UC Law Business Journal

Volume 20 | Number 1 Article 3

1-2024

How European Human Rights Law Will Reshape U.S. Business

Rachel Chambers

David Birchall

HOW EUROPEAN HUMAN RIGHTS LAW WILL RESHAPE U.S. BUSINESS

Rachel Chambers[*] *& David Birchall*[**]

In recent years several European states have enacted human rights due diligence laws, culminating in the imminent EU-wide Corporate Sustainability Due Diligence Directive.

This article provides a comprehensive analysis of these laws and explores their potential impact on U.S. businesses. Human rights due diligence emerges from the United Nations Guiding Principles on Business and Human Rights (2011) and was originally conceived as a voluntary means by which corporations could demonstrate that they proactively monitor and manage potential human rights abuses within their corporate group and supply chains. Since 2017, European states have begun enacting binding human rights due diligence laws. These laws are innately extraterritorial in nature, designed to ensure that corporations that operate in the European market comply with human rights standards throughout their value chain, including through their suppliers and business partners. The emergence of European due diligence laws will thus impact U.S. businesses and industries: an estimated 10,000 U.S. businesses will be directly affected, and far more will have to comply as a result of supplying or partnering with EU-based firms. The effect on U.S. business could be dramatic, particularly with major divergences between the EU and United States in relation to labor law and other legal regimes. The article analyzes how U.S. businesses will be affected, what businesses may need to do, and how divergent legal regimes may be addressed. It further discusses options for the U.S. Government to take a proactive approach to the European incursion on U.S. law and business in the interest of protecting rights while providing business certainty.

---

[*] Assistant Professor of Business Law, University of Connecticut School of Business.

[**] Senior Lecturer, London South Bank University.

Research for this article was supported through a small grant from Universitas 21. An earlier version of this article was presented at the Mid Atlantic Academy of Legal Studies in Business Conference, May 2023. The authors would like to thank the conference participants, Shareen Hertel and Nina Gardner for their comments and insights. In addition, Kevin Musco and Shae Heitz provided valuable research and citation assistance.

TABLE OF CONTENTS

INTRODUCTION

Business and human rights (BHR), once largely characterized by voluntarism, is becoming an increasingly legalized field.[1] Major developments in the domestic law of European states, as well as at the European Union level, mandate that corporations conduct human rights due diligence (HRDD) globally.[2] HRDD requires companies to put in place processes to proactively manage potential and actual adverse human rights impacts with which they are involved. For example, companies are expected to investigate their own supply chains to ensure that no human rights violations are occurring therein. If they discover such violations, they must take steps to mitigate the harm and prevent them from happening again.[3]

The enactment of mandatory HRDD (known as mHRDD) laws is a significant departure from past practice among European states, but more significantly for the purposes of this article, from U.S. practice. It builds on the first wave of BHR laws which required companies to report on their impacts on human rights and environment.[4] The new wave of laws encompasses reporting requirements but adds the possibility of liability for human rights violations, including by suppliers and subsidiaries of EU companies. This raises major issues for U.S. businesses and legislators.

Many U.S. corporations will be bound by these new laws, either directly due to their presence in European markets, or indirectly as suppliers and partners to European businesses. These companies may find that compliance with U.S. law is not enough to meet European HRDD standards, with labor law a particular issue. Legislators are faced with the problem that some U.S. corporations will now be following different and often more stringent European rules, threatening the level playing field and placing U.S. legal authority on the backfoot.

BHR rules are designed to ensure that businesses respect human rights throughout their global operations, for example, by not using forced labor or

1. Gabriela Quijano & Carlos Lopez, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?*, 6 BUS. & HUM. RTS. J. 241, 254 (2021).

2. Surya Deva, *Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?*, 36 LEIDEN J. OF INT'L L. 389, 390 (2023).

3. *See* UNITED NATIONS, GUIDING PRINCIPLES, ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK 17 (2011).

4. Rachel Chambers & Anil Yilmaz Vastardis, *The New EU Rules on Non-Financial Reporting: Potential Impacts on Access to Remedy?,* 10 HUM. RTS. & INT'L LEGAL DISCOURSE 18, 18 (2016).

damaging the environment.[5] The United States has so far largely preferred to implement BHR rules through voluntary approaches, while Europe is shifting to binding rules, most notably HRDD. The United States is not without legal and policy initiatives in the BHR field, but these focus principally on modern slavery. Examples include the California Transparency in Supply Chains Act, which mandates that companies disclose any steps they have undertaken to identify forced labor in their supply chain.[6] Another law is the (Federal) Uyghur Forced Prevention Act, which includes a rebuttable presumption that goods from Xinjiang Uyghur Autonomous Region in China are made with forced labor, therefore putting the onus on companies using Xinjiang labor to demonstrate that no compulsion was involved.[7] Outside of the forced labor field, there is a reporting requirement for listed companies under section 1502 of the Dodd Frank Act that includes reporting on due diligence undertaken to ensure that the company is not sourcing conflict minerals.[8]

This, and two other important trends, may be pushing HRDD laws into the United States, despite hesitancy on the part of the Federal Government.[9]

The 2022-2024 State Department-led renewal of the U.S. National Action Plan for Responsible Business Conduct[10] has brought Government attention to BHR. HRDD rules, arguably for the first time, seem like a serious proposition, albeit a huge legislative stretch for the Federal Government.[11] This development has been sparked by the radical changes to European business law mandating that European corporations conduct HRDD, that may significantly impact U.S. companies.

Even though HRDD laws are unlikely to be passed in the United States soon,[12] many U.S. companies are bound by the European rules either by virtue

---

5. FLORIAN WETTSTEIN, BUSINESS AND HUMAN RIGHTS: ETHICAL, LEGAL, AND MANAGERIAL PERSPECTIVES 171-183 (2022).

6. KAMALA D. HARRIS, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE 1 (2015).

7. Uyghur Forced Labor Prevention Act, H.R. 6210, 116th Cong. (2020).

8. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010).

9. The Center for Strategic and International Studies (CSIS) argues that the "Congressional action to mandate additional corporate due diligence on human rights is unlikely in the short term." MARTI FLACKS, PRIORITIES FOR THE U.S. NATIONAL ACTION PLAN ON RESPONSIBLE BUSINESS CONDUCT 3 (2023).

10. Press Release, Anthony J. Blinken, Secretary of State, 10th Anniversary of the UN Guiding Principles on Business and Human Rights (June 16, 2021), https://www.state.gov/10th-anniversary-of-the-un-guiding-principles-on-business-and-human-rights/. *See also National Action Plan on Responsible Business Conduct*, U.S. DEPT. OF STATE, https://www.state.gov/responsible-business-conduct-national-action-plan/#FederalRegisterNotice.

11. Rights CoLab, Comment Letter on the U.S. Department of State's National Action Plan on Responsible Business Conduct (DOS-2022-0002-0001) (2022), https://www.federalregister.gov/documents/2022/02/28/2022-04178/national-action-plan-on-responsible-business-conduct-notice-of-opportunity-to-submit-written [hereinafter Rights CoLab Submission]. The NAP renewal process alone could not of course result in the passing of a HRDD law – this would require Congress to legislate. CSIS cautions that the "NAP is not the vehicle to push [the HRDD] agenda." *Id.*

12. *Id.*; *see also* Sarah W. Gamble, *A Corporate Human Rights Due Diligence Law for California*, 55 U.C. DAVIS L. REV. 2421, 2421 (2022) (arguing in favor of the enactment of a state HRDD law in California); *see also* Kellie R. Tomin, *Germany Takes Action on Corporate Due Diligence in Supply Chains: What the United States Can Learn from International Supply Chain Regulations*, 18 LOY. U. CHI.

of doing business in Europe, or by being embedded within the value chain of a European business. Thus, the HRDD requirements are reaching U.S. companies through the backdoor. Such requirements currently derive from individual states' domestic laws—French law, German law, etc.—but the imminent enactment of a European HRDD directive extends this legal phenomenon across the trading bloc. This presents two possible risks to U.S. business and Government. First, that businesses will be on the receiving end of foreign legal obligations rather than following "home grown" rules, and second, that companies caught by the European provisions may be placed at a competitive disadvantage vis-à-vis those that are not.

In the current U.S. National Action Plan renewal process, civil society has called for the Securities and Exchange Commission (SEC) to use its rulemaking power to require disclosure from listed companies of what is called "decision useful" HRDD.[13] This effort to tie HRDD to the needs of investors advances the issue by couching it as a response to a market need. Whether or not the proposal gains any traction, as BHR becomes an increasingly legalized field, investors may increasingly find human rights performance to be financially material (i.e., relevant to the decision of whether to invest in a company). Other market forces are also demanding HRDD: for example, the Business and Human Rights Resource Centre reports that "retailers, including in the U.S., are increasingly demanding human rights and environmental checks throughout the value and supply chain."[14]

The current HRDD landscape in the United States presents uncertainties and differing standards for businesses, and a lack of protection for rights-holders. Voluntary HRDD has been shown to produce poor quality processes and outcomes.[15] When U.S. companies are benchmarked against their counterparts in other capital-exporting states, through such tools as

---

INT'L L. REV. 189, 189 (2022) (It argues that Germany's Act on Corporate Due Diligence in Supply Chains should serve as a model for a U.S. federal supply chain HRDD law. It discusses a number of state laws and proposed Federal legislation, including the 2020 Business Supply Chain Transparency on Trafficking and Slavery Act, a short-lived draft that never left committee. Its analysis section looks to the Uyghur Forced Prevention Act and argues that, inter alia, "American lawmakers must include an effective remediation mechanism for affected parties."); *see also* Business Supply Chain Transparency on Trafficking and Slavery Act of 2020, H.R. 6279, 116th Cong. (2020). *But see* David Hess, *The Management and Oversight of Human Rights Due Diligence*, 58 AM. BUS. L.J. 751, 755 (2021) (who, following a review of recent legislative developments in the United States, argues "[t]hese activities suggest that further developments in HRDD in the United States are a real possibility.").

13. Rights CoLab Submission, *supra* note 11. Decision-usefulness means that the piece of information provided in financial reporting can change or affect the financial decision potentially of the users. LADAN SHAGARI & KABIRU ISA DANDAGO, DECISION USEFULNESS APPROACH TO FINANCIAL REPORTING: A CASE FOR THE GENERAL PUBLIC 3 (2013).

14. Nahla Davies, *Are US Businesses Falling Behind on Human Rights Due Diligence?*, BUS. & HUM. RTS. RES. CTR. (Feb. 17, 2022), https://www.business-humanrights.org/en/blog/are-us-businesses-falling-behind-on-human-rights-due-diligence/.

15. KNOW THE CHAIN, INSIGHTS BRIEF: FIVE YEARS OF THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT 3 (2015); Raphael Deberdt & Patricia Jurewicz, *Corporate Inaction on Minerals Due Diligence Motivates RSN to Shift Gears*, RESPONSIBLE SOURING NETWORK (June 1, 2020), https://www.sourcingnetwork.org/blog/2020/5/26/corporate-inaction-on-minerals-due-diligence-motivates-rsn-to-shift-gears.

Corporate Human Rights Benchmark from the World Benchmarking Alliance, they have been found to lag when it comes to conducting HRDD.[16] While certain companies have adopted a more progressive stance towards mHRDD,[17] the business community as a whole has been characterized as being against legally binding remedy mechanisms.[18]

So far, the U.S. Government has not seen mandatory HRDD as something aligned with U.S. business ideology or practice.[19] Yet, it is entering through the backdoor anyway, and authoritative organizations such as the American Bar Association (ABA) are pushing for the adoption of responsible business practices.[20] It may be that the pragmatic course of action for the United States is to take ownership of HRDD, by developing an HRDD law applicable to U.S. businesses. This would move HRDD beyond its sporadic interventions in California and Xinjiang, and into a comprehensive policy tool, with the aim of benefiting rights-holders worldwide. The discussions over the renewal of the National Action Plan for Responsible Business Conduct would be an ideal focal point for elevating the profile of this conversation.

The remainder of this article proceeds in five parts. Part One lays the foundation by explaining the meaning of HRDD and describing how HRDD has evolved as a legal concept. Part Two discusses the five HRDD laws which have already been passed in European states, including France and Germany, and the imminent Europe-wide HRDD directive. Here, we ask which companies are affected and what such laws require of them. Part Three turns to oversight and enforcement: how are these laws being enforced and what does this tell us about potential enforcement against foreign companies, including U.S. businesses?

Part Four examines current U.S. law, policy, and practice in the field of HRDD. Specifically, we discuss the law and policy that places obligations similar to HRDD on companies. We assess the corporate practice of HRDD and explore why companies are undertaking the process in the absence of a legal obligation to do so. Finally, Parts Five and Six provide an analysis of the impact of HRDD laws on U.S. firms, asking what they will need to do to

16. The World Benchmarking Alliance's Social Transformation Baseline Assessment shows that 84% of the 400 U.S. companies surveyed scored "zero" on HRDD, compared with 59% of companies from other G7 countries. WORLD BENCHMARK ALLIANCE, SOCIAL TRANSFORMATION BASELINE ASSESSMENT 2022 9 (2022). *But see* WORLD BENCHMARKING ALLIANCE, 2022 CORPORATE HUMAN RIGHTS BENCHMARK INSIGHT REPORT 3 (2022) (demonstrating improvement among U.S. companies) [hereinafter CHRB 2022 REPORT].

17. Some companies are in favor. *See, e.g.*, *Update: 40 Businesses & Networks Reaffirm Support for Ambitious EU CSDDD in Line with International Standards During Trilogue*, BUS. & HUM. RTS. RES. CTR. (May 31, 2023), https://www.business-humanrights.org/en/latest-news/business-statement-csddd/ (providing a list of large firms that have made public statements in support of mandatory due diligence regulation).

18. Christina Ochoa, *Business & Human Rights: Optimism and Concern from the U.S. Perspective*, 8 L. & BUS. RSCH. 1, 20 (2018).

19. FLACKS, *supra* note 9.

20. *Contractual Clauses Project: Working with Stakeholders to Ensure Human Rights Due Diligence in Business Contracting*, AM. BAR. ASS'N, https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/ (last visited Aug. 2, 2023).

comply, and assessing the risks/dilemmas they face. We conclude by considering the question of whether we need a homegrown U.S. HRDD law, or not.

I. HUMAN RIGHTS DUE DILIGENCE

HRDD is a concept that was first introduced by Professor John Ruggie in the UN Guiding Principles on Business and Human Rights (UNGPs).[21] In its initial guise, it was proposed as an internal business management policy designed to help companies "to identify, prevent, mitigate and account for how they address their adverse human rights impacts."[22] Professor Ruggie's aim was to encourage businesses to build knowledge of their own impacts upon human rights, and therefore to be motivated to address these impacts, within a reflexive and collaborative process of engaging civil society.[23]

HRDD entails four steps: (i) identify and assess any actual or potential adverse human rights impacts; (ii) take appropriate action by integrating the findings from impact assessments; (iii) track the effectiveness of their response; and (iv) communicate externally how adverse impacts are being addressed.[24] Scholars have emphasized the potential for HRDD as a preventative tool.[25] For prevention to materialize in practice, businesses must do much more than identifying and assessing their human rights impacts, the first step of the process. To "take appropriate action" in response to what they find, they need to be prepared to address actual and potential human rights impacts by making changes to and/or stopping harmful practices.[26] To do so, it has been argued there needs to be a corporate culture accepting of the goals of HRDD.[27] Although HRDD itself does not include remediation for harm caused, remediation is necessary under the UNGPs whenever a business identifies that

---

21. *See* UNITED NATIONS, *supra* note 3 at 5. Professor Ruggie was the UN Secretary-General's Special Representative for Business and Human Rights from 2005 – 2011. In this capacity, he developed the UNGPs.

22. *Id.* at 8. The human rights in question are "[i]nternationally recognized human rights," "understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Organization's Declaration on the Fundamental Principles and Rights at Work." *Id.* at 13.

23. John Gerard Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights*, HARV. KENNEDY SCH. CORP. RESP. INITIATIVE WORKING PAPERS, June 2017, at 1; David Birchall, *Any Act, Any Harm, to Anyone: The Transformative Potential of Human Rights Impacts under the UN Guiding Principles on Business and Human Rights*, U. OXFORD HUM. RTS. J. 120, 121 (2019).

24. Deva, *supra* note 2 at 394.

25. Robert McCorquodale & Justine Nolan, *The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses*, 68 Netherlands Int'l L. Rev. 455 (2021). See also, Deva, *supra* note 2 at 390 ("[i]t is therefore timely to interrogate the potential and limitations of mandatory HRDD laws in preventing business-related human rights abuses.").

26. Remediation is not part of HRDD as set out in the UNGPs, but it does form part of the corporate responsibility to respect. *See* UNITED NATIONS, *supra* note 3 at 22.

27. Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation*, 22 BUS. ETHICS Q. 145, 156 (2012).

it has "caused or contributed to adverse impacts."[28] Through this process it was hoped that companies would shift from ignoring their own human rights impacts, particularly those arms-length impacts at distant subsidiaries and suppliers, to developing the "institutional capacity to *know* and *show* that they do not infringe on others' rights."[29]

It is difficult to quantify precisely how successful the voluntary, intra-corporate version of HRDD has been. It has certainly had a dramatic uptake in terms of discursive support, adoption and elucidation by multilateral bodies,[30] and to some extent, adoption by companies, yet it is also vulnerable to the allegations that have plagued voluntary Corporate Social Responsibility (CSR) for decades.[31] It can be used as a veneer disguising a lack of real change, and it can be ignored by those causing most harm. Particularly in non-public facing industries, it can become a managerialist tick-box exercise, and compliance costs can be pushed onto already struggling suppliers and business partners.[32]

With this in mind, various groups and experts called for HRDD to be made mandatory, while parts of the Global South pushed for a binding treaty on Business and Human Rights with a larger and more ambitious scope.[33] The shift to legislative, mandatory HRDD (mHRDD) in Europe has been rapid. The first law came into force in 2017. As of 2023, a total of five States, all

28. *See* UNITED NATIONS, *supra* note 3 at 24.

29. JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 99 (2013).

30. *See, e.g.*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE 1 (2021); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT (2018); INTERNATIONAL LABOUR ORGANIZATION, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (6th ed. 2022); INTERNATIONAL FINANCE CORPORATION, PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (2012); EQUATOR PRINCIPLES, EQUATOR PRINCIPLES: EQUATOR PRINCIPLES III (2013).

31. Florian Wettstein, *Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment*, 14 J. OF HUM. RTS. 162, 182 (2015).

32. Subhabrata Bobby Banerjee, *Corporate Social Responsibility: The Good, the Bad and the Ugly*, 34 CRITICAL SOCIO. 51, 79 (2008); David Birchall, *The Role of Civil Society and Human Rights Defenders in Corporate Accountability*, *in* THE EDWARD ELGAR RSCH. HANDBOOK ON HUM. RTS. & BUS. 1, 20 (Surya Deva & David Birchall eds., 2020).

33. Tori Loven Kirkebø & Malcolm Langford, *Ground-breaking? An Empirical Assessment of the Draft Business and Human Rights Treaty*, 114 AM. J. OF INT'L L. 179–185 (2020); Ruwan Subasinghe, *A Neatly Engineered Stalemate: A Review of the Sixth Session of Negotiations on a Treaty on Business and Human Rights*, 6 BU. & HUM. RTS. J. 384, 391 (2021); David Birchall, *Between Apology and Utopia: The Indeterminacies of the Zero Draft Treaty on Business and Human Rights*, 42 SUFFOLK TRANSNAT'L L. REV. 289, 289 (2019).

European, have enacted legislation[34] and the EU is in the process of agreeing a mHRDD framework that will be implemented EU-wide, when passed.[35]

mHRDD is an understandably popular policy form for States seeking to retain and strengthen liberal capitalism while ameliorating its harms.[36] It places the onus on companies themselves to investigate their own human rights issues, thereby avoiding centralized coercion.[37] It limits itself to human rights and the environment, and often only a subset of human rights, therefore reducing the burden on corporations while speaking to the core concerns of liberal populations today.[38] In theory, it provides a transnational, extraterritorial mechanism whereby European standards can be implemented globally, at least insofar as covered companies are connected to global business activity.[39] This serves a human rights goal, and more cynically, a possible economic goal by making offshoring less attractive to European firms.[40]

Naturally, these advantages generate their own critiques. The two major critiques are that these standards will be too onerous for businesses, including that they will force significant, expensive regulatory standards on businesses with minimal connection to Europe. The second critique is that they fail to assist rights-holders. These are to some extent in conflict, but it is feasible that on-paper compliance will be expensive and time-consuming without significantly benefitting rights-holders. Numerous questions including which rights should be covered, how the rules will be enforced, what remedy and

---

34. 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 Relating to the Duty of Vigilance of Parent Companies and Ordering Companies (1)]. J. Officiel de la République Française [J.O.] [Official Gazette of France], Mars 28, 2017; 7 [hereinafter French Corporate Duty of Vigilance Law]. Gesetz über unternehmerische Sorgfaltspflichten in Lieferketten (Supply Chain Due Diligence Act), July 22, 2021, Elektronischer Bundesanzeiger [eBAnz] at 2959 2021 (Ger.); This law entered into force on 1 January 2023 [hereinafter German Supply Chain Due Diligence Act]; 8 Wet zorgplicht kinderarbeid van 24 oktober 2019, Stb. 2019; Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), LOV-2021-06-18-99, Ministry of Child. & Families (2022) [hereinafter Norwegian Law]. Adopted by Dutch Senate in May 2019, DUTCH CHILD LABOUR, DUE DILIGENCE LAW 1 (AMFORI, 2020); Systematische Sammlung des Bundesrechts [SG] [Systematic collection of federal law], Dec. 3, 2021, SR 221.433 (Switz.) [hereinafter Swiss Law Conflict Minerals & Child Labor Due Diligence Law].

35. *Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, Proposal, Euro. COM (2022) 71 final (2022) [hereinafter CSDDD].

36. Jaakko Salminen & Mikko Rajavuori, *Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis*, 26 MAASTRICHT J. OF EUR. AND COMPAR. L. 602, 626 (2019).

37. Antoine Duval, *Ruggie's Double Movement: Assembling the Private and the Public Through Human Rights Due Diligence*, 41 NORDIC J. OF HUM. RTS. 279, 279 (2023).

38. MAKAU MUTUA, HUMAN RIGHTS STANDARDS: HEGEMONY, LAW, AND POLITICS 127 (2016).

39. Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?*, 117 J. OF BUS. ETHICS 493, 500 (2013).

40. Dalia Palombo, *Transnational Business and Human Rights Litigation: An Imperialist Project?*, 22 HUM. RTS. L. REV. 1 (2022).

sanction may be available, and how complex business models and supply chains should be addressed make mHRDD a complicated area of law.

mHRDD is rapidly becoming a major thread of business regulation in Europe. It is designed to operate as an intra-corporate regulatory chain, whereby a corporation becomes obligated to investigate the activities of its subsidiaries and supply chain partners. By definition, it has extraterritorial application, and this is the main rationale behind mHRDD. It responds most centrally to the risk that EU companies—through their transnational supply chains and partners—may be using and profiting from child labor, modern slavery, harmful environmental practices, or other serious rights abusing practices that would be clearly outlawed in Europe. Therefore, how mHRDD laws will affect business partners, subsidiaries, and suppliers is a key concern. Governments like that of the United States will also be watching keenly to see how companies within their jurisdiction will be affected. The next section describes and analyzes each of the current mHRDD laws in place in Europe, before moving onto the EU-wide proposal.

II. EUROPEAN HRDD LAWS

A. *The French Law on the Corporate Duty of Vigilance*

In 2017, the French Law on the Corporate Duty of Vigilance was the first HRDD-based law to be enacted. The law covers companies incorporated or registered in France for at least two consecutive fiscal years that either employ at least 5,000 people within France or employ at least 10,000 people globally. The employment criterion includes both the parent company and subsidiaries.[41] These companies must draft and implement an annual "vigilance plan." On the business side, this plan must cover the actions of the company, of companies controlled by that company, and suppliers and subcontractors in an "established commercial relationship" with the company. On the human rights side, the plan must cover "serious violations with respect to human rights and fundamental freedoms, health and safety, and the environment." The company must map the potential risks to rights within its operations and must act to mitigate and remove these risks, including monitoring these actions to ensure their adequacy.

French law allows two distinct forms of civil liability. Where a corporation fails to produce an adequate vigilance plan, any interested party can petition the court to order compliance with the law, so long as they have notified the company of the concern and given the company three months to address it. Second, damages can be sought by those harmed by the corporation's actions. However, to succeed under the law, the injured party must prove a link between the harm suffered and a failure to properly comply with the vigilance obligation. This question of the link between the fault of inadequately

41. Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317, 320 (2017).

designing the vigilance plan and the harm suffered is a notable hurdle under the French law. It means that, for example, a French subsidiary could cause significant harm in a third country, but plaintiffs must prove that failure to plan or implement a vigilance plan by the parent company was a significant causal factor.

One of the first decisions under the French law was made in February 2023.[42] Although the case failed on procedural grounds and can be appealed, the court noted some key issues with the law. It stated that there is no standard as to what constitutes a "vigilant corporation," making judgement difficult, and relatedly a lack of precision in the law, including for example, key performance indicators.[43]

B. *The Dutch Child Labor Due Diligence Act*

The Dutch Law is narrow in scope, covering only child labor. It applies to all business enterprises supplying goods or services in the Netherlands. It mandates that all such businesses develop a due diligence plan if there is a "reasonable suspicion" of child labor within a supply chain.[44] Child labor is defined in accordance with existing international law, with Article Two of the Act citing the International Labor Organization (ILO) 182 Convention on Worst Forms of Child Convention (1999) and noting that where States have ratified the ILO 138 Minimum Age Convention (1973), the standards therein will also apply.[45] Article 2 also states that the following criteria constitutes child under the Act: "[w]ork performed by persons under the age of 15 or who are subject to compulsory schooling. Work performed by people under the age of 18 that may endanger the health, safety or morality of those performing it."[46]

Failure to submit a plan where necessary can lead to an administrative fine of €8,200. A fine of up to ten percent of the worldwide annual turnover of the enterprise may be imposed for failing to carry out HRDD. Company directors may be held criminally liable and subject to a prison sentence of up to two years where the company is held liable for two violations under the act within a five-year period.

The distinctive element of the Dutch Act is that it applies to all businesses that supply goods and services in the Netherlands. It therefore covers firms that have no corporate presence in the country. This element, combined with the total ban on labor performed by those under 15 and on dangerous work under 18, may lead to a large number of companies needing to be aware of

---

42. Tribunal judiciaire de Paris, civ. Feb. 28, 2023, 352J-W-B7G-CXB4 [hereinafter *Total*].

43. Eleonore Hannezo et. al, *First Decisions by French Courts on Duty of Vigilance Law: Dismissal of Claims Lodges by Six NGOs Against TotalEnergies*, LINKLATERS (Mar. 1, 2023), https://sustainablefutures.linklaters.com/post/102i8vw/first-decision-by-french-courts-on-duty-of-vigilance-law-dismissal-of-claims-lod.

44. SAM ENGELMAN, DUTCH CHILD LABOUR DUE DILIGENCE ACT: HELLIOS INFORMATION B.V. 2 (2021).

45. *Id.*

46. DUTCH CHILD LABOUR, *supra* note 34.

this Act. However, despite being passed into law in 2019, it has not come into force and looks likely to be superseded by an HRDD law not limited to the issue of child labor.[47]

C. *The Swiss Conflict Minerals and Child Labor Due Diligence Law*

The Swiss Act is similar to the Dutch Act, in that it covers a narrow scope of human rights but in a far-reaching way. It covers only child labor and conflict minerals. To be clear, it does not only cover child labor within conflict mineral production, but rather is one Act containing both child labor rules and conflict mineral rules.[48]

Child labor is defined similarly to the Dutch law. It includes:

> [A]ny form of work performed within or outside an employment relationship by persons who have not reached the age of 18 and which is among the worst forms of child labour as defined in Article 3 of ILO Convention No. 182 of 17 June 1999 concerning the Prohibition and immediate Action for the Elimination of the Work Forms of Child Labour (ILO Convention No. 182)[;]
>
> in the case of work performed on the territory of a State which has ratified ILO Convention No. 138 of 26 June 1973 concerning Minimum Age for Admission to Employment (ILO Convention No. 138), in addition: any form of child labour prohibited under the legislation of that State, provided that the legislation is in conformity with ILO Convention No. 138 . . . .
>
> [A]ny form of work performed within or outside an employment relationship by persons who are subject to compulsory education or who have not yet reached the age of 15[;] and
>
> Any form of work performed within or outside an employment relationship by persons who have not reached the age of 18, provided that such work, by its nature or the circumstances in which it is performed, is likely to be dangerous to the life, health or morals of the young person concerned.[49]

The law applies to businesses that have a registered office, central administration, or principal place of business in Switzerland, including Swiss-organized subsidiaries of foreign-based multinationals. It exempts small and medium-sized enterprises, which are defined according to Swiss law as those that meet two of the three criteria for two consecutive years, based on assets,

---

47. *An Update on Proposed Dutch Mandatory Human Rights Due Diligence Legislation – The November 2022 Amended Bill*, ROPES & GRAY (Jan. 4, 2023), https://www.ropesgray.com/en/newsroom/alerts/2023/01/an-update-on-proposed-dutch-mandatory-human-rights-due-diligence-legislation-the-november-2022. This law also covers foreign companies, non-EU undertaking engaged in activities or marketing products in the Netherlands and "a large undertaking" under the EU Accounting Directive. *Id.*

48. Swiss Law Conflict Minerals & Child Labor Due Diligence Law, *supra* note 34.

49. *Id.* at art. 2.f.

revenue, and employee numbers. The child labor element excludes low-risk businesses. These are defined as those falling within the category of requiring only "basic" child labor due diligence in UNICEF's Children's Rights in the Workplace Index.[50]

The conflict minerals element of the law covers "3TG"—tungsten, tin, tantalum—and gold.[51] It contains comparable exceptions to child labor, based on where the minerals were sourced and that businesses used minimal amounts of the resource.

For each element, the law covers the entirety of the supply chain. Businesses must operate a due diligence policy where child labor is reasonably suspected within its supply chain or when procuring 3TG metals from high-risk areas. A fine of up to CHF100,000 is possible for failure to comply with these obligations.[52]

D. *The German Supply Chain Due Diligence Act*

The German Act is narrower than some of the laws previously discussed in terms of the enterprises that it covers. It applies to business enterprises which have their central administration, principal place of business, administrative headquarters, or statutory seat in Germany and that have at least 3,000 employees. This also covers foreign corporations with a German subsidiary that have at least 3,000 employees. From January 2024, this figure will drop to 1,000.[53]

The Act does not apply to all human rights, but its scope is wider than the Dutch and Swiss laws. The German approach was to select a list of human rights that were deemed particularly important and relevant to cover. These include protections against child labor and slavery, some serious environmental risks, employment discrimination, as well as deliberate torture, violation of the right to life, and physical harm.[54] HRDD should be completed following a process similar to that in the UNGPs.[55]

The covered enterprises are required to conduct HRDD in relation to risks concerning all listed international human rights and environmental rights. Section 3 provides an inclusive list of HRDD steps, which are mostly in line with the UNGPs and are further elaborated by Sections 4–7 and 10. The due diligence obligations apply to the covered enterprises' own business operations and direct suppliers, but misconduct by indirect suppliers can give reason to

---

50. *Id.* at art 7.2.

51. *Id.* at art. 2.c.

52. *Swiss Conflict Minerals and Child Labor Due Diligence Legislation takes Effect – Will Require Due Diligence and Reporting by Many U.S.-Based Multinationals Doing Business in Switzerland*, ROPES & GRAY (Feb. 1, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/february/swiss-conflict-minerals-and-child-labor-due-diligence-legislation-takes-effect.

53. *Germany's New Supply Chain Due Diligence Act: What You Need to Know*, SEDEX, https://www.sedex.com/blog/germanys-new-supply-chain-due-diligence-act-what-you-need-to-know/ (last visited Aug. 6, 2023).

54. German Supply Chain Due Diligence Act, *supra* note 34, §§ 3-7, 10.

55. *Id.* § 15.

act as soon as an enterprise has gained substantiated knowledge of possible human rights violations by the supplier.[56] The Act includes the possibility of financial penalties but no liability under civil law.[57]

E. *The Norwegian Act Relating to Enterprises Transparency and Work on Fundamental Human Rights and Decent Working Conditions*

The Norwegian Transparency Act[58] shares many similarities with the other national legislation discussed above. First, it covers only larger businesses, again having to meet two of three criteria (i.e., based on assets, revenues, and number of employees).[59] Corporate groups are counted based on the aggregation of parent and subsidiary companies. It is noteworthy that to classify as a larger enterprise under the Norwegian Law, a company needs only 40 employees, as opposed to 250 under the Swiss Law.

The Norwegian Transparency Act covers all "internationally recognized" human rights. This language is taken from the UNGPs. The Act specifies that this includes the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); and the ILO's core conventions associated with the Declaration on Fundamental Principles and Rights at Work. The UNGPs clarify that other Conventions (such as those on hours and wages) are also covered where relevant. Importantly, the Norwegian Act also includes a living wage among its human rights requirements that are considered integral to "decent working conditions."

A further improvement within the Norwegian Transparency Act is that it specifies that covered enterprises "shall carry out due diligence in accordance with the OECD Guidelines for Multinational Enterprises."[60] This is beneficial because one of the key problems that the French court saw in evaluating claims under the French Act in the February 2023 case was that it was unclear exactly what constituted adequate due diligence.[61] Transplanting the OECD definitions does not solve this problem, since they are derived from guidelines rather than law, and HRDD will vary in different circumstances, but it does move the Norwegian Act closer to concreteness. The Act further includes a "duty to account" by requiring that firms publish an accessible statement regarding their HRDD on their website or a similar venue.[62] There is also a "right to information," whereby any individual can request "information from an enterprise regarding how the enterprise addresses actual and potential adverse impacts."[63] The Act is overseen by the Norwegian Consumer

56. *Id.* § 9.
57. *Id.* § 6.
58. Norwegian Law, *supra* note 34.
59. *Id.* § 3.
60. *Id.* § 4.
61. *Total*, *supra* note 42.
62. Norwegian Law, *supra* note 34 § 5.
63. *Id.* § 6.

