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Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*

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Abstract

The proliferation of human rights disclosure and due diligence laws around the globe is a welcome development in the area of business and human rights. Corresponding improvement in conditions for workers and communities in global supply chains whose human rights are impacted by businesses has not materialized, however. In this Article, we focus on the oversight and enforcement features of human rights disclosure and due diligence laws as one of the missing links to achieving the accountability objectives envisaged by such legislation. Drawing on our analysis of key legislative developments, we observe and critique that the state has almost completely withdrawn itself from the oversight and enforcement roles and assigned these crucial accountability functions solely to consumers, civil society, and investors. Without a regulatory mechanism to ensure quality of human rights disclosures and due diligence processes and to impose sanctions for failing to comply with the laws, not only may the disclosures and processes be inadequate, but there is a danger that misleading disclosures and flawed processes may mask harmful impacts and be detrimental to any hopes of vindicating the rights of workers and communities in global supply chains. We offer a new perspective on a more effective approach to oversight and enforcement in which the state should function as a key actor through which consumers, civil society, and investors can hold businesses accountable.

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I. INTRODUCTION

In response to intense civil society pressure and increasing public awareness of appalling human rights impacts of businesses, including working conditions amounting to slavery and forced labor,[1] several governments have committed themselves to take action to prevent human rights abuses by businesses and to eradicate modern slavery in global supply chains.[2] State efforts to date have primarily concentrated on increasing transparency in parent or lead companies.[3] The United States and some countries in Europe have adopted legislation that requires companies to make annual public disclosures containing information about their human rights impacts.[4] While transparency can fulfill complementary prevention and accountability functions alongside other measures, such as strengthening local trade union involvement and setting clear liability standards to eradicate adverse human rights impacts by business, it can only do so if designed diligently and implemented robustly. The design of existing human rights transparency rules has allowed highly ineffective reporting practices to emerge.[5] For instance, a large number of businesses covered under the California Transparency in Supply Chains Act fail to disclose all the required information, and many do not have a disclosure statement at all.[6] Human rights disclosures under existing legislation are at best minimal in their reporting of risks and at worst

1 HUMAN RIGHTS WATCH, HUMAN RIGHTS IN SUPPLY CHAINS 5–8 (2016).

2 *See, e.g.*, Theresa May, *My Government Will Lead the Way in Defeating Modern Slavery*, THE TELEGRAPH (July 30, 2016, 10:01 PM), https://perma.cc/37ZE-DW8T. "Modern slavery" is not used as a legal term of art, but rather to encompass exploitative practices including forced labor, bonded labor, human trafficking, and child labor. Justine Nolan & Gregory Bott, *Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices*, 24 AUSTRALIAN J. HUM. RTS. 44, 47 (2018).

3 *See, e.g.*, Modern Slavery Act 2015, c. 30 §§ 1–62, § 54 sched. 1–5 (U.K.) [hereinafter MSA]. There are, in addition, legal provisions to address domestic instances of modern slavery. *See* Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–14 [hereinafter TVPA].

4 *See, e.g.*, TVPA, *supra* note 3; MSA, *supra* note 3.

5 *See* Genevieve LeBaron & Andreas Rühmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8 GLOB. POL'Y 15 (2017); CORE COAL., RISK AVERSE: COMPANY REPORTING ON RAW MATERIAL AND SECTOR-SPECIFIC RISKS UNDER THE TRANSPARENCY IN SUPPLY CHAINS CLAUSE IN THE UK MODERN SLAVERY ACT 2015 3 (2017); Justine Nolan, *Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?*, 15 BRAZ. J. INT'L L. 65 (2018); *see also* U.K. HOUSES OF PARLIAMENT JOINT COMM. ON HUM. RTS., HUMAN RIGHTS AND BUSINESS 2017: PROMOTING RESPONSIBILITY AND ENSURING ACCOUNTABILITY, 2016–17, HL 153, HC 443.

