful when delivered in person by a leader in a human, authentic way."

Rob Chesnut, *General Counsel at Airbnb*

Practical tip: GCs have shared practical tips based on what has worked well in their organizations:

- "Tone from the top" and reinforcement of messaging, to ensure a continuous focus on business integrity issues, is fundamental. Short videos in which business leaders across the organization discuss business integrity can be a highly effective and easily accessible tool.
- Always ensure that corporate values, codes of conduct and specific compliance policies are available on the organization's intranet.
- Except where they are commercially sensitive, codes and policies can also be made available to the public to demonstrate to other stakeholders the importance of business integrity to the organization.
- New employees should be told about the organization's values and commitments, and should be required to sign any code of conduct to ensure they are aware of the organization's commitment to it.
- A common complaint among employees is that they attend too many training modules and that these are too legalistic. This can lead to a lack of buy-in or an inability to identify with the issues in question. Scenario-based training that is refreshed annually can be more effective.
- Creating an internal network of compliance officers and legal advisors can provide a useful sounding board when new challenges arise or proposed solutions need to be tested.

Problem-spotting: Grievance mechanisms and whistleblowing

Grievance mechanisms and whistleblowing provide workers (and other stakeholders to whom they are made available) with a clear and structured way to report business integrity concerns and suspected breaches of any codes of conduct or policies. They are an important risk management tool for businesses which can help address integrity-related issues and strengthen related processes. Such channels should be designed to ensure employees and/or other stakeholders feel safe in raising concerns and provide them with protection against retaliation.

Grievance mechanisms or whistleblowing might be owned or managed by a particular function (e.g., human resources or compliance). To ensure issues are properly characterized and improvement actions are implemented across the business, it is important that escalated issues are triaged by a cross-functional team. This might include representatives from legal and compliance, human resources, procurement and public affairs.

Practical tip: Having a process for grievances that is robust and well-resourced can save time and money in the long run.

More information on grievance mechanisms can be found in Chapter 4 of this Guide.

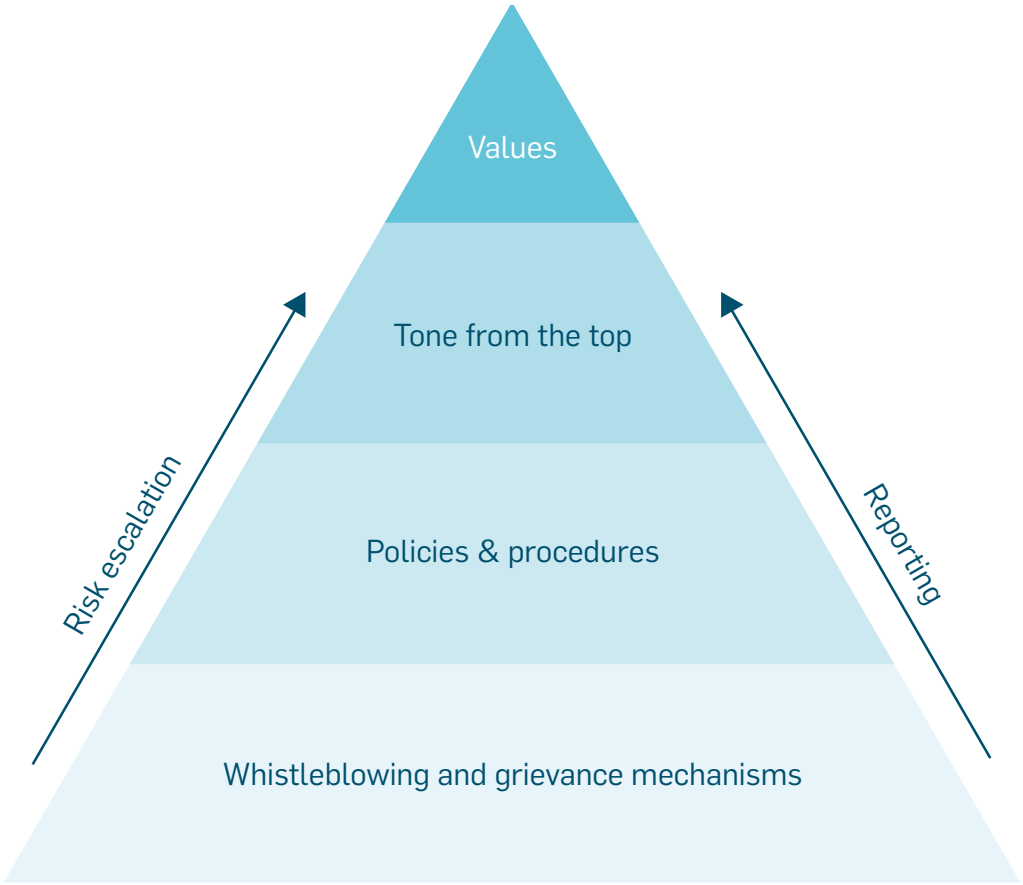
"Both the regulatory landscape and stakeholder expectations evolve more and more quickly, and compliance programmes must follow suit. We try to ensure that employees benefit from a continuous learning programme, we have developed "policy of the month" campaigns to clearly explain and illustrate one dedicated policy at the time and to create true understanding and acceptance of our standards of conduct."

Frida Berlin, *Ethics and Compliance Program Manager at Getinge*

When we combined with SAB and merged two multinational companies almost two years ago, our legal teams were faced with the enormous task of integrating two complex compliance systems. We saw this as an opportunity to look for a new, technology-driven approach. We explored data aggregation and analytics to manage the process, help identify potentially corrupt practices, and integrate the businesses into our culture.

BrewRIGHT drives transparency across all parts of our business. This tool will influence and encourage ethical behaviour across all functions – not just compliance. BrewRIGHT supports the management of compliance and ethics through data collection, analysis and machine learning, this allow us to conduct focused analysis of the transactions that are specifically flagged for risk.

Rodrigo Cunha, *Global Ethics and Compliance Officer at AB-InBev*



Keeping track
It is increasingly important that organizations keep track of business integrity issues across a range of areas. This can include issues raised through grievance mechanisms and whistleblowing, internal reporting lines and investigations. It may also improve and identify current and future challenges or trends such as regulatory investigations, incoming laws and regulations, entry into new markets, and social and political change.

Maintaining a comprehensive picture can provide a better understanding of the spectrum of business integrity risks organizations face. It also ensures that business leaders are up to speed and that appropriate functions are properly resourced. GCs are often called on to assist with the preparation of risk matrices or dashboards which map and prioritize all relevant data.

In a large multinational business keeping track can be a very significant task which must be consistently maintained. As such, the proper functioning of risk identification and escalation systems is key. Data analytics offer new opportunities to GCs and compliance professionals to help them identify trends, predict upcoming risks and ensure early intervention to mitigate any impact on the business and stakeholders.

Practical tip: GCs recommend that the business regularly reviews the way it has handled business integrity issues to ensure they are being dealt with consistently and effectively across the organization.

Measuring performance
It is always challenging to assess how well corporate values are embedded within an organization as well as the effectiveness of any compliance programme seeking to support the incorporation of those values within the business's DNA. The mere fact that issues have not been reported does not mean they do not exist. A further complexity arises because a business is never static and so any assessment is merely a snapshot of a particular point in time.

However, there are tools and methods that can be deployed to gauge how well an organization is doing, as indicated in our practice tips.

Practical tip: Measuring business integrity in practice

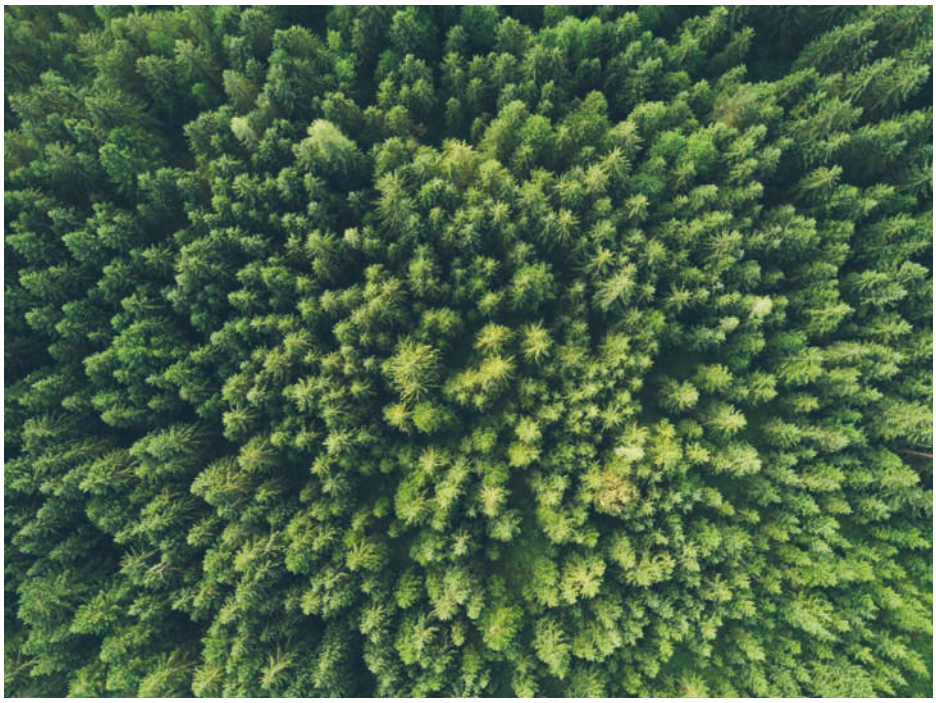
- Self-assessment exercises, internal surveys and information-gathering exercises are simple means of testing understanding of business integrity issues across the organization. GCs can provide valuable insights on how to gauge business understanding.
- These can be designed to cover a range of topics including basic knowledge of business integrity principles, budget and resourcing for compliance issues, uptake of training, spend on gifts and entertainment, testing corporate culture and awareness of grievance mechanisms and whistleblowing.
- If conducted across the business, scores can be used to draw comparisons across functions, business lines and regions. They can also be tracked over time to establish if performance is improving or worsening.
- Other organizations have turned to external advisers for help in conducting a business integrity review, in which a range of key individuals across the business are invited to be interviewed and discuss how effectively they perceive corporate values to be embedded.
- Some GCs have established an "ethics barometer" which aims to measure how open the company and its managers are to discussing potential problems. Employees are asked about the climate of trust and openness in their teams, their perception of how freely they can express views without fear of retaliation, and whether they see gaps between policies and practice.
- Other GCs have engaged with NGOs and other third-party stakeholders (including other companies active in the same sector) to gauge the outside perspective on their organizations.

