
NOTE

A Corporate Human Rights Due Diligence Law for California

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The United Nations Guiding Principles on Business and Human Rights (“UNGPs”) establish that corporations and States have a role in respecting and protecting human rights. Yet today, many of the world’s largest corporations have failed to show any evidence of identifying or mitigating human rights abuse in their supply chains. In response, States have begun passing human rights due diligence (“HRDD”) laws, which generally require businesses to identify, mitigate, and report human rights risks throughout their supply chains.

While HRDD laws are on the rise in Europe, they have been largely absent in the United States. Instead, there has been a focus on environmental, social, and governance (“ESG”) investing, as well as shareholder proposals, as a means to change corporate behavior. This Note discusses this phenomenon and argues that while ESG investing and shareholder proposals have the potential to create positive impacts, they cannot serve as a replacement for regulation. Drawing on lessons from the French Duty of Vigilance Law and the German Supply Chains Act, this Note argues that California should embrace its unique positionality and pass a corporate human rights due diligence law.

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INTRODUCTION

Raphael was born in the Democratic Republic of the Congo (“DRC”),¹ which produces more than half of the world’s supply of cobalt.² Cobalt — the “blood diamond of batteries”³ — is a metal used in lithium-ion batteries that power the world’s iPhones and electronic vehicles.⁴ When Raphael was twelve years old, his family was no longer able to pay his school’s \$6 monthly fee, so he was forced to drop out.⁵ He then began working as a surface digger at a nearby cobalt mine with other children in his village.⁶ On April 16, 2018, while Raphael was deep underground with thirty other diggers, the tunnel above him collapsed and he was buried alive.⁷ There were no survivors.⁸

In December 2019, Raphael’s family and thirteen others brought suit in the United States (“U.S.”) against Apple, Microsoft, Dell, Google, and Tesla alleging the companies were aware that the cobalt used in their products was linked to child labor.⁹ The technology companies moved to dismiss the suit arguing, *inter alia*, that they cannot control the cobalt mines in the DRC and therefore cannot be held liable.¹⁰ In November

¹ See Siddharth Kara, *I Saw the Unbearable Grief Inflicted on Families by Cobalt Mining. I Pray for Change*, GUARDIAN (Dec. 16, 2019, 5:45 AM EST), <https://www.theguardian.com/global-development/commentisfree/2019/dec/16/i-saw-the-unbearable-grief-inflicted-on-families-by-cobalt-mining-i-pray-for-change> [<https://perma.cc/Z6V7-H2CW>]; see also Annie Kelly, *Apple and Google Named in US Lawsuit over Congolese Child Cobalt Mining Deaths*, GUARDIAN (Dec. 16, 2019, 5:28 AM EST), <https://www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths> [<https://perma.cc/C8HW-C2TS>] [hereinafter *US Lawsuit*].

² *US Tech Giants Sued over DRC Cobalt Mine Child Labour Deaths*, ALJAZEERA (Dec. 17, 2019), <https://www.aljazeera.com/economy/2019/12/17/us-tech-giants-sued-over-drc-cobalt-mine-child-labour-deaths> [<https://perma.cc/Y3KQ-FGMU>].

³ Justine Calma, *Tesla to Make EV Battery Cathodes Without Cobalt*, VERGE (Sept. 22, 2020, 7:50 PM EDT), <https://www.theverge.com/2020/9/22/21451670/tesla-cobalt-free-cathodes-mining-battery-nickel-ev-cost> [<https://perma.cc/3CJL-PGLY>].

⁴ See *Democratic Republic of Congo: Government Must Deliver on Pledge to End Child Mining Labour by 2025*, AMNESTY INT’L (Sept. 1, 2017), <https://www.amnesty.org/en/latest/news/2017/09/democratic-republic-of-congo-government-must-deliver-on-pledge-to-end-child-mining-labour-by-2025/> [<https://perma.cc/4M6N-DKJT>].

⁵ Kara, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Complaint at 6, *Doe 1 v. Apple Inc.*, No. 19-cv-03737 (D.D.C. Dec. 15, 2019); Kelly, *US Lawsuit*, *supra* note 1.

¹⁰ Memorandum of Points and Authorities in Support of Defendants’ Joint Motion to Dismiss at 6, *Doe I v. Apple Inc.*, No. 19-cv-3737, 2020 WL 5361693 (D.D.C. Aug. 25, 2020); see also Tom Ramstack, *Tech Giants Try to Dismiss Lawsuit Accusing Them of Child Labor Violation*, WELL NEWS (Aug. 27, 2020), <https://www.thewellnews.com/>

2021, a D.C. District Court judge sided with the technology companies and dismissed the suit.¹¹

This lawsuit illustrates one of the most challenging human rights issues of our time — how to protect individuals and communities from harmful corporate practices.¹² Tasked with clarifying corporations' responsibilities in the business and human rights sphere,¹³ John Ruggie, then United Nations (“U.N.”) Special Representative on Business and Human Rights, led the development of the U.N. Guiding Principles on Business and Human Rights (“UNGPs”), which the Human Rights Council unanimously endorsed in 2011.¹⁴ The UNGPs are a non-enforceable “blueprint for action” that outline the roles and responsibilities that governments and companies have in respecting and protecting human rights.¹⁵ These principles establish that corporations are required to “become aware of, prevent and address adverse human rights impacts.”¹⁶ Significantly, the UNGPs note this requirement extends to all “adverse human rights impacts that are directly linked to [a corporation’s] operations, products or services by their business relationships, even if they have not contributed to those impacts.”¹⁷ To meet this responsibility, the UNGPs establish that corporations should carry out human rights due diligence (“HRDD”).¹⁸ HRDD involves

litigation/tech-giants-try-to-dismiss-lawsuit-accusing-them-of-child-labor-violation/
[https://perma.cc/5RKH-B5ZS].

¹¹ Doe I v. Apple Inc., No. 19-cv-03737, 2021 WL 5774224, at *18 (D.D.C. Nov. 2, 2021) (finding that while “Plaintiffs suffered terrible injuries in the DRC. . . . they fail[ed] to plead sufficient facts for their case to go forward”).

¹² JOHN RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 1 (2013) [hereinafter JUST BUSINESS].

¹³ See *id.* at 142-48.

¹⁴ See UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK, U.N. Doc. HR/PUB/11/04, at iv (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf [https://perma.cc/3M2J-Y5V2] [hereinafter GUIDING PRINCIPLES]; see also RUGGIE, JUST BUSINESS, *supra* note 12, at 1.

¹⁵ UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R, FREQUENTLY ASKED QUESTIONS ABOUT THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, U.N. Doc. HR/PUB/14/3, Sales No. E.14.XIV.6, at 6 (2014), https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf [https://perma.cc/GS2Z-9AMT] [hereinafter FREQUENTLY ASKED QUESTIONS].

¹⁶ John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 56, U.N. Doc. A/HRC/8/5 (Apr. 7, 2018).

¹⁷ GUIDING PRINCIPLES, *supra* note 14, at 14.

¹⁸ *Id.* at 15-16.

corporations implementing a process to identify, prevent, mitigate, and communicate risks to human rights within every step of their supply chain: from the raw materials to the final product.¹⁹

Yet today, many of the world's largest corporations have failed to show any evidence of identifying or mitigating human rights abuse in their supply chains.²⁰ This is not a failure of the UNGPs. The UNGPs were not developed to “fix” business and human rights challenges. Instead, the UNGPs were intended to generate “a mix of measures — voluntary and mandatory, national and international — that would strengthen the business and human rights regime over time.”²¹ As John Ruggie remarked, the endorsement of the UNGPs simply marked the “end of the beginning.”²²

In 2017, France became the first country to require corporations to undertake HRDD.²³ In 2020, European Commissioner for Justice, Didier Reynders, announced that the European Commission would introduce HRDD legislation for corporations in the European Union (“E.U.”).²⁴ In lieu of waiting for the E.U. to pass HRDD legislation,²⁵

¹⁹ See *id.* at 17-18.

²⁰ *Mandatory Due Diligence*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/> (last visited Dec. 27, 2021) [<https://perma.cc/85HJ-E7YL>].

²¹ John Ruggie, Opening Remarks by John Ruggie at the Conference “Human Rights and Decent Work in Global Supply Chains” (Oct. 6, 2020), <https://shiftproject.org/opening-remarks-by-john-ruggie-at-the-conference-human-rights-and-decent-work-in-global-supply-chains/> [<https://perma.cc/BN7S-STW7>] [hereinafter Opening Remarks].

²² John G. Ruggie, Special Representative of the Sec’y-Gen. for Bus. & Hum. Rts., Presentation of Report to United Nations Human Rights Council (May 30, 2011), https://www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf [<https://perma.cc/85BH-NJ7P>].

²³ See *infra* Part III.B.

²⁴ *EU Commissioner for Justice Commits to Legislation on Mandatory Due Diligence for Companies*, BUS. & HUM. RTS. RES. CTR. (Apr. 30, 2020), <https://www.business-humanrights.org/en/latest-news/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies/> [<https://perma.cc/PA5K-HQCW>]; Responsible Business Conduct Working Group, *Presentation and Discussion with Commissioner for Justice Didier Reynders on Due Diligence Study*, VIMEO (Apr. 29, 2020), <https://vimeo.com/413525229> [<https://perma.cc/J2FY-9T3M>].

²⁵ The proposed EU legislation was significantly delayed. On October 15, 2021, Commissioner Reynders confirmed that the EU legislative proposal on mandatory human rights due diligence would be published in late autumn. See Finance Watch, *Keynote Speech, Didier Reynders - Webinar: Sustainable Corporate Governance*, YOUTUBE (Oct. 15, 2021), <https://www.youtube.com/watch?v=mA4g6uutePc> [<https://perma.cc/P7GM-NHR6>]. However, this failed to occur. GIBSON DUNN, UPDATE ON MANDATORY HUMAN RIGHTS DUE DILIGENCE: GROUNDBREAKING NEW YORK FASHION SUSTAINABILITY LEGISLATION PROPOSAL, WHILE EU INITIATIVE STALLS (Jan. 27, 2022), <https://www.gibsondunn.com/wp-content/uploads/2022/01/update-on-mandatory-human->

Germany pushed ahead with its own HRDD law in 2021.²⁶ However, while European nations have moved to codify the UNGPs,²⁷ this

rights-due-diligence-groundbreaking-new-york-fashion-sustainability-legislation-proposal-while-eu-initiative-stalls.pdf [https://perma.cc/J92V-PUTQ]; see also OPEN LETTER TO PRESIDENT VON DER LEYEN: IT IS TIME FOR YOU TO SHOW LEADERSHIP ON THE SUSTAINABLE CORPORATE GOVERNANCE INITIATIVE (Dec. 8, 2021), <https://www.amnesty.eu/wp-content/uploads/2021/12/Open-letter-to-President-VDL-on-SCG-Delay.pdf> [https://perma.cc/88CA-5RLS] (“It is unacceptable that such a crucial new law that can help millions of people to demand justice against human rights violations and can help safeguard our environment and the climate, is delayed for the third time.”). Finally, on February 23, 2022, the European Commission released the proposed “Due Diligence Law.” Monika Pronczuk, *Companies in the E.U. Could Be Held Liable for Violations Along Their Supply Chain*, N.Y. Times (Feb. 23, 2022), <https://www.nytimes.com/2022/02/23/business/economy/eu-supply-chain-violations.html> [https://perma.cc/C5MR-HB37].

²⁶ See *infra* Part III.A.

²⁷ Following the EU’s continued delay to introduce mandatory HRDD legislation, the Netherlands became the latest European government to announce its own plans to introduce legislation at the national level. Sam Eastwood, James Ford, Libby Reynolds & Malcolm Wu, *Business and Human Rights – The Netherlands to Introduce Mandatory Human Rights Due Diligence Legislation*, MAYER BROWN (Dec. 28, 2021), <https://www.eyonesg.com/2021/12/business-and-human-rights-the-netherlands-to-introduce-mandatory-human-rights-due-diligence-legislation/> [https://perma.cc/3LRH-44AA]. There are also currently movements for similar laws in Finland, Austria, Denmark, and Switzerland. See Sam Eastwood, James Ford & Libby Reynolds, *Business and Human Rights: Mandatory Human Rights Due Diligence – European Commission to Introduce a Legislative Initiative by 2021*, MAYER BROWN (May 19, 2020), <https://www.mayerbrown.com/en/perspectives-events/publications/2020/05/business-and-human-rights-mandatory-human-rights-due-diligence-european-commission-to-introduce-a-legislative-initiative-by-2021> [https://perma.cc/56KL-PM6C]; see also Samantha J. Rowe, Patricia Volhard, Philipp von Holst, Jin-Hyuk Jang, Christina Heil, Merrill Lawry-White & Jan Schoberwalter, *Germany: Mandatory Human Rights Due Diligence*, COMPLIANCE & ENF’T (May 6, 2021), https://wp.nyu.edu/compliance_enforcement/2021/05/06/germany-mandatory-human-rights-due-diligence/ [https://perma.cc/G3Y3-9ZNP]. Similar initiatives have also been developed in Kenya and Thailand. Elisabeth De Nadal, *Multinationals and Human Rights Abuses: Are There Any Good News?*, OPEN DEMOCRACY (Oct. 27, 2020, 9:44 AM), <https://www.opendemocracy.net/en/democraciaabierta/lmultinacionales-abusos-derechos-humanos-hay-alg%C3%BA-avance-en/> [https://perma.cc/AU8Z-UV4M]. In 2015, the United Kingdom (“UK”) passed the Modern Slavery Act, but has yet to follow the European Union in passing mandatory human rights due diligence. See *Will the UK Follow the EU’s Lead on Human Rights Due Diligence?*, HERBERT SMITH FREEHILLS (June 12, 2020), <https://www.herbertsmithfreehills.com/latest-thinking/will-the-uk-follow-the-eu%E2%80%99s-lead-on-human-rights-due-diligence> [https://perma.cc/388J-FDPT] [hereinafter *Will the UK Follow*]. However, in October 2021, major corporations, including Microsoft, TESCO, and Unilever, called on the UK to “introduce a new legal requirement for companies and investors to carry out human rights and environmental due diligence.” CALLING FOR A NEW UK LAW MANDATING HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE FOR COMPANIES AND INVESTORS (Oct. 22, 2021), https://media.business-humanrights.org/media/documents/UK_BUSINESS_STATEMENT_MHREDD_OCT21_FINAL.pdf [https://perma.cc/A4WY-MTR9].

movement has been largely absent in the U.S.²⁸ Although there are some laws that address human rights violations or supply chain due diligence, these laws are narrow²⁹ and sector specific.³⁰ For example, in 2010, California passed the California Transparency in Supply Chains Act (“CTSCA”), which is intended to inform consumers about companies that responsibly manage their supply chains.³¹ Under the CTSCA, every California retail seller and manufacturer that exceeds \$100 million in gross sales must disclose how it is *attempting* to eradicate slavery and human trafficking from its direct supply chain.³² It relies “primarily on reputational risk, rather than any direct punitive or legal measures.”³³ Theoretically, the CTSCA changes consumer behavior and “improve[s] the lives of victims of slavery and human trafficking.”³⁴ In reality, the

²⁸ See Cynthia A. Williams & John M. Conley, *Trends in the Social [Ir]responsibility of American Multinational Corporations: Increased Power, Diminished Accountability*, 25 *FORDHAM ENV'T L. REV.* 46, 47 (2013); Chantal Carriere, *Mind the Gap: Domestic Liability for Corporate Human Rights Violations in the US and Abroad*, *INT'L BAR ASS'N* (Aug. 30, 2019), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=9DA3551F-D889-47CF-B645-02D1C4F72D9D> [<https://perma.cc/FB2S-78BT>]. In 2019, civil society organizations encouraged Congress to pass a Corporate Transparency Act which they argued would stem corruption and advance human rights. *US: Pass Law to Stem Corruption, Protect Rights*, *HUM. RTS. WATCH* (Apr. 11, 2019, 10:00 AM EDT), <https://www.hrw.org/news/2019/04/11/us-pass-law-stem-corruption-promote-rights> [<https://perma.cc/3WKT-EZYD>].