Authority, and fines can be issued. No quantitative details are included in the Act.

F. *The EU Corporate Sustainability Due Diligence Directive (CSDDD)*

The CSDDD is a proposal for a Directive by the European Commission which, following certain revisions, is now the subject of provisional agreement between the European Council and the European Parliament, to require EU companies, and companies operating in the EU, to conduct human rights and environmental due diligence.[64] The exact terms of the Directive could change slightly during the ongoing EU legislative process, and once passed, it will also need to be implemented by each EU member state, leading to further uncertainties around exactly what the final version will look like. However, most significant areas are settled.

The CSDDD will compel companies that operate in the EU above a certain size to identify, prevent, mitigate, and account for the potential and actual adverse human rights impacts.

i. Which Rights?

The CSDDD contains an Annex listing which rights are covered.[65] This includes twenty human rights and a further twelve environmental rights and prohibited actions. Most civil and political rights are covered, including rights to privacy, liberty, freedom of thought, and life; labor rights are also included such as living wage and the prohibition on child labor.[66] Some human rights are included but restricted to "workers." For example, point 8:

> Violation of the prohibition to restrict workers' access to adequate housing, if the workforce is housed in accommodation provided by the company, and to restrict workers' access to adequate food, clothing, and water and

64. CSDDD, *supra* note 35. Provisional agreement was reached on Dec. 14, 2023. *See* Press Release, Council of the Eur. Union, Corporate Sustainability Due Diligence: Council and Parliament Strike Deal to Protect Environment and Human Rights (Dec. 14, 2023), https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/ [hereinafter The European Council Press Release]. Note that the provisionally agreed text has not been released yet. We refer to the text of the European Commission's proposal for the Directive, *supra* note 35, in the discussion of the proposed Directive below, except when the press release on the provisional agreement amends that text.

65. *Id.* at Annex. The European Council press release adds: "The compromise adds new elements to the obligations and instruments listed in the Annex as regards human rights, particularly for vulnerable groups and core International Labour Organisation (ILO) Conventions, which can be added to the list, by delegated acts, once they have been ratified by all member states." It "clarifies the nature of environmental impacts covered by this directive as any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions or excessive water consumption or other impacts on natural resources." *Id.*

66. *Id.*

> sanitation in the workplace in accordance with Article 11 of the International Covenant on Economic, Social and Cultural Rights.[67]

It therefore appears as though the right to privacy, for example, must be respected by companies throughout their supply chains for anyone potentially affected (e.g., citizens subject to surveillance), but the right to housing applies only to workers within their supply chain.

ii. Which Companies?

The CSDDD will capture all large companies within the EU, and an estimated 4,000 outside of the EU. It applies to all EU limited liability companies with at least 500 employees and at least €150 million per annum in net turnover worldwide.[68] It also applies to smaller firms operating in high-risk sectors (at least 250 employees and a net turnover of at least €40 million worldwide). It will apply directly to companies outside of the EU, three years from when the Directive comes into force, that generate at least €150 million per annum within the EU, or that generate at least €40 million within the EU in a high-risk sector.[69]

High-risk sectors are defined as the following:

- the manufacture and wholesale trade of textiles, leather and related products, including clothing and footwear;
- agriculture, forestry, fisheries, the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages; and/or
- the extraction of mineral resources regardless from where they are extracted (including crude petroleum, natural gas, coal, lignite, metals and metal ores, and quarry products), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products.[70]

In the draft Directive, "company" is defined as any limited liability entity, as well as financial service providers.[71] The inclusion of financial service providers (including asset managers and investment firms) was challenged,[72]

---

67. *Id.*

68. *Id.* at art. 2. Net turnover means the amounts derived from the sale of products and the provision of services after deducting sales rebates and value added tax and other taxes directly linked to turnover. Council Directive 2013/24/EU, art. 2(5), 2013 O.J. (L 158) (EC).

69. CSDDD, *supra* note 35, at art. 2. The European Council press release, supra note 64 confirms that "for non-EU companies it will apply if they have a €150 million net turnover generated in the EU, three years from the entry into force of the directive. The Commission will have to publish a list of non-EU companies that fall under the scope of the directive."

70. *Id.* at art. 3a.

71. *Id.*

72. In one note, a group of financial service providers argue that 'the Commission proposal refers broadly to "other financial services" which would include many other services such as trading securities,

and in the provisional agreement between the European Council and the European Parliament "the financial sector will be temporarily excluded from the scope of the directive, but there will be a review clause for a possible future inclusion of this sector based on a sufficient impact assessment."[73] As will be explored below, companies which are not within the scope of the Directive but are in business relationships with companies that do fall within its scope will necessarily be affected by the regulation. Because of the size and economic importance of the EU, it may be that few larger firms can avoid its reach.

iii. Duties

EU Member States shall ensure that companies conduct human rights and environmental due diligence as laid down in Articles 5 to 11 ("due diligence") by carrying out the following actions:

> (a) integrating due diligence into their policies in accordance with Article 5;
> (b) identifying actual or potential adverse impacts in accordance with Article 6;
> (c) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimizing their extent in accordance with Articles 7 and 8;
> (d) establishing and maintaining a complaints procedure in accordance with Article 9;
> (e) monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10;
> (f) publicly communicating on due diligence in accordance with Article 11. [74]

Article 3 provides further information on what constitutes an "adverse impact":

> (a) "Adverse environmental impact" means an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II;
> (b) "Adverse human rights impact" means an adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex, Part I Section 1, as enshrined in the international conventions listed in the Annex, Part I Section 2.[75]

---

derivatives, payments, custody, settlement and clearing' and describe such services as "services which are essential for the infrastructure of the financial system but where there is little to no ability to impact real economy activity." ASSOCIATION FOR FINANCIAL MARKETS IN EUROPE, CORPORATE SUSTAINABILITY DUE DILIGENCE: AN EFFECTIVE APPROACH FOR FINANCIAL INSTITUTIONS 2 (2023).

73. The European Council Press Release, *supra* note 64.

74. CSDDD, *supra* note 35, at art. 4(1).

75. *Id.* at art. 3b, c.

The draft Directive then further explains the measures that Member States must take to ensure corporate compliance with the law. Article 5 obligates Member States to ensure that companies have a due diligence policy in place that describes the company's approach to due diligence, sets out a code of conduct for employees and subsidiaries, and describes due diligence procedures. Article 6 addresses the identification of adverse impacts, clarifying that due diligence must cover the company's "own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships." To "prevent potential impacts," Article 7 raises the possibility of terminating business relationships where adverse impacts are likely, and the business partner refuses to adequately address the risk. This is confirmed in the provisional agreement: "As a last resort, companies that identify adverse impacts on environment or human rights by some of their business partners will have to end those business relationships when these impacts cannot be prevented or ended."[76] Further articles detail complaints and monitoring procedures. Article 15 addresses climate change policy, and states that:

> Member States shall ensure that companies referred to in Article 2(1), point (a), and Article 2(2), point (a), shall adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement.[77]

iv. Supervision and Liability

Further articles discuss supervision and liability. Article 18 obligates Member States to delegate a "supervisory authority" to oversee implementation of the Directive. These supervisory authorities "shall have at least" the power "to order the cessation of infringements of the national provisions adopted pursuant to this Directive," "to impose pecuniary sanctions in accordance with Article 20," and "to adopt interim measures to avoid the risk of severe and irreparable harm." Beyond this, Member States are permitted to decide for themselves the nature and severity of sanctions for breach, with Article 20 stating that sanctions shall be "effective, proportionate, and dissuasive." Article 22 mandates civil liability, including damages for breaches of Articles 7 and 8.[78] Article 25 states that breach of the EU Directive shall also become breaches of Directors' duty of care.

---

76. The European Council Press Release, *supra* note 64.

77. *Id.* at art. 15. The European Council Press Release, *supra* note 64, adds: "The compromise struck today strengthens the provisions related to the obligation of means for large companies to adopt and put into effect, through best efforts, a transition plan for climate change mitigation."

78. The European Council Press Release, *supra* note 64, adds: "On civil liability, the agreement reinforces the access to justice of persons affected. It establishes a period of five years to bring claims by those concerned by adverse impacts (including trade unions or civil society organisations). It also limits the disclosure of evidence, injunctive measures, and cost of the proceedings for claimants." *See also* Press

v. Effect on Foreign Companies

As highlighted above, mHRDD is designed to be extraterritorial. The aim is to compel companies based within a jurisdiction to comply with human rights rules that are generally well enforced within that jurisdiction throughout its global operations. Extraterritoriality is very much the point.

The EU Directive covers non-EU companies in three main ways. First, it covers non-EU companies that do enough business in the EU to cross the €150 million, or €40million in high-risk sectors, threshold. Second, it covers non-EU parent companies with EU subsidiaries that meet the turnover and employment threshold.[79] Third, it covers non-EU companies in the value chain of an EU company, or a non-EU company covered in one of the above two ways.[80] This category could be highly expansive, as there are no size limits, and any firm in the value chain would be covered that is in "established business relationship" test with the covered companies (like the French "established commercial relationship" test for tier two of the supply chain and beyond). These firms would not be covered directly by the EU Directive, but rather would be pressured to comply by another firm and may lose their business partnership if they do not comply.

vi. Connection to Reporting[81]

There is no stand-alone transparency requirement in the CSDDD that obliges companies to disclose information about their due diligence process or outcome. Instead, the Commission's draft of the CSDDD defers to a separate EU directive, the Corporate Sustainability Reporting Directive (CSRD), for rules on disclosure of HRDD. Companies fulfill the reporting aspect of the CSDDD by following CSRD.[82] The CSRD was finalized in 2022 and will be a freestanding reporting requirement from 2025 for companies within its scope. As a reporting directive, the CSRD obligates that companies report on a range of environmental, social, and governance aspects of their business. CSRD is an evolution of the EU's Non-Financial Reporting Directive (2014), expanding the scope of what needs to be reported, expanding the number of companies to be covered, and introducing mandatory auditing.

Release, European Coalition for Corporate Justice, CSDDD Political Deal: A Pivotal Step but a Missed Opportunity to Embrace Transformative Change (Dec. 14, 2023), https://corporatejustice.org/news/press-release-csddd-political-deal-a-pivotal-step-but-a-missed-opportunity-to-embrace-transformative-change/.

79. The European Council Press Release, *supra* note 64, adds that the provisions for non-EU companies will apply three years from the entry into force of the Directive.

80. *Id.* at art. 2.2.

81. *What the New European CSRD Rules Mean for U.S. Companies*, WOLTERS KLUWER (May 31, 2023), https://www.wolterskluwer.com/en/expert-insights/csrd-for-us-companies.

82. GABRIELLE HOLLY & SIGNE ANDREASEN LYSGAARD, HOW DO THE PIECES FIT INTO THE PUZZLE?: MAKING SENSE OF EU REGULATORY INITIATIVES RELATIVE TO BUSINESS AND HUMAN RIGHTS (2022).

CSRD will apply to all large EU companies, defined as those that meet two of three criteria: more than 250 employees; a turnover of more than €40 million; total assets of €20 million. From 2028, non-EU companies will also have to report from 2028 where they generate revenues over €150 million and also have either a large or listed EU subsidiary or a significant EU branch (generating €40 million in revenues). The respective subsidiary or branch will be responsible for publishing CSRD-style sustainability reports for these non-EU undertakings at a consolidated level from 2028 onwards. CSRD will also apply to companies with securities listed on an EU-regulated market.

Companies covered by the CSRD will have to report in a range of areas. This includes environmental impact, human rights (including labor rights and other social impact), anti-corruption and bribery, and diversity of the board. Companies will have to provide data and information as to their strategy, the resilience of their business model, and how they deal with sustainability-related risks. Reporting must be conducted on a "double materiality" basis, meaning that both the effect of external factors on the company and how the company impacts the wider world, must be reported.[83] Companies must also report on their value chains, although this is not mandatory for the first three years. The EU CSRD Directive leaves it to Member States to define what sanctions may be incurred.

G. *Extraterritorial Reach of HRDD Laws*

As can be seen from the preceding sections, foreign companies are covered by HRDD laws in different ways. The necessary jurisdictional link can be established:

- through a business enterprise's place of incorporation, e.g., the German law covers foreign companies with subsidiaries in Germany.
- by virtue of products and services placed on the state's domestic market, e.g., the Norwegian law covers foreign companies selling products or services in Norway.
- by reference to turnover in the EU, e.g., the draft EU Directive covers foreign companies active in the EU with a specified threshold for turnover generated in the EU.

In addition, the laws extend to business partners of covered European businesses wherever incorporated or located:

- through the entire supply chain as well as business partners, e.g., the Norwegian: enforces due diligence assessments in this way,
- through an "established commercial or business relationship", e.g., the French duty of vigilance applies to subsidiaries,

83. *CSRD: A Guide to the Corporate Sustainability Reporting Directive*, PERSEFONI, https://www.persefoni.com/learn/what-is-csrd (last updated July 27, 2023).

subcontractors, or suppliers with whom the company maintains such a relationship and the draft EU Directive applies to a company's own operations and those of its subsidiaries, and to entities within its value chain with whom the company has "an established business relationship."

- when an enterprise gains "substantiated knowledge" of a potential human rights violation, e.g., the German law enforces due diligence with respect to an enterprise's own business operations and direct suppliers' operations, and when it gains such knowledge of indirect suppliers.

One question for U.S. and other foreign companies as they assess the impact of these laws is how the laws will be enforced against them, and whether this is likely to happen in practice.

III. OVERSIGHT AND ENFORCEMENT OF HRDD

Oversight and enforcement are vital components of HRDD laws,[84] but the type of oversight varies between the different laws. At one end of spectrum, the French Law on the Corporate Duty of Vigilance is enforced by the courts; at the other end, the German Supply Chain law nominates a regulator to provide oversight and enforcement. Given the novelty and potential magnitude of the obligation being placed on companies, guidance is necessary and a "carrots and sticks" approach to enforcement recommended.[85] It is through oversight and enforcement that understanding of how these obligations are met in practice is built. Although we do not yet have examples of how these laws will be enforced against foreign companies (including those from the United States), enforcement against domestic companies gives an indication of regulatory approaches and priorities.

The different routes for plaintiffs to raise concerns about a company's adherence to the French Law on the Corporate Duty of Vigilance were noted above.[86] A key aspect of this regime is that there is no regulatory oversight: everything is done by the courts, prompted by claims from rightsholders and their representatives. French civil society organizations have assumed the responsibility for monitoring the implementation of the law by analyzing vigilance plans and cross-checking their content with reliable information about the company's human rights performance.[87] A 2020 report by the French High Council for Economy, which is monitoring the implementation

84. Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHI. J. INT'L L. 323 (2021).

85. RACHEL CHAMBERS ET AL., REPORT OF RESEARCH INTO HOW A REGULATOR COULD MONITOR AND ENFORCE A PROPOSED UK HUMAN RIGHTS DUE DILIGENCE LAW 20 (2020).

86. *See* McCorquodale & Nolan, *supra* note 25.

87. *See, e.g.*, THE LAW ON DUTY OF VIGILANCE OF PARENT AND OUTSOURCING COMPANIES, YEAR 1: COMPANIES MUST DO BETTER 8 (Juliette Renaud et al. eds., 2019).

of the law, proposed the installation of a public supervisory authority for the law; this proposal has not been adopted.[88]

Interestingly, one of the main French civil society organizations monitoring implementation of the law, Sherpa, issued a strong statement against the establishment of a public authority.[89] Sherpa's statement expresses the concern, based upon experience with other public oversight bodies in France and in particular the French Anti-Corruption Agency, that such a body might in fact, distort the duty derived from the law by interpreting it "as a simple obligation to put in place internal risk management processes"[90]—essentially a compliance exercise. This is far from Sherpa's vision of the law as an "obligation of constant behavior, which must be assessed in a concrete manner"[91]—i.e., entailing substantive changes to corporate practice. Scholars and practitioners in other countries have reached the opposite conclusion with regard to oversight and enforcement —i.e., that a public authority is the best option.[92] In this vein, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has conducted research and issued a report about best practice in oversight of HRDD by a public authority.[93]

Since the French law came into force, plaintiffs have raised a series of complaints about failure to comply with the duty of vigilance directly with companies, and four cases have now reached the courts.[94] These cases reveal some challenges with the judicial oversight process. Virginie Rouas notes that the cases have faced procedural hurdles, including (1) whether the civil or commercial court is competent to hear claims under French law, (2) whether the obligation to commence proceedings with a formal notice has been done properly, and (3) lack of consistency between claims in the formal notice and claims before the judge.[95] It seems that the French courts' responsibility to interpret the law is proving to be onerous in light of the law's ambitious but vague provisions and the lack of official guidance on vigilance measures. She

88. *Evaluation de la mise en oeuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (Jan. 2020).

89. CREATING A PUBLIC AUTHORITY TO ENFORCE THE DUTY OF VIGILANCE LAW: A STEP BACKWARD? 1 (2021).

90. *Id.* at 4.