KEY RESOURCES

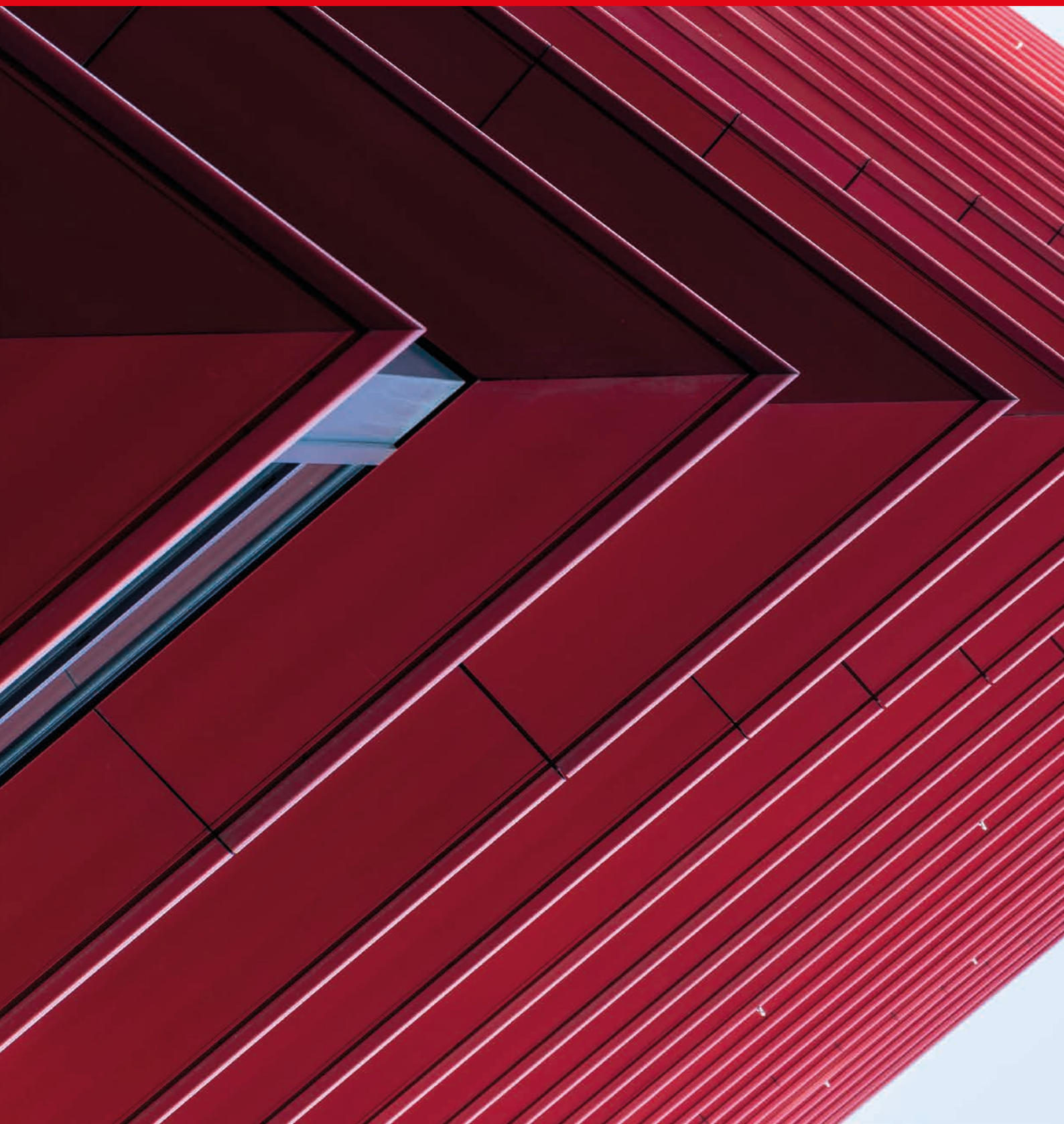
The Ten Principles of the **UN Global Compact** provide a practical framework through which businesses can set themselves up for success. www.unglobalcompact.org

The **UN Guiding Principles on Business and Human Rights** provide a useful framework which clarifies how businesses can ensure they respect human rights. www.ohchr.org

The **OECD** Guidelines for Multinational Enterprises provide standards for responsible business conduct, including on human rights, employment and industrial relations. www.oecd.org



02_CORPORATE SUSTAINABILITY AND FIDUCIARY DUTIES



Why are fiduciaries factoring ESG into their decisions?

Concepts of fiduciary duty, or investor duties, including loyalty, care and prudence exist in most jurisdictions. This includes the UK, US and within the EU. The application of these duties and the way they are enforced varies but typically they bind those who exercise discretionary power in the interests of another person in circumstances that give rise to a relationship of trust and confidence, such as in the case of directors and trustees.

Increasingly, investors, regulators, NGOs and other stakeholders are seeking the integration of ESG factors into investment decision-making processes. Based on the notion that sustainable decision-making and investing supports responsible business practices, some countries have introduced (or are considering) regulations and codes which will require this. These can underpin long-term business success contributing to increased value creation, investment performance and earnings.

GCs are well positioned to help fiduciaries (and others making business decisions) within their organizations to navigate this changing landscape.

"Investors are increasingly focused not just on the financial performance of the company, but on making sure that organizations perform in a sustainable way."

Shannon Thyme Klinger, *Group General Counsel at Novartis*

Practical tip: The UN-supported Principles for Responsible Investment (PRI) publishes a range of useful materials, including its report on *Fiduciary duty in the 21st century* which presents a modern interpretation of investor duties, under which decision-makers need to take account of all financially material factors, including material ESG factors, to better manage risk and generate sustainable returns.

A shifting regulatory landscape

New regulations are driving change in this area. In the UK, directors must have regard to the impact of the company's operations on the community and the environment as part of their duty to act in a way that they consider in good faith would be most likely to promote the success of the company. Some companies must now also explain publicly how they have done this. Since October 2019, when making investment decisions, the financially material considerations that trustees must consider include ESG factors (which cover climate change). A new EU Regulation on investor disclosures will require ESG integration by EU financial market participants, including private and occupational pension funds, insurance funds, portfolio management and investment advisers.

In the US, 39 states have enacted laws expressly permitting directors to take non-shareholder constituencies (such as employees, local communities, etc.) into account when making decisions. Although in most states companies are not prohibited from taking ESG factors into account, more traditional approaches to corporate decision-making (which focus on maximization of value in purely financial terms) remain the norm, including in Delaware where the majority of US companies are incorporated.

The case for a greater role for ESG factors in fulfilling fiduciary duties is growing. This effort is reflected in the development of new voluntary standards and increasing business convergence around them, as evidenced by the new Statement on the Purpose of a Corporate announced by the Business Roundtable 2019 in August 2019 and by the UNIP-FI principles for responsible banking launched in September 2019.

Practical tip: The Financial Stability Board is an international body that monitors and makes recommendations about the global financial system. Its Task Force on Climate-related Financial Disclosures ("TCFD") has developed a voluntary climate-related financial risk disclosure standard for use by companies in providing information to investors, lenders, insurers and other stakeholders. The standard addresses the physical, liability and transition risks associated with climate change and what constitutes effective financial disclosures across industries. The work and recommendations of the Task Force will help companies understand what financial markets want from disclosure in order to measure and respond to climate change risks and encourage firms to align their disclosures with investors' needs.

Given the developments described above, GCs will increasingly be called upon to reconcile and integrate a wider array of issues into the thinking and evidence that underpins business decision-making processes.

Section 1: Asset owners and asset managers

Against this backdrop, asset owners and asset managers who invest on behalf of others are increasingly focused on ESG factors. They seek investment prospects that can demonstrate that they manage ESG risks responsibly and reviewing their approach to the identification and management of ESG risks and opportunities.

The GC's advisory role

GCs can offer important support to their organizations by seeking to ensure the business operates in a way that satisfies legal requirements in this area and is ready to adapt to any incoming regulatory changes.

They can provide valuable advice on the documentation of ESG-related decisions and on ensuring that ESG-related public statements are aligned with legal requirements, policy commitments and the organization's approach in practice.

GCs are well placed to assist with the development and implementation of systems and controls designed to ensure that ESG risks and benefits are properly considered when investment decisions are made e.g., the formulation of an ESG policy on asset allocation and stewardship (see below). GCs can also advise (alongside others within the business) on when external specialist legal or other advice (e.g., from human rights specialists or environmental consultants) may be needed to support these efforts.

GCs may also consider joining and/or actively participating in industry-led initiatives which aim to clarify and enhance the role of ESG factors in asset owner and asset manager decision-making. See "Key Resources" on page 24 for details about a number of leading initiatives in this area.

Practical tip: A range of formal and informal initiatives and fora are available which seek to raise awareness of the role of ESG factors in decision-making and to support asset owners and asset managers in putting this into practice. These can be valuable sources of information and guidance for GCs e.g., the UN-supported PRI (which have been adopted by organizations with over US$80 trillion in assets). The Principles help to understand the investment implications of ESG factors and to support the UN's international network of investor signatories in incorporating these factors into their investment and ownership decisions, including the use of practical tools.

"BlackRock's clients are increasingly familiar with ESG and its potential impact on long-term value, and they are more interested than ever in factoring ESG considerations into their investment mandates. In our experience, well managed companies deal effectively with material ESG factors relevant to their business. ESG considerations are integral to our Investment Stewardship team's efforts to protect and enhance the long-term value of our clients' assets. In our engagements with the companies we invest in on behalf of clients we focus on how management and the board identify, assess, and manage those material ESG factors, and how that is reflected in long-term strategic planning."

Michelle Edkins, *Global Head of Investment Stewardship at BlackRock*

ESG policies on asset allocation and stewardship

An ESG policy can help ensure that asset owners and asset managers factor ESG considerations into investment decisions consistently and in a clearly defined way which can be tracked, measured and evidenced. GCs have a key role to play in ensuring that policies and practices keep pace with legal changes in this area. Such a policy might cover:

- the approach to selection and retention of investments
- the selection and retention of investment managers
- how investment managers should engage with portfolio companies on ESG issues
- what notifications and reporting are expected in relation to portfolio company ESG issues
- how ESG performance of the portfolio should be measured
- the approach to auditing of investment managers
- good practice uses of available ESG data
- triggers for potential divestment
- how beneficiaries' views will be taken into account
- reporting to beneficiaries

Practical tip: ESG policies will need to be reviewed and refreshed on a regular basis to ensure they remain up to date and practical.

Practical tip: The UK-based Pensions and Lifetime Savings Association provides guidance on how ESG considerations can be taken into account in investment manager selection in its *Environmental, Social and Corporate Governance (ESG) Made Simple* guide.

Screening for and managing ESG risks

Asset owners and asset managers may establish a risk management framework which aims to identify, escalate and assess ESG risks which arise at portfolio company level. Such a system can provide valuable information on the risk profile of a particular investment and on the portfolio as a whole. Existing risk management systems and processes may be capable of expansion to accommodate ESG considerations, ensuring efficiencies where possible. GCs will often be well positioned to provide input into the design of such a system, based on their experience of dealing with the management of risk in other areas, or of dealing with issues when risk management systems have failed — both of which can provide valuable sources of transferable learnings.

Practical tip: The UN Guiding Principles on Business and Human Rights provide a useful framework designed to underpin the requirement that businesses respect human rights. Businesses are expected to make human rights policy commitments, identify actual and potential human rights impacts through due diligence, act upon their findings, track the effectiveness of their efforts and communicate openly about them. This framework could provide a useful starting point for those considering the management of broader ESG risks.