²⁹ See *infra* Part II; see also Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213-18 (2010) (requiring companies to disclose whether their products contain tin, tantalum, tungsten, or gold from the DRC or an adjoining country).

³⁰ See, e.g., Dodd Frank Act § 1502 (requiring disclosure related to conflict minerals originating in the DRC); see also *US Conflict Minerals Law*, *GLOB. WITNESS* (Nov. 15, 2017), <https://www.globalwitness.org/en/campaigns/conflict-minerals/dodd-frank-act-section-1502/> [<https://perma.cc/62T2-WAMJ>].

³¹ S.B. 657, 2009-2010 Reg. Sess., ch. 556, 2010 Cal. Stat. 2641 (codified at CAL. CIV. CODE § 1714.43 (2012) and CAL. REV. & TAX. CODE § 19547.5 (2011)); see also *The California Transparency in Supply Chains Act of 2010: New Information to Aid Consumer Purchasing Decisions: Hearing on S.B. 657 Before the Assemb. Comm. on Judiciary, 2009–2010 Reg. Sess. 2* (Cal. 2010) [hereinafter *The California Transparency in Supply Chains Act of 2010*].

³² CAL. CIV. CODE § 1714.43.

³³ N.Y.U. STERN CTR. FOR BUS. & HUM. RTS., *ASSESSING LEGISLATION ON HUMAN RIGHTS IN SUPPLY CHAINS: VARIED DESIGNS BUT LIMITED COMPLIANCE* 4 (2019), https://issuu.com/nyusterncenterforbusinessandhumanri/docs/nyu_jaco_research_brief_june14_fina [<https://perma.cc/V2JX-KZQW>].

³⁴ S.B. 657, 2010 Cal. Stat. at 2642; see also *The California Transparency in Supply Chains Act of 2010*, *supra* note 31, at 2.

ability of this law to influence behavior or effect change throughout supply chains has been severely limited.³⁵

This Note examines the movement toward hardening business and human rights law and argues California is uniquely positioned to clarify and codify corporate accountability in regards to human rights abuses committed within supply chains.³⁶ Part I provides a brief background on the historical evolution of HRDD laws, focusing specifically on the UNGPs.³⁷ Part II examines two possible counterarguments to legislation. First, that the rise of environmental, social, and governance (“ESG”) investing renders legislation unnecessary. Second, that shareholder proposals are a sufficient mechanism to drive corporate accountability and respect for human rights. In response, this Section argues that while ESG investing and shareholder proposals are necessary complements, they are insufficient supplements to regulation.³⁸ Part III discusses and analyzes the first two major HRDD laws that passed in Europe — the French Duty of Vigilance law and the German Supply Chains Act.³⁹ Part IV argues that California should embrace its unique positionality and adopt HRDD legislation based on elements from the French and German HRDD laws.⁴⁰

I. BACKGROUND

Leading up to the adoption of the UNGPs, there were multiple failed attempts to establish an authoritative global standard on business and human rights.⁴¹ This Section briefly summarizes these failed attempts, provides a broad overview of the UNGP structure, and discusses the shifting corporate stance towards HRDD laws.

³⁵ Kish Parella, *A New Case for Human Rights Due Diligence in Supply Chains*, CLS BLUE SKY BLOG (July 24, 2020), <https://clsbluesky.law.columbia.edu/2020/07/24/a-new-case-for-human-rights-due-diligence-in-supply-chains/> [https://perma.cc/Y7AW-UR3R]. Reports have also shown corporate compliance with the CTSCA varies significantly. See MICHAEL BALL, CHRIS N. BAYER, MICHAEL MCCOY, STEFAN REED, JASPER TRAUTSCH & JIAHUA XU, CORPORATE COMPLIANCE WITH THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT OF 2010, at 2 (2015), http://media.wix.com/ugd/f0f801_0276d7c94ebe453f8648b91dd35898ba.pdf [https://perma.cc/5FP3-L43T].

³⁶ See *infra* Part IV.

³⁷ See *infra* Part I.

³⁸ See *infra* Part II.

³⁹ See *infra* Part III.

⁴⁰ See *infra* Part IV.

⁴¹ Pini Pavel Miretski & Sascha-Dominik Bachmann, *The UN ‘Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’: A Requiem*, 17 DEAKIN L. REV. 5, 13 (2012).

In the 1970s and 1980s, the U.N. sought unsuccessfully to create an international code of conduct for business.⁴² In the late 1990s, the U.N. Sub-Commission on the Promotion and Protection of Human Rights proposed imposing binding international law obligations on companies.⁴³ Yet, while the proposal garnered significant support from human rights activists, who broadly felt that legally binding instruments were the most effective tool to regulate business conduct,⁴⁴ the business community fervently opposed it and the proposal was abandoned.⁴⁵ At the time, businesses argued that human rights responsibilities lay with States⁴⁶ rather than companies.⁴⁷

In 2005, due in part to intensifying advocacy efforts and legal challenges, then U.N. Secretary-General, Kofi Annan, appointed Harvard Professor, John Ruggie, as an individual expert to “identify and clarify” existing standards regarding business and human rights.⁴⁸ The two-year position turned into a six-year commitment that ended with the unanimous adoption by all member States of the UNGPs.⁴⁹

The UNGPs are based on three mutually reinforcing pillars: protect, respect, and remedy.⁵⁰ The first pillar, protect, underscores that under international human rights law, States are obligated to protect against

⁴² David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 902 (2003).

⁴³ These obligations were termed “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.” RUGGIE, JUST BUSINESS, *supra* note 12, at xvii.

⁴⁴ John Gerard Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights* 9 (Harv. Kennedy Sch. Corp. Resp. Initiative, Working Paper No. 67, 2017), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/workingpaper_67_0.pdf [<https://perma.cc/KR6P-EYSA>] [hereinafter *The Social Construction*].

⁴⁵ RUGGIE, JUST BUSINESS, *supra* note 12, at xvii; Miretski & Bachmann, *supra* note 41, at 17.

⁴⁶ For the purposes of this note, a State refers to a country, while a state refers to territory within a country.

⁴⁷ RUGGIE, JUST BUSINESS, *supra* note 12, at xvii; see ECONOMIST INTEL. UNIT, THE ROAD FROM PRINCIPLES TO PRACTICE: TODAY'S CHALLENGES FOR BUSINESS IN RESPECTING HUMAN RIGHTS 4 (2015), https://eiuperspectives.economist.com/sites/default/files/EIU-URG%20-%20Challenges%20for%20business%20in%20respecting%20human%20rights%20WEB_corrected%20logos%20and%20UNWG%20thx.pdf [<https://perma.cc/J29E-XVS9>] [hereinafter THE ROAD] (recalling that in the 1990s, “there was no recognition that companies had human rights responsibilities”).

⁴⁸ RUGGIE, JUST BUSINESS, *supra* note 12, at xvii-xviii.

⁴⁹ *Id.* at xix-xx.

⁵⁰ *Id.* at 82, 172.

human rights abuses by private actors — including companies.⁵¹ In practice, this means a State is expected to advance appropriate regulation, legislation, and adjudication to enforce this principle of protection.⁵² While the UNGPs do not specifically call on States to implement laws that regulate a corporation's activities abroad, there are strong policy reasons for doing so.⁵³ For example, the State where the violation occurred may be unable or unwilling to protect human rights.⁵⁴

Respect, the second pillar, establishes that corporations have a responsibility to respect all internationally recognized human rights.⁵⁵ This includes the rights enshrined in the International Bill of Human Rights, as well as the International Labor Organization Declaration on Fundamental Principles and Rights at Work.⁵⁶ Practically, this means corporations must develop an understanding of the impact of their operations, mitigate abuse, and respond to adverse impacts when they occur.⁵⁷ Significantly, the UNGPs indicate that the corporate responsibility to respect human rights is a distinct and separate responsibility from the State's duty to protect human rights.⁵⁸

Remedy, or the “forgotten” third pillar,⁵⁹ focuses on victims' ability to access predictable and effective means of remedy in cases where

⁵¹ *Id.* at 82; FREQUENTLY ASKED QUESTIONS, *supra* note 15, at 19.

⁵² FREQUENTLY ASKED QUESTIONS, *supra* note 15, at 20.

⁵³ This is also known as extraterritorial jurisdiction. Extraterritorial jurisdiction involves exercising a state's legal power outside of its territory. Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction*, 99 *Cornell L. Rev.* 1303, 1304 (2014). Given the confusing nature of this term, this Note attempts to avoid it where possible. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 reporters' note 1 (AM. LAW INST. 2018) (“To prevent confusion, this Restatement avoids the word ‘extraterritorial’ when possible in favor of more neutral phrases like geographic scope”); see also RUGGIE, *JUST BUSINESS* *supra* note 12, at 82.

⁵⁴ See FREQUENTLY ASKED QUESTIONS, *supra* note 15, at 21-22.

⁵⁵ GUIDING PRINCIPLES, *supra* note 14, at 13; UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R., *THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE*, U.N. Doc HR/PUB/12/02, at 9 (2012), https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf [<https://perma.cc/M664-YWSM>].

⁵⁶ GUIDING PRINCIPLES, *supra* note 14, at 14; U.N. WORKING GRP. ON BUS. & HUM. RTS., *THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: AN INTRODUCTION 3*, https://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf (last visited Oct. 1, 2021) [<https://perma.cc/D6Y2-T2HE>] [hereinafter U.N. WORKING GROUP].

⁵⁷ U.N. WORKING GROUP, *supra* note 56, at 2.

⁵⁸ *Id.*

⁵⁹ Lorna McGregor, *Activating the Third Pillar of the UNGPs on Access to an Effective Remedy*, *EJIL:TALK!* (Nov. 23, 2018), <https://www.ejiltalk.org/activating-the-third-pillar-of-the-ungps-on-access-to-an-effective-remedy/> [<https://perma.cc/4TMV-PQ3Y>].

businesses violate their human rights.⁶⁰ This pillar has remained largely unrealized.⁶¹ The doctrine of limited liability, which is embedded in the U.S.⁶² and many other countries,⁶³ poses a significant barrier.⁶⁴ This doctrine typically prevents victims harmed by subsidiaries or companies that are part of its supply chain from seeking redress against the parent company.⁶⁵ While in practice those harmed could still bring suit in the country where the subsidiary or contractor operates, victims are often left with no satisfactory recourse in countries that have weak or ineffectual legal systems.⁶⁶

After the endorsement of the UNGPs, the Office of the U.N. High Commissioner for Human Rights released a press statement announcing the UNGPs “provide — for the very first time — a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.”⁶⁷ The adoption was indeed extraordinary,

⁶⁰ FREQUENTLY ASKED QUESTIONS, *supra* note 15, at 34.

⁶¹ See SHIFT, ACCOUNTABILITY AS PART OF MANDATORY HUMAN RIGHTS DUE DILIGENCE 4 (2020), https://shiftproject.org/wp-content/uploads/2020/10/Shift_mHRDD_Accountability_October2020.pdf [<https://perma.cc/WF9V-PYCF>] (“For those experiencing human rights harms, accessing remedy remains a widespread challenge.”); De Nadal, *supra* note 27.

⁶² See William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193-94 (1929) (“Limited liability is now accepted in theory and in practice. It is ingrained in our economic and legal systems. The social and economic order is arranged accordingly. Our philosophy accepts it.”).

⁶³ RUGGIE, JUST BUSINESS, *supra* note 12, at 188-89 (noting in his “survey of the relationship between corporate law and human rights in the thirty-nine jurisdictions around the world indicated that some form of legal separation and limited liability exists in all of them”); Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 595-96 (1986) (describing how limited liability spread throughout continental Europe in the early 1800s).

⁶⁴ Elise Groulx Diggs, Milton C. Regan & Beatrice Parance, *Business and Human Rights as a Galaxy of Norms*, 50 GEO. J. INT’L L. 309, 311 (2019).

⁶⁵ See *id.*; Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769, 1769 (2015).

⁶⁶ Diggs et al., *supra* note 64, at 310-11; see also Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001) (“Corporations are powerful global actors that some states lack the resources or will to control.”). In an effort to address this issue, the United Nations Human Rights Office of the High Commissioner (“OHCHR”) initiated the Accountability and Remedy Project in 2014. *OHCHR Accountability and Remedy Project: Improving Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, https://www.ohchr.org/EN/Issues/Business/Pages/OHCHR_accountabilityandremedyproject.aspx [<https://perma.cc/QBJ8-BS4V>] (“[E]xtensive research has shown that in cases where business enterprises are involved in human rights abuses, victims often struggle to access remedy.”).