91. *Id.*

92. CHAMBERS ET AL., *supra* note 85; C.C. VAN DAM & M.W. SCHELTEMA, OPTIONS FOR ENFORCEABLE IRBC INSTRUMENTS 7 (2020).

93. SHIFT & UN HUMAN RIGHTS, ENFORCEMENT OF MANDATORY DUE DILIGENCE: KEY DESIGN CONSIDERATIONS FOR ADMINISTRATIVE SUPERVISION 3 (2021) (working on the assumption that there should be administrative oversight, the paper offers recommendations for design of that oversight).

94. Case 1: against EDF, Nov. 2021; Case 2: against TotalEnergies, Feb. 2023; Case 3: against Vigie Groupe SAS (formerly known as Suez Groupe SAS), Jun. 2023; Case 4 against TotalEnergies, July 2023 (The French judge just dismissed the complaint filed by NGOs and municipalities against the oil company TotalEnergies (climate change case). *See Lessons Learned from the 28 February Paris Court Ruling in the "TotalEnergies" Case*, RÖDEL & PARTNER (Mar. 15, 2023), https://www.roedl.com/insights/france-paris-court-ruling-totalenergies-case-lessons-learned#lessons.

95. Virginie Rouas (@VirginieRouas), TWITTER (June 8, 2023, 7:13 AM), https://twitter.com/VirginieRouas/status/1666765431154122753.

argues: "Judges appear uneasy in this role, opting for a formalistic procedural approach to avoid having to rule on serious societal issues."[96]

The French law contrasts with the German Supply Chain Due Diligence Law, the latter containing provisions for a full regulatory oversight and enforcement system. There is a formal process for submission and audit of receipt of HRDD reports (again unlike the French, which are not collected or checked by a public authority). The law requires reports to be submitted to the competent public authority,[97] the Federal Office for Economic Affairs and Export Control (known as the BAFA after the acronym of its name in German), and then an audit process be conducted by the BAFA to ensure that all covered companies have submitted a report and that each report contains the required content.[98]

The Act also vests responsibility for the official monitoring and enforcement of the due diligence and reporting obligations with the BAFA,[99] and equips the authority with powers to investigate potential failures to comply with the law.[100] To fulfil its role, the BAFA is empowered to carry out risk-based inspections of enterprises. It may summon persons, enter offices, inspect and examine documents and prescribe specific measures to remedy problems. It may also impose financial penalties and administrative fines."[101] Enforcement of the law is against the parent company only, not its subsidiaries or suppliers.[102]

---

96. *Id.*

97. German Supply Chain Due Diligence Act, *supra* note 34 at § 12 ("[e]nterprises must submit their due diligence reports to the Federal Office for Economic Affairs and Export Control, which reviews the reports, no later than four months after the end of the financial year"); *cf. id.* at XIII. 2 (for details of the first report).

98. *Id.* § 13.

99. *Id.* § 19.

100. *Id.* § 15, 16, 17, & 18.

101. *Supply Chain Act: Frequently Asked Questions*, CSR BUS. & HUM. RTS., https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText18: XIV (last updated July 24, 2023). Monitoring by the Federal Office for Economic Affairs and Export Control. If BAFA determines that any violation of the German law has occurred, it may impose on a company a penalty payment of up to EUR 50,000 or a fine of up to EUR 800,000. In the case of companies with average annual sales of more than EUR 400 million, the BAFA may fix the fine for certain violations at an amount equal of up to two per cent. of the company's average annual sales. In addition, violations can result in exclusion from public procurement procedures for up to three years. Note that individual managers can also be held liable. German law, discussed in David E. Bond et al., *Supply Chain Compliance with Human Rights and Environmental Obligations*, WHITE AND CASE (Feb. 24, 2023), https://www.whitecase.com/insight-alert/supply-chain-compliance-human-rights-and-environmental-obligations.

102. "What are the consequences of the Act for smaller enterprises supplying larger enterprises that fall under the Act? By their nature, the obligations under the Supply Chain Act cannot simply be passed on to suppliers. This applies, for example, to obligations to report to the authority and the public. Suppliers outside the legal scope of application also do not have to fear inspection measures or sanctions by the Federal Office for Economic Affairs and Export Control. Enterprises that do fall within the scope of the Act also remain responsible for monitoring their supply chains and fulfilling the obligations concerning risk analysis, preventive and remedial measures." *Supply Chain Act: Frequently Asked Questions*, *supra* note 101.

The BAFA, along with other German government agencies, has provided considerable information online about the law and how it will be enforced. In a website created by the German Federal Ministry of Social and Labor Affairs on the law, its "frequently asked questions" section includes the following:

> 2. What is the stance of the Federal Office for Economic Affairs and Export Control when assessing the appropriateness of measures taken by enterprises to fulfil their due diligence obligations?
>
> The principle of appropriateness gives enterprises a great deal of leeway in deciding which risks they should address first and which measures are reasonable. Authorities acknowledge this leeway and take it into account when monitoring compliance. The Federal Office for Economic Affairs and Export Control reviews whether enterprises took appropriate action at the time of the decision, i.e., ex ante. Thus, enterprises have to show which criteria they used to assess risks and implement measures. The enterprise's internal decision process must be plausible and comprehensible for the Federal Office for Economic Affairs and Export Control. It does not review the enterprise's decision from an ex-post facto point of view, so enterprises should not be sanctioned for what in hindsight turns out to have been a mistake.[103]

Thus we see that companies will be given latitude in deciding which measures are reasonable for them to take.[104] The BAFA has already started investigating corporate compliance with the law.[105] It has sent letters to certain German companies asking whether they have established a human rights risk management process; to identify their human rights officer and to confirm whether the company has sufficient means to undertake this role – financial and personnel.[106] The same approach to oversight that has been adopted in other legal fields such as data protection or cartel law, for the German Supply Chain Law.[107] That is: in the first year or so, the authorities were quiet and watched the market, but from the second year onward, fines have been imposed.[108] The first complaint has already been filed with the BAFA, with one of the companies that is subject to complaint being the U.S. firm Amazon. The complaint concerns health and safety at Amazon supplier factories in Bangladesh.[109]

---

103. *Id.*

104. *Id.*

105. HUMAN RIGHTS DUE DILIGENCE FORUM ACTIVITIES AND MEMBERSHIP: A FORUM FOR LEGAL PRACTITIONERS WORKING IN THE AREA OF BUSINESS AND HUMAN RIGHTS 6 (British Institute of International and Comparative Law 2023) (on file with author).

106. *Id.*

107. *Id.*

108. *Id.*

109. *First Complaint Case Filed Under German Supply Chain Act*, EUR. CTR. FOR CONST. AND HUM. RTS. (Apr. 24, 2023), https://www.ecchr.eu/en/press-release/erster-beschwerdefall-nach-deutschem-lieferkettengesetz-eingereicht/.

As noted above, the Norwegian Consumer Authority is tasked with monitoring compliance with the HRDD obligations under the Norwegian law, including reporting and right to information obligations. The Consumer Authority can "on its own initiative, or based on a request from others, seek to influence enterprises to comply with the Act, including by conducting negotiations with the enterprises or their organizations."[110] The authority may issue orders and prohibitions (under s.12) to ensure business compliance with HRDD, reporting and right to information obligations.

A. *Oversight of the CSDDD*

As discussed above, Article 18 of the EU Directive obligates Member States to delegate a 'supervisory authority' to oversee implementation of the Directive.[111] These supervisory authorities "shall have at least" the power "to order the cessation of infringements of the national provisions adopted pursuant to this Directive," "to impose pecuniary sanctions in accordance with Article 20," and "to adopt interim measures to avoid the risk of severe and irreparable harm." They should be of a public nature with appropriate powers and financing.[112] The draft leaves it up to the Member States to decide whether they will establish one new public supervisor or embed this task with existing supervisors.[113] As regards companies not based in the EU, the competent supervisory authority is that in which the company has its registered office, branch or authorized representative.[114] However, the latter companies may file a reasoned request to change their supervisory authority.[115] According to the EU Council's proposed text, if the foreign company does not have a branch in any Member State, or has branches located in different Member States, it will be regulated in the EU state where it has the largest turnover.[116]

The EU Directive specifies powers for supervisory authorities. They should be entitled to carry out investigations on their own initiative[117] or based on complaints or substantiated concerns.[118] The company's efforts to comply

110. Norwegian Law, *supra* note 34.

111. *See* CSDDD, *supra* 35, at art. 18.

112. *Id.* at art. 17 & 18(1).

113. MARTIJN SCHELTEMA & ROBERT MCCORQUODALE, SUPERVISORY MECHANISMS AND DIRECTORS DUTIES: INNOVATIONS IN THE PROPOSED EU DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE (2022). "Recital 53 explicitly mentions the option to embed public supervision regarding financial institutions in a separate (existing) public supervisor." *Id.*

114. CSDDD, *supra* note 35, at art. 17(2) & (3).

115. *Id.* at art. 17(3).

116. "As regards companies referred to in Article 2(2), the competent supervisory authority shall be that of the Member State in which the company has a branch. If the company does not have a branch in any Member State, or has branches located in different Member States, the competent supervisory authority shall be the supervisory authority of the Member State in which the company generated most of its net turnover in the Union in the financial year preceding the last financial year before the date indicated in Article 30 or the date on which the company first fulfils the criteria laid down in Article 2(2), whichever comes last." *Id.*

117. *Id.* at art.18(2).

118. *Id.* at art. 19.

with the remedial action required by the supervisory authority and investments made or targeted support to business relations in value chains, as well as collaboration with other entities, shall be taken into account by the public supervisor.[119] Supervisory authorities should also cooperate and coordinate their actions.[120] To this end a European Network of Supervisory Authorities will be established.[121] The CSDDD does not provide further details about this network – simply stating that it may assist national supervisors.[122]

Overall, the regulatory and enforcement infrastructure for the CSDDD is along similar lines to the comparable infrastructure for the German law. Companies can learn from early regulatory enforcement of that law the type of oversight and enforcement that they might anticipate for the CSDDD.

IV. CURRENT U.S. LAWS, POLICY, AND PRACTICE ON HRDD

The preceding parts of the article set out the details of the new laws that have been passed or are shortly to be passed in Europe. Our focus now turns to the comparative position in the United States. Our aim is to understand whether HRDD is currently expected of U.S. companies—both legally and by the market (investors, consumers etc.) and what HRDD is happening in practice.

The stocktaking exercise that is currently being undertaken as part of the renewal of the U.S. National Action Plan on Responsible Business Conduct (NAP) makes this an appropriate moment to consider current law, policy, and practice in the United States. In the field of business and human rights, a NAP is defined as an "evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights (UNGPs)."[123] The UN Working Group on Business and Human Rights, in its guidance on NAPs, recommends that a NAP should, in line with the UNGPs, represent a "smart mix" of mandatory and voluntary, as well as international and national measures.[124] A baseline assessment of existing law and policy is recommended.[125]

BHR rules enacted to-date in the United States have focused on disclosure. This is in keeping with the dominant approach to

119. *Id.* at art. 20(2).

120. *Id.* at art. 17(4), 18(3), & Recital 55.

121. *Id.* at art. 21.

122. *Id.* at Recital 55.

123. GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS 1 (UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS 2016).

124. *Id.*

125. *Id.* at 20. The current State-Department led U.S. NAP renewal process, *National Action Plan on Responsible Business Conduct supra* note 10, has not included a baseline assessment. *Id.*

securities/corporate regulation.[126] HRDD fits into certain of these rules as a subject to be reported on in the mandated disclosure.

Mandatory financial and related disclosure requirements are found primarily in securities law, specifically Regulation S-K promulgated by the Securities and Exchange Commission (SEC).[127] Other SEC rules establish specific detailed disclosures for its registrants.[128] Notably, the SEC has issued rules on disclosure of human capital information,[129] and has recently proposed rules to enhance and standardize climate-related disclosures, which would require registrants to include certain climate-related disclosures in their registration statements and periodic reports.[130] In addition, registrants must disclose any information that may have a material impact on their business.[131] Whether or not human rights impacts are material varies—those impacts that result in major operations disruptions or litigation exposure are very likely material[132]—but the position for other impacts is the contested.[133] As noted

126. *See* Jena Martin, *Changing the Rules of the Game: Beyond a Disclosure Framework for Securities Regulation*, 118 W. VA. L. REV. 59, 59 (2015) (discussing the SEC's disclosure-based framework and outlining its many shortcomings).

127. 17 C.F.R. § 229 (2015).

128. *See, e.g.*, the SEC amendment to Item 101(c) of Regulation S-K which requires its registrants to include a disclosure of their human capital resources in Form 10-K, effective November 9, 2020, if such disclosure is material to understanding the listed company's business taken as a whole. Modernization of Regulation S-K Items 101, 103, and 105.

129. "Human Capital Management" (HCM) is an umbrella term that concerns multi-faceted aspects of a corporation's employees and operations including work force diversity, percentage of full time versus part time workers, turnover etc. David Essex & Vicki-Lynn Brunskill, *Human Capital Management (HCM)*, TECHTARGET, https://www.techtarget.com/searchhrsoftware/definition/human-capital-management-HCM?Offer=abt_pubpro_AI-Insider (last visited Aug. 4, 2023).

130. Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46. "The proposed rules would add new Subpart 1500 to Regulation S-K and new Article 14 to Regulation S-X to require disclosure of:

1. climate-related risks that are reasonably likely to have a material impact on a public company's business, results of operations, or financial condition;
2. greenhouse gas ("GHG") emissions associated with a public company that includes, in many cases, an attestation report by a GHG emissions attestation provider; and
3. climate-related financial metrics to be included in a company's audited financial statements."

Colin J. Diamond et al., *SEC Proposes Long-Awaited Climate Change Disclosure Rules*, WHITE & CASE (Mar. 24, 2022), https://www.whitecase.com/publications/alert/sec-proposes-long-awaited-climate-change-disclosure-rules. For a discussion of systemic risk related to climate change, *see* Barnali Choudhury, *Climate Change as Systemic Risk*, 18 BERK. BUS. L.J. 52 (2021).

131. David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5, 24 (2019). Scholars argue that the SEC should require disclosures on ESG issues. *See* Virginia Harper Ho, *"Comply or Explain" and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317, 317 (2017) (arguing that the SEC should adopt a "comply-or-explain" approach to ESG issues).

132. Anthony Ewing, *Mandatory Human Rights Reporting*, *in* BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 284, 285 (Dorothée Baumann-Pauly & Justine Nolan eds., 2016).

133. The U.S. Chamber of Commerce, for instance, has categorically rejected the materiality of ESG information in the past. ESSENTIAL INFORMATION: MODERNIZING OUR CORPORATE DISCLOSURE SYSTEM 13-14 (U.S. Chamber of Commerce (CCMC) 2017). On the other hand, the International Organization of Securities Commissions, says "ESG matters, though sometimes characterized as non-

above, though, as BHR becomes an increasingly legalized field, investors may increasingly find human rights performance to be financially material. There is no explicit obligation in U.S. securities law requiring companies to report on their human rights-related impacts and due diligence, except the narrowly focused section 1502 of the Dodd-Frank Act, discussed next.[134] Outside securities law, there are other laws, both federal and state, that push U.S. companies in the direction of HRDD without directly requiring it. Discussion of these follows in sections b to d below.

A. *Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1502*

Section 1502, passed by Congress in 2010, was designed to prevent money from conflict minerals from being used to finance human rights violations in the Democratic Republic of Congo (DRC).[135] Section 1502 amended the Securities Exchange Act of 1934, directing the SEC to issue rules, which it duly did by issuing the Conflict Mineral Rule in 2012. Companies first issued reports to comply with the Rule in 2014. The Rule requires any reporting company that uses tin, tungsten, tantalum, and/or gold or "any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or a neighboring country"[136] if those minerals are "necessary to the functionality or production of a product" manufactured by those companies"[137] to conduct a country-of-origin inquiry to determine whether any of these minerals originated in the Democratic Republic of Congo or its neighboring countries or are from scrap or recycled sources, and report its findings using a Specialized Disclosure Report (Form SD).[138] If the inquiry determines that there is reason to believe that the minerals may have originated in the covered

financial, may have a material short-term and long-term impact on the business operations of the issuers as well as on risks and returns for investors and their investment and voting decisions." IOSCO Statement: Statement on Disclosure of ESG Matters by Issues 1 (Int'l Org. of Sec. Comm'n 2019). For discussion of the convergence of financial and non-financial materiality, see Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L.J. 645, 645 (2019).

134. Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act amends § 13 of the Securities Exchange Act of 1934. The EU has passed a disclosure law aimed at supply chain due diligence for the use of these minerals. This is corporate law, not securities law. Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 lays down supply chain due diligence obligations for EU-based importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

135. *Fact Sheet: Disclosing the Use of Conflict Minerals*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/opa/Article/2012-2012-163htm—related-materials.html (last visited Aug. 6, 2023) (stating that it was enacted "because of concerns that the exploitation and trade of conflict minerals by armed groups is helping to finance conflict in the DRC region and is contributing to an emergency humanitarian crisis.").

136. Pub. L. No. 111-203, tit. 15, sec. 1502(a), (b), (e)(4), 124 Stat. 1376, 2213, 2218 (2010) (codified at 15 U.S.C. § 78m).

137. *Id.*

138. Reporting companies are any companies that have registered their securities with the SEC and, as such, are required to issue periodic reports to the agency under § 12 of the Securities Exchange Act.

countries and are not from recycled or scrap materials, the company is required to conduct due diligence in accordance with the OECD Due Diligence Guidance, and publish this in a Conflict Minerals Report.