Any system should incorporate processes designed to identify portfolio companies involved in material or recurring environmental issues, labour issues, conflict with local communities, adverse human rights impacts and unethical behaviour or otherwise irresponsible business conduct, amongst other things. It should also horizon-scan to ensure awareness of trends and developments (including incoming regulation) which could affect all or part of the portfolio.

Practical tip: A number of asset owners and asset managers are using the Ten Principles of the UN Global Compact as a reference point when screening potential investments for ESG risks and benefits or assessing the performance of existing investments.

Identifying ESG risks and issues can be challenging, so to be effective any system would need to draw on a range of data points, including direct engagement with portfolio companies themselves where appropriate.

Practical tip: The UN Sustainable Stock Exchanges initiative aims to build the capacity of stock exchanges and securities market regulators to promote responsible investment in sustainable development and advance corporate performance on ESG issues through research, consensus building and technical assistance. Amongst other things, it maintains a database to inform investors on the work certain exchanges are undertaking to advance sustainability.

If an issue is identified, its actual and potential financial and other impacts on the portfolio company, the wider portfolio and the asset owner will need to be assessed. It will also be necessary to evaluate the degree of leverage the asset owner and asset manager have to influence behaviour and remedial action within the affected portfolio company. In some situations, divestment may be considered. ESG policies should help asset owners and asset managers navigate difficult decisions in this area and the support of the GC will be essential.

Practical tip: Climate stress testing is in its early stages of development. However, the *TCFD June 2017 Technical Supplement* provides a useful starting point.

ESG-related systems and processes can also be put in place to identify positive contributions by portfolio companies to ESG matters. As well as being a useful indicator of performance, these can provide valuable insights into good practice in this area.

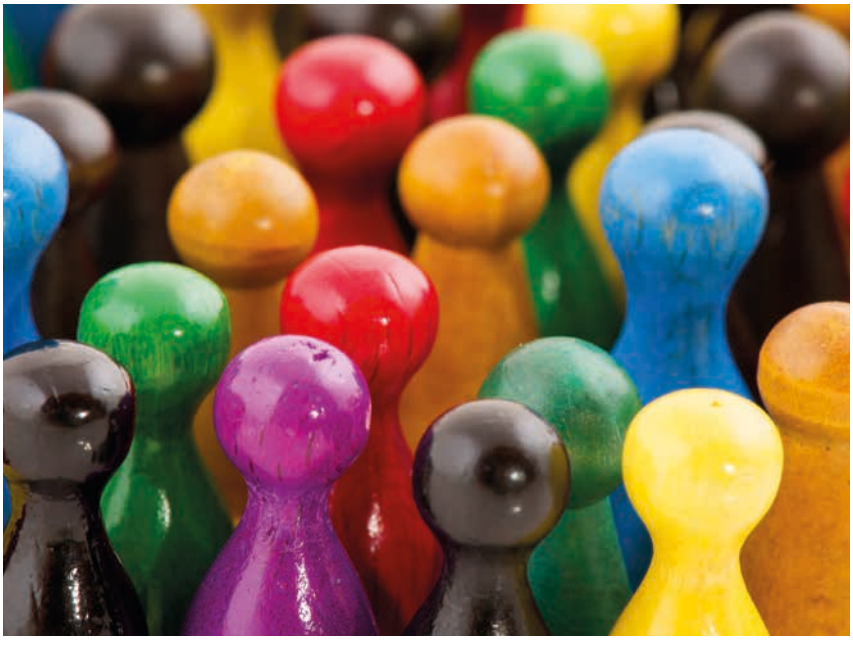
There is a role for GCs supporting their organization's efforts to ensure that elements of any ESG policy and risk management framework are embedded within the organization. For example, the ESG policy must have been effectively communicated to investment managers in a way that secures their buy-in and ensures that they understand the potential consequences if it is not applied. They will need to be properly incentivized to attach appropriate importance to ESG factors and appreciate the potential need for longer time horizons for risk analysis, returns and sustained engagement in connection with certain ESG investments. Investment managers will also need to be kept informed of the changing legal landscape in this area and its relevance to their role.

Section 2: Companies

Company boards are turning their attention to ESG issues when making business decisions to ensure they fulfil their duties and are well informed as to the ESG-related risks and opportunities associated with their organization's activities. They will be ready to engage with actual or potential investors on what they are doing in this area, given the increased focus of their stakeholders (including asset owners and asset managers) on ESG issues.

The GC's advisory role

GCs within portfolio companies can play a key role in keeping the board updated on ESG-related legal and policy developments, and the evolving expectations of investors. As strategic advisers to the board, they may be called on to highlight trends in investor ESG concerns, activist campaigns and the approach of their peers in this area. They are also well placed to advise on when it is appropriate to seek advice from external advisors with particular expertise (e.g., a human rights or environmental specialist).



GCs may also consider joining and/or actively participating in industry-led initiatives which aim to clarify and enhance the role of ESG factors in asset owner and asset manager decision-making. See "Key Resources" on page 24 for details of a number of leading initiatives in this area.

Board ESG policy

Board-level ESG policies can help ensure that ESG features prominently on the corporate agenda and proper consideration is given to ESG factors in corporate decision-making processes. Formulating a policy can be a useful first step towards focusing the board's attention on the evolving expectations of investors and other stakeholders and preparing the company for future engagement on ESG matters. GCs will need to ensure that any regulatory provisions governing — and/or guidance available on — how ESG factors should be integrated into board decision making processes are appropriately reflected in the policy. The policy should be clear and sufficiently flexible and should be regularly revised to reflect developments and trends.

A board ESG policy might cover:

- how the organization defines ESG
- who is responsible for overseeing the management of ESG risks and opportunities
- when and how ESG factors should be considered in the context of the organization's operations, having regard to a range of time horizons
- what "materiality" and "saliency" mean in the context of ESG and how different perspectives should be sought and taken into account (e.g., perspectives of/impacts on rights holders)
- how ESG risks (including supply chain) will be assessed and addressed
- what key performance indicators will be used to assess ESG performance
- when external ESG expertise may be needed and how it can be provided
- how ESG factors taken into account in decision-making should be documented

Practical tip: GCs recommend establishing a cross-functional working group tasked with developing an ESG policy to ensure that perspectives from across the organization are reflected in it.

ESG governance

GCs can play a key role in ensuring that ESG governance within their organization is robust. This can include advising the board on whether decision-making processes at all levels of the organization are taking account of ESG factors, and that the implications of these are well understood.

Equally, there is a role for GCs (in conjunction with other functions within the business) in making sure that ESG policy commitments are cascaded throughout the organization and reflected in relevant systems and procedures. This is important so that business is conducted in a way that is consistent with ESG commitments and expectations and that information being escalated to the board provides a complete and accurate picture of performance, risks and opportunities.

"Companies need to be catalysts for culture change. If I had one piece of advice for General Counsel, it would be that we must continue to be proactive about risk management, while at the same time challenging ourselves and our teams to be business leaders with law degrees who understand the importance of smart risk taking."

Shannon Thyme Klinger, *Group General Counsel at Novartis*

GCs will need to work closely with the board to ensure that it documents appropriately how ESG factors have been considered, being mindful of the scope of factors that are permitted (or required) to be taken into account in the relevant jurisdiction. GCs should also work with the board to approve any relevant public reports, including any ESG sections in annual or sustainability reports.

Practical tip: Public reports should always be reviewed by the legal team to ensure consistency with other public statements, policy commitments and the approach of the business in practice. It is important that reports are factually accurate and do not over or understate the organization's position in relation to ESG policies and practices.

GCs can provide valuable input into periodic reviews of ESG governance processes, given that they are likely to be aware of key risks and issues that have arisen and been escalated to the legal team and will have experience of board level decision-making processes. They can also support the business and help close gaps by providing training on ESG-related legal and policy developments (or by working with external service providers who can do so).

KEY RESOURCES

The **International Corporate Governance Network** has published a range of practical materials including on its *Guidance on Investor Fiduciary Duties*. www.icgn.org

The **Institutional Investors Group on Climate Change** makes available a range of climate change-related reports, briefing papers and practical guides for institutional investors. www.iigcc.org

The US-based **Investor Stewardship Group** has developed a stewardship framework for institutional investors. www.isgframework.org

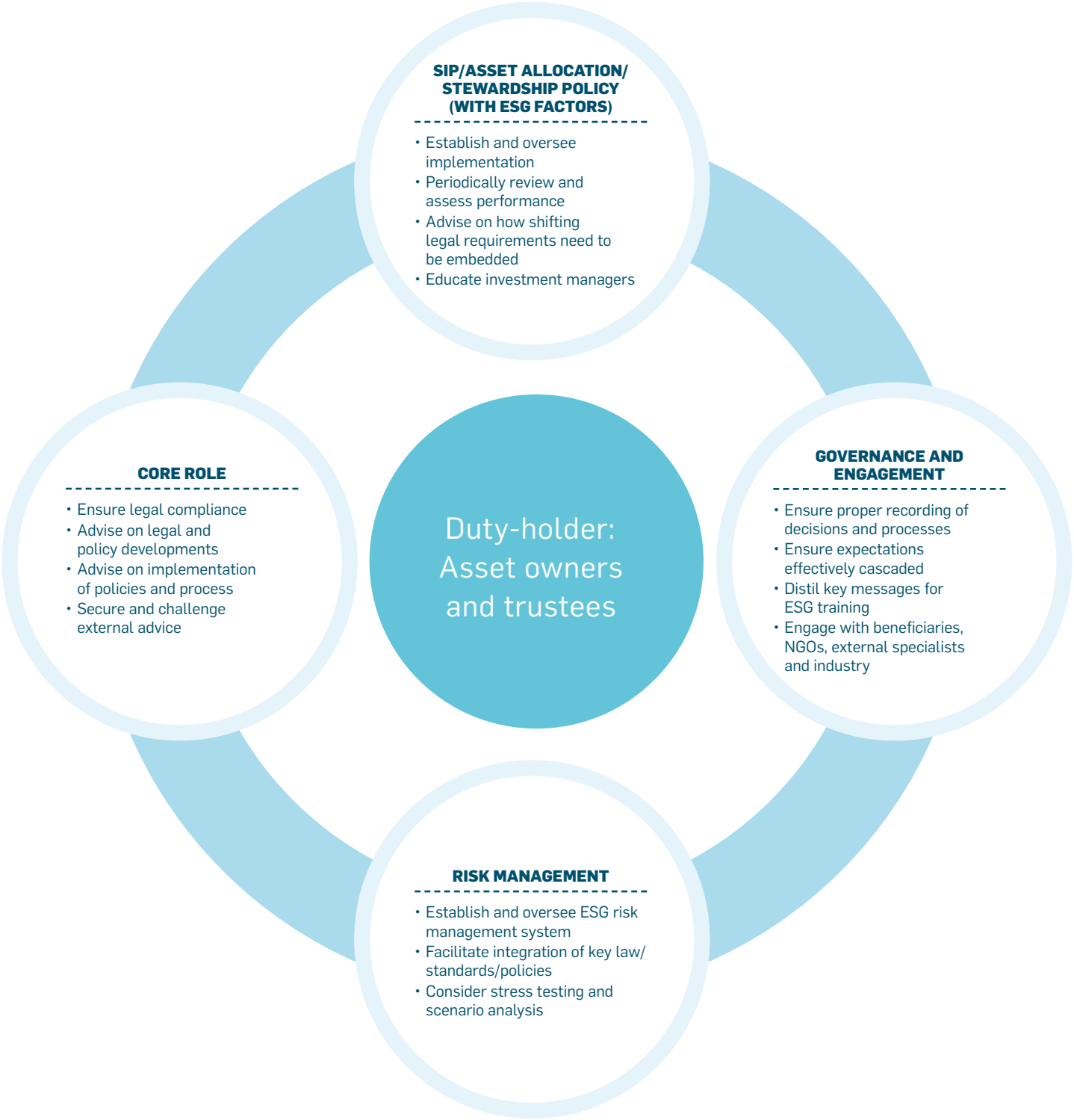
The **Pensions and Lifetime Savings Association** has published a useful guide on *Environmental, Social and Corporate Governance (ESG) Made Simple*. www.plsa.co.uk