⁶⁷ Miretski & Bachmann, *supra* note 41, at 6.

as not only were the UNGPs the first authoritative global standard on business and human rights,⁶⁸ but the adoption also marked the first time the body had endorsed a normative text that was not negotiated by governments.⁶⁹

Despite this landmark event, full implementation of this global standard remains elusive.⁷⁰ Yet recently, there has been an industry shift toward acceptance and even advocacy for HRDD legislation.⁷¹ In 2019, major chocolate companies acknowledged the pervasive issue of child labor on cocoa farms and called for human rights and environmental due diligence requirements that build upon the UNGPs.⁷² After two decades of not only failing to eradicate child labor, but also failing to make any reported improvements,⁷³ Hershey Spokesman Jeff Beckman said “[i]t has become clear that in order to effect widespread change across the entire sector, new policies and regulations that will hold all purchasers of cocoa accountable for their supply chains is needed.”⁷⁴ This is an abrupt shift from over a decade ago when the industry

⁶⁸ FREQUENTLY ASKED QUESTIONS, *supra* note 15, at 1.

⁶⁹ Ruggie, *The Social Construction*, *supra* note 44, at 1.

⁷⁰ ECCJ Publishes “Key Features of Mandatory Human Rights Due Diligence Legislation,” EUR. COAL. FOR CORP. JUST. (June 8, 2020), <https://corporatejustice.org/news/6133-eccj-publishes-key-features-of-mandatory-human-rights-due-diligence-legislation> [<https://perma.cc/WFP6-R27N>] [hereinafter *ECCJ Publishes*] (noting that “[s]ince the . . . adoption of the UNGPs in 2011, full implementation of the corporate responsibility to respect human rights . . . has remained marginal”).

⁷¹ See Caroline Kelly, *A Look at France’s Duty of Vigilance Law, Two Years Later*, ANTI-CORRUPTION & GOVERNANCE CTR. (July 19, 2019), <https://acgc.cipe.org/business-of-integrity-blog/a-look-at-frances-duty-of-vigilance-law-two-years-later> [<https://perma.cc/FP5Q-WDH2>] [hereinafter *Two Years Later*].

⁷² *Cocoa Companies Call for Human Rights and Environmental Due Diligence Requirements*, VOICE NETWORK (Dec. 2, 2019), <https://www.voicenetwork.eu/2019/12/cocoa-companies-call-for-human-rights-and-environmental-due-diligence-requirements/> [<https://perma.cc/HSR7-XTX2>] (noting that the European Union is “by far the largest importer and consumer of cocoa in the world”).

⁷³ NORC, NORC FINAL REPORT: ASSESSING PROGRESS IN REDUCING CHILD LABOR IN COCOA PRODUCTION IN COCOA GROWING AREAS OF CÔTE D’IVOIRE AND GHANA 68 (2020), https://www.norc.org/PDFs/Cocoa%20Report/NORC%202020%20Cocoa%20Report_English.pdf [<https://perma.cc/L4Q6-T3M8>] (finding “[b]etween 2008/09 and 2018/19, the proportion of children in agricultural households engaged in child labor in cocoa production increased by 14 percentage points”).

⁷⁴ Bob Fernandez, *Hershey Failed at Curbing Child Labor in Cocoa Fields. Now It and Other Chocolate Makers are Turning to Lawmakers for Help*, MORNING CALL (Jan. 7, 2020, 9:43 AM), <https://www.mcall.com/business/mc-biz-hershey-chocolate-firms-child-labor-cocoa-fields-new-rules-20200107-7nuv7133x5dvnokn6pt5w53foe-story.html> [<https://perma.cc/UJK3-WZV5>].

staunchly argued that no government regulation was necessary.⁷⁵ The industry's pivot was called a "watershed moment."⁷⁶

In 2020, following the announcement from the European Commission's Commissioner for Justice, Didier Reynders, that the E.U. would pass legislation requiring companies across the E.U. to carry out HRDD, twenty-six companies, business associations, and initiatives, including Adidas and Unilever, issued a joint statement of support noting mandatory legislation could help provide legal certainty regarding their corporate responsibilities and "clarify legal consequences for when responsibilities are not met."⁷⁷ Other companies, such as IKEA, Coca-Cola, and BMW, asserted that such laws would "level the playing field for responsible businesses."⁷⁸

This next Section will examine investor pressure and shareholder proposals as two possible counterarguments to legislation. Yet, as this Section will argue, investor pressure and shareholder proposals alone are insufficient accountability mechanisms.

II. THE GOVERNANCE GAP

In 2018, sixty-nine of the richest one hundred entities on the planet were corporations, not States.⁷⁹ Yet, despite this economic reality, international law does not hold corporations to the same

⁷⁵ Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, WASH. POST (June 5, 2019), <https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/> [<https://perma.cc/Y7L9-A3PQ>].

⁷⁶ Natasha Foote, *EU-Wide Approach to Due Diligence Needed to Regulate Cacao Sector, Manufacturers and NGOs Say*, EURACTIV (Dec. 2, 2019), <https://www.euractiv.com/section/agriculture-food/news/eu-wide-approach-to-due-diligence-needed-to-regulate-cacao-sector-manufacturers-and-ngos-say/> [<https://perma.cc/WQ8K-AL3M>].

⁷⁷ Support for EU Framework on Mandatory Human Rights and Environmental Due Diligence (Sept. 2, 2020), https://media.business-humanrights.org/media/documents/EU_Business_Statement_Mandatory_Due_Diligence_02092020.pdf [<https://perma.cc/86EF-8HVT>] [hereinafter Support for EU Framework]. See generally *List of Large Businesses, Associations & Investors with Public Statements & Endorsements in Support of Mandatory Due Diligence Regulation*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/> (last updated Jan. 2022) [<https://perma.cc/LS92-YPMK>] (listing companies that have publicly come out in favor of HRDD).

⁷⁸ Kelly, *Two Years Later*, *supra* note 71.

⁷⁹ *69 of the Richest 100 Entities on the Planet are Corporations, Not Governments, Figures Show*, GLOB. JUST. NOW (Oct. 17, 2018), <https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/> [<https://perma.cc/A8MB-CZAD>].

responsibilities as States.⁸⁰ Without international law to follow corporations across State borders, corporate activity often slips through regulatory gaps.⁸¹

To address this gap, some States have moved towards implementing domestic laws. However legal developments in the United States have lagged far behind.⁸² Indeed, recent Supreme Court decisions have narrowed federal statutes such as the Alien Tort Statute (“ATS”),⁸³ which has been used by advocates and victims of human rights abuses overseas to sue corporations.⁸⁴

Recently, the Supreme Court effectively crippled victims’ ability to hold corporations accountable under the ATS.⁸⁵ In *Nestlé USA, Inc. v.*

⁸⁰ ERIKA GEORGE, INCORPORATING RIGHTS: STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY 25 (2020).

⁸¹ John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 REG. & GOVERNANCE 317, 329 (2017), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/rego.12154> [<https://perma.cc/4LXB-USM9>] (noting the “disjuncture between economic reality and legal convention . . . creates a global governance gap that defies standard and simple solutions”) [hereinafter *Multinationals*].

⁸² See Almut Schilling-Vacafflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?*, 22 HUM. RTS. REV. 109, 112 (2020), <https://link.springer.com/content/pdf/10.1007/s12142-020-00607-9.pdf> [<https://perma.cc/YVF2-CC4X>]; Carriere, *supra* note 28; Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May-June 2019), <https://hbr.org/2019/05/the-investor-revolution> [<https://perma.cc/NJ9Y-NQ7C>] (noting the U.S. has lagged behind the “more recent legal opinions and regulatory guidelines [that] make it clear that it is a violation of fiduciary duty *not* to consider such [ESG] factors”).

⁸³ The ATS gives federal district courts jurisdiction over civil actions brought by an alien for a tort committed in violation of the law of nations or a treaty of the U.S. 28 U.S.C. § 1350 (2018); *see, e.g.*, *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386, 1390 (2018) (finding it “inappropriate for courts to extend ATS liability to foreign corporations absent further action from Congress”); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013) (limiting ATS claims to those that “touch and concern” the U.S.); *see also* Williams & Conley, *supra* note 28, at 49 (arguing *Kiobel* “substantial[ly] eviscerate[ed] [] companies’ legal accountability for international human rights violations under the ATS”).

⁸⁴ Allie Brudney & Avery Kelly, *CAL Files Two Amicus Briefs in the Nestlé USA, Inc. v. Doe I Case at the Supreme Court*, CORP. ACCOUNTABILITY LAB (Oct. 22, 2020), <https://corpaccountabilitylab.org/calblog/2020/10/22/cal-files-two-amicus-briefs-in-the-nestl-usa-inc-v-doe-i-case-at-the-supreme-court> [<https://perma.cc/S5HK-GEE2>] [hereinafter *CAL Files Two Amicus Briefs*]. U.S. corporations have been sued under the ATS in more than 180 federal cases over the last three decades. Transcript of Oral Argument at 36, *Nestlé USA, Inc. v. Doe I*, 141 S. Ct. 1931 (2020) (No. 19-416). *But see* RUGGIE, JUST BUSINESS, *supra* note 12, at 198 (expressing concern that “so large a fraction of the world’s court cases against multinational corporations for involvement in human rights abuses abroad hinge on . . . a statute in one single country. No other country has a statute like it”).

⁸⁵ Brudney & Kelly, *CAL Files Two Amicus Briefs*, *supra* note 84.

Doe, the plaintiffs, Malian nationals, sued Nestlé USA, Cargill, and other U.S. based companies under the ATS for aiding and abetting child slavery in violation of international law.⁸⁶ The plaintiffs were trafficked into the Ivory Coast as child slaves to work on cocoa farms.⁸⁷ While the U.S. companies did not own or operate these farms, the plaintiffs claimed the companies knew, or had reason to know that the farms were using child slaves and yet still provided the farms with technical and financial resources.⁸⁸

In order to establish their claim, the plaintiffs had to prove that their case “touch[ed] and concern[ed]” the U.S.⁸⁹ To show this, the plaintiffs claimed that all the companies’ “major operational decisions” were made from within the U.S.⁹⁰ In response, the defendants claimed, *inter alia*, that only individuals could be sued under the ATS.⁹¹

While the Court did not hold that the ATS bars suits against all U.S. corporations, it did find that “allegations of general corporate activity — like decision making — cannot alone establish” liability under the ATS.⁹² Thus, while it appears plaintiffs can still bring claims under the ATS against U.S. corporations, this path has been severely narrowed. Following *Nestlé*, it seems that to establish a cause of action, a plaintiff must show there was conduct in the U.S. that went beyond decision making about how to conduct operations abroad.⁹³ As Professor

⁸⁶ *Nestlé USA, Inc. v. Doe I*, 141 S. Ct. 1931, 1936 (2021). Oral arguments were heard on December 1, 2020. See *Nestlé USA, Inc. v. Doe I*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/nestle-usa-inc-v-john-doe-i/> (last visited Oct. 30, 2020) [<https://perma.cc/PXR7-CCR4>]. For a breakdown of the arguments, see Beth Van Schaack, *Nestlé & Cargill v. Doe Series: In Oral Arguments, Justices Weigh Liability for Chocolate Companies*, JUST SECURITY (Dec. 7, 2020), <https://www.justsecurity.org/73727/nestle-cargill-v-doe-series-in-oral-arguments-justices-weigh-liability-for-chocolate-companies/> [<https://perma.cc/4R8D-95XD>].

⁸⁷ *Nestlé USA, Inc.*, 141 S. Ct. at 1935.

⁸⁸ *Id.* The companies provided the farms with training, fertilizer, tools, and cash in exchange for the exclusive right to purchase cocoa. *Id.*

⁸⁹ See *Kiobel v. Royal Dutch Petroleum Co.* 569 U.S. 108, 124-25 (2013).

⁹⁰ *Nestlé USA, Inc.*, 141 S. Ct. at 1935.

⁹¹ Reply Brief for Petitioner Nestlé USA, Inc. at 25, *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2020) (Nos. 19-416 & 19-453). Their position was supported by the U.S. See Brief for the United States as Amicus Curiae Supporting Petitioners at 10-11, *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2020) (Nos. 19-416 & 19-453). Notably, by arguing that the Court should exclude domestic corporations from the ATS cause of action, the U.S. reversed its previously held position in *Kiobel* and *Jesner*. See Brief for the International Law Scholars as Amicus Curiae Supporting Respondents at 6, *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2020) (Nos. 19-416 & 19-453).

⁹² *Nestlé USA, Inc.*, 141 S. Ct. at 1937.

⁹³ William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021),

William Dodge noted, “[t]here may be cases that fit that description, but they are likely to be few and far between.”⁹⁴ This leaves few remaining judicial avenues in the U.S. for victims to hold corporations accountable for their actions committed overseas.⁹⁵

Yet, as these legal mechanisms have weakened, investors have increased pressure on corporations regarding environmental, social, and governance (“ESG”) issues,⁹⁶ and shareholders have introduced proposals to try and leverage their stake in a corporation to improve its ESG performance.⁹⁷ While these movements contribute to the UNGPs’ goal of advancing the business and human rights agenda, the following will discuss how alone they are insufficient to bridge the global governance gap.⁹⁸ Instead, it is only with the proper implementation of mandatory HRDD laws that the values embedded in the UNGPs will be upheld.

A. *The Power of ESG Investor Pressure*

In 1970, Milton Friedman published an article in *The New York Times* claiming businesses had a social responsibility to increase profit.⁹⁹ According to Friedman, business leaders who pursued anything else were “unwitting puppets of the intellectual forces that ha[d] been undermining the basis of a free society.”¹⁰⁰ This profit centric approach, known as the “Friedman doctrine” or “shareholder primacy,” became “Wall Street gospel” and remained staunchly embedded in the corporate mindset until roughly 2008, when the financial crisis accentuated the dire economic and societal effects of shareholder primacy.¹⁰¹

<https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/> [<https://perma.cc/7JEZ-X7KJ>].

⁹⁴ *Id.*

⁹⁵ *See id.*; *see also* GEORGE, *supra* note 80, at 6.