6 *See* California Transparency in Supply Chains Act, 2010 Cal. Legis. Serv. ch. 556 (West) [hereinafter CTSCA]; Andrew G. Barna, *The Early Eight and the Future of Consumer Legal Activism to Fight Modern-Day Slavery in Corporate Supply Chains*, 59 WM. & MARY L. REV. 1449, 1463 (2018) (citing the statistic that only 62 percent of covered companies disclosed).

misleading about human rights impacts across global supply chains and subsidiaries.[7]

There have been various efforts to address the shortcomings of transparency-focused laws, including the adoption of the French Law on Corporate Duty of Vigilance,[8] German businesses' push for new human rights due diligence laws,[9] and the European Union's announcement that it will likely enact a due diligence law in 2021.[10] The process of human rights due diligence (HRDD) requires companies to identify, prevent, mitigate, and communicate risks to human rights.[11] If done properly, it can transform corporate behavior and prevent harms.[12] Company reports of human rights impacts and due diligence provide information to stakeholders to enable them to make informed choices about their interactions with the corporation. As such, they act as an important component of an overall corporate accountability framework for human rights impacts. Push for transformation can come from external or internal sources—information found in reports might trigger external stakeholder pressure to transform corporate behavior, or the information gathering and disclosing process might influence internal decision making.[13] If such a transformation materializes, disclosures and HRDD can achieve prevention and mitigation of adverse human rights impacts. But to be able to fulfill these transformation and prevention functions, HRDD must be done properly, and reporting must contain information that is accurate and provides a complete and meaningful picture of the disclosed issues. The current designs of transparency and HRDD laws do not contain adequate safeguards to ensure duties are carried out properly and in accordance with the relevant legislation.

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7 *See, e.g.*, CORE COAL., *supra* note 5.

8 *See* 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 Mar. 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette Of France], Mar. 28, 2017.

9 *Business and Human Rights: German Companies Push for Mandatory Due Diligence Law*, INT'L BAR ASSOC. (Mar. 5, 2020), https://perma.cc/PQB3-X3TU.

10 *See* CORE COAL., 25 NGOS AND TRADE UNIONS CALL FOR A UK LAW ON MANDATORY HUMAN RIGHTS DUE DILIGENCE (2019); *EU to Legislate for Human Rights and Environment Due Diligence*, HAUSFELD LLP (2020), https://perma.cc/5T89-V7DE.

11 *See* John Ruggie (Special Representative of the Secretary-General), Guiding Principles of Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework, ¶ 15, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UNGPs].

12 *See generally* Robert G. Eccles & George Serafeim, *Corporate and Integrated Reporting: A Functional Perspective*, *in* CORPORATE STEWARDSHIP: ACHIEVING SUSTAINABLE EFFECTIVENESS (Susan A. Mohrman et al. eds., 2015); Karin Buhmann, *Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action*, 3 BUS. & HUM. RTS. J. 23, 35 (2018).

13 *See* Buhmann, *supra* note 12.

Most worryingly, the transparency and due diligence rules discussed in this Article typically require minimal substantive disclosure and largely adopt only "non-coercive enforcement,"[14] which leaves the watchdog role almost exclusively to consumers, investors, and NGOs.[15] Without a regulatory oversight mechanism to ensure the quality of disclosures and to impose sanctions for misleading information, not only may the reporting be inadequate, but also the disclosures may present false realities and be detrimental to any hopes of improving rights of workers and communities in the global supply chain. The question of oversight and enforcement, however, remains underexplored in the literature.

This Article makes a novel contribution to the ongoing discussions about how to improve human rights disclosure and due diligence laws to achieve the stated legislative aims. It has been observed and critiqued that the oversight and enforcement features of these laws remain weak or nonexistent.[16] Taking this as our starting point, we first offer a new framing of the problem by analyzing how these laws assign oversight and enforcement roles between the state and the market. We critique that the state has almost completely withdrawn itself from the oversight and enforcement roles and assigned these crucial accountability functions primarily to consumers, civil society, and investors. As discussed below, even in the case of the French Law, civil society acts as the main driver of oversight. We argue in favor of greater state involvement in transnational business regulation as it concerns the human rights impacts of businesses. We argue that state-based enforcement and oversight constitute necessary ingredients for public disclosures and HRDD to contribute to the improvement of human rights conditions in supply chains and to achieve accountability for adverse business impacts on human rights. We offer a new perspective on a more effective approach to oversight and enforcement that distinguishes human rights disclosures and due diligence from traditional corporate reporting and due diligence. Our approach assigns these functions primarily to a public authority that should have expertise in both corporate governance and human rights and would also function as an enabler for consumers, civil society, and investors to hold businesses accountable.