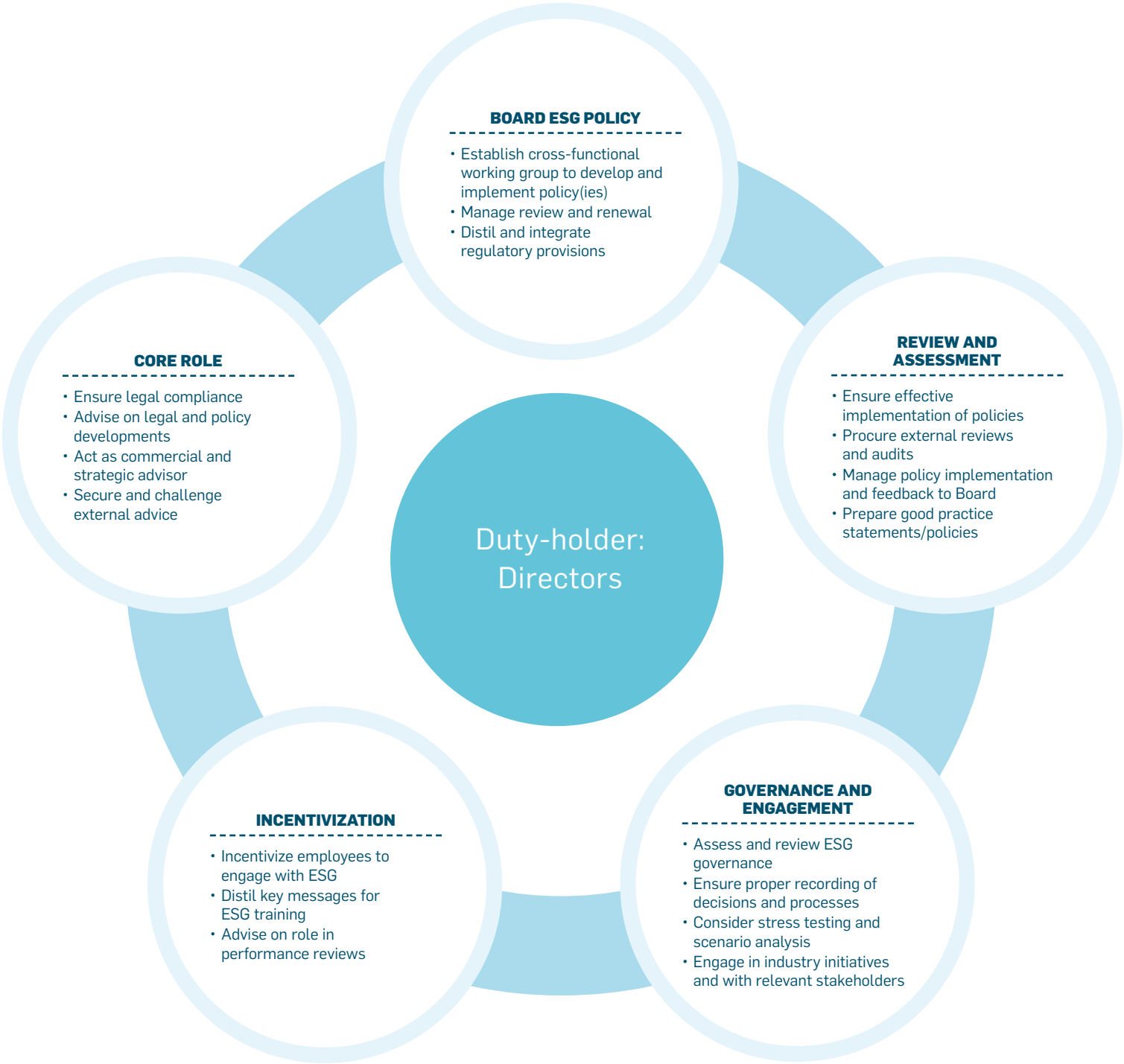
The **Task Force on Climate-related Financial Disclosures** launched its TCFD Knowledge Hub designed to help organizations implement the TCFD recommendations by providing a large number of relevant insights, tools and resources. www.fsb-tcfd.org

The **UN Global Compact** has published a series of country memos on *Sustainability and the Fiduciary Duties of Board of Directors*. www.unglobalcompact.org

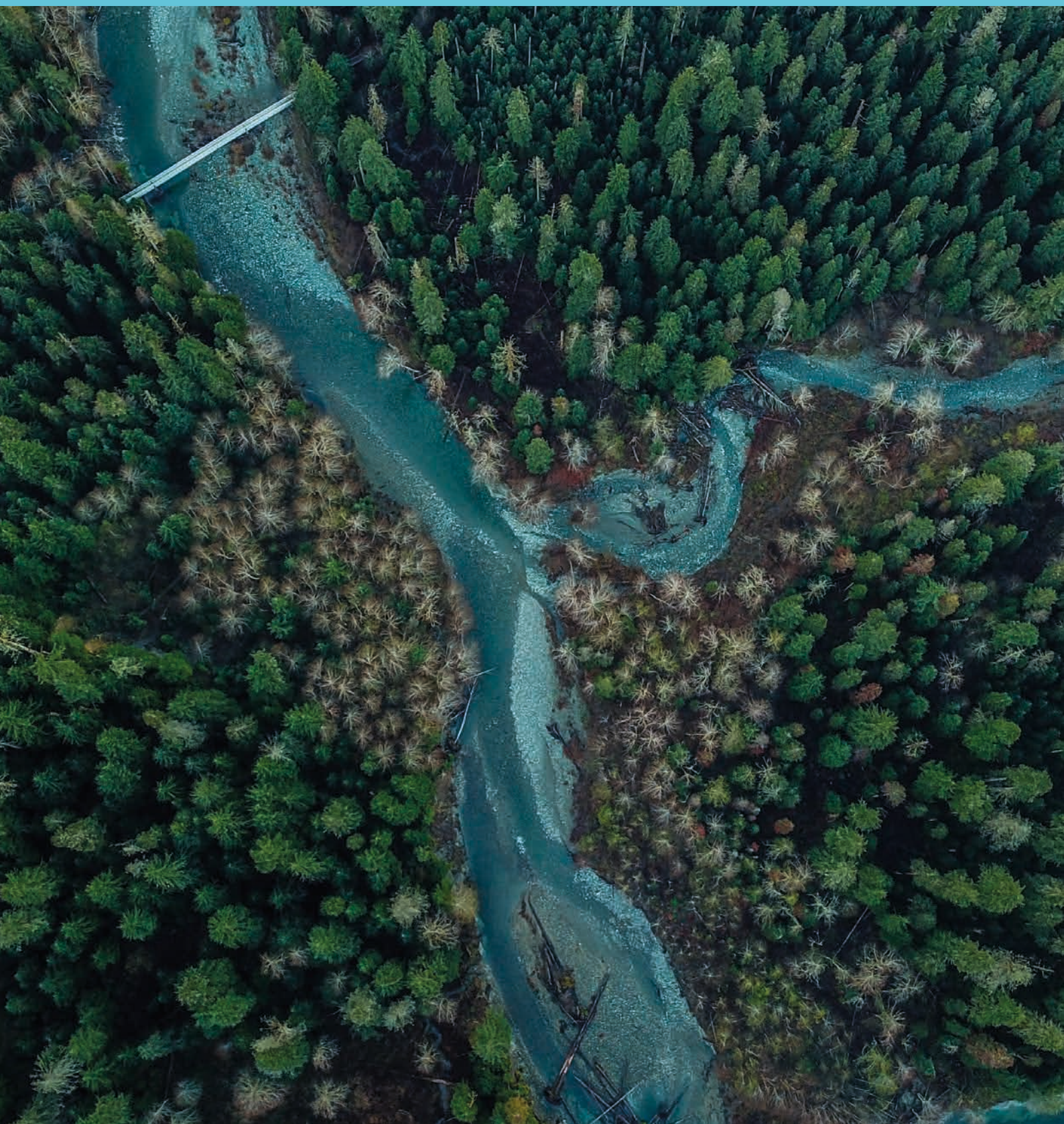
The **UN-supported Principles for Responsible Investment** publishes a wide range of useful materials, including its report on *Fiduciary duty in the 21st century*. www.unpri.org

Model for the GC's role in guiding duty-holders to effectively integrate ESG factors into decision-making




BOARD ESG POLICY
• Establish cross-functional working group to develop and implement policy(ies)
• Manage review and renewal
• Distil and integrate regulatory provisions
REVIEW AND ASSESSMENT
• Ensure effective implementation of policies
• Procure external reviews and audits
• Manage policy implementation and feedback to Board
• Prepare good practice statements/policies
GOVERNANCE AND ENGAGEMENT
• Assess and review ESG governance
• Ensure proper recording of decisions and processes
• Consider stress testing and scenario analysis
• Engage in industry initiatives and with relevant stakeholders
INCENTIVIZATION
• Incentivize employees to engage with ESG
• Distil key messages for ESG training
• Advise on role in performance reviews
CORE ROLE
• Ensure legal compliance
• Advise on legal and policy developments
• Act as commercial and strategic advisor
• Secure and challenge external advice
Duty-holder: Directors

03_HUMAN RIGHTS AND SUPPLY CHAIN DUE DILIGENCE



Why are businesses focusing on human rights in their supply chains?

Traditional methods of supply chain risk management have focused on commercial aspects of procurement and on contingency planning. They have been designed to ensure favourable supply terms and business continuity. However, against a backdrop of increasingly globalized and complex supply arrangements, stakeholder expectations have evolved. GCs have noted ever greater calls for businesses to consider and address the sustainability of their supply chains, with a particular focus on human rights. Initiatives such as the Ten Principles of the UN Global Compact and the UN Guiding Principles on Business and Human Rights ("Guiding Principles") require businesses not only to look within their own business but also to consider behaviours reflected within their supply chains. Moreover, the regulatory landscape in this area is rapidly catching up reflecting the shift from "soft" laws and voluntary frameworks to hard laws.