Guidance issued by the SEC under the rule requires companies to publish annual reports on the steps taken to exercise due diligence and to have those reports independently audited.[139] In April 2017, as required by a U.S. court of appeals decision,[140] the U.S. district court entered a final judgment invalidating, on First Amendment grounds, the portion of the rule that required companies to state whether any of their products "have not been found to be 'DRC conflict free.'"[141] The district court remanded the matter back to the SEC to take additional action in furtherance of the court's decision. The SEC Division of Corporation Finance issued a statement saying that it would not recommend enforcement action if a company were to file only a Form SD describing its reasonable country of origin inquiry and whether any of its conflict minerals originate (or may originate) from a covered country.[142] Thus the due diligence part of the Rule is no longer enforced by the SEC.

B. *California Transparency and Supply Chain Act*

The California Transparency and Supply Chain Act of 2010 (TSCA)[143] is the only other law in force at present requiring companies to report on human rights-related topics. The law exists to provide consumers with "information regarding companies' efforts to eradicate human trafficking and slavery from their product supply chains."[144] A provision of state law, the Act requires retail sellers and manufacturers of a certain size doing business in the state of California to disclose their efforts to eradicate slavery and human trafficking from their supply chain for tangible goods offered for sale.[145] There are five topics that the law tells companies report on, which include verification, audit, and certification. The disclosed information should be posted on the retail seller or manufacturer's website.

---

139. The Final Rule for the implementation of § 1502 was approved by the SEC in August 2012. 17 C.F.R. §§ 240, 249b. *See* Olga Ortega-Martin, *Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?*, 32 NETHERLANDS Q. HUM. RIGHTS 64, 65 (2014) (detailing the requirements of § 1502).

140. Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n, 800 F.3d 518, 530 (D.C. Cir. 2015).

141. *Id.*

142. Division of Corporation Finance, Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule: SEC Division of Corporation Finance, U.S. Sec. & Exch. Comm'n (Apr. 7, 2017), https://www.sec.gov/news/public-statement/corpfin-updated-statement-court-decision-conflict-minerals-rule.

143. California Transparency in Supply Chains Act. CAL. CIV. CODE § 1714.43 (West 2012).

144. *Frequently Asked Questions (FAQs) - SB 657*, STATE OF CAL. DEP'T OF JUST. OFF. OF THE ATT'Y GEN, https://oag.ca.gov/SB657/faqs (last visited Aug. 5, 2023).

145. CAL. CIV. CODE § 1714.43(a)(1) (2012). The law applies to 1) "retail seller[s] and manufacturer[s]" who do business in California and have "annual worldwide gross receipts that exceed [$100 million]." *Id.*

C. *Tariff Act and Uyghur Forced Labor Prevention Act*

The United States bans the importation of any products mined, produced, or manufactured wholly or in part by forced labor, pursuant to Section 307 of the Tariff Act of 1930. Although in force for nearly a century, this law gained teeth in 2016 when a measure passed under the Obama administration eliminated its consumptive demand clause, which had provided an exclusion from the import ban for forced-labor goods not produced in such quantities in the United States as to meet the country's consumptive demands.[146] U.S. Customs and Border Protection (CBP) enforces the law.

In 2021, President Biden signed the Uyghur Forced Labor Prevention Act (UFLPA),[147] which applies an import ban specifically to goods made in whole or in part in China's Xinjiang Uyghur Autonomous Region (XUAR) and by certain identified entities associated with the region. The CBP Commissioner is to apply a presumption that "assumes that all goods manufactured in Xinjiang are made with forced and therefore banned under the 1930 Tariff Act."[148] The CBP "may issue an exception if the importer provides 'clear and convincing evidence' that the goods in question are not linked to forced labor, fully responds to all CBP requests for information, and can demonstrate that it has fully complied with CBP guidance."[149] The CBP has since issued guidance providing detailed instructions to companies on how they can conduct human rights due diligence and supply chain tracing sufficient to demonstrate that either goods were not sourced from the XUAR, or, if they are from the XUAR, that they were not produced with forced labor.[150] The types of information that CBP will need from the company include their due diligence system information, supply chain tracing information, and information on supply chain management measures.[151] The U.S. Government has identified as high priority for UFLPA enforcement certain goods such as polysilicon, garments, apparel, and tomatoes.[152]

---

146. U.S. CUSTOMS & BORDER PROTECTION, Trade Facilitation and Trade Enforcement Act of 2015 Repeal of the Consumptive Demand Clause (2016).

147. *Uyghur Forced Labor Prevention Act*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/trade/forced-labor/UFLPA (last visited Aug. 4, 2023).

148. U.S. DEP'T OF HOMELAND SEC., OFF. OF STRATEGY, POL'Y, AND PLANS, STRATEGY TO PREVENT THE IMPORTATION OF GOODS MINED, PRODUCED, OR MANUFACTURED WITH FORCED LABOR IN THE PEOPLE'S REPUBLIC OF CHINA: REPORT TO CONGRESS (2022).

149. *Id.*

150. U.S. Customs and Border Prot., CBP Publ'n No. 1793-0522, Uyghur Forced Labor Prevention Act: U.S. Customs and Border Protection Operational Guidance for Importers 4 (2022).

151. *Id.* at 13-15.

152. STRATEGY TO PREVENT, *supra* note 148. CBP has expanded its targets to include automotive parts, metals, pharmaceuticals, and other products as evidence has emerged that these goods are being produced in or with components from the XUAR. *See* Marti Flacks, *What's Next for the Uyghur Forced Prevention Act?*, CTR. FOR STRATEGIC INT'L STUD. (June 21, 2023), https://www.csis.org/analysis/whats-next-uyghur-forced-labor-prevention-act.

The UFLPA also obliges companies that are already required to file annual or quarterly reports under Section 13 of the Securities Exchange Act of 1934, to include in their reports information concerning its or its affiliates' dealings with entities operating in Xinjiang.[153] However, this disclosure obligation is limited only to specific activities (such as detention or surveillance) conducted by business partners in Xinjiang, while it excludes explicitly from this disclosure requirement "activities of the issuer or any affiliate of the issuer" relating to the "import of manufactured goods."[154]

D. *Civil Claims Against Companies*

The Alien Tort Statute (ATS) allows victims of very serious human rights violations to sue the company that committed the violation (whether directly or as an accomplice). This law, once the jewel in the crown of corporate accountability in the United States that should have given companies reason to ensure that they were not involved in such violations, has been gutted by a series of Supreme Court decisions.[155] It has not been repealed or killed off completely however.[156]

The Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA)[157] allows victims to sue trafficking perpetrators for monetary damages—both compensatory and punitive—if they establish by a preponderance of the evidence that the perpetrators benefited from participation in a venture that they knew or should have known engaged in forced labor or trafficking. The threat of such lawsuit should encourage companies to conduct HRDD to ensure that they are not participating in such a venture. There are however a number of major challenges with regard to this law. In *Doe v. Apple*, a case decided in 2021, the District Court for the District of Columbia (Judge Carl Nichols) held that only the TVPRA's criminal provisions apply extraterritorially, not its civil cause of action.[158] This decision guts the provision and comes after earlier case law had already created challenges for plaintiffs. In particular, *Ratha v. Phatthana Seafood Co.* had

153. *Uyghur Forced Labor Prevention Act*, supra note **Error! Bookmark not defined.**, section 9.

154. *Id.*

155. Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 U. PA. J. INT'L L. 519, 519 (2021).

156. Doe I v. Cisco Systems, 66 F.Supp. 3d 1239, 1249 (N.D. Cal. 2014); *see also Ninth Circuit Allows Human Rights Claims Against Cisco to Proceed*, TRANSNATIONAL LITIG. BLOG (July 19, 2023), https://tlblog.org/ninth-circuit-allows-human-rights-claims-against-cisco-to-proceed/ (the Ninth Circuit held that plaintiffs had adequately alleged domestic conduct by a U.S. corporation to satisfy the test established in *Nestle*).

157. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat 2875, 2878 (2003) discussed as a corporate accountability tool in Rachel Chambers & Jena Martin, United States: Potential Paths Forward after the Demise of the Alien Tort Statute, in CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX: KEY LEGAL DEVELOPMENTS IN SELECTED JURISDICTIONS 351, 359 (Ekaterina Aristova & Uglješa Grušić eds., 2022).

158. Doe v. Apple Inc., Civil Action 1:19-cv-03737 (CJN) (D.D.C. Nov. 2, 2021).

introduced an onerous standard for proving "participation."[159] Plaintiffs must show that the defendant "took some action to operate or manage" the human trafficking venture, by for example "directing or participating in [the supplier's] recruitment employment practices, or [establishing] the working conditions" at the supplier's factory.[160] Plaintiffs must also persuade the court that the defendants "benefitted" from the supplier's human trafficking, which has been interpreted in the supply chain context to mean that they must prove that the defendant company sold the products tainted by human trafficking.[161] Plaintiffs must also demonstrate that the defendant "knew or should have known" that the venture engaged in forced or trafficking; various issues indicate whether a corporation or individual should have known this. These include "terms of a contract agreement, separation of a division of the labor force, lack of competing suppliers with equally low costs, and promises of immigrant visas."[162]

E. *Proposed Laws*

The likelihood of a new HRDD law being enacted is very low, as discussed in the introduction, and this is borne out in practice as laws that are put forward are not adopted. As an example, during the 116th Congress (2019-21), a House committee discussed the Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019[163]—a draft law that would have required publicly listed companies to report their findings from human rights due diligence investigations to the SEC annually.[164] Companies would be required to:

> 1. Undertake an annual analysis to identify human rights risks and impacts in their operations and value chain that are known or should be known;

---

159. Ratha v Phatthana Seafood Co, No. CV 16-4271-JFW (Asx), 2017 WL8293174, *4 (C.D. Cal. 21 Dec 2017) (US District Court, Central District of California); *see* Ramona Lampley, *Mitigating Risk, Eradicating Slavery*, 68 AM. UNIV. L. REV. 1707, 1707 (2019).

160. *Ratha*, 2017 WL8293174 at *4.

161. *Id.* at *6. Congress has since amended the Trafficking Victims Protection Reauthorization Act to apply to persons who *attempt* to benefit from forced labor. Maggie Lee & Martina Vandenberg, *Congress Amends the TVPRA to Correct Ninth Circuit's Erroneous Ruling in Ratha*, TRANSNATIONAL LITIG. BLOG (Aug. 1, 2023), https://tlblog.org/congress-amends-the-tvpra-to-correct-ninth-circuits-erroneous-ruling-in-ratha/ (explaining the amendment and its origins in the Ninth Circuit's decision in *Ratha*. They also explain that as a "clarification" it should apply retroactively to pending cases, including *Ratha*).

162. Laura Ezell, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 VAND. L. REV. 499, 522 (2016).

163. Discussion Draft on Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019, H.R., 116th Cong. (Fed. Doc. 2019).

164. *See Building a Sustainable and Competitive Economy: An Examination of Proposals to Improve Environmental, Social, and Governance Disclosures: Hearing Before the Subcomm. On Inv'r Prot., Entrepreneurship & Capital Mkts. Of the H. Comm. on Fin. Servs.*, 116th Cong. (July 10, 2019). *See also* Amal Bouchenaki et al., *Mandatory Human Rights Due Diligence On The Cards In The US?*, HERBERT SMITH FREEHILLS (July 25, 2019), https://www.herbertsmithfreehills.com/latest-thinking/mandatory-human-rights-due-diligence-on-the-cardsin-the-us.

2. Rank any risks and impacts based on their severity; and
3. Disclose the process and results of their assessment, as well as any actions the company has taken to avoid, mitigate, or remediate the identified risks or impacts.[165]

The bill notes that while certain countries have leveraged ESG regulation to mandate risk assessment of human rights violations, the United States has not, and the bill seeks to fill this gap by making this an SEC endeavor. The future of the Act is uncertain, given a lack of progress since July 2019.[166] State law offers a potentially more promising avenue for passing HRDD legislation—it was the state of California that passed the Transparency in Supply Chains Act, and it is the state of New York that is currently taking on the mantle of legislative innovation in this field.

In January 2022, the New York State Senate introduced a bill that seeks to impose significant human rights and environmental due diligence and disclosure obligations on fashion retail sellers and manufacturers operating in the state of New York. If passed into law, the "Fashion Sustainability and Social Accountability Act" would be the first such law to target the fashion industry.[167] The obligations include supply chain mapping and transparency, and yearly environmental and social sustainability reporting. Retailers and manufacturers will be required to publish annual due diligence reports on their public website detailing policies, processes, and activities they have implemented to identify, prevent, mitigate, and account for environmental and social risks.[168]

F. *Policy*

There are examples of the U.S. Government incorporating HRDD into policy. On September 30, 2020, the State Department issued recommendations on implementing UN Guiding Principles on Business and Human Rights for transactions linked to foreign government end-users for products or services with surveillance capabilities.[169] These guidelines encourage U.S. businesses to integrate human rights due diligence into

165. Discussion Draft, *supra* note 163.

166. Eric Bouffard et al., *Part Two – Mandatory Corporate Human Rights Due Diligence: What Now and What Next?* An International Perspective, GIBSON DUNN (Mar. 10, 2021), https://www.gibsondunn.com/part-two.

167. As initially drafted, the bill faced criticism from some human rights and labor organizations, who said it was too focused on disclosure and did not require sufficient action of the part of fashion companies. An amended version of the bill was drafted which steps up the requirements on companies as well as their liability if they fall short.

168. *The New York Fashion Sustainability and Social Accountability Act: What your Business Needs to Know About the NY's Proposed Fashion Sustainability and Social Accountability Act,* BRIGHTEST (Dec. 10, 2022), https://www.brightest.io/ny-fashion-act-sustainability.

169. *U.S. Department of State Guidance on Implementing the "UN Guiding Principles" for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities*, U.S. DEP'T OF STATE (Sept. 30, 2020), https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-/due-diligence-guidance/.

compliance programs including training on relevant human rights considerations or development of appropriate policies, systems, and processes to mitigate risk of human rights abuses and violations. However, this is not intended to impose any requirements under U.S. law.

G. *Practice*

Some U.S. companies are publicly committing to HRDD in the absence of any legal obligation to perform it. Examples of these companies include Amazon,[170] Microsoft,[171] and Hewlett-Packard Company (HP).[172] The company commitments are similar in nature to one another; they point out that as a company they "recognize [their] responsibility to respect and uphold internationally recognized human rights through ethical treatment of [their] workforce and those within our value chain."[173] Often the specific areas of focus are workers' rights and protections, as well as ensuring safe and inclusive working conditions. While some companies are doing HRDD, this type of action is rare and confined to certain high exposure companies.

As long as HRDD remains voluntary and confined to the intra-corporate level, it is difficult to guarantee that it is more than Corporate Social Responsibility window-dressing. For example, while Starbucks publicized a global human rights statement in 2020,[174] the company still falls amongst the poorest performers in their industry ranking for human rights Ranking has become a key method for determining progress among companies, including on HRDD. The Corporate Human Rights Benchmark (CHRB), part of the World Benchmarking Alliance (WBA), compares the policies, processes, and practices that large companies implement to systematize their human rights since 2017.[175] The findings from these inquiries into company practices are publicized in CHRB reports.

Between 2022 and 2023, the CHRB methodology will assess companies in five sectors: (1) the apparel sector; (2) the automotive manufacturing sector; (3) the extractives sector; (4) the food and agriculture products sector; and (5) the ICT manufacturing sector.[176] In 2021, the CHRB team created and published a revised methodology to collect information about companies. The

---

170. *Amazon Global Human Rights Principles*, AMAZON, https://sustainability.aboutamazon.com/human-rights/principles (last visited July 13, 2023).

171. Steve Crown, *Taking on Human Rights Due Diligence*, MICROSOFT (Oct .20, 2021), https://blogs.microsoft.com/on-the-issues/2021/10/20/taking-on-human-rights-due-diligence/.

172. *Respecting Human Rights Across our Business*, HP, https://www.hp.com/us-en/sustainable-impact/human-rights.html (last visited July 13, 2023).

173. *Amazon*, *supra* note 170.

174. STARBUCKS 2020 REPORT: GLOBAL ENVIRONMENTAL & SOCIAL IMPACT REPORT (Starbucks, 2020).

175. CHRB 2022 REPORT, *supra* note 16 at 3.

176. *The Methodology for the 2022-2023 Corporate Human Rights Benchmark*, WBA (Sept. 30, 2021), https://www.worldbenchmarkingalliance.org/research/the-methodology-for-the-2022-corporate-human-rights-benchmark/. *See* ERIKA GEORGE, INCORPORATING RIGHTS: STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY 160-165 (Oxford Univ. Press, 2021).

new methodology did not fundamentally change the CHRB approach but instead aimed to strengthen it by relying on stakeholder inputs as well as "evolving international and industry-specific standards on human rights and responsible business conduct."[177]

The CHRB methodology is composed of five measurement themes, each focusing on a different aspect of how a business seeks to ensure human rights obligations are present in operations and supply chains. The measurement themes and indicators include the following:

- Measurement theme A: Governance and Policies (10%)
  - A1: Policy Commitments (5%)
  - A2: Board Level Accountability (5%)
- Measurement theme B: Embedding Respect and Human Rights Due Diligence (25%)
  - B1: Embedding Respect for Human Rights in Culture and Management Systems (10%)
  - B2: Human Rights Due Diligence (15%)
- Measurement theme C: Remedies and Grievance Mechanisms (20%)
- Measurement theme D: Performance: Company human rights practices (25%)
- Measurement theme E: Performance: Responses to serious allegations (20%)

In summary, the CHRB Report found that generally, companies are "taking more of an action on human rights."[178] In the automotive sector, out of the twenty-nine automotive companies in the world, only three sat in the 30-40% band. The top two spots are taken by U.S. companies including Ford (39)[179] and General Motors Corporation (GM) (36.7). The only other U.S. automotive company evaluated was Tesla (7.3) in the bottom 0-10% band.