The Article begins in Section II by unpacking the concept of accountability in the context of business impacts on human rights. Next, Section III outlines and compares the HRDD and reporting requirements under key examples of the relevant legislation: the E.U. Non-Financial Reporting Directive (enacted 2014);

14 Adam S. Chilton & Galit A. Sarfaty, *The Limitation of Supply Chain Disclosure Regimes*, 53 STAN. J. INT'L L. 1, 12 (2017).

15 *See* TIM BARTLEY, RULES WITHOUT RIGHTS: LANDS, LABOR, AND PRIVATE AUTHORITY IN THE GLOBAL ECONOMY 7, 12, 40 (Oxford, 2018) (noting that corporate codes of conduct and private social or ethical audits are the prime examples of this mode of governance).

16 *See, e.g.*, Nolan, *supra* note 5, at 68–71; LeBaron & Rühmkorf, *supra* note 5.

the French Law on the Corporate Duty of Vigilance of 2017; the California Transparency in Supply Chains Act of 2010 (CTSCA); the U.K. Modern Slavery Act 2015 (MSA); the Australian Modern Slavery Act 2018 (AMSA); the U.S. Dodd-Frank Act of 2010 § 1502; the E.U. Conflict Minerals Regulation (enacted 2017); and the Dutch Child Labor Law (enacted 2019). In doing so, the Article briefly addresses the reasons behind the enactment of the laws, the transparency and HRDD requirements they contain, and the institutional arrangements supporting these requirements, in order to give the reader context for the discussion that follows.

Building on the existing scholarship,[17] the analysis in Sections IV and V frames the approach of the existing legislation to oversight and enforcement as market-led and critiques this model of oversight and enforcement. In Section VI, we argue that enforcement of these laws via regulatory oversight, alongside market oversight, is essential for achieving their accountability objectives. We then evaluate the options for regulatory oversight of HRDD and reporting. Here, we analyze the distinguishing features of human rights reporting from financial and other types of non-financial reporting.[18] We urge policymakers to move away from placing HRDD and reporting within the realm of traditional corporate reporting and instead to adopt a *sui generis* model of oversight that marries corporate reporting expertise with human rights expertise.

II. What Is Accountability in This Context and What Are the Various Tools for Accountability?

Corporate accountability represents a movement away from the voluntarism and self-regulation that characterize contemporary corporate social responsibility (CSR).[19] For Peter Newell, "the term [accountability] implies both a measure of answerability (providing an account for actions undertaken) and enforceability (punishment or sanctions for poor performance or illegal conduct)."[20] In the context of business impacts on human rights, we conceive of accountability as a wider concept than liability, encompassing the idea that companies should be held responsible for the consequences of their actions via non-legal accountability (risk of loss of reputation, denial of access to foreign markets, fall in share price, and

17 *See, e.g.*, Justine Nolan, *Human Rights and Global Corporate Supply Chains: Is Effective Supply Chain Accountability Possible?*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS 248 (Surya Deva & David Bilchitz eds., 2017); Chilton & Sarfaty, *supra* note 14.

18 Other types of non-financial reporting include diversity, governance, and environmental performance.

19 *See generally* Renginee G. Pillay, *The Limits to Self-Regulation and Voluntarism: From Corporate Social Responsibility to Corporate Accountability*, 99 AMICUS CURAE 10 (2014).