⁹⁶ *See* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1401-05 (2021).

⁹⁷ *See* Matthew G. Lawson, *Available Company Defenses to Climate Change Shareholder Activism: Trends in Climate Change Litigation, Part 5*, JENNER & BLOCK (Sept. 5, 2019), <https://jenner.com/library/posts/19278> [<https://perma.cc/5SZU-HMSU>].

⁹⁸ *See infra* Parts II.A, II.B.

⁹⁹ Milton Friedman, *A Friedman Doctrine – The Social Responsibility of Business is To Increase Profits*, N.Y. TIMES (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> [<https://perma.cc/NT58-3H63>].

¹⁰⁰ *Id.*

¹⁰¹ Martin Lipton, *The Friedman Essay and the True Purpose of the Business Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 17, 2020),

Faced with the consequences of decades of Friedman capitalism, investors began taking a company's ESG performance into account when making investment decisions.¹⁰² In 2018, a quarter of global assets under management were invested based on a company's ESG profile, not just its earnings.¹⁰³ In 2020, 3,038 investors representing over \$100 trillion dollars in combined assets committed to integrating ESG information into their investment decisions.¹⁰⁴

When making these decisions, investors rely on ESG rating agencies, such as MSCI, who produce ESG scores.¹⁰⁵ These scores typically analyze various elements clustered under the three broad categories of environment ("E"), social ("S"), and governance ("G").¹⁰⁶ Elements collected under E could include carbon emissions and water management; S elements might incorporate community relations, diversity issues, and health and safety; and G elements could encompass transparency, shareholder rights, bribery, and corruption.¹⁰⁷ Rating agencies assign weights to each of these elements, and aggregate the results into a final composite ESG score.¹⁰⁸ However, the way in which rating agencies select and weigh ESG elements is often misleading.¹⁰⁹

<https://corpgov.law.harvard.edu/2020/09/17/the-friedman-essay-and-the-true-purpose-of-the-business-corporation/> [<https://perma.cc/WUZ8-ASG5>].

¹⁰² Indeed, many have embraced ESG as the "panacea of our ailing society." MICHAEL O'LEARY & WARREN VALDMANIS, *ACCOUNTABLE: THE RISE OF CITIZEN CAPITALISM* 93 (2020); see also John G. Ruggie & Emily K. Middleton, *Money, Millennials and Human Rights — Sustaining "Sustainable Investing"* 1 (Harv. Kennedy Sch. Corp. Resp. Initiative, Working Paper No. 67, 2018), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working_papers/CRI69_FINAL.pdf [<https://perma.cc/P8NS-TYDF>].

¹⁰³ Ruggie & Middleton, *supra* note 102, at 1.

¹⁰⁴ Florian Berg, Julian F. Koelbel & Roberto Riogobon, *Aggregate Confusion: The Divergence of ESG Ratings* 1 (Aug. 15, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438533 [<https://perma.cc/QSX4-Q3W6>].

¹⁰⁵ Cam Simpson, Akshat Rathi & Saijel Kishan, *MSCI, the Largest ESG Rating Company, Doesn't Even Try To Measure the Impact of a Corporation on the World. It's All About Whether the World Might Mess with the Bottom Line*, BLOOMBERG (Dec. 9, 2021), <https://www.bloomberg.com/graphics/2021-what-is-esg-investing-msci-ratings-focus-on-corporate-bottom-line/> [<https://perma.cc/BF54-SANC>].

¹⁰⁶ Ruggie & Middleton, *supra* note 102, at 2.

¹⁰⁷ For a longer list of typical ESG elements, see *id.*

¹⁰⁸ Hans Taparia, *The World May Be Better Off Without ESG Investing*, STAN. SOC. INNOVATION REV. (July 14, 2021), https://ssir.org/articles/entry/the_world_may_be_better_off_without_esg_investing [<https://perma.cc/39H2-ZG2U>].

¹⁰⁹ *Id.* ("[ESG scores] are subject to human judgment and inconsistent accesses to ESG information."); Ruggie & Middleton, *supra* note 102, at 2, 4 ("Indicators measuring these elements can number in the hundreds, but they and the algorithms that produce usable data points almost always are proprietary.").

First, ESG rating agencies sometimes measure what risks the *world* poses to a *company's* economic value, rather than how a *company* impacts the *world*.¹¹⁰ This methodology leads to some counterintuitive results. For example, in 2019, McDonald's, one of the top beef purchasers in the world, produced fifty-four million tons of emissions — a seven percent increase in four years.¹¹¹ For context, this was more greenhouse gas than either Portugal or Hungary emitted that year.¹¹² However, MSCI awarded McDonald's an *improved* ESG score due to its efforts to mitigate “risks associated with packaging material and waste.”¹¹³ These mitigation efforts included installing recycling bins in France and the UK, where McDonald's could face sanctions if it did not recycle.¹¹⁴ According to MSCI's rationale — regulatory risks outweighed risks to the planet.¹¹⁵ Consequently, even if companies are causing significant environmental damage or inflicting human rights abuse, they can still achieve high composite scores if they perform well on other elements that ESG rating agencies weigh heavily.¹¹⁶

Second, according to a recent MIT study, the field of ESG metrics is riddled with inconsistencies and more aptly called “aggregate confusion.”¹¹⁷ The study analyzed six prominent ESG rating agencies and found tremendous variability in the scores given to companies.¹¹⁸ This variance was due in part to human judgment — the agency's overall view of a firm influenced the measurement of specific categories.¹¹⁹ These differences in ratings have significant consequences. For example, the variance in ESG ratings can decrease companies' incentives to improve their ESG performance, by creating uncertainty in what the market expects and values.¹²⁰ Additionally, the discrepancy makes it difficult for investors to evaluate companies' overall ESG performance.¹²¹

Despite these challenges, some, such as MSCI's Chairman and Chief Executive Officer, Harry Fernandez, believe the world needs to more

¹¹⁰ Simpson et al., *supra* note 105; Taparia, *supra* note 108.

¹¹¹ Simpson et al., *supra* note 105.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Taparia, *supra* note 108.

¹¹⁷ Berg et al., *supra* note 104, at 1.

¹¹⁸ *Id.*

¹¹⁹ *Id.*; Taparia, *supra* note 108.

¹²⁰ BERG ET AL., *supra* note 104, at 1.

¹²¹ *Id.*

fully adopt ESG investing.¹²² Others have attempted to move the needle by reframing and improving the conceptual foundation of ESG ratings.¹²³ A few have warned that ESG investing is a “deadly distraction” and have called on the government to “fix the rules.”¹²⁴ Regardless of whether ESG investing can ultimately change corporate behavior, it falls fundamentally short on a critical issue — victims’ access to remedy.

B. The Impact of Shareholder Proposals

Shareholder proposals provide another mechanism to drive corporate change and accountability. Shareholders attempting to leverage their stake in a company to improve a company’s ESG performance can introduce proposals and proxy materials to be presented and voted upon at shareholder meetings.¹²⁵ While votes on shareholder proposals are typically nonbinding, they provide a means to focus corporate executive attention on certain issues such as ESG.¹²⁶ However, shareholder proposals cannot serve as a replacement for regulation. First, large asset managers, such as BlackRock, tend to wield an outsized influence in public companies and have a lackluster engagement record.¹²⁷ Second, it can be incredibly difficult for individual shareholders to vote on — let alone introduce — proposals.

¹²² Simpson et al., *supra* note 105 (“MSCI is doing [ESG ratings] to protect capitalism. Otherwise, government intervention is going to come, socialist ideas are going to come.”).

¹²³ See WITOLD J. HENISZ, ENGINE NO. 1, A NEW WAY OF SEEING VALUE: INTRODUCING THE ENGINE NO. 1 TOTAL VALUE FRAMEWORK 17 (2021), https://engine1.com/files/Engine_No._1_Total_Value_Framework.pdf [<https://perma.cc/BH8F-RMNJ>]; Ruggie & Middleton, *supra* note 102, at 9.

¹²⁴ Tariq Fancy, *Financial World Greenwashing the Public with Deadly Distraction in Sustainable Investing Practices*, USA TODAY (Mar. 16, 2021, 4:00 AM ET), <https://www.usatoday.com/story/opinion/2021/03/16/wall-street-esg-sustainable-investing-greenwashing-column/6948923002/> [<https://perma.cc/LF95-QCLD>].

¹²⁵ Lawson, *supra* note 97.

¹²⁶ Paul Kiernan, *SEC Raises Bar for Shareholder Resolutions; Critics Say Move Could Chill Corporate Democracy; Companies Cite Costs Caused by Gadfly Investors*, WALL ST. J. (Sept. 23, 2020), <https://www.wsj.com/articles/sec-raises-bar-for-shareholder-resolutions-11600877050> [<https://perma.cc/2974-CE5R>].

¹²⁷ Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-concentration of Corporate Ownership, and New Financial Risk*, 19 J. BUS. & POL. 298, 313 (2017), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/30AD689509AAD62F5B677E916C28C4B6/S1469356917000064a.pdf/hidden-power-of-the-big-three-passive-index-funds-re-concentration-of-corporate-ownership-and-new-financial-risk-.pdf> [<https://perma.cc/DCH2-ETCA>] (“[W]hen combined, BlackRock, Vanguard, and State Street constitute

1. Influence of Large Asset Managers

In 2019, ESG proposals made up half of all proposal filings.¹²⁸ While half of those proposals were withdrawn following engagement from the corporations,¹²⁹ companies are not always willing to engage,¹³⁰ and successful shareholder proposals are rare.¹³¹ Success stories typically come when large asset managers support the proposal. For example, in 2017, a shareholder proposal calling for ExxonMobil to disclose their climate change impacts, passed in large part due to BlackRock, Vanguard, and State Street casting votes in favor of the proposal.¹³² Yet, that same year, BlackRock and Vanguard only supported two of the ninety climate change related proposals that they voted on.¹³³ Furthermore, while BlackRock has advocated for environmental responsibility, it has supported ninety-nine percent of management-

the single largest shareholder in at least 40 percent of all listed companies in the United States.”); see also David McLaughlin & Annie Massa, *The Hidden Dangers of the Great Index Fund Takeover*, BLOOMBERG (Jan. 9, 2020), <https://www.bloomberg.com/news/features/2020-01-09/the-hidden-dangers-of-the-great-index-fund-takeover> [<https://perma.cc/UG5B-47HN>] (“Some 22% of the shares of the typical S&P 500 company sits in [BlackRock’s, Vanguard’s, and State Street’s] portfolios, up from 13.5% in 2008. Their power is probably greater, given that many stockholders don’t bother to vote their shares.”).

¹²⁸ Peter Reali, Christina Gunnell & Jennifer Grzech, *2020 Proxy Season Preview*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 27, 2020), <https://corpgov.law.harvard.edu/2020/04/27/2020-proxy-season-preview/> [<https://perma.cc/FQD6-NMMS>].

¹²⁹ *Id.* See generally Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262 (2016) (discussing shareholder proposal settlements and the issues these settlements raise in regard to democratic transparency, participation, accountability, and enforcement).

¹³⁰ See, e.g., *Apple Under ‘Great Pressure’ to Respond After Investors Criticize Chinese App Removals*, APPLEINSIDER (Feb. 27, 2020), <https://appleinsider.com/articles/20/02/26/apple-under-great-pressure-to-respond-after-investors-criticize-china-app-removals> [<https://perma.cc/3TZW-7VBJ>] (discussing how a shareholder proposal was voted down following Apple’s recommendation); Stephen Nellis & Ross Kerber, *Apple Investor Vote Sounds ‘Warning’ over China App Takedowns*, REUTERS (Feb. 26, 2020), <https://www.reuters.com/article/us-apple-shareholders/apple-investor-vote-sounds-warning-over-china-app-takedowns-idUSKCN20K1PV> [<https://perma.cc/4V3W-4PMA>] (reporting that Apple opposed a shareholder proposal addressing Apple’s app removals in China, claiming it “already provides extensive information about when it takes down apps at the request of governments”).

¹³¹ O’LEARY & VALDMANIS, *supra* note 102, at 137.

¹³² Andrew J. Hoffman, *The Next Phase of Business Sustainability*, STAN. SOC. INNOVATION REV. (Spring 2018), https://ssir.org/articles/entry/the_next_phase_of_business_sustainability [<https://perma.cc/GF59-WA69>] (“[F]inancial advisory firms BlackRock, Vanguard, and State Street cast votes in opposition to ExxonMobil management and called for the company to disclose its climate change impacts.”).

¹³³ O’LEARY & VALDMANIS, *supra* note 102, at 137-38.

nominated directors at U.S. fossil fuel companies.¹³⁴ A notable exception came when BlackRock supported Engine No. 1, an activist hedge fund, in its fight to install three new members on Exxon's board in order to steer the company towards reducing its carbon footprint.¹³⁵

Unsurprisingly, large asset managers are even more reticent to *initiate* ESG proposals. One review of approximately four thousand shareholder proposals issued between 2008 and 2017 revealed that neither Vanguard, BlackRock, nor State Street had initiated a single proposal.¹³⁶ Indeed, even the founder of Vanguard, John Bogle, noted that “for decades, with a handful of exceptions, the participation of our institutional money managers in corporate governance has been limited, reluctant and unenthusiastic.”¹³⁷

2. Barriers to Individual Shareholder Proposals

For individual shareholders, introducing and voting on proposals can be extremely difficult. Under the Securities and Exchange Commission (“SEC”) rule 14a-8(i)(7) (“Rule 14a-8”), public companies can exclude a shareholder proposal that “deals with a matter relating to the company’s ordinary business operations.”¹³⁸ Prior to excluding shareholder proposals under Rule 14a-8, companies typically request that the SEC Division of Corporation Finance provide its view on whether it agrees with the company that a proposal can be lawfully excluded under Rule 14a-8.¹³⁹ After reviewing the shareholder proposal, and the company’s basis for exclusion, the SEC Division of Corporation Finance issues a “no-action” letter, which informally advises companies whether or not the SEC will recommend enforcement action against them for blocking the respective proposal.¹⁴⁰

¹³⁴ *Id.* at 138.

¹³⁵ Matt Phillips, *Exxon’s Board Defeat Signals the Rise of Social-good Activists*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html> [https://perma.cc/UNK7-QLWG].