Expectations are changing

Consumers, NGOs, regulators, industry groups and other stakeholders are engaging in increasingly intensive scrutiny of corporate supply chains. These stakeholders expect businesses to be much more transparent about what they are doing to ensure they are using their bargaining powers responsibly and in a way that secures sustainability throughout the value chain. Human rights are often an area of key concern, given the potential for unfair labour practices, unsafe working conditions, modern slavery and trafficking within supply chains.

In this digital age news travels fast. So when incidents occur, they are rapidly linked to big brands. There is increasing pressure not just to say, but also to demonstrate, that the business is "doing the right thing" in these situations. Reputational risk and brand damage are very real possibilities.

The regulatory landscape is shifting

GCs are increasingly being called upon to advise on legal and litigation risks and on "hard" and "soft" laws in this area, and input into systems and processes designed to manage supply chain-related risks.

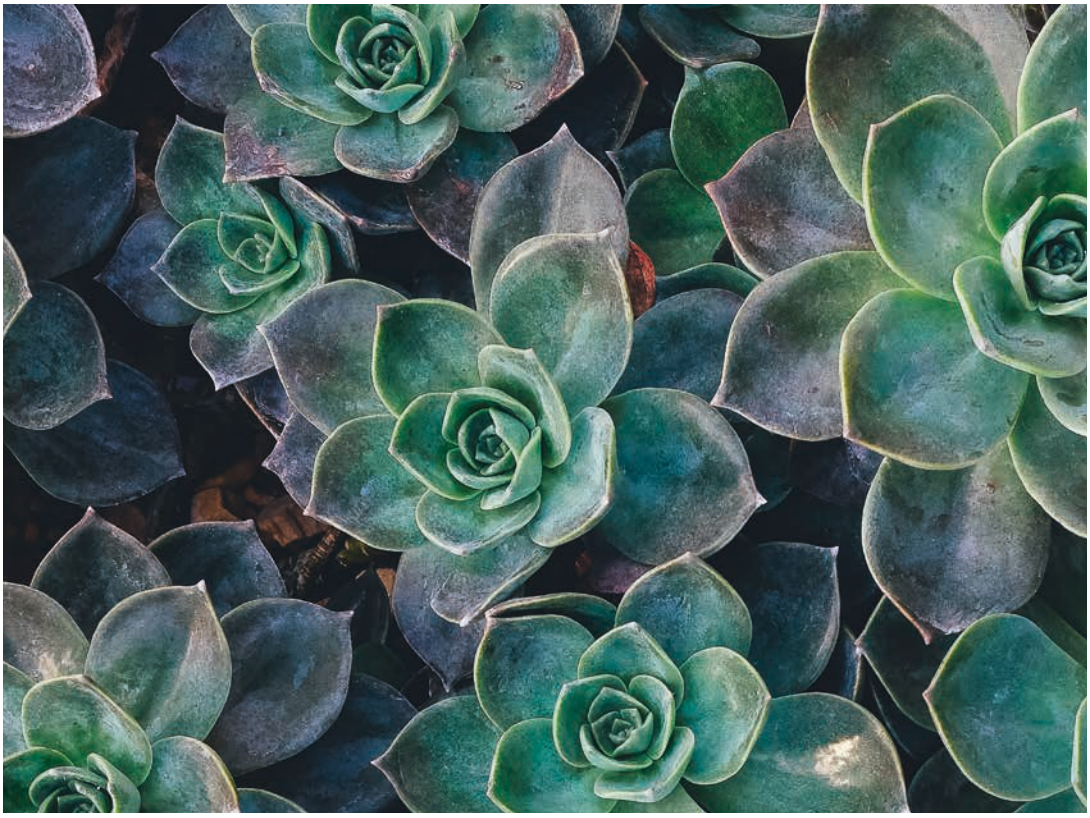
GCs will have noted the introduction of reporting requirements seeking to encourage businesses to know their supply chains, conduct due diligence and report on steps they have taken. For example, the UK Modern Slavery Act requires certain businesses to report on what they have done to ensure there is no modern slavery in their supply chain. Similar requirements exist in California and Australia and are proposed in Canada and Hong Kong. Large French companies must prepare and report on a "vigilance plan" through which they identify and manage human rights risks (amongst other things), including in relation to suppliers. Human rights-related supply chain due diligence requirements are proposed in Switzerland and in The Netherlands (in relation to child labour). EU requirements for non-financial reporting demand that certain large organizations report on human rights matters and their approach to supply chains (amongst other things).

Some of these developments have been shaped by "soft" laws, such as the Guiding Principles. Although not legally binding, they were unanimously adopted by the UN Human Rights Council and there has been widespread business convergence around them as an international and normative standard on business respect for human rights. They require businesses (regardless of industry, location or size) to assess through human rights due diligence actual and potential human rights impacts arising from their own activities, or those to which they contribute or are directly linked through their business relationships (including suppliers). Businesses are expected to act upon their findings, track the effectiveness of their efforts and communicate openly about them. The OECD Guidelines for Multinational Enterprises echo many of the requirements of the Guiding Principles. They are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide standards for responsible business conduct including on human rights, employment and industrial relations, the environment and anti-bribery, amongst other things. National Contact Points (NCPs) for Responsible Business Conduct promote the OECD Guidelines, respond to enquiries and provide a mediation and conciliation platform to help resolve cases of alleged breach. NCP complaints can attract significant media attention and companies involved can suffer reputational damage.

These initiatives set the standard for international corporate best practice, with courts and regulators increasingly using them as a reference point. Businesses are now under pressure to integrate the Guiding Principles requirements into their risk management systems to keep pace with their peers and ensure they can present a credible narrative to support their compliance with relevant "hard" laws. This requires a cross-functional effort, drawing on the skills of GCs, compliance professionals and those with subject matter expertise.

Knowing the supply chain

To be able to develop a clear picture of the actual and potential human rights risks in any supply chain, a business must first establish who its suppliers are, what products and services they supply and where they operate. For most businesses, this represents a significant challenge. Gaining a meaningful understanding of the complex web of suppliers supporting them can be a seemingly impossible task.



Practical tip: GCs recommend establishing a cross-functional steering committee or working group on human rights, which can provide a useful internal forum for developing know-how, sharing learnings, receiving escalated issues and making recommendations.

Some organizations have engaged in "supplier mapping" processes through which they catalogue all of their "tier 1" suppliers (i.e., those with whom they have a direct contractual relationship), seek further information from some of those suppliers on their own supply chain (i.e., "tier 2" and "tier 3" suppliers) and then prioritize further work based on perceived levels of human rights risk. For example, a business may focus on the supply chain for a particular product because it is manufactured in jurisdictions considered to be high risk from a human rights perspective (based, for example, on reported incidents, a lack of regulation and enforcement of safe working practices, weak labour rights and poor access to remedies).

Practical tip: Because every business is different, an individual approach to mapping suppliers should be taken which works for the relevant organization. It is important to be able to clearly articulate this, even if it involves prioritization or several stages, so stakeholders understand that a process is in place and is being followed.

A detailed knowledge of the supply chain does not mean that the risk of problems arising is eliminated. But for GCs, a key part of managing human rights risks is to ensure the business has a sufficiently well-developed picture of its supplier landscape to be able to understand which parts it should subject to further scrutiny and so that appropriate risk management systems and processes can be applied where they are needed most. This should facilitate the flow of information, so the business can react quickly if an issue does arise in order to establish the facts, work with the supplier to remedy the problem and communicate its approach to stakeholders.

Conducting due diligence through a human rights lens

In this context, human rights due diligence involves an assessment of actual and potential human rights impacts within the supply chain. This is an assessment through the lens of salient risks to rights holders, not simply a review of whether a particular human rights issue may be a material risk to the business. The two may align, but this will not always be the case.

The Guiding Principles acknowledge that human rights due diligence can be included within broader enterprise risk-management systems. However, sometimes enhanced human rights due diligence in the form of a tailored human rights impact assessment may be appropriate. The scope of any such assessments can vary, but they are often deployed when a business considers a particular supplier, supply chain, product or business line to be high risk from a human rights perspective and wants to gain a deeper understanding of the specific adverse impacts which are occurring or which may arise.

Human rights impact assessment steps

Practical tip: Some businesses have undertaken reviews of their existing systems and processes to see where human rights considerations can be integrated. For example, some have expanded the list of checks undertaken and questions asked during supplier on-boarding processes and supplier audits.

Due diligence processes can vary in their scope and depth. Typically, they will include some desktop research involving a review of publicly-available resources relating to a supplier or the environment in which it operates, with any documentation provided by the supplier itself (such as responses to questionnaires). But, in high risk scenarios, due diligence can also extend to site visits, scrutiny of systems and processes (such as health and safety training records, complaints logs and incident reports) and third-party audits undertaken by experts.

Practical tip: GCs recommend casting the net widely when looking for evidence of actual or potential human rights impacts e.g., working hours records, incident logs, complaints logs and grievance mechanisms, training records and details of how employees transit to and from work can all reveal adverse human rights impacts.

Stakeholder engagement is also a vital part of the due diligence process.

Practical tip: GCs have reported that informal chats held with local workers, members of the local community, NGOs and industry association leaders have been a valuable source of information.

Addressing actual or potential adverse human rights impacts

The Guiding Principles require that, where a business identifies that it has caused or contributed to adverse human rights impacts, it should provide for, or co-operate in, remediation through legitimate processes. Remedy can take a number of different forms, so as to be appropriate to the harm caused or contributed to. Some organizations have put in place compensation schemes for affected persons, while in other cases an apology or implementation of a particular practical measure for the benefit of a community or other affected group may be more appropriate.

Practical tip: Blockchain, or "distributed ledger" technology, has the potential to change how members of a supply chain communicate and so could be a means to achieve both greater transparency and integrity of data. Pilots are underway to understand how this can be used to identify supply chain problems more quickly and accurately.

If the business is involved solely because the impact is directly linked to its operations, products or services by a business relationship (such as a relationship through the supply chain) there is an expectation that it will use its leverage to address the impact. GCs are well placed to assist with any analysis of what leverage the organization has in relation to its suppliers. Leverage is of course likely to be greatest in respect of tier 1 suppliers with whom a direct contractual relationship exists. Commercial leverage may also exist (particularly in competitive markets) as well as collaborative leverage gained through industry associations and initiatives.

Practical tip: Many GCs are reviewing the standard contractual protections their organization seeks to include in every supplier agreement, expanding these to cover human rights-related provisions with a view to creating leverage for the future.

"Partnership is the most effective way to achieve sustainability and adopt an operative model to address deficiencies. This is also mirrored by Sustainable Development Goal 17. We are working towards developing such a collaborative multi-stakeholder initiative and on identifying — for instance — a suitable platform for a natural rubber sustainable supply chain."

Filippo Bettini, *Chief Sustainability and Risk Governance Officer at Pirelli and C.*

Even where limited leverage exists, a range of tools may still be available including offering training, capacity building and support, enhanced monitoring and reporting, potential legal action or termination of the relationship (though, this must be balanced against the risk that the organization will be perceived to be walking away from a problem rather than seeking to engage with it).