20 Peter Newell, *From Responsibility to Citizenship: Corporate Accountability for Development*, INST. DEV. STUD., Apr. 2002, at 1–2.

shareholder dissent) as well as legal accountability through regulators or courts of law.[21] We concur with Simon Zadek's common-sense opinion that for accountability to work, there must be "capability to do something about [a given action and] . . . some level of consensus about the action that needs to be accounted for and the penalties for failure . . . [Additionally, there needs to be] a reasonably well-defined 'community' that can reach such decisions."[22]

In following Zadek's criteria, one must first determine what needs to be accounted for in the context of transparency and due diligence for human rights abuses in a company's supply chains and subsidiaries. Second, one must determine what consequences and penalties may attach to performance that falls below the expected or required standard and what processes are needed to assess compliance and impose sanctions.

Determining the scope of accountability can be a complex task where the disclosure obligations are placed on parent or lead companies even though the presence of human rights abuses in those companies' subsidiaries or supply chains may not be contrary to any legal requirement or obligation placed on the parent or lead company. The corporate law concepts of corporate personality, limited liability, and the contractual nature of relationships with suppliers insulate parent or lead companies from liability for harm caused by subsidiaries and suppliers.[23] Therefore, at least in theory, legal liability falls on the subsidiary, supplier, or sub-supplier that is directly linked to the human rights harm rather than the lead company that sells the end product.[24] For instance, the MSA imposes criminal liability only for slavery and human trafficking that take place within the U.K.[25] Accountability arises from the presence of slavery within a business organization. By contrast, supply chain accountability for slavery and human trafficking overseas through the Act is achieved through disclosure of the steps taken to identify and eliminate these practices.[26] Unlike the former type of criminal accountability that applies in the domestic context, the latter obligation is neither

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21 David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 335 (2011).

22 Simon Zadek, *The Meaning of Accountability*, *in* BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 240, 241 (Dorothée Baumann-Pauly & Justine Nolan eds., 2016).

23 *See generally* KATHARINA PISTOR, CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019).

24 However, it is still possible for a parent or lead company to be directly liable for the harms suffered as a result of a subsidiary's acts or omissions. *See* Vendanta Resources v. Lungowe [2019] UKSC 20 (appeal taken from Eng.); Chandler v. Cape [2012] EWCA (Civ) 525 (appeal taken from Eng.). The French Law places a legal requirement on the parent company to conduct due diligence in its supply chain. *See* Loi 2017-399, *supra* note 8.

25 *See* MSA, *supra* note 3, §§ 1–2.

26 *Id.* § 54.

an obligation of result nor an obligation of due diligence to eliminate slavery within supply chains. Instead, it is an obligation to report the steps, if any, taken to eliminate slavery. The presence of human rights abuses and modern slavery practices legally distant from the parent or lead company renders it difficult to define what action needs to be accounted for in modern slavery or human rights disclosures, particularly if a legally-mandated due diligence obligation is lacking.

At the outset, the conduct that needs to be accounted for is the failure on a parent or lead company's part to make diligent efforts to identify, prevent, mitigate, and eliminate human rights abuses in its subsidiaries and supply chains and to disclose adequately the steps taken.[27] This is just one piece of the wider puzzle of accountability. We are not looking at other pieces of the puzzle such as the role of state oversight and enforcement through civil or criminal liability for human rights harms. Relatedly, we are not looking at this from the perspective of access to remedy. Our concern is whether the current disclosure and HRDD frameworks improve accountability: (1) to victims of business human rights impacts and (2) to those affected indirectly as consumers, customers, or investors who buy from and/or invest in the company on the understanding that it is doing all that can be reasonably expected to prevent and remediate human rights abuses and modern slavery in its global supply chains.

There is a spectrum of regulatory approaches to bringing about corporate accountability in terms of the consequences that will attach to poor performance, ranging from light-touch (private-led regulation) to stringent regulation with binding standards enforced by public authorities.[28] Genevieve LeBaron and Andreas Rühmkorf observe that home state regulation on business and human rights has been "enacted through a range of different institutional designs that combine elements and instruments of public and private governance."[29] That said, as will be seen in Section III, a heavy emphasis has thus far been placed on various degrees of transparency accompanied by market-centered accountability mechanisms at the light-touch end of the spectrum. This mode of regulation is a move away from traditional "command and control" regulation, in which governments adopt "legal rules backed by [civil or criminal] sanctions,"[30] toward

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27 This accords with the due diligence requirements of the U.N. *See* UNGPs, *supra* note 11, at 21–22.