¹³⁶ O’LEARY & VALDMANIS, *supra* note 102, at 138.

¹³⁷ John C. Bogle, *The Supreme Court Had Its Say. Now Let Shareholders Decide*, N.Y. TIMES (May 14, 2011), <https://www.nytimes.com/2011/05/15/opinion/15bogle.html> [https://perma.cc/Z8BB-3YWR].

¹³⁸ SEC Shareholder Proposals, Staff Legal Bulletin No. 14L (CF), Fed. Reg. (Nov. 3, 2021), <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals> [https://perma.cc/GL23-TXRN].

¹³⁹ *Shareholder Proposal No-action Responses Issued Under Exchange Act Rule 14a-8*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/corpfin/shareholder-proposals-no-action> (last updated Dec. 22, 2021) [https://perma.cc/N4L6-ZF6D].

¹⁴⁰ For example, on December 20, 2021, the SEC responded to Apple Inc., stating it was “unable to concur” that Apple could exclude a shareholder proposal seeking the

On September 23, 2020, the SEC voted 3–2 in favor of raising the eligibility and resubmission threshold for introducing shareholder proposals.¹⁴¹ This amendment was the first substantive alteration to the shareholder proposal rules since 1998.¹⁴² Prior to the rule change, a shareholder only needed to acquire \$2,000 worth of a company’s securities and hold them for one year prior to submitting a shareholder proposal.¹⁴³ Following the policy change, in order to have their voice heard through a proposal, a shareholder had to own \$25,000 worth of securities for at least a year, or hold \$2,000 for three years.¹⁴⁴

The outcome was seen as a triumph for corporate executives “who ha[d] bristled at shareholder efforts to influence corporate policies on social and political issues” and a win for SEC Chairman Jay Clayton who took over the commission under the Trump Administration.¹⁴⁵ Clayton and the two other Republican commissioners who voted in favor of the change argued that the increased threshold would deter activist shareholders from “buying stocks simply to pressure companies to advance their personal beliefs.”¹⁴⁶ The Business Roundtable also supported the proposal and claimed the amendments would “help create a better proxy system that will benefit investors and other stakeholders over long term.”¹⁴⁷ However, others viewed the new rule

company to prepare a report “on the extent to which the Company’s policies and procedures effectively protect workers in its supply chain from forced labor.” Apple Inc., SEC Staff No-Action Letter (Dec. 20, 2021), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/saksapple122021-14a8.pdf> [<https://perma.cc/C3P7-39AA>]; Lawson, *supra* note 97.

¹⁴¹ Caroline A. Crenshaw, Comm’r, *Statement on Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, U.S. SEC. & EXCH. COMM’N (Sept. 23, 2020), <https://www.sec.gov/news/public-statement/crenshaw-14a8-2020-09-23-0> [<https://perma.cc/8W3Q-3UZX>].

¹⁴² Shearman & Sterling LLP, *2021 Proxy Season Quick Reference Guide*, LEXOLOGY (Jan. 14, 2021), <https://www.lexology.com/library/detail.aspx?g=302b39da-455b-45ed-b770-4e2c64b87a24> [<https://perma.cc/73WW-DKWY>].

¹⁴³ Crenshaw, *supra* note 141.

¹⁴⁴ *Id.*

¹⁴⁵ Kiernan, *supra* note 126.

¹⁴⁶ *Id.*

¹⁴⁷ Douglas MacMillan, *Small Investors Have Pushed Big Companies Toward Social Change. A New SEC Rule Will Limit Their Influence*, WASH. POST (Sept. 25, 2020), <https://www.washingtonpost.com/business/2020/09/25/sec-shareholder-rule/> [<https://perma.cc/CAS3-3MBG>]. Some have argued the Business Roundtable’s position puts it at odds with its recent shift from shareholder primacy in its 2019 Statement on the Purpose of a Corporation. *Id.* See generally *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy that Serves All Americans’*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>

as “chill[ing] corporate democracy,”¹⁴⁸ disenfranchising less-wealthy investors, and stifling dialogue on emerging issues.¹⁴⁹

Furthermore, critics saw this change as an effort by the Trump Administration to subvert efforts on Wall Street to focus on ESG issues.¹⁵⁰ Scott Stringer, the New York City Comptroller, noted that the mechanism for submitting shareholder proposals “should be enhanced, not diminished,” and that “[t]he SEC’s 3-2 vote to approve the Shareholder Proposal Rule is a slap in the face to corporate accountability.”¹⁵¹ Commissioner Caroline A. Crenshaw, a Democratic commissioner who voted against the rule, argued that while she did not believe that all shareholder proposals represent good ideas, they provide an effective mechanism “for sending good ideas to management, while allowing bad ideas to fall away.”¹⁵² Additionally, Crenshaw voiced concern that while proposals related to the pandemic and climate risk saw unprecedented support during the 2020 proxy season, many will now no longer make the ballot.¹⁵³

Recent changes under the Biden Administration have eased these restrictions, and made it more difficult for companies to exclude ESG proposals.¹⁵⁴ However, major structural issues still stand in the way of individual shareholder proposals passing. Perhaps most significant is the reality that of the individual Americans who own stocks, most do not have a voice.¹⁵⁵ This stems from the fact that most Americans do

[<https://perma.cc/4ZDM-VDLA>] (replacing shareholder primacy statements with a declaration that member organizations share a “fundamental commitment to all of our stakeholders”); Michael Hiltzik, *Column: Last Year CEOs Pledged to Serve Stakeholders. You Were Right Not To Buy It*, L.A. TIMES (Aug. 19, 2020), <https://www.latimes.com/business/story/2020-08-19/big-business-shareholder-value-scam> [<https://perma.cc/H6YE-LY3P>] (“American businesses won’t be weaned from favoring shareholders above all other until they’re forced to . . . they’ll talk about changing, but talk is cheap.”).

¹⁴⁸ Kiernan, *supra* note 126.

¹⁴⁹ Reali et al., *supra* note 128.

¹⁵⁰ Kiernan, *supra* note 126.

¹⁵¹ *Statement from New York City Comptroller Scott M. Stringer on SEC Rule Change*, N.Y. CITY COMPTROLLER (Sept. 23, 2020), <https://comptroller.nyc.gov/newsroom/statement-from-new-york-city-comptroller-scott-m-stringer-on-sec-rule-change/> [<https://perma.cc/8MWP-3AQJ>].

¹⁵² Crenshaw, *supra* note 141.

¹⁵³ *Id.*

¹⁵⁴ David A. Bell, Ron C. Llewellyn, Ran Ben-Tzur & Julia Forbess, *SEC Adopts Guidance Likely To Lead to More Policy-related Shareholder Proposals*, FENWICK (Nov. 9, 2021), <https://www.fenwick.com/insights/publications/sec-adopts-guidance-likely-to-lead-to-more-policy-related-shareholder-proposals> [<https://perma.cc/VDQ6-S5YP>].

¹⁵⁵ See Teresa Ghilarducci, *Most Americans Don’t Have a Real Stake in the Stock Market*, FORBES (Aug. 31, 2020, 9:44 PM EDT), <https://www.forbes.com/sites/>

not directly invest in individual stocks.¹⁵⁶ Instead, they invest in broad, low-cost, diversified mutual funds or exchange-traded funds.¹⁵⁷ Under current regulations, these funds — not the individual shareholder — control voting.¹⁵⁸

While there have been efforts to change this, the structural barriers remain high.¹⁵⁹ Furthermore, future administrations can always bring back restrictions. Thus, while shareholder proposals have the power to draw attention to ESG principles, relying on the power of shareholder proposals to address systemic corporate human rights abuses within international supply chains is insufficient.¹⁶⁰

As this Section has highlighted, while ESG investing and shareholder proposals have the potential to create positive impacts, they cannot serve as a replacement for regulation. Instead, they must be viewed as complements — instruments operating together to establish sufficient accountability mechanisms.¹⁶¹ The shift to mandatory HRDD laws has recognized that soft law principles and voluntary incentives are not enough by themselves to fully integrate the UNGPs.¹⁶² This next Section

teresaghilarducci/2020/08/31/most-americans-dont-have-a-real-stake-in-the-stock-market/?sh=27c5081e1154 [https://perma.cc/7MKG-JVMV].

¹⁵⁶ See *id.*

¹⁵⁷ See Jeff Sommer, *Shareholder Democracy Is Getting Bigger Trial Runs*, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2021/10/15/business/shareholder-democracy-stocks.html> [https://perma.cc/KE5J-7UGT].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ This is not to say that no shareholder proposal makes an impact. For example, during the 1980s, anti-apartheid activists used shareholder proposals to pressure corporations to sever economic ties with South Africa. See Philip A. Broyles, *The Impact of Shareholder Activism on Corporate Involvement in South Africa During the Reagan Era*, 28 INT'L. REV. MOD. SOCIO. 1, 2-3 (1998); Nancy H. Kreisler, *Mobil Is Quitting South Africa, Blaming 'Foolish' Laws in U.S.*, N.Y. TIMES (Apr. 29, 1989), <https://www.nytimes.com/1989/04/29/business/mobil-is-quitting-south-africa-blaming-foolish-laws-in-us.html> [https://perma.cc/VVH5-CZ9W].

¹⁶¹ See, e.g., Ruggie, *The Social Construction*, *supra* note 44, at 63 (acknowledging that the shift towards accepting businesses have human rights responsibilities was helped by “escalating pressure from civil society and adversely affected populations”).

¹⁶² See, e.g., Sandra Cossart & Lucie Chatelain, Opinion, *What Lessons Does France's Duty of Vigilance Law Have for Other National Initiatives?*, BUS. & HUM. RTS. RES. CTR. (June 27, 2019), <https://www.business-humanrights.org/en/blog/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives> [https://perma.cc/P3PL-29Y2] (“The French Duty of Vigilance law is . . . a formal recognition that soft law principles and voluntary initiatives are insufficient.”); Rachel Davis, *Beyond Voluntary: What It Means for States To Play an Active Role in Fostering Business Respect for Human Rights*, SHIFT (Feb. 2019), <https://shiftproject.org/beyond-voluntary-what-it-means-for-states-to-play-an-active-role-in-fostering-business-respect-for-human-rights> [https://perma.

will analyze the potential power these laws can have using the French Duty of Vigilance Law¹⁶³ and the German Supply Chains Act as examples.

III. THE EXCEPTIONS

At the outset, John Ruggie hypothesized that his mandate would serve as an “unfolding dynamic that would lead to greater protection against corporate-related human rights harm.”¹⁶⁴ Looking back nearly ten years later, Ruggie noted that “governments, with exceptions, have been a weak link in this dynamic.”¹⁶⁵ Germany and France have been two of those exceptions. This Section discusses the development of the German and French HRDD laws and provides a brief overview of each in turn. It then examines the first case brought under the French HRDD law.

A. The German Response

In 2016, under the German National Action Plan for Business and Human Rights (“NAP”),¹⁶⁶ German corporations were urged to voluntarily check and report whether human rights standards were adhered to within their supply chains.¹⁶⁷ If less than fifty percent of German corporations with at least 500 employees failed to implement effective due diligence standards by 2020, Germany’s governing coalition agreed to pass a law mandating action.¹⁶⁸

On July 14, 2020, Germany Labor Minister Hubertus Heil and German Development Minister Gerd Müller presented survey results¹⁶⁹

cc/XU3B-WQUA] (noting comprehensive human rights due diligence legislation helps “drive more effective implementation of the UNGPs”).

¹⁶³ France paved the way forward when it passed its Duty of Vigilance Law in 2017. De Nadal, *supra* note 27.

¹⁶⁴ RUGGIE, JUST BUSINESS, *supra* note 12, at 202.

¹⁶⁵ Ruggie, Opening Remarks, *supra* note 21.

¹⁶⁶ *National Action Plan for Business and Human Rights*, AUSWÄRTIGES AMT (Dec. 21, 2016), <https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/-/227580> [<https://perma.cc/3PVS-XHPW>].

¹⁶⁷ Joshua Posaner & Nette Nöstlinger, *Debate Rages over Policing Ethical Abuses in Global Supply Chains*, POLITICO (Sept. 17, 2020, 6:00 AM), <https://www.politico.eu/article/debate-rages-in-berlin-and-brussels-over-policing-ethical-abuses-in-global-supply-chains> [<https://perma.cc/3PJW-3MPV>].

¹⁶⁸ *Germany: Monitoring of the National Action Plan on Business & Human Rights*, BUS. & HUM. RTS. RES. CTR. (Aug. 14, 2020), <https://www.business-humanrights.org/en/latest-news/germany-monitoring-of-the-national-action-plan-on-business-human-rights> [<https://perma.cc/X7V9-CA9B>].

¹⁶⁹ @tagesschau, *Vorstellung des Lieferkettengesetz mit Entwicklungsminister Müller (CSU) und Arbeitsminister Heil (SPD)*, PERISCOPE (July 14, 2020), <https://www.pscp.tv/w/>

that showed only twenty-two percent of the 455 companies that responded met the NAP requirements.¹⁷⁰ Based on these results, Ministers Heil and Müller declared the coalition agreement applied.¹⁷¹ Chancellor Angela Merkel agreed.¹⁷²

Yet, it took until July 22, 2021, to publish the law.¹⁷³ For Minister Heil it was simple: “[i]f you make profits globally, you should also take responsibility for global human rights.”¹⁷⁴ Others did not see it this way. For years, the Labor, Development, and Economics ministries struggled to agree on key elements of the legislation, particularly regarding civil liability.¹⁷⁵ Finally, following negotiations led by Chancellor Merkel, a legislative compromise was announced in early 2021.¹⁷⁶ Germany’s Federal Cabinet subsequently approved draft legislation,¹⁷⁷ which the German Bundestag adopted on June 11, 2021¹⁷⁸ and the German Bundesrat authorized on June 25, 2021.¹⁷⁹

The *Lieferkettensorgfaltspflichtengesetz*, or Supply Chain Due Diligence Act (“LkSG”), will enter into force in 2023 and initially apply

1OdJrWMVppzxX [https://perma.cc/2UEN-689X] (Ministers Heil and Müller presenting the survey results at a press conference and answering questions from reporters).

¹⁷⁰ *German Parliament Passes Mandatory Human Rights Due Diligence Law*, BUS. & HUM. RTS. RES. CTR. (June 16, 2021), <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/> [https://perma.cc/Z4X6-3KBT] [hereinafter *German Parliament*].