Both food and agriculture and ICT included many more U.S. companies[180] than the automotive sector. For food and agriculture, no U.S. company was in the top 50-60% band. Three companies fell in the 30-40% band—The Hershey Company (38.5), Kellogg's (33.6), and General Mills (30.3)—and three companies fell in the 20-30% band—Walmart (22), Mondelez International (21.5), and Coca-Cola Company (21). The majority of companies in this sector fell below a 20% score. Ten companies fell in the 10-20% band—Archer Daniels Midlands (ADM) (17.9), Target Corporation (17.5), McDonalds (16.1), Starbucks (15.4), Amazon (15.1), Kraft Heinz (13.8), Hormel Foods (12.9), Kroger (10.7), George Weston (10.4), and Monster Beverage (10.2)—and nine companies fell in the 0-10% band—Yum!

177. CHRB 2021-2022 METHODOLOGY REV., 2 (WBA, May-June 2021), https://assets.worldbenchmarkingalliance.org/app/uploads/2021/05/Overview-of-the-CHRB-Methodology-Review-Process_2021.pdf [hereinafter CHRB Methodology Rev. 2022].

178. CHRB 2022 Report, *supra* note 16 at 8.

179. All scores in this next section are scored out of 100: X/100.

180. The CHRB 2022 Report, *supra* note 16, identifies these companies as North American.

Brands (9.7), Sysco (9.6), McCormick (9.2), Costco (9.0), Conagra Brands (8.6), Tyson Foods (6.9), Brown-Forman Corporation (3.6), Alimentation Couche-Tard (3.4), and Constellation Brands (1.8).

Out of all three sectors, U.S. companies appear to be the most successful in the ICT sector. Out of the seven companies worldwide that fall in the 30-40% band, U.S. companies hold four spots, including the top scoring company—HPE (39.1). The three other companies in this top band include Corning (36.2), HP (33.6), and Apple (31.6). The majority of North American companies in this sector fall in the 10-30% bands. There are six companies in the 20-30% band—Cisco (29.2), Microsoft (28.8), Dell (27.2), Western Digital (26.5), Intel (22.2), and Walmart (22.0)—and eight companies fall into the 10-20% band—Qualcomm (19.5), Lam research (16.1), Amazon (15.1), Nvidia (14.2), Micron Technology (13.7), Broadcom (13.3), Applied Materials (12.2), and Skyworks Solutions (11.9). There are four companies in the 0-10% band—Amphenol (8.6), Texas Instruments (8.1), Microchip Technology (7.5), and Analog Devices (4.1).

i. Implementation of Dodd-Frank Section 1502

Companies were first required to file reports on their use of conflict minerals in 2014; the disclosures pertained to minerals used during 2013. Dodd-Frank section 1502 mandates an annual Government Accountability Office[181] report. The first such report was issued in 2015, on the first cycle of company disclosures covering reporting year 2013.[182] The 2022 version of the report noted that the "number of companies filing conflict mineral disclosures with the SEC has continued to decrease since 2014,"[183] though the report suggests that the decrease may be explained by an increase in mergers and acquisitions by firms that would have otherwise been required to file.[184] In total, 1,021 companies filed conflict minerals disclosures with the SEC in 2021.[185] Of these, an estimated 97 percent completed a "reasonable country-of-origin inquiry,"[186] the intermediary step between determining whether a firm's products contain conflict minerals and performing due diligence to determine the source and chain of custody of said minerals.

181. The U.S. Government Accountability Office (GAO) is an independent, non-partisan agency that reports to the U.S. Congress on the ways that public funds are spent. *About*, GAO: U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/about/index.html (last visited July 31, 2023).

182. SEC CONFLICT MINERALS RULE: INITIAL DISCLOSURES INDICATE MOST COMPANIES WERE UNABLE TO DETERMINE THE SOURCE OF THEIR CONFLICT MINERALS 5 (GAO, 2015).

183. CONFLICT MINERALS: 2022 COMPANY REPORTS ON MINERAL SOURCES WERE SIMILAR TO THOSE FILED IN PRIOR YEARS 32 (GAO, 2023).

184. *Id.* at 33.

185. *Id.*

186. *Id.*

ii. Implementation of the Transparency in Supply Chains Act (TSCA)

A study on compliance with the law was performed by Professors Adam Chilton and Galit Sarfaty and published in 2017.[187] Following a review of benchmarking organization KnowTheChain's dataset,[188] they reported that just under eighty percent (79.2%) of firms obliged to comply with the TSCA "have a disclosure posted [on their website]."[189] Further, the authors report that though "roughly a fifth of companies have still not complied with the CTSCA, it does appear that compliance has increased over time."[190] Other topics surveyed by Chilton and Sarfaty include the "number of topics covered in TSCA disclosures" and "[consumer] awareness."[191] The TSCA provides no private right of action for consumers aggrieved by firms who fail to comply with their disclosure obligations under the law. Instead, the "exclusive remedy" for a violation of the TSCA is an action for injunctive relief brought by the California Attorney General.[192] The California AG has not brought a single case.[193] Private litigants have attempted to bolster actions based on other California consumer protection law by citing to the TSCA, albeit with the reverse effect (i.e., their cases have been undermined by the presence of the statute).[194]

iii. Implementation of Uyghur Forced Labor Prevention Act

There is evidence that companies are conducting human rights due diligence to ensure that they are not sourcing from Xinjiang Uygur Autonomous Region (XUAR).[195] To ensure that this happens on a wider scale, enforcement of the law is key. One witness to a U.S. Congressional Executive

187. Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT'L 1, 1 (2017).

188. KnowTheChain is "a resource for companies and investors who need to understand and address forced labor risks within the supply chains." *KnowTheChain: Ranking Companies' Efforts to Address Forced Labour in Their Supply Chains*, BUS. & HUM. RTS. RES. CTR. (June 9, 2020), https://www.business-humanrights.org/en/latest-news/knowthechain-ranking-companies-efforts-to-address-forced-labour-in-their-supply-chains/.

189. Chilton & Sarfaty, *supra* note 187 at 16.

190. *Id.*

191. *Id.* at 17-19.

192. CAL. CIV. CODE § 1714.43(d) (2012).

193. Chambers and Yilmaz Vastardis, *supra* note 84 at 338.

194. *See, e.g.,* Hodsdon v. Mars, Inc., 891 F.3d 857, 860 (9th Cir. 2018) ("[T]he California consumer protection laws do not obligate the defendants-appellees to label their goods as possibly being produced by child or slave."); Barber v. Nestlé USA, Inc., 154 F.Supp.3d 954, 962 (C.D. Cal. 2015) (In a case where plaintiffs did not dispute that defendants complied with their TSCA requirements, noting that "[p]laintiffs may wish—understandably—that the Legislature had required disclosures beyond the minimal ones required by § 1714.43.").

195. Hearing of the Congressional Executive Commission on China (CECC): Implementation of the Uyghur Forced Labor Prevention Act and the Impact on Global Supply Chains, Testimony of Anasuya Syam: Human Rights and Trade Policy Director 3 (The Human Rights Trafficking Legal Center, 2023) ("Corporations are developing compliance and due diligence programs to ensure their supply chains are free of forced.") [hereinafter Syam Testimony]; *Id.*

Commission on China hearing on implementation of the law quoted Scott Nova (Executive Director of the Workers' Rights Consortium) as saying: "only when we enforce the law, that is, when importers with forced labor in their supply chains are caught, and financial consequences are imposed, will they feel the pressure to perform adequate due diligence that prevents the use of forced labor."[196]

Enforcement data is available on the U.S. Customs and Border Patrol website on its dashboard.[197] This shows that in the first nine months from June 2022 when the Act came into force, 3,588 shipments have been stopped at port, with 1,323 subsequently released and 490 denied entry into the United States. There are 1,778 shipments pending review. The data can be broken down into sectors. For example, apparel, footwear, and textile products make up 291 of the 490 shipments denied entry by CBP, which the Congressional Hearing witness observed,[198] is a low number given the quantity of cotton that is farmed in XUAR.

One of the challenges with the law is that even companies with robust compliance systems that integrate human rights may struggle to overcome the UFLPA's rebuttable presumption that goods with a nexus to XUAR are made with forced labor. Difficulties that importers may face in gathering the required information include the lack of tracing technologies and the inability to obtain credible audits in China.[199] If the nexus exists, due diligence may be a non-starter.

Importers therefore are using "applicability reviews" to contest that the rebuttable presumption even applies to their shipments by maintaining that they have no connections to XUAR.[200] According to the witness to the Congressional Hearing, "it appears that the burden of proof applied by CBP, in such reviews, is much less than "clear and convincing evidence [the standard used for the rebuttable presumption]."[201] The witness adds, "This is precisely the route that hundreds of companies are taking, according to CBP."[202] There are other "go-arounds" for companies including illegal transshipment of goods,[203] and the issuing of low value direct-to-consumer or "*de minimis*"

196. *Id.* at 34.

197. *Uyghur Forced Prevention Act Statistics*, U.S. CUSTOMS. & BORDER PROTECTION, https://www.cbp.gov/newsroom/stats/trade/uyghur-forced—prevention-act-statistics (last visited Aug. 5, 2023).

198. Syam Testimony, *supra* note 195. *See also* Miguel Angel Bacigalupe, *Where was This T-Shirt Made?*, 3 COLUM. BUS. L. REV. 1438, 1443 (2021) (arguing that the UFLPA is ineffective and proposing solutions including the use of tracing technologies).

199. Both CBP's Operational Guidance and the FLETF Strategy acknowledge this. *See* David E. Bond, *US Authorities Begin Enforcement of Uyghur Forced Labor Prevention Act and Issue Guidance for Importers*, WHITE AND CASE (June 28, 2022), https://www.whitecase.com/insight-alert/us-authorities-begin-enforcement-uyghur-forced-labor-prevention-act-and-issue.

200. Syam Testimony, *supra* note 195 at 6.

201. *Id.*

202. *Id.*

203. *Id.* at 5. Transhipment is transferring good from one ship to another. It is not always a matter of illegality, as Miguel Angel Bacigalupe notes, few products currently ship directly from XUAR to the United States. He explains that in the garment sector, shipments to the United States are minimal since they

packages to evade customs scrutiny.[204] If goods are denied entry into the U.S. market, the company can have them transported elsewhere (e.g., to Canada or Mexico, from where they may be transported to the United States overland).[205] Thus, while UFPLA may have prompted some companies to embark on part(s) of the HRDD process (particularly by assessing human rights impacts through supply chain mapping), its provisions have been evaded by other companies.

iv. Non-Governmental Prompts for HRDD

Some non-governmental organizations are also taking steps to persuade companies to undertake HRDD.[206] One U.S.-based effort that stands out is the Model Contract Clauses project developed by a working group of the American Bar Association's Business Law Section. The intention of this project is to help buyers redesign their contractual clauses to better protect human rights in their supply chains. Companies already covered by HRDD laws or likely to be covered are advised by the ABA to consider adapting their contracts. The working group published a set of model contract clauses in 2021 (called Model Contract Clauses or MCCs 2.0) and continues to work on explaining and amplifying them.[207] According to the authors: "MCCs 2.0 are the first model contract clauses that attempt to integrate the principles contained in the UNGPs and the OECD Due Diligence Guidance into

typically enter the garment supply chain either in China or elsewhere in Asia (having been processed from cotton, which is grown in XUAR, into garments). Bacigalupe, *supra* note 198 at 1474.

204. Syam Testimony, *supra* note 195 at 6-7. Flacks discusses a proposal to remove this exception. *See* Flacks, *supra* note 152.

205. Note however that when the United States-Mexico-Canada Agreement ("USMCA") entered into force, on February 17, 2023, the Mexican Ministry of Economy published in the Federal Official Gazette an *Administrative regulation that sets forth the goods which importation is subject to regulation by the Ministry of Labor and Social Welfare*, which prohibits the importation of goods produced with forced labor, and became effective on May 18, 2023. This implements the obligation included in the USMCA to prohibit the importation of goods produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor. GLOBAL SUPPLY CHAIN REGULATION BLOG, MEXICO'S IMPLEMENTATION OF USMCA FORCED LABOR IMPORT BAN (Feb. 22, 2023), https://supplychaincompliance.bakermckenzie.com/2023/02/22/mexicos-implementation-of-usmca-forced-labor-import-ban/. Canada's *Customs Tariff* was amended in 2021 to prohibit the import of goods from any country that are produced wholly or in part by forced labor for the same reason. GLOBAL SUPPLY CHAIN REGULATION BLOG, UK, US AND CANADIAN GOVERNMENTS ANNOUNCE NEW MEASURES OVER ALLEGED XINJIANG, CHINA HUMAN RIGHTS CONCERNS (Feb. 18, 2021) https://supplychaincompliance.bakermckenzie.com/2021/02/18/uk-us-and-canadian-governments-announce-new-measures-over-alleged-xinjiang-china-human-rights-concerns/.

206. Understanding legal and other prompts for a company to conduct HRDD is the subject of a new research project by the British Institute for International and Comparative Law. *See Identifying and Comparing Impacts of mHREDD Legal Models on Internal Corporate Practice*, BRITISH INST. OF INT'L & COMPAR. L., https://www.biicl.org/projects/identifying-and-comparing-impacts-of-mhredd-legal-models-on-internal-corporate-practice (last visited Aug. 6, 2023).

207. *Contractual Clauses Project*, *supra* note 19; *The Mission*, RESPONSIBLE CONTRACTING PROJ., https://www.responsiblecontracting.org (last visited Aug. 1, 2023).

international supply contracts."[208] Aside from prompts from authoritative bodies such as the ABA, motivation to conduct HRDD in the United States is likely premised on the perceived normative force of the UNGPs and market-driven efforts to enhance the reputation and competitive positioning of large American companies.[209]

V. IMPACT OF EU HRDD LAW ON U.S. FIRMS

Like other non-EU companies, U.S. firms may be affected by the EU Directive for multiple reasons: 1) a firm may do enough business in the EU to cross the turnover threshold; 2) or it may own a subsidiary that crosses the threshold; 3) or it may be part of the value chain of an EU company that crosses the threshold. Analysis by *The Wall Street Journal* suggests that over 10,000 non-EU firms (of which circa 3,500 are from the United States) will be impacted by the Corporate Sustainability Reporting Directive, which has almost identical criteria of turnover and employees to the Due Diligence Directive.[210]

The first two categories will cover many large companies. Numerous U.S. firms do extensive business in the EU, either directly or through a subsidiary, including high profile firms in the IT sector such as Apple and Amazon, automotive manufacturers such as Ford, and apparel firms such as Nike. These firms will need to comply with the EU Directive. For those U.S. companies that do business directly in the EU, the company as a whole will be affected. For the more common situation of EU subsidiaries, only the subsidiary is implicated technically. However, due to the inevitable links between parent and subsidiary, it is likely that in many cases the Directive will apply across the corporate group, or at least to the parent as well. In this way, a breach of the Directive by a U.S. parent company would constitute a breach by the subsidiary on the grounds of failing to conduct adequate due diligence of its supply chain.

It is also possible that a breach by the subsidiary could lead to litigation against the parent company in the United States. A breach by the subsidiary that costs the corporate group financially could be litigated under Caremark.[211] Caremark is the standard for director duties under Delaware law. It obligates company directors to take proactive measures to facilitate compliance and to detect, mitigate, and remedy any failure to comply that leads to financial losses. Where this is not achieved, the director is in breach of duty. Caremark requires evidence of bad faith and has long been almost redundant due to the

208. MODEL CONTRACT CLAUSES VERSION 2.0 AND THE RESPONSIBLE BUYER CODE: EXECUTIVE SUMMARY (Bus. & Hum. Rts. Res. Ctr.).

209. *See, e.g.,* CHRB 2022 REPORT, *supra* note 16.

210. Dieter Holger, *At Least 10,000 Foreign Companies to Be Hit by EU Sustainability Rules*, WALL ST. J. (Apr. 5, 2023, 4:46 AM), https://www.wsj.com/articles/at-least-10-000-foreign-companies-to-be-hit-by-eu-sustainability-rules-307a1406.

211. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

difficulties of proving this bad faith, but several recent cases appear to be edging the bar lower.[212]

From a legal perspective, the Boeing case is the most transformative.[213] Following two fatal crashes of Boeing airplanes, shareholders challenged the directors of Boeing in court. The court held that certain compliance risks should be deemed "mission critical" and subject to enhanced oversight regulations. These are defined as "[r]isks that implicate the core business of the company and are externally regulated earn the mission-critical designation, which means that the courts will scrutinize board oversight of those risks more rigorously."[214] Secondly, the court also allowed shareholders to have the right to enhanced inspection of confidential documents in order to help them prove their case. Roy Shapira writes that: "Shareholders have always enjoyed a qualified right to inspect their company's "books and records," nestled in Delaware's Section 220. But in recent years, courts have liberalized their interpretation of Section 220's requirements so that they now order provision of documents in more cases and order provision of more types of documents."[215] Importantly, this is not just a trend towards more rigorous shareholder oversight. Rather, the courts are moving from narrowly focusing on breaches of rules designed to protect investors directly, such as financial reporting, towards explicit scrutiny "with regulations meant to protect broader societal interests."[216]

At this stage it is impossible to say how U.S. courts will treat breaches of the EU Directive for Caremark purposes. The expansion of Caremark from financial reporting to product safety is one thing, but whether that then extends to labor rights, for example, is another question. Where a failure to meet compliance standards causes financial losses for U.S. shareholders, these shareholders would have a *prima facie* case under Caremark. However, bad faith may be more difficult to prove, and the courts may view compliance with the EU Directive as overly complex and onerous, at least in the first few years.

This also invokes one of the major unknown elements of the EU Directive's impacts on firms in the United States. The EU Directive is designed to address human rights abuses within the value chain of EU-based firms, primarily. When one thinks of these, the most common issues that spring to mind relate to activities in the Global South, particularly mining in African states, manufacturing in South Asian states, and conducting business

212. Robert Bird, *Caremark Compliance for the Next Twenty-Five Years*, 58 AM. BUS. L. J. 63, 63 (2021); *see also* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1459 ("courts should recognize [ESG considerations] as an essential part of boards monitoring mission.").

213. *In re* The Boeing Co. Derivative Litig., C.A. 2019-0907-MTS, COUNCIL ON FOREIGN RELS. (Del. Ch. Sep. 7, 2021); David Shepardson & Tom Hals, *Shareholders may Pursue 737 MAX Claims Against Boeing Board, Court Rules*, REUTERS (Sept. 8, 2021, 7:07 AM), https://www.reuters.com/business/aerospace-defense/shareholders-may-pursue-some-737-max-claims-against-boeing-board-2021-09-07/.

214. Roy Shapira, *Max Oversight Duties: How Boeing Signifies a Shift in Corporate Law*, 48 J. OF CORP. L. 119, 121 (2022).

215. *Id.* at 121.

216. *Id.* at 121, 136.

operations in conflict zones. The root idea is that since the boom of globalization, large firms have stopped using highly paid, highly protected, European labor, and have turned to cheaper global labor.[217] While the EU, ostensibly, has no direct issue with this shift in workforce, the cheaper foreign labor often suffers from a lack of regulation and is vulnerable to human rights abuses. Therefore, laws such as mHRDD are needed.

There is both a political and a power-related element here.[218] The assumption is that the large European firm is important enough to its suppliers that those suppliers will change their practices in order to meet European demands.[219] Paradigmatically we could think of a large fast fashion firm such as the Swedish company H&M, which outsources its manufacturing to independent producers in the Global South, while mandating that these manufacturers comply with a code of conduct. While this system is far from perfect, and H&M is routinely unmasked for violations within its supply chain, it is true that H&M's size means that both suppliers and the national governments that host these suppliers have a vested interest in retaining H&M's business and therefore a vested interest in attempted compliance (in practice or at a minimum, on-paper).

EU firms may not in general have this same power relationship with U.S. firms. This is particularly true when an action that is legally permitted in the United States is in breach of the EU Directive. We turn to this issue next, with a focus on labor rights.

A. *The Labor Issue*

At the outset of this section, it is worth identifying a major unknown within the EU Directive, which relates to the interpretation of human rights standards. The EU Directive covers only those human rights listed in the Directive's Annex 1. This is a partial list of the rights contained in the international human rights covenants. The problem here is that the way these rights are defined in international covenants is not exhaustive. They are not necessarily designed to be directly transplanted into legally binding forms. For example, number eight on the list specifies that workers should be protected against "Violation of the prohibition to restrict workers" access to adequate housing, if the workforce is housed in accommodation "provided by the company." This has only a general outline in international law, which is not specific to worker accommodation, and this outline is provided in a non-

217. David Birchall, *Human Rights and Political Economy: Addressing the Legal Construction of Poverty and Rights Deprivation*, 3 THE J. OF L. & POL. ECON. 393, 395 (2022).

218. David Birchall, *Corporate Power Over Human Rights: An Analytical Framework*, 6 BUS. & HUM. RTS. J. 42, 66 (2021).

219. We see in practice that suppliers are being required by buyers to comply with HRDD law, PWC and others found that about 80% of French SMEs are required to comply with the French Duty of Vigilance law obligations by buyers, without having sufficient financial support in doing so: PWC and others. RSE: LA PAROLE AUX FOURNISSEURES! (*Résultats de l'enquête*, 2nd ed., 2022).

binding General Comment.[220] It is therefore not clear what a national court would deem to breach this standard.

For example, a national court could argue that housing standards for a company's workers should meet the national standards of the jurisdiction of the company's head office. It could instead argue that the company need only meet local housing standards, perhaps with some minimum standards as supplemental. National governments that have ratified the ICESCR have only ratified a "right to adequate housing", with no further details. This issue carries through other rights, including the rights to privacy and free speech. In these cases, the corresponding international standard is general in nature, designed to permit varied interpretations across different jurisdictions.

In the United States, it is labor rights that are most distinct from Europe's laws.[221] Child labor,[222] prison labor, and trade union rights are all subject to very different rules in the two regions. There is also the issue that some industries in the United States, most notably agriculture, suffer from a lack of regulation and frequent allegations of serious labor rights abuses.

i. Acts Legal in the United States but in Breach of the EU Directive

This section discusses three areas where acts which are legally permitted in the United States could breach the EU Directive, specifically: trade union laws, child labor, and prison labor.

First, the greatest and clearest divide is between trade union laws in the United States and the EU.

Point 15 of the Annex defines violation of trade union rights as a breach that entails:

> Violation of the right to freedom of association, assembly, the rights to organise and collective bargaining in accordance with Article 20 of the Universal Declaration of Human Rights, Articles 21 and 22 of the International Covenant on Civil and Political Rights Article 8 of the International Covenant on Economic, Social and Cultural Rights, the International Labour Organization Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the International Labour Organization Right to Organise and Collective Bargaining Convention, 1949 (No. 98), including the following rights: (a) workers are free to form or join trade unions, (b) the formation, joining and membership of a trade union must not be used as a reason for unjustified discrimination or retaliation, (c) workers' organisations are free to operate in accordance

220. International Covenant on Economic, Social and Cultural Rights (ICESCR), Gen. Assembly Res. 2200A (XXI), General Comment 4, para. 8 (1966).

221. It is noteworthy how few of the ILO conventions the United States has signed and ratified: *see* ILO, *Ratifications for United States of America*, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last visited Sept. 5, 2023).

222. The United States has signed and ratified ILO Conventions 105 – Abolition of Forced Labour Convention – and 182 – Worst Forms of Child Labour Convention. *Id.*

> with applicable in line with their constitutions and rules without interference from the authorities; (d) the right to strike and the right to collective bargaining;[223]

In the United States, the National Labor Relations Act "forbids employers from interfering with, restraining, or coercing employees in the exercise of rights relating to organizing, forming, joining or assisting an organization for collective bargaining purposes, or from working together to improve terms and conditions of employment, or refraining from any such activity."[224] There is, therefore, a legally guaranteed right to collectively bargain to form trade unions. However, in practice, companies frequently go to extreme lengths to curtail union organizing, and the National Labor Relations Board is argued to be a weak enforcer of trade union rights.[225]

"Right-to-work" laws are a legal regime that further threatens trade union rights. Right to work laws prevent mandatory unionization, and mandatory payment of fees, within workplaces. Other factors such as at-will employment (wherein the employer has the right to fire any employee at any time without reason) are another key to limiting the practical ability to unionize. Even some examples of prohibited practices listed by the National Labor Relations Board are in practice commonplace, such as "[t]hreatening to close the plant if employees select a union to represent them."[226]

If U.S. laws, and U.S. companies, are deemed to breach trade union rights, this will create an enormous problem for U.S.-EU business relationships, with many of the largest companies either in breach, or perpetually at risk of breach. However, it may be that the black letter law of the National Labor Relations Act is sufficient for firms to be deemed compliant with trade union rights, even if the reality in practice is quite different. This is one major question stemming from the EU Directive for U.S. companies.

Points 11 and 12 of the Annex discuss child and forced labor:

> 11. Violation of the prohibition of child labour is covered under Article 32 of the UN Convention on the Rights of the Child, including the worst forms of child labour (i.e., affecting persons below the age of 18 years); Article 3

---

223. The United States, and others, have not ratified the International Covenant on Economic, Social and Cultural Rights. Anya Wahal, *On International Treaties, the United States Refuses to Play Ball*, COUNCIL ON FOREIGN RELS. (Jan. 7, 2023, 5:08 PM), https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball.

224. *About NLRB: Employer/ Union Rights and Obligations*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employer-union-rights-and-obligations (last visited Aug 4, 2023).

225. *See, generally*, LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS, Cornell Univ. Press (2004).

226. *Id.*; *see* Steven Greenhouse, *'Old-School Union Busting': How US Corporations are Quashing the New Wave of Organizing*, THE GUARDIAN (Feb. 26, 2023, 4:00 PM), https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employer-union-rights-and-obligations (providing evidence of these tactics).

> of the of ILO Convention 182 on the Worst Forms of Child Labour Convention (1999) including: (a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, as well as forced or compulsory labour, including the forced or compulsory recruitment of children for use in armed conflicts; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;, (c) the use, procuring or offering of a child for illicit activities, in particular for the production of or trafficking in drugs; and (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children.
>
> Article 32 of the Convention on the Rights of the Child states:
>
> 1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral, or social development.
> 2. States Parties shall take legislative, administrative, social, and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
>   (a) Provide for a minimum age or minimum ages for admission to employment;
>   (b) Provide for appropriate regulation of the hours and conditions of employment;
>   (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.[227]

Two major issues present themselves here, a low minimum working age in many states[228] and the permissive attitude toward work that may be considered "harmful to the child's health." A Federal bill circulating in the United States, known as the Future Logging Careers Act, is designed "to exempt certain 16- and 17-year-old individuals employed in logging operations from child labor laws."[229] Logging is the most dangerous job in the United States.[230] From an HRDD perspective, logging carries the additional risk that it produces a raw material that could be used in numerous products. EU companies using U.S. timber would have to be aware of the risk and would have to ensure that the timber they were using was not produced by companies employing those under 18 years. If this was difficult due to

227. UN Commission on Human Rights, *Convention on the Rights of the Child*, E/CN.4/RES/1990/74 (1990).

228. *Check State, Federal Rules When Hiring Kids to Deliver Newspapers*, TEX. PRESS ASS'N (Jan. 4, 2019), https://www.texaspress.com/check-state-federal-rules-when-hiring-kids-deliver-newspapers.

229. Future Logging Careers Act, S. 671, 118th Cong. (2023). Another potential legislative advancement is a law that is in committee on child labor in agriculture, the Children's Act for Responsible Employment (CARE ACT).

230. Adrian Mak, *Top 25 Most Dangerous Jobs in the United States*, ADVISOR SMITH (Sept. 30, 2021), https://advisorsmith.com/data/most-dangerous-jobs/.

complex supply chains making the precise source of the timber difficult to identify, EU firms may be forced to find suppliers outside of the United States.

The Future Logging Careers Act is designed to provide an exemption to the Fair Labor Standards Act (FLSA), which largely ensures that the United States complies with international child labor law. However, this Act already contains an exemption for agriculture, and it is in this sector that the biggest problems appear. The Federal Standards for Agricultural Labor offer no minimum age to work full time on family farms, nor any restrictions on undertaking dangerous work on family farms. The minimum age to work full time on a non-family farm is twelve, and to undertake dangerous work is sixteen. While some states have stricter standards than these Federal mandates, none meet international legal standards.[231] Both breach the CRC and other international laws. According to Human Rights Watch, "[m]ore US child workers die in agriculture than in any other industry. A child dies in a farm accident once every three days in the United States, and every day, at least 33 children are injured while working on US farms."[232]

Agriculture presents an enormous problem to EU companies and to U.S. companies working in the EU.[233] For products to be imported directly to the EU,[234] companies subject to the European Directive will need to complete due diligence on U.S. farms themselves. This is complicated enough. But the bigger problem will occur for manufactured products with many ingredients. Here, it will be prohibitively complicated and expensive for the EU firm to track how each ingredient was produced. Regarding manufactured goods, it is highly likely that the definition of "established business relationship"[235] will not include every company that provides ingredients or raw materials for the finished product; conterminously, a line will be drawn above which a specified raw material is integral to the product and therefore is covered. The relevant definition in the EU Directive states (Article 3):

> (a) 'business relationship' means a relationship with a contractor, subcontractor or any other legal entities ('partner')
>
> (i) with whom the company has a commercial agreement or to whom the company provides financing, insurance, or reinsurance, or

231. *How Do US States Measure Up on Childs Rights?*, HRW, https://www.hrw.org/feature/2022/09/13/how-do-states-measure-up-child-rights (last visited Aug. 8, 2023).

232. *Id.*

233. Note that agricultural labor is not covered by Occupational Safety and Health Administration standards. U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY AND HEALTH ADMIN., Chapter 10: Industry Sectors, https://www.osha.gov/enforcement/directives/cpl-02-00-164/chapter-10 (last visited Aug. 8, 2023).

234. Bilateral agricultural and related products trade between the United States and the European Union totaled $49.4 billion in 2021, making the European Union the fourth largest export market for U.S. agricultural and related products after Canada, Mexico, and China. U.S. DEP'T OF COM., INT'L TRADE ADMIN., EU - Country Commercial Guide, Agricultural sector. https://www.trade.gov/country-commercial-guides/eu-agricultural-sector (last visited Aug. 8, 2023).

235. As noted above, suppliers that meet this definition fall within the HRDD requirements of the CSDDD.

> (ii) that performs business operations related to the products or services of the company for or on behalf of the company (emphasis added);
>
> (b) 'established business relationship' means a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain (emphasis added);
>
> (c) 'value chain' means activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company (emphasis added).

The italicized parts are most relevant. "Value chain" covers companies that "perform business operations related to the product ... including the development of the product ... [but] which does not represent a negligible or merely ancillary part of the value chain." Taken together, companies that provide the raw materials or ingredients for a product are prima facie within the scope, but with an exception for "negligible" contributions. The key test will be how "negligible" is defined.

On forced labor, Annex 1 states:

> 12. Violation of the prohibition of forced labor; this includes all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself or herself voluntarily, for example as a result of debt bondage or trafficking in human beings; excluded from forced labour are any work or services that comply with Article 2 (2) of International Labour Organization Forced Labour Convention, 1930 (No. 29) or with Article 8 (3) (b) and (c) of the International Covenant on Civil and Political Rights.

Article 2(2)c of the ILO Forced Labour Convention states:

> Any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies, or associations.

Article 8 (3) states in part:

> (a) No one shall be required to perform forced or compulsory labour;
>
> (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court.

The major concern here is the involvement of private companies in prison labor. In the United States, prison labor is carried out under the

direction of state or federal authorities. This therefore complies with the ILO Forced Labour Convention. However, prison labor is often used to complete contract work for private companies.[236] This is the result of a 1979 statute, the Prison Industry Enhancement Certification Program, which permits partnership with private firms to produce and to retail prison-made goods.[237] One such partnership in Oregon is Prison Blues' clothing company, which sells apparel globally. The Minnesota Department of Corrections runs MINNCOR. In 2018, MINNCOR allegedly had a contract with Anagram, the largest balloon manufacturer in the U.S., worth nearly $9 million. The next year, 111 inmates continued to produce "decorated party balloons" for MINNCOR, according to the National Correctional Industries Association (NCIA) database. Large contracts such as this, coupled with correctional industries wages of between $0.50 and $2.00 per hour, have allowed MINNCOR to make a profit of over $13 million in 2019.[238]

Although there is room to debate the wording of the EU Directive's provision A.2(2) and whether such workers are "placed at the disposal" of private companies, it would seem high risk for an EU firm to knowingly partner with U.S. firms that make use of prison labor, even if they do not employ prisoners directly.

ii. Acts Prohibited but Commonplace in the U.S.

Beyond those areas where legally permitted practices may still amount to human rights violations under the EU Directive, the United States has the problem of lax regulation that in turn leads to risk of legal breaches. This is particularly true regarding migrant labor, and frequently but not exclusively within agriculture. Migrant laborers include both undocumented migrants (who could be returned to their home country if they attempt to report any infraction of their labor rights) and those on H-2 visas. These are work visas that are tied to an employer. If a worker on an H-2 visa reports labor rights abuse, they could be fired and instantly deported. This situation makes labor rights abuses very common.