28 *See* LeBaron & Rühmkorf, *supra* note 5, at 17–19, 26. *Compare* Bribery Act 2010, c. 23, §§ 1–20, sched. 1–2 (U.K.), *with* MSA, *supra* note 3 (highlighting that, under these categories, the former produced significant changes in corporate practice while the latter has not).

29 *See* LeBaron & Rühmkorf, *supra* note 5, at 17.

30 *See* David J. Doorey, *Who Made That? Influencing Foreign Labor Practices Through Reflexive Domestic Disclosure Legislation*, 43 OSGOODE HALL L.J. 353, 366 (2005).

what is termed "reflexive" regulation,[31] or "New Governance."[32] Through this mechanism, the government acts as "the orchestrator of private actors to encourage compliance"[33] and attempts to "influence normative practices indirectly by shaping the context in which society's various actors and subsystems interact and bargain with one another."[34] This model has been widely supported by the CSR literature due to its promise of effecting organizational and lasting change,[35] whereas command-and-control type regulation has been viewed with skepticism due to its potential to produce a tick-box approach to human rights issues.[36] Human rights disclosure laws discussed in this Article largely adopt this light-touch regulation model based on a market-led model of accountability. Recent developments suggest a slow, gradual movement toward more stringent regulation, with a new legislative approach featuring a legal duty to conduct HRDD and to publish HRDD information backed by certain penalties and civil liability for failure to comply.[37] Karin Buhmann has argued that for the light-touch approach to be successful, it needs to properly encourage organizational learning and not merely focus on penalties for non-disclosure.[38] While the organizational learning focus is crucial, decades of voluntarism and soft regulation in this field have not produced successful outcomes when the bottom line of business remains profit oriented.[39] One reason for this lack of meaningful progress is the lack of stringent legal accountability mechanisms to push businesses to take disclosure

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31 Gunther Teubner, *Substantive and Reflexive Elements in Modern Law,* 17 L. & SOC'Y REV. 239, 242 (1983). In the context of the nature of social disclosure rules, see generally Barnali Choudhury, *Social Disclosure*, 13 BERKELEY BUS. L.J. 207 (2016).

32 David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability Through Transparency*, 17 BUS. ETHICS Q. 453, 454–55 (2007) (describing New Governance as "process-oriented, flexible, participatory, and experimental").

33 *See* Nolan, *supra* note 5, at 70.

34 *See* Doorey, *supra* note 30, at 357.

35 *See* Hess, *supra* note 32.

36 *See* Pillay, *supra* note 19 (providing an overview and critique of the voluntary and light-touch approaches to regulation of corporate human rights impacts). *See generally Responding to Modern Slavery – New UK Benchmarking Report*, HERBERT SMITH FREEHILLS (Oct. 24, 2017), https://perma.cc/8E9S-6RPV.

37 *See* Loi 2017-399, *supra* note 8; *The Netherlands Takes an Historic Step by Adopting Child Labor Due Diligence Law*, MVO PLATFORM (May 14, 2019), https://perma.cc/UW7H-W9BP; *Frequently Asked Questions About the New Dutch Child Labor Due Diligence Law*, MVO PLATFORM (Apr. 14, 2017), https://perma.cc/W8LM-SPPT; *see also* Saskia Wilks & Johannes Blankenbach, *Will Germany Become a Leader in the Drive for Corporate Due Diligence on Human Rights?*, BUS. AND HUM. RTS. RES. CTR. (Feb. 20, 2019), https://perma.cc/SD2U-25PA; *Details about the Initiative*, SWISS COAL. FOR CORP. JUST., https://perma.cc/4TBM-585Z.

38 *See* Buhmann, *supra* note 12, at 39.