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *Act on Corporate Due Diligence in Supply Chains*, FED. MINISTRY OF LAB. & SOC. AFFS., <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html;jsessionid=693C7D2CF065BC8D0437A13E02D3E833> (last visited Feb. 22, 2022) [https://perma.cc/C7RL-T2H6] [hereinafter *Act on Corporate Due Diligence*].

¹⁷⁴ Kit Holden, *Germany to Fine Its Companies for Human Rights and Environmental Violations Abroad*, LOCAL (Mar. 3, 2021, 3:18 PM CET), <https://www.thelocal.de/20210303/germany-to-fine-its-companies-for-human-rights-and-environmental-violations-abroad> [https://perma.cc/PSB8-TKZB].

¹⁷⁵ *German Parliament*, *supra* note 170.

¹⁷⁶ *Id.*

¹⁷⁷ *Act on Corporate Due Diligence*, *supra* note 173; *see also Will the UK Follow*, *supra* note 27.

¹⁷⁸ Tobias Koppmann, Florian Lechner, Sharon Lamb, Anne-France Moreau, Ettore Scandale & Benedikt Glossner, *The New German Supply Chain Due Diligence Act (with a View Across the Border)*, NAT’L. L. REV. (July 14, 2021), <https://www.natlawreview.com/article/new-german-supply-chain-due-diligence-act-view-across-border> [https://perma.cc/M3LP-K6CV].

¹⁷⁹ Beschluss [Decision], Deutscher Bundesrat: Drucksachen [BR] 495/21 (Ger.), [https://www.bundesrat.de/SharedDocs/drucksachen/2021/0401-0500/495-21\(B\).pdf?__blob=publicationFile&v=1](https://www.bundesrat.de/SharedDocs/drucksachen/2021/0401-0500/495-21(B).pdf?__blob=publicationFile&v=1) [https://perma.cc/58X4-SDED].

to companies with 3,000 or more employees.¹⁸⁰ In 2024, the law will then apply to companies with 1,000 or more employees that have a registered office or branch in Germany.¹⁸¹

The law lays out nine due diligence obligations for all corporations covered under the act.¹⁸² First, corporations must establish a risk management system that is incorporated throughout all relevant business processes.¹⁸³ Second, an individual, such as a human rights officer, must be designated within the corporation to monitor the corporation's risk management system.¹⁸⁴ Third, regular risk analyses must be performed on a yearly basis in order to identify any human rights or environmental risks within its own business or at its direct suppliers.¹⁸⁵

Fourth, the corporation must issue a policy statement describing its human rights strategy.¹⁸⁶ Fifth, the corporation is required to enact preventative measures within its own business. Additionally, the corporation must identify preventative measures with its direct suppliers as well. This includes agreeing on contractual control mechanisms to verify compliance with the corporation's human rights strategy.¹⁸⁷ Sixth, if a corporation finds that human rights or environmental related abuse has occurred, the corporation must take remedial action.¹⁸⁸ If the violation occurred at a direct supplier, the corporation must take steps to end the contractual relationship.¹⁸⁹ Seventh, a complaints procedure must be established that allows individuals to report human rights and environmental risks that arise

¹⁸⁰ INITIATIVE LIEFERKETTENGESETZ, WHAT THE NEW SUPPLY CHAIN ACT DELIVERS – AND WHAT IT DOESN'T 1, 2 (June 11, 2021), https://germanwatch.org/sites/default/files/Initiative-Lieferkettengesetz_Analysis_What-the-new-supply-chain-act-delivers.pdf [<https://perma.cc/GU4C-PTWA>] [hereinafter WHAT THE ACT DELIVERS]. Currently more than 600 German companies fall within this threshold. Rowe et al., *supra* note 27.

¹⁸¹ WHAT THE ACT DELIVERS, *supra* note 180. Today, that would include approximately 2,900 German companies. Rowe et al., *supra* note 27.

¹⁸² Lieferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains], July 16, 2021, BGBL I at 2959, § 3(1), https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=4 [<https://perma.cc/F99T-69TS>].

¹⁸³ *Id.* § 4(1).

¹⁸⁴ *Id.* § 4(3).

¹⁸⁵ *Id.* § 5(1).

¹⁸⁶ *Id.* § 6(2).

¹⁸⁷ *Id.* § 6(4).

¹⁸⁸ *Id.* § 7(1).

¹⁸⁹ *Id.* § 7(2).

within a corporations' activities or those of its direct suppliers.¹⁹⁰ Eighth, when implementing due diligence obligations, the corporation must adopt procedures that allow the corporation to become aware of risks at the indirect supplier level as well.¹⁹¹ Finally, corporations must document and report on their due diligence obligations and make them available on their website.¹⁹²

The German Federal Office for Economic Affairs and Export Control ("BAFA") is responsible for monitoring and enforcing the law.¹⁹³ BAFA can request information and issue remediation orders.¹⁹⁴ Additionally, any complaints regarding violations are submitted to BAFA.¹⁹⁵ Notably, the law does not provide a new cause of action allowing impacted parties to bring suit in German courts.¹⁹⁶ Instead, corporations will face fines for failure to adhere to the due diligence obligations laid out in the law.¹⁹⁷ These fines can amount up to eight million euros or approximately two percent of annual global turnover.¹⁹⁸ Sanctions could also include debarment from public procurement for up to three years.¹⁹⁹

While praising the country for taking positive steps forward, many civil society organizations have criticized the law for failing, *inter alia*, to cover smaller corporations, provide effective remediation routes for impacted individuals, and for lessening the due diligence restrictions for a corporation's indirect suppliers.²⁰⁰ While this nascent German

¹⁹⁰ *Id.* § 8.

¹⁹¹ *Id.* § 9.

¹⁹² *Id.* § 10(1)-(2).

¹⁹³ *Id.* § 19; Koppmann et al., *supra* note 178.

¹⁹⁴ Koppmann et al., *supra* note 178.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Act on Corporate Due Diligence*, *supra* note 173; Koppmann et al., *supra* note 178.

¹⁹⁸ *Act on Corporate Due Diligence*, *supra* note 173.

¹⁹⁹ Salomé Lemasson, *In Europe, Human Rights Litigation Is Gaining Momentum*, FCPA BLOG (Sept. 28, 2021, 7:28 AM), <https://fcpublog.com/2021/09/28/in-europe-human-rights-litigation-is-gaining-momentum> [<https://perma.cc/2N2M-EP9P>].

²⁰⁰ Unlike the proactive risk analysis required for a corporation's own business activities and direct suppliers, for indirect suppliers, a corporation only needs to conduct a risk analysis when it gains "substantiated knowledge" of a human rights violation. WHAT THE ACT DELIVERS, *supra* note 180, at 4-6; *see also Germany: New Supply Chain Law a Step in the Right Direction*, HUM. RTS. WATCH (June 11, 2021, 5:00 AM EDT), <https://www.hrw.org/news/2021/06/11/germany-new-supply-chain-law-step-right-direction> [<https://perma.cc/8U32-PBHH>]. The European Coalition for Corporate Justice stated that while the law is a "good start . . . victims deserve more." *German Parliament Adopts Supply Chain Law, but Compromise Leaves Gaps*, EUR. COAL. FOR CORP. JUST. (June 11, 2021),

Supply Chains Due Diligence Act is a positive step forward for corporate accountability, it remains to be seen how effective this law will be in pushing corporations to protect, respect, and remedy human rights abuses that occur within their supply chains.

B. The Pathbreaking French Solution

While Germany was still evaluating whether its voluntary due diligence measures would be sufficient, in 2017, following a laborious four year process, France became the first country to adopt a law that required companies to undertake HRDD.²⁰¹ This pathbreaking new *Loi Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre*, or Law Relating to the Duty of Vigilance of Parent and Contracting Companies (“LdV”),²⁰² was based on the understanding that in order to create real change, corporations had to be held accountable for activities they outsourced or conducted worldwide.²⁰³ In order to do this, the relationship between parent companies and subsidiaries had to be reconstructed.²⁰⁴

supply-chain-law [https://perma.cc/W265-QG4T]. Similarly, Dr. Miriam Saage-Maaß applauded the German government on passing the LkSG but criticized the law for failing to “do justice to those affected by human rights violations.” *Bundestag Passes Supply Chain Law: An Important Step — But Not Enough for Those Affected*, ECCHR (June 11, 2021), <https://www.ecchr.eu/pressemitteilung/bundestag-verabschiedet-lieferkettengesetz> [https://perma.cc/3APY-6SXB].

²⁰¹ *Towards Mandatory Human Rights Due Diligence*, BUS. & HUM. RTS. RES. CTR.: BLOG (June 2, 2020), https://www.business-humanrights.org/en/blog/?opinion_series=3&backdate_after=&backdate_before=&query= [https://perma.cc/FE3S-5YJA].

²⁰² Sandra Cossart, Jérôme Chaplier & Tiphaine Beau De Loménie, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317, 317 (2017). *See generally* Loi 2017-399 du 27 mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre [Law 2017-399 of March 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Mar. 23, 2017, art. 1 (Fr.).

²⁰³ THE LAW ON DUTY OF VIGILANCE OF PARENT AND OUTSOURCING COMPANIES YEAR I: COMPANIES MUST DO BETTER 4 (Juliette Renaud et al. eds., Maria Gioia trans., 2019); EVALUATION DE LA MISE EN ŒUVRE DE LA LOI N° 2017-399 DU 27 MARS 2017 RELATIVE AU DEVOIR DE VIGILANCE DES SOCIÉTÉS MÈRES ET DES ENTREPRISES DONNEUSES D'ORDRE, CONSEIL GÉNÉRAL DE L'ÉCONOMIE 12 (2020), https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf [https://perma.cc/NU4H-6JD5] [hereinafter EVALUATION]; Cossart et al., *supra* note 202, at 323.

²⁰⁴ EVALUATION, *supra* note 203, at 12-13; *see also* OLIVIER PETITJEAN, DEVOIR DE VIGILANCE: UNE VICTOIRE CONTRE L'IMPUNITÉ DES MULTINATIONALES 10-11 (2019) (describing how diffuse chains of responsibility in multinational corporations “facilitates abuse and gives free rein to the sole pursuit of financial profit” (translated from French)).

The law was developed by young women activists in coordination with left wing deputies and lawyers.²⁰⁵ At first, the law was met with staunch opposition.²⁰⁶ Businesses feared that the legislation would harm their international competitiveness, while politicians worried that holding French businesses liable for harm committed by their subsidiaries in other jurisdictions may not be fair.²⁰⁷ Nevertheless, advocates persisted.²⁰⁸

In part due to their persistence, the LdV was passed.²⁰⁹ The law addresses the harmful impacts of multinational companies on human rights and the environment, creates binding obligations on companies, and provides a judicial avenue for victims.²¹⁰ It does so by establishing a duty of care, or “a legal obligation to adhere to a standard of reasonable care, while performing any acts that could foreseeably harm human rights or the environment.”²¹¹ The law extends beyond French borders, as a qualifying company must exercise this duty of care throughout its international supply chain.²¹²

Notably, not all companies are required to follow this law.²¹³ The law only imposes a duty of care on any company incorporated or headquartered in France for at least two consecutive fiscal years that either employs at least 5,000 employees itself and through its French

²⁰⁵ Alice Evans, *Overcoming the Global Despondency Trap: Strengthening Corporate Accountability in Supply Chains*, 27 REV. INT'L POL. ECON. 658, 662 (2020) [hereinafter *Global Despondency Trap*].

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 662-63.

²⁰⁸ See *Séance du 1er février 2017 (compte rendu intégral des débats)* [Session of February 1, 2017, (full report of the discussions)], SÉNAT (Feb. 1, 2017), <https://www.senat.fr/seances/s201702/s20170201/s20170201005.html#int626> [https://perma.cc/Y3ZQ-XXWK] (applauding advocates' tireless efforts to pass the legislation).

²⁰⁹ Evans, *Global Despondency Trap*, *supra* note 205, at 659, 671-72 (“Campaigners also got lucky, with the coincidental appointment of a sympathetic Minister.”). The law’s passage was also due to a combination of conditions including (1) the public outrage surrounding the “Rana Plaza” tragedy in 2013 (the collapse of a textile factory in Bangladesh that had close links with French companies); (2) the French national political culture (widespread anticipation of state intervention and anti-globalization sentiment); (3) a center-left government under previous President Hollande; and (4) the appointment of a Minister of Economy and Industry in 2016 who was in favor of the law. Schilling-Vacaflor, *supra* note 82, at 115.

²¹⁰ Cossart & Chatelain, *supra* note 162; see also Code civil [C. civ.] [Civil Code] art. 1240 (Fr.) (stating that a person who causes damage to another person by his or her act or omission is bound to provide remedy when fault is established).

²¹¹ Cossart et al., *supra* note 202, at 318-19.

²¹² *Id.* at 319.

²¹³ See Law 2017-399 of Mar. 27, 2017, art. 1 (Fr.).

subsidiaries, or employs at least 10,000 people itself or through its subsidiaries located in France and abroad.²¹⁴ While there is no publicly available list of companies that fall under the LdV, in 2021, it was estimated the law applied to approximately 263 companies, including Christian Dior,²¹⁵ L'Oréal,²¹⁶ and Nestlé.²¹⁷ Of these companies, it was estimated that forty-four companies have still not published a vigilance plan.²¹⁸

For those companies that fall within the LdV parameters, the law requires companies to establish and implement a vigilance plan to “identify risks and prevent serious violations of human rights and fundamental freedoms, human health and safety and the environment.”²¹⁹ The vigilance plan must identify risks within the company’s own activities, as well as its controlled subsidiaries, subcontractors, and suppliers.²²⁰ The plan can be created in consultation with stakeholders, but must include the following five measures: (1) mapping to identify, analyze and prioritize risks; (2) procedures to assess subsidiaries, subcontractors, or suppliers with whom an established commercial relationship is maintained; (3) action measures to mitigate risks or prevent serious damage; (4) an alert mechanism; and (5) a monitoring system to evaluate the effectiveness

²¹⁴ *Id.*; see also Cossart et al., *supra* note 202, at 320.