Practical tip: GCs are deploying a range of tools to help their organizations manage risk in this area, including:

- publishing supplier codes of conduct and requiring suppliers to ensure that their own suppliers adhere to them
- adding human rights-related "red flags" into supplier selection processes, which can be done as part of basic third-party due diligence, to ensure those with known problems or operating in challenging environments can be easily identified
- increasing leverage in supplier relationships by including contractual protections and seeking transparency in the form of audit, access and reporting obligations
- seeking to build capacity with suppliers identified as high risk and working on corrective action plans with those identified as non-compliant
- preparing an action plan for continuous improvement

It is important that any supply chain due diligence process is meaningful, reflects the organization's corporate values and is properly embedded in business practices. See Chapter 1 for more information on the importance of corporate values and how to successfully embed business integrity within an organization.

KEY RESOURCES

"Decent Work in Global Supply Chains: A Baseline Report" includes good practice examples from companies participating in the **UN Global Compact** Action Platform on Decent Work in Global Supply Chains, and *"Human Rights: The Foundation of Sustainable Business"* provides good practice examples illustrating different parts of the UNGPs. www.unglobalcompact.org

In 2018 the **UN Working Group on Business and Human Rights** presented a report to the UN General Assembly on human rights due diligence in practice with a companion note on emerging tools, resources. www.ohchr.org

Know the Chain is a resource for companies and investors to understand and address forced labour risks within their global supply chains. www.knowthechain.org

The Modern Slavery Map makes available a large number of resources and includes details of multi-stakeholder initiatives for businesses, many of which are supply chain focused. www.modernslavery.map.org

Shift has published a useful guide on *Respecting Human Rights Through Global Supply Chains* and a publication tackling the question *"What Do Human Rights Have to Do with Mergers and Acquisitions?"*. www.shiftproject.org

UN Global Compact publication *Business: It's Time to Act* offers a quick overview of the steps businesses can take to help eliminate modern slavery, while highlighting key resources, initiatives and engagement opportunities to support business action. www.unglobalcompact.org

04_CORPORATE SUSTAINABILITY AND GRIEVANCE MECHANISMS

What are grievance mechanisms and why should businesses support them?

A grievance mechanism is a non-judicial process established or supported by a company through which complaints or concerns about business integrity, compliance, human rights and other issues can be raised. Grievance mechanisms can take many forms, adopt a broad scope or focus on a specific issue and can serve a range of purposes.

For example, they can act as an early warning system, providing potentially critical information for broader business integrity due diligence processes, enabling the organization to take prompt action and contain problems before they escalate. As noted in Chapter 1 of this Guide, it is important that information received through a grievance mechanism is triaged by a cross-functional team to ensure issues are properly characterized and acted upon.

Grievance mechanisms can also be used to provide remedies where a company has caused or contributed to an adverse impact on a person or group of people. They can be particularly effective where those affected have no realistic state-based or judicial route through which they can seek redress. This is more commonly the case in jurisdictions which lack strong public institutions, have a weak rule of law, where judicial processes are very slow or severely under-resourced, or where corruption is prevalent and undermines access to, and the administration of, justice. The remedy provided will depend on the circumstances and might include an apology, changes in policies/processes, undertaking initiatives to support a particular group and/or financial compensation.

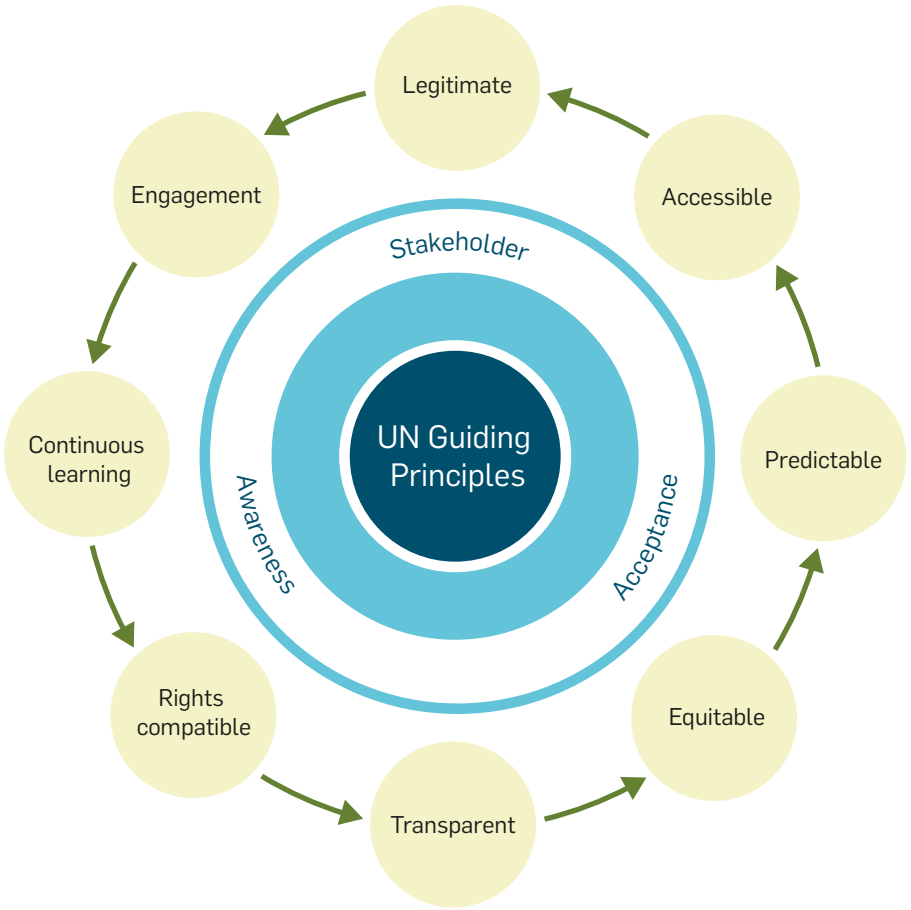
> "Our experience at Nestlé shows that grievance mechanisms are not only effective tools for promoting compliance, but also for supporting sustainability and social responsibility commitments. In addition to specific mechanisms available to its employees, Nestlé has a 'tell us' mechanism for use by third parties (such as suppliers) and the general public. Messages received are screened by a cross-functional team which includes representatives from Legal, Compliance, Audit and Public Affairs. This helps ensure that we correctly identify topics, including both those that may have legal or compliance implications, and those relevant to our 'Creating Shared Value' agenda."
>
> **Ricardo Cortes-Monroy, *Former Chief Legal Officer and Group General Counsel at Nestlé***

The UN Guiding Principles on Business and Human Rights ("Guiding Principles") (described in Chapter 3 of this Guide) set an expectation that businesses should establish or participate in grievance mechanisms for individuals and communities whose human rights have been adversely impacted. This is supported by the OECD Guidelines for Multinational Enterprises (described in Chapter 3 of this Guide). The Guiding Principles explain that grievance mechanisms should complement judicial mechanisms and facilitate the remedy of adverse human rights impacts. But they are clear that grievance mechanisms should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms. The Guiding Principles set certain criteria to ensure the effectiveness of grievance mechanisms, which are outlined in more detail on page 38 of this guide.

Grievance mechanisms form part of responsible business processes. Providing a transparent and easily accessible means whereby affected persons can be heard and/or access remedy can reduce the risk of social volatility, litigation, or damage to reputation. They can also support an organization's social licence to operate and help create a stable, secure and sustainable environment in which to do business.

Where to start when developing a grievance mechanism

The Guiding Principles establish effectiveness criteria for all non-judicial grievance mechanisms designed to address adverse human rights impacts. To ensure their effectiveness, the Guiding Principles explain that grievance mechanisms should be legitimate, accessible (including by taking into account local language requirements and literacy considerations), predictable, equitable, transparent, rights-compatible and a source of continuous learning. They should also be based on engagement and dialogue with the stakeholders for whose benefit the mechanism is being set up.



Practical tip: The establishment of a cross-functional committee to assist with the design and implementation process for a grievance mechanism can help ensure valuable inputs are heard.

These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. The Guiding Principles point out that poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance among affected stakeholders by heightening their sense of disempowerment and disrespect by the process.

Practical tip: Stakeholder engagement which involves a truly representative group of participants is fundamental to the effectiveness of any grievance mechanism. It can help build trust and ensure that the mechanism is fit for purpose. Designing an appropriately scoped, targeted, clear and accessible engagement process may be challenging but can pay dividends in the long run.

For example, the Compliance Advisor Ombudsman (CAO) (the independent accountability mechanism for the World Bank Group's International Finance Corporation and Multilateral Investment Guarantee Agency) advises those considering implementing a grievance mechanism to follow a staged process. This includes identifying and engaging key actors in the company and community to ensure that different perspectives have been considered in the design process, that the key decision-makers are committed to the process and that they will respond to complaints quickly. The CAO also suggests assessing the type and scope of grievances that are likely to arise and any existing local methods, procedures or capacity to handle them. Finally, the purpose and goals of the grievance mechanism should be determined.

How can GCs support their organizations when designing and implementing grievance mechanisms?

Through their understanding of judicial processes and sound grasp of how business risks can quickly escalate into legal risks, GCs are well placed to assist in any discussion around whether to establish a grievance mechanism, and what form it should take. They can also provide useful input on the availability of state-based or judicial remedy processes in a particular jurisdiction, and their relative strengths, which can inform a decision on whether to proceed with a company-led grievance mechanism.

GCs and their teams should be closely involved in the review and assessment of any complaints received through a grievance mechanism to ensure that issues potentially giving rise to legal or enforcement action are properly characterized.

They can also play a pivotal role in implementing grievance mechanisms designed to provide a remedy, particularly where this involves the settlement of existing legal claims.

KEY RESOURCES

The **World Bank Group's Compliance Advisor Ombudsman** has developed a detailed toolkit to help organizations establish project-level grievance mechanisms. The toolkit offers practical guides and troubleshooting tips, supported by illustrative case studies. www.cao-grm.org

CERES has published a detailed *"Investor Primer on Grievance Mechanisms".* www.engagethechain.org

Reports and Guidance on the first two project pillars (judicial mechanisms and state based non-judicial mechanisms) of a project by the office of the **United Nations High Commissioner for Human Rights** on Accountability and Remedy are available with materials relating to the third (non-state based grievance mechanisms) due to be available soon. www.ohchr.org

Shift has published *"Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights"* which reviews what companies are expected to do to provide remedy when human rights impacts have already occurred, whether in their own operations or in their value chains, in line with the UNGPs. www.shiftproject.org

The **UN Global Compact's** Business for the Rule of Law Framework outlines ways in which businesses can and have taken action to support the rule of law around the world. www.unglobalcompact.org

The **UN Global Compact's** Action Platform for Peace, Justice and Strong Institutions (Sustainable Development Goal 16) aims to provide global business standards in understanding, implementing and reporting on business engagement in these areas. www.unglobalcompact.org

05_CHALLENGES TO CORPORATE SUSTAINABILITY – MANAGING A CRISIS

Crisis management: how corporate sustainability helps companies prevent and navigate a crisis

What is a crisis?