39 *See* Pillay, *supra* note 19. On the voluntary approach of multi-stakeholder initiatives, see *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, MSINTEGRITY (July 2020), https://perma.cc/MCW4-WHLL.

and HRDD obligations seriously. It has been argued by critics of the current transparency rules that without, as a minimum, an accompanying HRDD obligation and civil, administrative, or criminal liability for failure to comply, these rules cannot effectively contribute to corporate accountability.[40] The analysis in the latter parts of this Article discusses the necessity for state-based oversight and enforcement supported by stakeholders as an essential ingredient for the efficacy of any laws, whether they comprise transparency obligations only or they include the additional requirement of HRDD. This is crucial to ensure the avoidance of a disconnect between what is reported in corporate disclosures and the actual human rights situation on the ground.[41]

Both transparency and HRDD are requirements of the U.N. Guiding Principles on Business and Human Rights (UNGPs).[42] The UNGPs, which were adopted unanimously by the U.N. Human Rights Council in 2011, represent a consensus of opinion among a number of states, companies, and non-governmental organizations, about the human rights responsibilities of corporations. The UNGPs expect business actors to "operationalize" their responsibility to respect human rights through HRDD and reporting processes.[43] Businesses are expected to communicate the steps they take to address human rights impacts by publishing sufficiently-detailed information on the impacts and steps taken to prevent, mitigate, and remediate these in appropriate form and frequency.[44]

The commentary on reporting explains "showing" that businesses respect human rights involves companies communicating and "providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors."[45] Thus, reporting under the UNGPs is not an end in itself but, theoretically at least, is an exercise that will provide a measure of accountability.[46] Reporting alone is not sufficient, however, and the reporting provisions in the UNGPs are supplemented by a requirement that companies conduct HRDD. This process entails identifying whether they

40 *See* LeBaron and Rühmkorf, *supra* note 5; Nolan, *supra* note 5; U.K. HOUSES OF PARLIAMENT JOINT COMM. ON HUM. RTS., *supra* note 5.

41 For an analysis of such a disconnect, see Madhura Rao & Nadia Bernaz, *Corporate Responsibility for Human Rights in Assam Tea Plantations - A Business and Human Rights Approach*, SUSTAINABILITY 2020, 12, 7409.

42 *See* UNGPs, *supra* note 11.

43 *See id.* (noting that UNGPs 16–24 are the "operational principles" in relation to the corporate responsibility to respect pillar).

44 *Id.* For an exploration of reporting under the UNGPs, see UN Guiding Principles Reporting Framework, SHIFT & MAZARS (2015), https://perma.cc/XZV8-R7MB.

45 UNGPs, *supra* note 11, at 20.

46 *But see, e.g.*, Jena Martin, *Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda*, 56 COLUM. J. TRANSNAT'L L. 530 (2018) (challenging this viewpoint).

have caused or contributed to adverse human rights impacts, integrating and acting upon the findings, tracking responses, and remediating the harm if an adverse impact has occurred.[47] The enactment of transparency and HRDD laws are illustrative of the polycentric governance described in the UNGPs.

The knowing-and-showing approach of the UNGPs has been a welcome shift from the naming-and-shaming approach.[48] We argue here that for the "showing" to be reliable and not misleading, there needs to be a reliable system of oversight. While the UNGPs acknowledge the role of transparency in achieving corporate accountability, Principle 3 and its commentary leave it up to each state to determine the type of transparency measures to be introduced. According to Principle 3, the states should *encourage* or *require* businesses to be transparent on how they address their human rights impacts.[49] As far as transparency measures go, the expectations of the UNGPs could be fulfilled by states introducing or maintaining the "light-touch" regulations and mandating reporting without any follow-up measures. The UNGPs place no clear expectations on states to introduce robust measures of oversight and enforcement for transparency requirements. We argue in this Article that such measures are a crucial element of transparency and HRDD laws to ensure corporate accountability.

III. Key Features of Human Rights Disclosure and Due Diligence Laws

We divide the legislation mandating disclosure and/or HRDD into two main categories: (1) general HRDD and disclosure laws and (2) laws that target a specific human rights issue.[50] The key features of the different laws are outlined below, with particular focus on two distinct elements: the type of disclosure required and the processes in place (or the lack thereof) to ensure accessibility and accuracy of the disclosures.