²¹⁵ To review Christian Dior’s vigilance plans, see *Christian Dior*, DUTY OF VIGILANCE RADAR, <https://vigilanceplan.org/company/christian-dior/> (last updated July 5, 2021) [<https://perma.cc/8NQ6-AJLE>].

²¹⁶ To review L’Oreal’s vigilance plans, see *L’Oréal*, DUTY OF VIGILANCE RADAR, <https://vigilance-plan.org/company/loreal> (last updated July 5, 2021) [<https://perma.cc/LP48-HYRW>].

²¹⁷ *Third Edition of the Duty of Vigilance Radar – McDonald’s, Lactalis, Bigard, Adrexo, Leroy Merlin, Generali, Altrad, Euro Disney . . . 44 Companies Still Breaking the Law?*, DUTY OF VIGILANCE RADAR (July 7, 2021), <https://vigilance-plan.org/third-edition-of-the-duty-of-vigilance-radar-mcdonalds-lactalis-bigard-adrexo-leroy-merlin-general-ialtrad-euro-disney-46-companies-still-breaking-the-law> [<https://perma.cc/C4LE-9HBT>] [hereinafter *Third Edition of the Duty of Vigilance Radar*]; Anna Triponel & John Sherman, *Legislating Human Rights Due Diligence: Opportunities and Potential Pitfalls to the French Duty of Vigilance Law*, INT’L BAR ASS’N (May 17, 2017), <https://respect.international/legislating-human-rights-due-diligence-opportunities-and-potential-pitfalls-to-the-french-duty-of-vigilance-law> [<https://perma.cc/K2T9-GGFA>]. To review Nestlé’s vigilance plan, see *Nestlé France*, DUTY OF VIGILANCE RADAR, <https://vigilance-plan.org/company/nestle-france> (last updated July 5, 2021) [<https://perma.cc/SA6R-REFQ>].

²¹⁸ *Third Edition of the Duty of Vigilance Radar*, *supra* note 217.

²¹⁹ Law 2017-399 of Mar. 27, 2017, art. 1 (Fr.).

²²⁰ Cannelle Lavite, *The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence*, VERFASSUNGSBLOG ON MATTERS CONST. (June 16, 2020), <https://verfassungsblog.de/the-french-loi-de-vigilance-prospects-and-limitations-of-a-pioneer-mandatory-corporate-due-diligence> [<https://perma.cc/JNU2-7XX3>].

of the plan.²²¹ The entire plan must be made public.²²² If a company fails to adhere to its vigilance plan, a party with standing, which includes affected persons, non-governmental organizations (“NGOs”), trade unions, or public municipalities, can formally notify a company of its noncompliance and order it to comply.²²³ If the company fails to comply with a formal notice following a three month period, a “competent court” can issue an injunction requiring a company to comply under penalty.²²⁴ Additionally, victims harmed by a corporation’s failure to adhere to its vigilance plan can seek reparation.²²⁵

Originally, the law stipulated a judge could levy a civil fine up to thirty million euros.²²⁶ However, the French Constitutional Court found the scope of the duty defined in the statute was not sufficient to impose a civil penalty between ten and thirty million euros.²²⁷ The Court rejected other arguments raised by the law’s opponents, including the claim that the law would force companies to disclose information relating to their industrial and commercial strategy.²²⁸ The Court found that so long as limitations are linked to constitutional requirements or justified by the general interest, such limitations are valid.²²⁹ The Court also objected to claims that the new law created a vicarious liability regime.²³⁰ In dismissing this argument, the Court found that the law was simply intended to establish company liability for breaches of its obligations set out in its vigilance plan.²³¹ Thus, the law’s geographic scope was upheld, allowing a party to bring actions in France even if the harm occurred in another State’s territory.²³²

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*; see, e.g., *Total Sued Under France’s New Duty of Vigilance Law*, ENV’T NEWS SERV. (Oct. 23, 2019, 7:23 AM), <https://ens-newswire.com/total-sued-under-frances-new-duty-of-vigilance-law/> [<https://perma.cc/WKZ2-4A3N>] [hereinafter *Total Sued*] (describing a suit against French company Total for their failure to implement a vigilance plan in Uganda).

²²⁵ Code civil [C. civ.] [Civil Code] art. 1240 (Fr.); Cossart et al., *supra* note 202, at 321; Lavite, *supra* note 220.

²²⁶ Cossart et al., *supra* note 202, at 321.

²²⁷ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2017-750DC, Mar. 23, 2017, J.O. 74 (Fr.).

²²⁸ *Id.*

²²⁹ *Id.*; see also Cossart et al., *supra* note 202, at 322.

²³⁰ CC No. 2017-750DC, J.O. 74.

²³¹ *Id.*

²³² Cossart et al., *supra* note 202, at 319.

The LdV is broadly viewed as pathbreaking, but it contains various procedural uncertainties²³³ that could derail its effectiveness and ability to protect individuals and the environment against business related human rights abuses. Thus, the first few cases will be critical. The first case is currently underway. In 2019, six NGOs — four French and two Ugandan — filed a lawsuit against TotalEnergies (“Total”), a French energy behemoth, for failing to address the human and environmental impact of an oil field project in Western Uganda.²³⁴ Total plans to drill over 400 wells, many of which will be in Murchison Falls National Park, near the shores of Lake Albert.²³⁵ These wells would allow the company to extract approximately 200,000 barrels of oil per day.²³⁶ The NGOs claim this project not only contains insufficient environmental safeguards threatening both biodiversity and local residents, but Total has also intimidated and failed to appropriately compensate local landowners displaced by the project.²³⁷ In a communication sent to Total CEO, Patrick Pouyanné, four U.N. Special Rapporteurs noted they had received reports that Total’s subsidiary, Total Uganda, and the subcontractor it hired, Atacama Consulting, had forced farmers to sign compensation agreements under duress and deprived them of their land before they received compensation.²³⁸ In response, Total’s General Counsel, Aurelien Hamelle, claimed the allegations were “baseless and

²³³ For example, the LdV does not clarify what constitutes a “competent court” or establish exactly what constitutes a breach of the LdV. Susy Bullock, Pierre-Emmanuel Fender, Perlette Jura, Oliver Welch & Finn Zeidler, *Gibson Dunn Discusses Mandatory Corporate Human Rights Due Diligence*, CLS BLUE SKY BLOG (Mar. 24, 2021), <https://clsbluesky.law.columbia.edu/2021/03/24/gibson-dunn-discusses-mandatory-corporate-human-rights-due-diligence/> [https://perma.cc/SXK3-62YZ]; Lavite, *supra* note 220.

²³⁴ AFP, *NGOs File Suit Against Total over Uganda Oil Project*, E. AFRICAN (Oct. 24, 2019), <https://www.theeastafrican.co.ke/business/NGOs-sue-Total-over-Uganda-oil-project/2560-5323092-r3aeku/index.html> [https://perma.cc/ZT4V-X2P7].

²³⁵ *Id.*; *Total’s Uganda Oil Projects ‘Hurt Tens of Thousands’: NGOs*, AL JAZEERA (Oct. 20, 2020), <https://www.aljazeera.com/news/2020/10/20/total-oil-project-hurts-100000-in-uganda-watchdog-ngos> [https://perma.cc/PWU8-4WNG] [hereinafter *Uganda Oil Projects*].

²³⁶ *Total Sued*, *supra* note 224.

²³⁷ *Uganda Oil Projects*, *supra* note 235.

²³⁸ Letter from David Kaye, Githu Muigai, David R. Boyd & Michel Forst, UN Special Rapporteurs, to Patrick Pouyanné, President, Total (Apr. 20, 2020), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25137> [https://perma.cc/5QEU-BQ9A].

unfounded” and argued that the project is “expected to bring significant economic and social benefits to both countries.”²³⁹

The NGOs bringing the case argue that Total’s vigilance plan does not comply with the LdV.²⁴⁰ Specifically, the NGOs claim Total failed to identify any risks associated with its activities and the activities of its subsidiary in Uganda.²⁴¹ In accordance with the law, the NGOs first presented Total with a formal demand in June 2019 that sought the company to revise its vigilance plan for the oil project in Uganda.²⁴² Total rejected the NGOs demands, so the NGOs filed suit.²⁴³ In January 2020, the French Nanterre Civil Court declared that because the case did not fall within its jurisdiction, it could not consider the NGOs demands.²⁴⁴ Instead, the court argued the case should fall to the

²³⁹ Letter from Aurélien Hamelle, Total Gen. Couns., to David Kaye, Githu Muigai, David R. Boyd & Michel Forst, UN Special Rapporteurs (May 18, 2020), <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35313> [<https://perma.cc/2MR2-NVUR>].

²⁴⁰ PRAKKEN D’OLIVEIRA, *SUING GOLIATH: THE STRUGGLE FOR JUSTICE IN CASES OF CORPORATE ABUSE ABROAD* 50 (2021), <https://corporatejustice.org/wp-content/uploads/2021/06/Suing-Goliath-event-presentation.pdf> [<https://perma.cc/T95P-J6B7>].

²⁴¹ De Nadal, *supra* note 27; *Duty of Vigilance: Total Formal Notice for Its Activities in Uganda*, LES AMIS DE LA TERRE FRANCE (June 25, 2019), <https://www.amisdelaterre.org/communique-presse/devoir-de-vigilance-total-mise-en-demeure-pour-ses-activites-en-uganda/> [<https://perma.cc/4A9F-KMN5>] [hereinafter *Total Formal Notice*].

²⁴² *Total Sued*, *supra* note 224.

²⁴³ *Id.* During the trial, two representatives of Ugandan communities, Fred Mwesigwa and Jelousy Mugisha, testified about the impact the Total oil project has had on their lives. Mugisha, a pastor and community leader, stated, “For us, it is impossible to access the courts in Uganda. So I hope that French justice will help us” *A Historic First Hearing on the Duty of Vigilance*, LES AMIS DE LA TERRE FRANCE (Dec. 12, 2019), <https://www.amisdelaterre.org/une-premiere-audience-historique-sur-le-devoir-de-vigilance/> [<https://perma.cc/MLZ4-4F2T>]. When the two men returned to Uganda following their testimony, they were subjected to harassment and intimidation. Mugisha was detained for nine hours at the airport in Kampala and unknown men attempted to break into Mwesigwa’s home. Both men were moved to undisclosed locations due to safety concerns. *Two Defenders in Danger*, LES AMIS DE LA TERRE FRANCE (Dec. 26, 2019), <https://www.amisdelaterre.org/deux-defenseurs-en-danger/> [<https://perma.cc/D7ZS-46MJ>]; see also Rebecca Rosman, *French Judges Tilt in Favour of Total in Landmark Ruling*, AL JAZEERA (Jan. 30, 2020), <https://www.aljazeera.com/economy/2020/1/30/french-judges-tilt-in-favour-of-total-in-landmark-ruling> [<https://perma.cc/N8AV-4CDC>].

²⁴⁴ Tribunal de grande instance [TGI] [ordinary court of original jurisdiction], Nanterre, Jan. 30, 2020, 19/02833 (Fr.), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200130_NA_judgment-1.pdf [<https://perma.cc/66KM-8TRB>]; see also Friends of the Earth Int’l, *French Court Declares Itself Incompetent in Favour of Commercial Court in Case Against Total over Alleged Failure to Respect French Duty of Vigilance Law in Its Operations in Uganda*, BUS. & HUM. RTS. RES. CTR. (Jan. 31, 2020), <https://www.business-humanrights.org/en/latest-news/french-court-declares-itself-incompetent-in-favour-of-commercial-court-in-case-against-total-over-alleged-failure-to-respect-french-duty-of->

Commercial Court.²⁴⁵ The Versailles Court of Appeal confirmed the decision.²⁴⁶ In response, the NGOs appealed to France’s highest court — the Court of Cassation.²⁴⁷ On December 15, 2021, the Court of Cassation ruled in favor of the NGOs, finding that as non-commercial claimants, the NGOs have the right to choose either a civil or commercial court.²⁴⁸ The case will now return to the Nanterre Civil Court to examine the merits.²⁴⁹

Regardless of the outcome, what would have once been an implausible suit is now possible given the LdV.²⁵⁰ Juliette Renaud, a corporate accountability senior campaigner for Friends of the Earth in France remarked that “this unprecedented legal case is [] a legitimate sign of recognition that transnational corporations have new and very concrete legal obligations under this law. Corporations can no longer hide behind ‘good intentions.’”²⁵¹

While the authenticity behind corporate “good intentions” can be debated, it is clear that in contrast to France and Germany, mechanisms in the U.S. to hold corporations accountable for human rights abuses committed in their supply chains are few and far between.²⁵² In order to address this governance gap,²⁵³ this Note argues California should pass HRDD legislation.²⁵⁴ This next Section will analyze how the French LdV and the Germany Supply Chain Due Diligence Act could serve as possible models for California.

vigilance-law-in-its-operations-in-uganda/ [https://perma.cc/LPA3-FGLV] [hereinafter *French Court Declares Itself Incompetent*].

²⁴⁵ *French Court Declares Itself Incompetent*, *supra* note 244.

²⁴⁶ Cour d’appel [CA] [regional court of appeal] Versailles, civ., Dec. 10, 2020, 20/01692 (Fr.).

²⁴⁷ Maia Courtois & Amélia Morghadi, *Total Case in Uganda, the Multinational Facing Justice*, REPORTERRE, <https://reporterre.net/Affaire-Total-en-Ouganda-la-multinationale-face-a-la-justice> (last updated Nov. 8, 2021, 1:33 PM) [https://perma.cc/XKY2-4J7N].

²⁴⁸ Hannah Brem, *French High Court Gives CSOs Procedural Win in Total Uganda Oil Case*, JURIST (Dec. 16 2021), <https://www.jurist.org/news/2021/12/french-high-court-rules-procedural-victory-for-civil-organizations-in-total-ugandaoil-case/> [https://perma.cc/63BW-3THM].

²⁴⁹ *Id.*

²⁵⁰ See Cossart & Chatelain, *supra* note 162.

²⁵¹ *Total Sued*, *supra* note 224.

²⁵² See Carriere, *supra* note 28.

²⁵³ RUGGIE, JUST BUSINESS, *supra* note 12, at 47 (“[I]n terms of the law, a large governance gap exists in business and human rights.”).

²⁵⁴ See *infra* Part IV.