Many organizations face unexpected challenges from time to time, but a "crisis" can be defined as a sudden or previously unidentified risk that threatens to significantly damage an organization's economic value or licence to operate. Crises can have broad roots, often driven at least in part by failures to operate ethically and sustainably.

Crisis prevention through strong culture and values

Effective crisis management begins by ensuring that a business is less susceptible to crises because it can prevent minor issues from developing into major ones. Organizations that have integrated sustainability considerations into their business strategy can typically better protect against, respond to, and bounce back from a crisis.

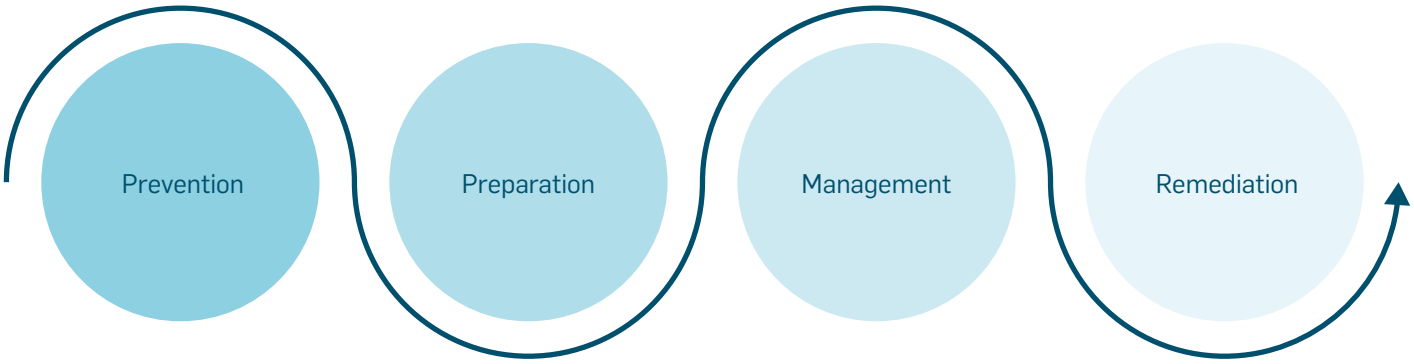
Practical tip: Weighing decisions carefully, and acting by reference to corporate values, can be the difference between weathering a crisis or suffering an even more significant loss. Increasingly, these values will be among the benchmarks by which stakeholders judge an organization's response.

Businesses should have regard to sustainability whatever the economic context, but a stable environment offers an opportunity to refocus sustainability goals to ensure these are integrated into the organization's culture, strategy and operations. Companies that are responsibly managed day-to-day are likely to be subject to more sympathetic scrutiny in a crisis if the underlying issue is perceived to be an exception to their general approach.

However, businesses can also overreach and develop a disconnect between how they articulate their values publicly and the culture they adopt internally. Material gaps between the external and internal approaches increase risk when problems arise so it is critical to avoid overstatement of the organization's approach or achievements in this area while at the same time striving for continuous improvement.

Practical tip: If the organization experiences significant gaps between its expressed values and actual behaviour, this increases its risks. Some GCs have undertaken an analysis of what these gaps are, and development strategies on how to address any gaps identified.

Stages of crisis prevention and management



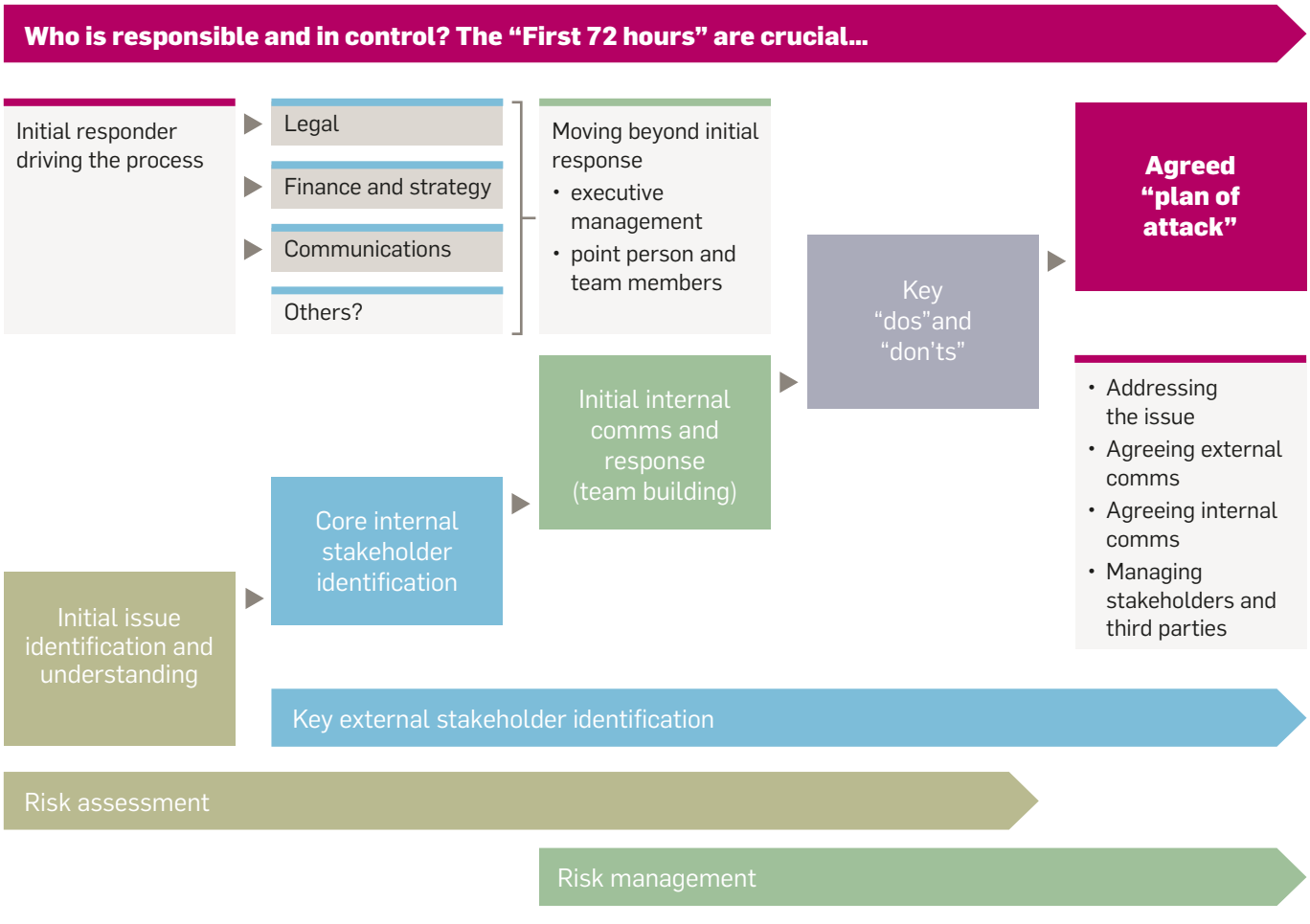
In some circumstances, prioritizing corporate sustainability, including ethics and integrity, can cause challenges. Some initiatives that have sustainability benefits, like safety or energy efficiency programmes, are typically beneficial in multiple ways such that commercial and sustainability drivers are not in conflict. But there are many daily decisions that involve trade-offs between shorter and longer-term costs and benefits. In these circumstances, it is preferable for decision-makers to acknowledge and express the tensions of competing drivers and then to make an informed decision. Many GCs consider they hold a particular guardianship role when considering these issues with management and the board.

"Some problems that a company faces are genuinely impossible to predict or avoid, but many others are avoidable or can be mitigated through robust controls, a strong culture and good governance. We find that organizations who have well-embedded corporate values are able to use them as a compass when making difficult decisions in a time of crisis. They help keep them on track, and ensure that the response is consistent and principled, even across a large organization."

Vanessa Havard-Williams, *co-head of Risk and Resilience and Crisis Management teams at Linklaters*

Pre-crisis preparation

Most organizations will have a general crisis response plan and a mechanism for categorizing incidents. Having an agreed high-level plan for management and information-sharing in a crisis and mapping out actions for the first stage of response is also very useful in supporting an efficient and appropriate reaction. Practising the roll-out of these plans regularly and participating in regular crisis simulations is invaluable. Gaps or areas of confusion can be identified and closed, and the distribution of roles and responsibilities can be assessed to ensure they are clear and effective.



Practical tip: Rolling out mock dawn raids, simulations of cyber attacks and rehearsals of other types of crisis will build up skills and confidence and help the business improve its planning. Ideally, it is also good to involve adviser teams (e.g., lawyers, communications advisers) in this process.

By being a driving force behind business and functional collaboration on risk management, a GCs can prepare themselves to take a key role during the initial crisis response and throughout a crisis. Boards of Directors can expect that their GCs will be part of the system of internal controls, providing a voice on key risk issues and guiding them through the governance and legal risks of the crisis.

Practical tip: Stakeholder mapping of internal and external stakeholders can be done ahead of time, and will help manage routine sustainability issues. Building strong relationships with stakeholders in the good times may help if things get difficult.

The initial response

The first phase of a crisis typically involves some basic first steps and a great deal of work on communication. The appropriate internal and external adviser teams must be mobilized quickly. The make-up of each team will depend on the nature of the crisis but will likely be outlined in general terms in the organization's crisis management plan. Very early steps will typically include: getting an initial understanding of the facts, securing evidence, identifying persons involved and any potential conflicts of interest, internal instructions on document retention, allocation of responsibilities, how to communicate on the topic, who should speak on behalf of the organization, and the briefing of senior managers and the board.

Identifying what are likely to be the key issues is a critical but an imperfect exercise at this stage since it will usually depend on incomplete facts. An initial analysis, carefully undertaken on the currently available information, is an important step in responsible crisis management. The process will assist the business in beginning to consider how to shape a response that is consistent with its values.

In the event of a crisis, businesses are expected to communicate immediately with key stakeholders including the general public. The social context, in terms of reduced public trust in business and the effect of digital and social media, make the tone of these communications more important than ever. Any communication should be accurate, culturally sensitive and aligned with the values of the business. At such an early stage considerable caution should be used as to what can be said particularly as to cause or consequences — even if there is pressure to say more or to commit to particular steps — as the facts are usually not yet fully known.

Practical tip: Initial communications should balance the need to say something with the lack of full information (a company's understanding of facts may develop and its analysis may become less positive). Blending legal, commercial and public affairs input is key to formulating the right tone and content.

Practical tip: Regulators usually prefer to be contacted ahead of any public announcement. Keeping commercial stakeholders and trade bodies informed is also important for maintaining those relationships.

Practical tip: Avoiding potential conflicts of interest and communicating a fair and clear approach is important to maintain stakeholder confidence.

Investigation, reporting and remediation

Once an organization weathers the initial response phase of a crisis, its attention typically turns to conducting an investigation, reporting the results of that investigation, and remediating any problematic conduct. This step is often viewed as critical by the board of an organization. GCs play a key role in advising board members on the scope and outcomes of any investigation.

Practical tip: You cannot change what has happened, but you can determine your response. How an organization responds when mistakes have happened can make its position much better or much worse.