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47 UNGPs, *supra* note 11, at 20–21. On human rights due diligence under the UNGPs; see generally Björn Fasterling, *Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk*, 2 BUS. & HUM. RTS. J. 225 (2017); see also Buhmann, *supra* note 12; Kendyl Salcito & Mark Wielga, *What Does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?*, 3 BUS. & HUM. RTS. J. 113 (2018).

48 Buhmann, *supra* note 12, at 39.

49 *See* UNGPs, *supra* note 11, at 8–9.

50 *See generally* Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 NW. J. INT'L L. & BUS. 87 (2014); David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5 (2019).

A. General Human Rights Due Diligence and Disclosure

In this section, we focus on the E.U. Non-Financial Reporting Directive (E.U. NFRD) and the French Law on the Corporate Duty of Vigilance.[51] The E.U. NFRD applies to all companies of a certain size governed by laws of individual E.U. Member States.[52] These companies are required to report on human rights and related matters "to the extent necessary for an understanding of the undertaking's development, performance and position and of the impact of its activity."[53] Companies must additionally disclose HRDD processes implemented by the company in pursuing policies related to non-financial matters, the corresponding outcome, and the principal risks arising in connection with the company's operations, including how the company manages these risks.[54] The provision adopts a "comply or explain" approach, meaning that companies can elect to comply with it either by making the required disclosures or by providing an explanation for why they have elected not to do so.[55] The E.U. NFRD leaves it up to each E.U. member state to determine whether to require verification of reports by an independent assurance service provider and whether to have a sanctions regime for companies that fail to report adequately. At a minimum, each member state is to require checks by an auditor for the existence of a report.[56] Some member states have implemented legislation requiring these disclosures to be made in the management report,[57] and some have imposed additional checks.[58] Thus, member states vary in the checks they have in place, but it has largely fallen to the "market" to oversee reporting.

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51 Directive No. 2014/95 of the European Parliament and of Council of 22 October 2014 amending Directive No. 2013/34 as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 57 (EU); Loi 2017-399, *supra* note 8.

52 Directive No. 2014/95, *supra* note 51. These are certain large companies and qualifying partnerships with more than 500 employees.

53 *Id.*

54 *Id.*

55 Virginia E. Harper Ho, *Comply or Explain and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317, 321 (2017).

56 According to a study reviewing how member states have transposed the directive into their national law, twenty member states only require the existence of the reports to be verified and not the content. The states are Austria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Norway. *See* GLOBAL REPORTING INITIATIVE, MEMBER STATE IMPLEMENTATION OF DIRECTIVE 2014/95/EU: A COMPREHENSIVE OVERVIEW OF HOW MEMBER STATES ARE IMPLEMENTING THE EU DIRECTIVE ON NON-FINANCIAL AND DIVERSITY INFORMATION 1, 16–31 (2017).

57 *See id.* Eight states require consistency checks with the management report: Belgium, Bulgaria, Denmark, Latvia, Netherlands, Romania, U.K., and Iceland.

58 For instance, Denmark. This subject is taken up in Section VI below.

In France, the French Law on the Corporate Duty of Vigilance requires companies meeting the threshold requirements for size[59] to create and implement an annual "vigilance plan" aimed at identifying and preventing human rights violations in both their domestic and their international operations, including those associated with their subsidiaries and supply chain.[60] The first plans were published in 2018. The development and the publication of the plan and a report on its implementation are among the substantive obligations prescribed by the "duty of vigilance."[61] The plan must set out the steps that the company will take to detect risks and prevent serious violations with respect to human rights and fundamental freedoms, health and safety, and the environment.[62] This includes mapping out and analyzing the risks and putting measures in place to mitigate risks and address negative impacts, including an alert mechanism and a monitoring scheme to follow up on the plan's implementation.[63] Unlike most of the other laws discussed in this Article, the French law's transparency requirement can only be fulfilled by complying. There is no room for compliance by explaining why no steps have been taken because taking the prescribed steps is a fundamental obligation placed on companies covered under the law. Since the development, implementation, and communication of the plan together constitute the vigilance duty, the French law brings together the HRDD and transparency elements of the UNGPs' second pillar previously discussed in Section II.