IV. A LEGISLATIVE PROPOSAL FOR CALIFORNIA

The UNGPs were intended to generate “a smart mix of measures — voluntary and mandatory, national and international — that would strengthen the business and human rights regime over time.”²⁵⁵ However, despite a building movement on ESG issues led by investors and shareholders in the U.S., there has been little effort to address the procedural and substantive challenges undermining remedial measures for victims of corporate human rights abuse.²⁵⁶ Given the current legal trend, this is unlikely to shift without a legislative push.²⁵⁷ A California HRDD law — if properly implemented — can accomplish this goal.

Some might argue that the focus should be on federal rather than state legislation, as state legislation could result in convoluted bifurcated laws spread across the U.S.²⁵⁸ However, as the fifth largest economy in the world,²⁵⁹ California stands in a unique position to clarify and codify corporate accountability in regards to human rights abuses committed within supply chains.²⁶⁰ Additionally, it appears to be much more politically feasible. For example, a federal equivalent to the California Transparency in Supply Chains Act (“CTSCA”) was first introduced in 2011 but has repeatedly failed to pass through Congress.²⁶¹ The most

²⁵⁵ Ruggie, Opening Remarks, *supra* note 21.

²⁵⁶ Carriere, *supra* note 28.

²⁵⁷ See *supra* Part II.

²⁵⁸ See, e.g., Andrew Green, *In Germany, Voluntary Monitoring of Supply Chain Abuses Has Failed*, DEVEX (July 27, 2020), <https://www.devex.com/news/in-germany-voluntary-monitoring-of-supply-chain-abuses-has-failed-97790> [<https://perma.cc/W3DF-AZJF>] (the German Federal Minister for Economic Affairs arguing that German legislation would result in “a national patchwork . . . within the EU”).

²⁵⁹ Pat Evans, *16 Mind-Blowing Facts About California's Economy*, BUS. INSIDER (Apr. 26, 2019, 8:06 AM), <https://markets.businessinsider.com/news/stocks/california-economy-16-mind-blowing-facts-2019-4-1028142608> [<https://perma.cc/4LT4-YGPU>] [hereinafter *California's Economy*].

²⁶⁰ This is also not the first time that California, as one of the largest economies in the world, has recognized its unique standing to address issues within the global market. See, e.g., KAMALA D. HARRIS, *THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE*, at I (2015), <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf> [<https://perma.cc/PLC4-Z7BS>] (noting California, as “the world’s seventh-largest economy and the country’s largest consumer base,” stands in a unique position to address forced labor around the globe).

²⁶¹ Business Supply Chain Transparency on Trafficking and Slavery Act of 2020, H.R. 6279, 116th Cong.; Sarah A. Altschuller, *H.R. 2759: New Federal Bill Would Require Companies to Disclose Efforts to Address Human Rights Risks in Their Supply Chains*, FOLEY HOAG LLP: GLOB. BUS. & HUM. RTS. BLOG (Aug. 9, 2011), <https://www.csrandthelaw.com/2011/08/09/h-r-2759-new-federal-bill-would-require-companies-to-disclose-efforts-to-address-human-rights-risks-in-their-supply-chains/> [<https://perma.cc/LR22-NGK9>].

recent iteration was introduced on March 13, 2020, but stalled in committee.²⁶² Given this, California should again embrace its unique positionality and work toward codifying its own mandatory measure to ensure greater protection against corporate-related human rights harms. This can be done by drawing on the lessons from the international community and by passing HRDD legislation modeled after laws such as the French LdV and the German Supply Chains Act.

Human rights issues within supply chains will not be solved with a single bill. Yet, without hard law to hold corporations accountable, the necessary due diligence work in supply chains will never be accomplished, abuses will continue to occur, and victims will perpetually be left without adequate remedies.²⁶³ COVID-19 has ripped off the proverbial Band-Aids and exposed the vulnerabilities in global supply chains.²⁶⁴ Now more than ever is the time for legislators to act. However, when drafting a new mandatory HRDD law, legislators must be careful not to enact a vapid law that gives the appearance of progress, without effecting real change. To this end, the following discussion draws on lessons from the French LdV and the German Supply Chains

²⁶² *Bills in the 116th Congress: H.R. 6279*, C-SPAN (last visited Jan. 21, 2022), <https://www.c-span.org/congress/bills/bill/?116/hr6279> [https://perma.cc/LH5K-NMZF]. But see Aleesha Fowler, Reagan R. Demas, Inez Asante, Maxine Jacobson, Doriane Nguenang & John M. Foote, *The Slave-Free Business Certification Act: Bipartisanship Grows in Congress Around Aggressive Corporate Legal Obligations on Supply Chain Responsible Sourcing*, BAKER MCKENZIE: GLOB. SUPPLY CHAIN COMPLIANCE BLOG (July 31, 2020), <https://supplychaincompliance.bakermckenzie.com/2020/07/31/the-slave-free-business-certification-act-bipartisanship-grows-in-congress-around-aggressive-corporate-legal-obligations-on-supply-chain-responsible-sourcing/> [https://perma.cc/7CM9-W77E] (noting there is growing “evidence of . . . different political factions whose interests and motives may coalesce in the near future to generate more significant legal obligations in supply chain activities”).

²⁶³ See U.N. High Comm’r for Hum. Rts., *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse*, ¶ 7, U.N. Doc. A/HRC/32/19 (May 10, 2016) (finding a need for “law reform and legal development, improvements to the functioning of judicial mechanisms, law enforcement, policy development and closer international cooperation” in order to effectively achieve the “imperatives of accountability and remedy for business-related human rights abuses”).

²⁶⁴ *EU Parliament Vote Critical to Hold Companies to Account*, HUM. RTS. WATCH (Jan. 21, 2021, 2:00 AM EST), <https://www.hrw.org/news/2021/01/21/eu-parliament-vote-critical-hold-companies-account#> [https://perma.cc/C9ZS-QR2P]; Posaner & Nöstlinger, *supra* note 167 (“COVID has shown the fragility of these hyper-efficient supply chains with very limited slack, because some of the risks are being outsourced In a way, there is no better moment to legislate.”); Support for EU Framework, *supra* note 77 (“The COVID-19 crisis is demonstrating the fragility of global supply chains, and the vulnerabilities this creates and exacerbates for workers, communities and businesses around the world.”).

Act to address some critical features and challenges associated with a HRDD law.²⁶⁵

A. *Geographic Scope*

First, in order to create an effective remedial scheme that fully incorporates the UNGPs, the new HRDD law should not be geographically constrained to California. Under the State duty to protect human rights, the UNGPs assert “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”²⁶⁶ The commentary to this principle recognizes that States are neither required nor prohibited under international human rights law “to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.”²⁶⁷ While the commentary does not go so far as to recommend States implement laws that extend beyond their borders,²⁶⁸ it notes that “[t]here are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State’s own reputation.”²⁶⁹ Depending on how the law is constructed, it can also help ensure that victims can seek redress in California courts even if the harm occurred outside the state.

The French LdV and German Supply Chains Act recognized these strong policy reasons for passing a HRDD law with a broad geographic scope. Both laws require corporations to conduct HRDD throughout their supply chains.²⁷⁰ If a corporation fails to conduct HRDD and a human rights violation occurs within its supply chain — even if the harm occurs outside of the State — then the corporation can face

²⁶⁵ It should be noted that the following is only intended to start the conversation. More research needs to be done to fully develop the elements of a California HRDD law. Additionally, a more detailed comparative analysis between the French, German, and theoretical California HRDD law would greatly benefit this area. Particularly since both France and Germany are civil law countries, while California follows the common law system.

²⁶⁶ *Guiding Principles*, *supra* note 14, at 3.

²⁶⁷ *Id.* at 3-4.

²⁶⁸ Surya Deva, *Corporate Human Rights Violations: A Case for Extraterritorial Regulation*, in *HANDBOOK OF THE PHILOSOPHICAL FOUNDATIONS OF BUSINESS ETHICS* 1077, 1081-82 (Christoph Luetge ed., 2012).

²⁶⁹ *Guiding Principles*, *supra* note 14, at 4.

²⁷⁰ *See supra* Parts III.A, III.B.

consequences.²⁷¹ However, the two laws differ in terms of application. While the French LdV requires corporations to conduct HRDD with both its direct and indirect suppliers, under the German Supply Chains Act, corporations are only required to conduct HRDD with indirect suppliers when they gain “substantiated knowledge” of a potential human rights violation.²⁷² Civil society organizations have criticized this aspect of the German Supply Chains Act, as it is “incompatible with the preventative idea of the [UNGPs]” given that a significant portion of human rights violations occur at the beginning of supply chains — right at the indirect supplier level.²⁷³ Therefore, in order to fully embrace the UNGPs and bridge the governance gap between businesses and human rights, California legislators should consider applying a broad geographic scope to the new HRDD law that encompasses both direct and indirect suppliers.²⁷⁴

B. Enforceability

Second, in order to be effective, the new HRDD law must be enforceable. To date, while the enforceability of the German Supply Chains Act remains to be seen,²⁷⁵ the enforceability of the French LdV

²⁷¹ See *id.*

²⁷² Lavite, *supra* note 220; WHAT THE ACT DELIVERS, *supra* note 180, at 4.

²⁷³ WHAT THE ACT DELIVERS, *supra* note 180, at 4.

²⁷⁴ In the late eighteenth and early nineteenth centuries, international law generally did not condone extraterritorial regulation. William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1590 (2020) [hereinafter *New Presumption*]. However, this shifted towards the end of the nineteenth century. *Id.* By 1927, the Permanent Court of International Justice declared that States were free to regulate extraterritorially unless a specific rule of international law prohibited them from doing so. S.S. “Lotus” (Fr./Turk.), Judgement, 1927 P.C.I.J. (ser. A) No. 10, at 19. *Id.* at 1590-91. Despite this, the U.S. Supreme Court applies a presumption against extraterritoriality. Dodge, *New Presumption*, *supra*, at 1591. California does as well. William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 UC DAVIS L. REV. 1389, 1403 (2020). Given this, the California legislature should make the HRDD law’s broad geographic scope, or extraterritorial application, clear. See *Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011) (“[T]he Legislature did not intend a statute to be operative, with respect to occurrences outside the state, . . . unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history.” (internal quotation marks omitted)); see also *Skiriotes v. Florida*, 313 U.S. 69, 79 (1941) (finding that the geographic scope of state statutes is a question of state law).

²⁷⁵ The law will come into force in 2023. WHAT THE ACT DELIVERS, *supra* note 180.

has been weak.²⁷⁶ In 2019, Amnesty International noted, most companies failed to publish plans that outlined how they intended to comply with the law.²⁷⁷ According to French civil society organizations, these plans made it difficult to understand which risks had been identified and how corporations had responded to them.²⁷⁸ Additionally, since no central repository exists that lists all the companies covered under the law, it has proven difficult to determine which companies are complying with the law.²⁷⁹ In an effort to address this issue, civil society has launched a website that tracks qualifying companies and their vigilance plans.²⁸⁰

In crafting a due diligence law for California, legislators should be mindful of these shortcomings and work to establish mechanisms to overcome them.²⁸¹ While legislation is no “silver bullet,”²⁸² it is an essential feature required to ensure a fundamental component of the UNGPs — access to remedy. As this Note has articulated, human rights abuses remain pervasive throughout global supply chains.²⁸³ Current soft law principles and voluntary incentive structures are not enough,²⁸⁴ and the current legal framework in the U.S. provides inadequate judicial avenues for victims seeking redress for corporate human rights abuses.²⁸⁵ Today, businesses are calling on legislators to pass regulation, to further progress the dynamic “mix” visualized by the UNGPs in order to standardize the responsibilities of businesses worldwide.²⁸⁶ California legislators should seize this moment to join the conversation happening internationally on mandatory HRDD best practices.

²⁷⁶ This is due in part to President Macron, who has been critical of mandatory laws on business and human rights. This negative attitude has led to a lack of commitment to monitor corporate noncompliance. Schilling-Vacaflor, *supra* note 82, at 116.

²⁷⁷ *France 2020*, AMNESTY INT’L (Apr. 16, 2020), <https://www.amnesty.org/en/location/europe-and-central-asia/france/report-france/> [<https://perma.cc/R3MD-LHQN>].

²⁷⁸ Schilling-Vacaflor, *supra* note 82, at 117.

²⁷⁹ Cossart & Chatelain, *supra* note 162.

²⁸⁰ *Id.*

²⁸¹ For example, legislators could require the California Secretary of State to publish an initial report documenting (1) the corporations that fall under the HRDD law; and (2) the corporations that are in compliance with the requirements of the new law.

²⁸² Ruggie, *Multinationals*, *supra* note 81.

²⁸³ *See supra* INTRODUCTION.

²⁸⁴ *See supra* Parts II.A, II.B.

²⁸⁵ *See supra* Part II.

²⁸⁶ Johannes Blankenbach & Saskia Wilks, *Opinion: European Companies Should Stop Putting Profit over People and Planet*, THOMAS REUTERS FOUND. NEWS (Sept. 8, 2020, 1:55 PM GMT), <https://news.trust.org/item/20200908135525-kty71> [<https://perma.cc/5MV9-M2QD>].

CONCLUSION

For far too long, those harmed by corporate human rights abuses have been left with no satisfactory recourse.²⁸⁷ While the passage of mandatory HRDD legislation in California is only one step toward combatting corporate related human rights abuses, properly implemented due diligence legislation can provide a remedy.²⁸⁸ The UNGPs provide that States must protect; companies must respect; and those who are victimized by corporate-related human rights abuse must have redress.²⁸⁹ As the fifth largest economy in the world,²⁹⁰ California stands in a unique position to protect, respect, and remedy human rights abuses within global supply chains.

²⁸⁷ See *supra* Part I.

²⁸⁸ See *supra* Part IV.

²⁸⁹ RUGGIE, JUST BUSINESS, *supra* note 12, at xxi.

²⁹⁰ Pat Evans, *16 Mind-Blowing Facts About California's Economy*, BUS. INSIDER (Apr. 26, 2019, 8:06 AM), <https://markets.businessinsider.com/news/stocks/california-economy-16-mind-blowing-facts-2019-4-1028142608> [<https://perma.cc/4LT4-YGPU>] [hereinafter *California's Economy*].