As legal scholar, Jennifer Gordon writes for the Brookings Institution, from "2015-2020, the U.S. National Human Trafficking Hotline identified over 3,200 H-2A visa holders in agriculture who suffered labor trafficking."[239]

---

236. *Private Companies Producing with US Prison Labor in 2020: Prisons Labor in the US, Part II*, CORP. ACCOUNTABILITY LAB (Aug. 5, 2020), https://corpaccountabilitylab.org/calblog/2020/8/5/private-companies-producing-with-us-prison-labor-in-2020-prison-labor-in-the-us-part-ii#:~:text=Incarcerated%20workers%20helped%20produce%20goods,Moly%20Manufacturing%2C%20to%20clothing%20made [hereinafter Accountability Lab].

237. Samar Ahmad, *The Shadow Workforce: Prison Labor and International Trade*, HARV. INT'L REV. (Oct. 26, 2020, 9:00 AM), https://hir.harvard.edu/the-shadow-workforce-prison-labor-and-international-trade/.

238. ACCOUNTABILITY LAB, *supra* note 236.

239. Jennifer Gordon, *Unfair Competition Under the USMCA: The Case of Migrant Workers on US Farms*, BROOKINGS (Feb. 28, 2023), https://www.brookings.edu/articles/unfair-competition-under-the-usmca-the-case-of-migrant-workers-on-us-farms/.

This is but a tiny fraction of the total number of violations, since most workers will not want to risk deportation by reporting. Convictions for labor rights abuse in agriculture are rare, but "six labor contractors have recently been convicted in Georgia and Florida 'for forced labor and human trafficking of migrant farm workers' . . . The convicted labor contractors took the workers' passports and their wages, deploying everything from threats of deportation to kidnapping and rape to keep them silent," Gordon reports.[240]

VI. IS A U.S. HRDD LAW NECESSARY? THE RISKS AND DILEMMAS FOR U.S. COMPANIES

While there are uncertainties as to the interpretation of the specific human rights standards, and these are likely to remain until we have case precedents covering all listed human rights in multiple jurisdictions, we can give an outline of the likely pressures on U.S. companies with links to the EU. Two key questions center on how much U.S. companies will need to change their practices (e.g., by creating additional processes and/or guaranteeing positive outcomes) and the effects such practices will have on rightsholders.

First, it is worth reiterating that there is a racialized and neo-colonialist element to these laws. The EU did not pass them to change the practice of U.S. firms or to change U.S. laws. Rather, the UN Guiding Principles on Business and Human Rights assumed that less well governed, less "developed" states have BHR governance gaps; and HRDD, whether as corporate practice or as law, could close these gaps.[241] Thus, the Global North sought to assert its standards throughout the Global South, with a consequence being an increase in tension between Europe and the United States over how to do so.[242]

A central question around HRDD since its inception has been that of whether HRDD is another "cosmetic compliance" exercise through which companies simply tick off boxes rather than integrate real mechanisms for change into production or business relationships. A key issue is whether compliance with HRDD requires genuine respect for rightsholders.[243] As a voluntary, intra-corporate practice, it was always likely that some firms would adopt it for the right reasons and make real change, while other firms would treat it as a tick box exercise, and still others would ignore it completely.

For binding HRDD, the contents of the law make a significant difference to its effectiveness. It is still too early to say how transformative these laws will be within Europe, let alone outside. It is almost certain that companies that

240. *Id.*

241. John Gerard Ruggie, *Global Governance and "New Governance Theory: Lessons From Business and Human Rights*, 20 GLOB. GOVERNANCE 5, 5 (2017).

242. Caroline Omari Lichuma, *(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains*, 81 ZAÖRV 497, 498 (2021).

243. Rachel Chambers & Jena Martin, *Reimagining Corporate Accountability: Moving Beyond Human Rights Due Diligence*, 18 NYU J. OF L. & BUS. 773, 804-806 (2022) (discussing the danger of cosmetic compliance with mHRDD); David Hess, *The Management and Oversight of Human Rights Due Diligence*, AM. BUS. L. J. 772, 773 (2021).

fall within the remit will have to expend considerable effort and cost to demonstrate compliance. This will also apply to U.S. firms that fall directly within the scope, although these will primarily be large firms that should be able to absorb the cost. Whether these compliance costs will generate respect for human rights is another unknown.

The most dramatic impacts may be on those U.S. firms expected to comply by EU partners, either because these firms are smaller or because the legally permitted and commonplace processes in place in the United States are themselves in breach of the rules. In the former case, firms will need to evaluate the cost of compliance against the importance of EU trading partnerships. In the latter case, it may be that whole industries need to change, or that European firms needs to seek new business partners.

As noted above, an entire U.S. industry may have to change or exit the EU market in order to accommodate the laws is agriculture[244] because it may be simply unable to demonstrate that child labor and modern slavery are not present in any one product given the nature of complex supply chains and domestic oversight difficulties.[245] It may be that specific areas are designated for EU production, allowing the rest of U.S. agriculture to retain its old practices, although this would also be complex.

In practice, however, there may be easy workarounds. The first centers on two related issues of corporate law. In its current guise, the draft EU Directive conditions parent company liability on misconduct by the parent itself in the form of failing to conduct adequate due diligence. This means that where a subsidiary causes harm, there will only be liability if it can be shown that the parent was irresponsible.[246] This therefore promotes the loophole evident in the *Vedanta v. Lungowe* decision in the English courts, whereby a parent company can avoid liability as long as it can show it is at arm's length from its subsidiary.[247] It incentivizes the parent not to oversee subsidiary operations, which is quite the opposite of the intended moral effect.

Second, the thresholds of turnover and employees of companies to be covered by the Directive are set at entity, not group, level. This presents the simple loophole of disaggregating one's corporate group further so that no

---

244. *See supra* Part IV: Is a U.S. HRDD law Necessary? The Risks and Dilemmas for U.S. COMPANIES.

245. Techane Bosona & Girma Gebresenbet, *Food Traceability as an Integral Part of Logistics Management in Food and Agricultural Supply Chain,* 33 FOOD CONTROL 32, 32 (2013).

246. Mariana Pargendler, *The EU Proposal on Corporate Sustainability Due Diligence and the Mystique of Complete Corporate Separateness*, UNIV. OF OXFORD (Apr. 11, 2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/eu-proposal-corporate-sustainability-due-diligence-and-mystique.

247. Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 U. PA. J. INT'L L. 519, 519 (2021); Tara Van Ho, *Vedanta Resources Plc and Another v. Lungowe and Others*, 114 AM. J. OF INT'L L. 110, 110 (2019); Ekaterina Aristova, *The Future of Tort Litigation Against Transnational Corporations in the English Courts: Is Forum [non] Conveniens Back?*, 6 BUS. & HUM. RTS. J. 399, 340 (2021). These companies will need to make sure that such an arm's length relationship is also how they present themselves to the SEC (where they usually show how much oversight there is).

single entity meets the threshold. In the words of two corporate law scholars, "[i]f the Proposed Directive is to have any bite, this apparent loophole will clearly have to be taken care of in the next phases of the legislative process."[248]

Third, the question of "how much is enough?" So far, the rules are largely written in general terms in the EU Directive and in promulgated laws in specific EU states. Companies must conduct due diligence and consult with stakeholders, for example, but at what point will a court be satisfied that adequate due diligence has been conducted? It is accepted that a company can use adequate due diligence as a legal defense, i.e., if a human rights violation is found at a supplier and the company can demonstrate adequate due diligence, that company will not be in breach.[249] It will however need to deal with the violation, including potentially terminating the business relationship.[250] Therefore, the definition in practice of "adequate" becomes key. The German Law uses the principle of appropriateness:

> Appropriateness relates to the nature and extent of the business activity, the leverage of the company over the entity which immediately caused the human rights or environmental risk, the severity, reversibility and probability of the violation, and the nature of the company's causal contribution to the violation (Section 3(2)).[251]

In one of the only cases to be decided under any mHRDD laws so far, the 2023 case under the French Corporate Duty of Vigilance Law, the court lamented the lack of definition in the law as to what constitutes a "vigilant corporation," describing the requirements as "vague," and implied that this would make finding in favor of complainants very difficult.[252]

Finally, key decisions related to enforcement, including the type and size of sanctions and how enforcement will operate, are left in the hands of

---

248. Luca Enriques & Matteo Gatti, *The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention*, UNIV. OF OXFORD (Apr. 21, 2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/extraterritorial-impact-proposed-eu-directive-corporate.

249. *See* Jonathan Bonnitcha & Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. OF INT'L L. 899, 890 (2017); John Gerard Ruggie & John F. Sherman III, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 EUR. J. OF INT'L L. 921, 921 (2017); Jonathan Bonnitcha & Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F. Sherman, III*, 28 EUR. J. OF INT'L L. 929, 930 (2017).

250. CSDDD, *supra* note 35 Art. A7(5).

251. Markus Krajewski, Kristel Tonstad, & Franziska Wohltmann, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, 6 BUS. & HUM. RTS. J. 550, 555 (2021).

252. Thomas Delille et al., *Business and Human Rights: First French Case-Law on the Duty of Vigilance—Judges Adopt A Cautious Approach to Avoid Judicial Interference in Corporate Management*, MAYER BROWN (Mar. 14, 2023), https://www.eyeonesg.com/2023/03/business-and-human-rights-first-french-case-law-on-the-duty-of-vigilance-judges-adopt-a-cautious-approach-to-avoid-judicial-interference-in-corporate-management/. *See also supra* Part II, Section D: The German Supply Chain Due Diligence Act.

Member States.[253] This means that we do not know key definitions at this point, and it opens the door to divergent enforcement regimes, which in turn could lead to regulatory arbitrage and a race to the bottom to attract corporate head offices.

A. *Options for the U.S. Government and Businesses*

The most obvious issue for the U.S. Government is that a significant number of companies will now have to comply with potentially onerous regulation, while others may decide to avoid the EU market in order to avoid the extra cost.[254]

i. What Should U.S. Lawmakers Do?

There are three major arguments in favor of the United States taking a proactive approach to mHRDD by implementing its own laws.[255] First, piecemeal HRDD type laws already exist in the United States. Second, the United States is becoming a recipient of foreign laws. Third, the United States should take global leadership on serious global issues of environment and rights through mHRDD.

One strong argument in favor of the United States adopting comprehensive mHRDD legislation is that it already has piecemeal versions of mHRDD. As cited above, the Uyghur Forced Labor Prevention Act and other Federal and state-level laws target specific instances of human rights violations and specific regions and industries. The Uyghur Forced Labor Prevention Act, in particular, appears a normative entry route for more comprehensive laws, because clearly Uyghurs in the Xinjiang region of China are not the only group in the world at risk of forced labor.[256] Equally, while the United States may not want a version of mHRDD that targets all human rights found in international law, other categories of human rights beyond modern slavery are important to the U.S. Government and consumers.

A second argument alluded to throughout this article is that the United States is now becoming a recipient of foreign standards. This introduces disparities and uncertainties. While there has not been discussion of this point, it seems plausible that were the United States to enact a similar HRDD law, U.S. companies' compliance with that law may be viewed as equivalent to the

---

253. *See, e.g.*, *Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, Proposal*, EURO. COMM'N, Arts. 6(4) & 18(1) (2022).

254. David Hess, *The Challenge of Modern Slavery in Global Supply Chains*, 23 GEO. J. OF INT'L AFFS. 35, 35 (2022).

255. Dalia Palombo, *The US at the Margins of Business and Human Rights*, 25(3-4) INT'L COMM. L. R. 247, 267 (2023) (arguing in favor of federal mandatory human rights and environmental due diligence law of general application).

256. GENEVIEVE LEBARON, COMBATTING MODERN SLAVERY: WHY LABOUR GOVERNANCE IF FAILING AND WHAT WE CAN DO ABOUT IT (Wiley & Sons, 2020).

EU Directive, meaning that U.S. suppliers and partners could comply only with the U.S. law.[257] This would of course require a significant overlap between the laws and no major gaps.

A third argument is from the perspective of global leadership. The last forty years of accelerated globalization have seen a dramatic rise in the size and power of corporations. This rising scale has not been matched by comparable responsibility.[258] With increasing globalization has come a gradual and fragmented, but evident, increase in concern for global populations, played out through activist pressures around "sweatshops" and environmental destruction, particularly.[259] With climate change increasingly a major global problem, interconnectivity deepens.[260] And all of these issues are ultimately caused overwhelmingly by corporations, as they are ones running the factories, rigs, mines, and transportation that are the root of the problem.

With mHRDD, for better or worse, now providing the template for how this problem of corporate irresponsibility will be addressed,[261] the United States has plenty to gain from taking a leadership role in its development. There are many debates around how mHRDD should be designed, with key criteria being the scope of rights and companies falling under it, stakeholder engagement, transparency, enforcement, access to remedy, and monitoring. Equally, there are plentiful arguments that mHRDD needs to radically transform or be supplemented by additional rights-based standards and goals, or standards beyond human rights, to achieve the goals of respecting and realizing rights.[262]

The main argument against the United States embracing an mHRDD law is that certain constituents may feel that such laws are unnecessary or proactively harmful. This argument is weakened, but not annulled, where some U.S. firms will be forced to comply with such rules anyway.

---

257. Harmonizing standards is a key concern of the EU to avoid double accounting: Josef Baumüller & Karina Sopp, *Double Materiality and the Shift from Non-Financial to European Sustainability Reporting: Review, Outlook and Implications*, 23 J. OF APPLIED ACCT. RSCH. 8, 9 (2022).

258. DAVID JASON KARP, RESPONSIBILITY FOR HUMAN RIGHTS: TRANSNATIONAL CORPORATIONS IN IMPERFECT STATES 17-22 (Cambridge Univ. Press, 2014).

259. FLORIAN WETTSTEIN, BUSINESS AND HUMAN RIGHTS: ETHICAL, LEGAL, AND MANAGERIAL PERSPECTIVES 15-21 (Cambridge Univ. Press, 2022). *See also* SHAREEN HERTEL, TETHERED FATES: COMPANIES, COMMUNITIES, AND RIGHTS AT STAKE, Chapter 2, (Cambridge Univ. Press, 2019) (for an overview of concern about sweatshops from the 1980s to the present).

260. CHIARA MACCHI, BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT: THE EVOLVING AGENDA (Springer, 2022).

261. David Birchall, *Reconstructing State Obligations to Protect and Fulfil Socio-Economic Rights in an Era of Marketisation*, 71 INT'L & COMPAR. L. Q. 227, 227 (2022); David Birchall, *Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts*, 25 AUSTRALIAN J. OF HUM. RTS. 428, 428 (2019).

262. MARIANNA LEITE, BEYOND BUZZWORDS: MANDATORY HUMAN RIGHTS DUE DILIGENCE AND A RIGHTS-BASED APPROACH TO BUSINESS MODELS (Cambridge Univ. Press, 2023); David Birchall & Nadia Bernaz, *Business Strategy as Human Rights Risk: The Case of Private Equity*, 24 HUM. RTS. REV. 1, 24 (2023); Margot E. Salomon, *Emancipating Human Rights: Capitalism and the Common Good*, LEIDEN J. OF INT'L L. 1, 21 (2023).

CONCLUSION

The rapid development of mHRDD laws in Europe will have a dramatic effect on U.S. companies, even if they may not provide comprehensive protection for rights-holders. Significant extra costs will be incurred to demonstrate compliance. Some sectors, such as agriculture, may have real difficulties in meeting compliance standards, and compliance with some U.S. laws may leave companies in breach of European standards. Further research is needed on current corporate practice of HRDD, what reasons motivate companies to conduct HRDD, and the cost of compliance.

There are still a lot of unanswered questions about the laws, and these will not be answered until courts and regulators have interpreted the meaning of key terms. This may mean that U.S. firms are compelled to take a cautious approach to ensure that they are compliant, although some may prefer to take the risk. For those numerous firms that form some part of European supply chains, they will have to comply with their European partners' demands or lose the partnership. This could be highly beneficial for rights-holders, particularly migrant workers and those in dangerous industries.

It is understandable if U.S. companies are perturbed by these developments, particularly given the range of different mHRDD laws coming out almost simultaneously. For firms that export globally and work in many industries, mHRDD presents an enormous bureaucratic problem. Firms would much prefer to work with a single legal regime, and the best way for the U.S. government to achieve this would be to develop its own mHRDD law. This would be more efficient for companies and would allow the United States to set its own standards. As long as it was similar enough to the EU version, compliance with the domestic mHRDD would probably be an acceptable equivalent for EU lawmakers, although this would require intense negotiation.

Extraterritorial HRDD laws from the EU evidence the longstanding divide in labor and rights-based laws between the United States and the EU. They also force this divide to be addressed, since now U.S. firms will be obligated to comply with EU understandings of human rights. The U.S. Government does not consider its longstanding laws (on unions, migrant labor, prison labor, child labor, etc.) to constitute human rights violations, and it may well not take kindly to the allegation. But these EU laws do imply that from the EU perspective, some U.S. laws are inadequate. It is easy to imagine a period of intense political hostility if a European court were to decide that companies compliant with U.S. union or labor rights law were in breach of EU human rights law.

These EU laws create a difficult situation for U.S. lawmakers. Radical changes to U.S. law to appease the EU will not be popular, but without such changes, the level playing field may be lost and industries such as agriculture may face grave difficulties. Ideally, for rights-holders, these EU laws would force a reckoning within the United States around longstanding labor

practices. Whether this occurs depends on political will. Whether the United States has that will at this moment may have major repercussions for international law, international relations, and for rights-holders.

* * *