It is important to establish the root cause of any crisis from both an internal and external perspective. The business should assess the extent to which governance and management changes are required to ensure similar issues do not recur. Often the board will want to assess corporate culture as well as governance structures and the degree of importance attributed within the company to responsible business practices and risk management. In instances which highlight a systemic issue, structural changes and a wide-ranging change management programme may be required by the board or may form part of its mitigation in relation to any regulatory or court process.

Practical tip: Lawyers need to take a commercial and responsible approach to addressing liabilities. For example, if it is clear that the company is at fault, it may be appropriate to offer remedies through a simplified process rather than adopt a defensive stance which could be more costly in the long run. See Chapter 4 for further detail on supporting and building grievance mechanisms.

During this phase of a crisis, the more transparency there is and the more the organization acknowledges missteps where these are identified, the more stakeholders are likely to begin to understand why it has made a hard or unpopular decision. But there will usually be other competing concerns. Sometimes privilege and confidentiality limit what can or should be said.

It is also important to be clear as to the quality and completeness of the information available. Sharing incomplete information could create the risk of early over-statement, and the GC (and any external counsel) should be the leading adviser(s) in that balancing process.

Organizations with strong pre-existing cultures of transparency have an advantage in navigating the tension that can sometimes arise between the need to be responsive to requests for information from stakeholders and the company's interest in keeping certain matters confidential, pending further developments or permanently.

Practical tip: A business that embraces transparency will be viewed as more credible when it approaches regulators, prosecutors and the public with news of a crisis.

The goodwill that a company gradually accumulates by embracing sustainability concepts can prove to be a valuable investment when the time comes to resolve a crisis. The GC has a role in reminding the company that it is important to embrace sustainability concepts not only because of their inherent importance, but also because the company will be better positioned if it is ever necessary to negotiate a resolution with its stakeholders following a crisis. However, businesses need to be very careful not to oversell as trust can be lost very quickly (and is very hard to regain) if stakeholders feel they have been misled.

Practical tip: Regaining stakeholder trust after something has gone wrong takes time. It is critical to curb the natural urge to rush to make ambitious commitments. A staged approach with external validation of delivery can be more effective.

After the crisis

Once a business has survived a crisis, it is necessary to rebuild its reputation and brand, assess how the crisis was handled, and identify improvements to aid risk management and pre-crisis preparation.

Having an ingrained sustainability culture, and the external stakeholder ties that come with such a culture, is a significant benefit to a business dealing with the aftermath of a crisis. Relying on community relationships to assess external perceptions on the organization's crisis response efforts will also provide valuable information that, together with internal assessments of how the crisis was handled, should inform the way the business deals with future issues.

Practical tip: A company that is an integral, respected and productive member of its local communities can draw on those existing ties to shape its approach to crisis management and to help regain its standing.

After a crisis, the GC should remember to continue developing and drawing upon ties with stakeholders (customers, communities, investors, employees and regulators) as one of the many channels to help explain a crisis, provide assurance that changes have been implemented, learn and respond to stakeholder concerns and assure the community that the company is committed to regaining its pre-crisis standing. The post-crisis outreach to stakeholders should be a dialogue. By soliciting views on their crisis response, GCs can better assess and adjust that response and gather important lessons about what aspects did and did not work. The value of real-life insights cannot be understated because of the critical role that public opinion plays in crisis recovery. NGOs and interest groups can be a partner in the post-crisis dialogue, particularly if a company has previously nurtured its relationships with them. This depends on a certain degree of alignment and sensitivity to addressing their concerns when a crisis negatively impacts issues they prioritize.

Practical tip: Where a crisis occurs, a responsible organization should consider how to prevent recurrence. This is a key part of crisis response. Implementation of improvement measures is part of restoring the organization to a robust position.

KEY RESOURCES

Global law firm **Linklaters LLP** has published a range of guides for GCs to help them prepare for and navigate crises. www.linklaters.com/CrisisReady

Many of the key resources referred to in other sections of this Guide provide useful frameworks that businesses can use to embed corporate values and manage business risks effectively and sustainably.

Companies are encouraged to become a **UN Global Compact** participant and adhere to the Ten Principles to address/avoid ESG-related crises. www.unglobalcompact.org/participation

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A series of roundtable meetings were held with corporate senior legal counsel, the UN Global Compact, Linklaters lawyers and academic experts from UC Berkeley School of Law on 7 November 2018 in Berkeley to discuss their reflections on a draft of this Guide, including those arising from their relevant experiences in advising on and/or monitoring developments in each of the topics covered.

METHODOLOGY

The UN Global Compact, Linklaters LLP, UC Berkeley School of Law, with the support of Nestlé and with guidance from an Advisory Group of GCs, has prepared this *Guide for General Counsel on Corporate Sustainability Version 2.0*.

Through this exercise, our objective has been to explore in more depth the practical steps GCs can take to drive corporate sustainability, building on the expanding influence GCs have on key issues that impact on their organizations' long-term commercial success and viability.

To that end, we conducted interviews with 25 GCs, Heads of Compliance and Governance and Ethics, Sustainability and Risk Governance directors in 14 jurisdictions, with the sole purpose of developing practical guidance borne out by their own views, experiences and concerns.

The interviews were conducted under "Chatham House" rules, and comments have only been attributed where permission has been granted by the individual concerned.

This effort has been guided by an Advisory Group comprised of current and former GCs, whose primary role was to make sure that this Guide is an accurate reflection of the challenges, opportunities and environment they and their colleagues have to operate within and confront on a day-to-day basis.

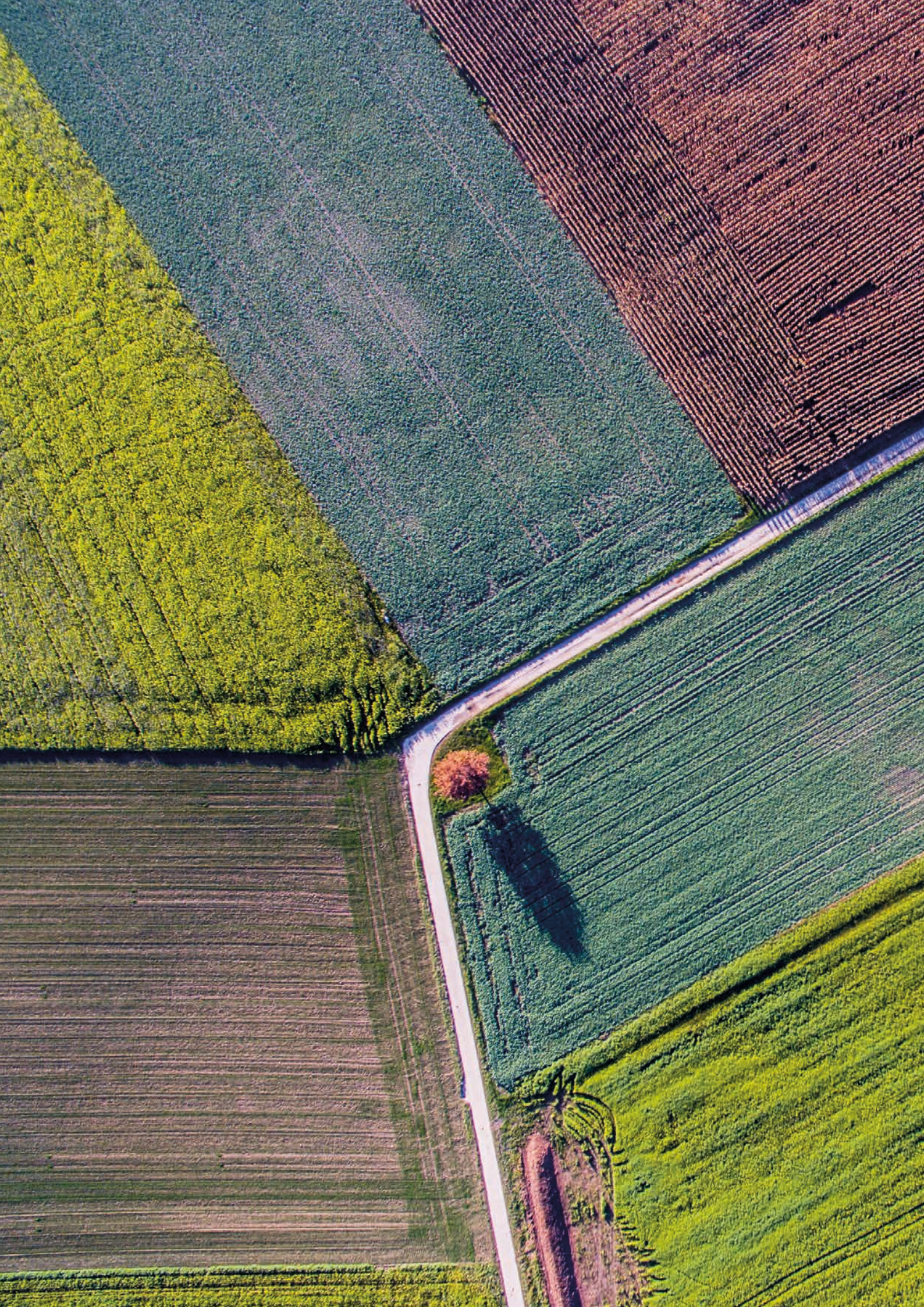
Our efforts were also augmented by our review of key resources, many of which explored the role of lawyers in today's corporate world, including those that focused on changes to the role, the "new expectations" of lawyers and the importance of their role in sustainability.

A series of roundtable meetings were held with corporate senior legal counsel, the UN Global Compact, Linklaters lawyers and academic experts from UC Berkeley School of Law on 7 November 2018 in Berkeley to discuss their reflections on a draft of this Guide, including those arising from their relevant experiences in advising on and/or monitoring developments in each of the topics covered.

Although this Guide has been drafted primarily for GCs, we expect that the observations and feedback will resonate with that wider audience noted above as well and, importantly, prepare the ground for proactive engagement by all parties.

While the focus on value creation from financial, social, environmental and ethical perspectives discussed herein has been the core framework for our analysis, we also seek to reinforce the the Ten Principles of the UN Global Compact which focus on human rights, labour, environment and anti-corruption.

This Guide encourages there to be discussion and debate amongst GCs about good practices in this area, and effective ways for them to continue to be partners with, and guardians of, their respective businesses.



THE TEN PRINCIPLES OF THE UNITED NATIONS GLOBAL COMPACT

HUMAN RIGHTS

1 Businesses should support and respect the protection of internationally proclaimed human rights; and

2 make sure that they are not complicit in human rights abuses.

LABOUR

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

4 the elimination of all forms of forced and compulsory labour

5 the effective abolition of child labour; and

6 the elimination of discrimination in respect of employment and occupation.

ENVIRONMENT

7 Businesses should support a precautionary approach to environmental challenges;

8 undertake initiatives to promote greater environmental responsibility; and

9 encourage the development and diffusion of environmentally friendly technologies.

ANTI-CORRUPTION

10 Businesses should work against corruption in all its forms, including extortion and bribery.

The Ten Principles of the United Nations Global Compact are derived from: the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.

United Nations
Global Compact

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