Compliance with the law is established through a court process whereby companies can be legally compelled—at the request of a party with standing, including an NGO or a trade union—to create and implement an adequate vigilance plan.[64] Prior to the initiation of a court process, companies will be given a three-month period to comply with the requirements of the law. Periodic penalties may be imposed by the court if companies are found to be failing their vigilance obligations. To date, a small number of notices have been served to companies, at the initiative of civil society organizations (CSOs), on the basis of

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59 The law applies to any company registered in France that has (a) 5,000 or more employees, including employees of its direct or indirect French-registered subsidiaries; or (b) 10,000 or more employees, including employees of its direct or indirect French-registered or foreign subsidiaries. *See* Loi 2017-399, *supra* note 8, art. 1. It is estimated that the law applies to about 150 companies. *See* Anna Triponel & John Sherman, *Legislating Human Rights Due Diligence: Opportunities and Potential Pitfalls to the French Duty of Vigilance Law*, INT'L BAR ASS'N (2017), https://perma.cc/SX59-5N5K.

60 *See* Loi 2017-399, *supra* note 8, art. 1, ¶ 3 (covering the companies that the company controls directly or indirectly and, moving down the supply chain, the activities of its subcontractors and suppliers "with which [it] maintains an established commercial relationship").

61 Stéphane Brabant & Elsa Savourey, *France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies*, *in* REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L'ÉTHIQUE DES AFFAIRES 1–7 (Dec. 2017).

62 Loi 2017-399, *supra* note 8.

63 *Id.* ¶¶ 4–9.

64 *Id.* ¶¶ 7–9; Brabant & Savourey, *supra* note 61, at 4.

inadequate vigilance plans, and two of these incidents have proceeded to the courts at the end of the three-month notice period.[65] Accountability also takes place through a process by which victims who have been harmed by a company covered by the legislation can claim damages for negligence through an ordinary civil lawsuit, using the company's noncompliance with the vigilance obligation as evidence of its wrongdoing.[66]

Combining HRDD and transparency backed up with sanctions, the French law is the most promising piece of legislation presently in force to advance corporate accountability. It moves away from exclusively relying on market-led oversight and enforcement of the law. It is not without shortcomings, however. It has been highlighted that the law's threshold for coverage is very high,[67] the sanctions available are weak in terms of remediating harms,[68] and, most importantly for the purposes of this Article, there is a lack of governmental monitoring and oversight for compliance by covered companies.[69] While the French law takes a crucial step by attaching sanctions to the vigilance obligations, in the absence of a state-initiated oversight mechanism it is left to the "market," typically CSOs, to monitor companies' compliance and initiate the complaints procedures available under the law. The lack of an official list and repository for vigilance plans render it challenging for CSOs, trade unions, and other stakeholders to identify shortcomings and take part in the enforcement of the obligations.[70] A preliminary proposal has been put forward to address this by designating certain individuals within the French administration to look into which companies are within the scope of the law, how the law is implemented, and whether some provisions of the law need to be clarified.[71] A need for formal oversight and more robust enforcement constitutes the main focus of the analysis presented in the later sections of this Article.

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65 Decisions on the substance of the complaints are pending at the time of writing. *See* Stéphane Brabant & Elsa Savourey, *All Eyes on France – France Vigilance Law First Enforcement Cases: Current Cases and Trends*, Cambridge Core Blog (Jan. 24, 2020), https://perma.cc/QZ2L-3HZU; Elsa Savourey, *All Eyes on France – France Vigilance Law First Enforcement Cases: The Challenges Ahead*, CAMBRIDGE CORE BLOG (Jan. 24, 2020), https://perma.cc/ENZ3-9R9N.

66 Companies would incur civil liability under the French Civil Code Articles 1240 and 1241. *See generally* 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 (2017).

67 FORUM CITOYEN POUR LA RSE, LAW ON DUTY OF VIGILANCE OF PARENT AND OUTSOURCING COMPANIES YEAR ONE: COMPANIES MUST DO BETTER 1, 8 (Juliette Renaud et al. eds., 2019).

68 Brabant & Savourey, *supra* note 61, at 2–4.

69 *See Duty of Vigilance Radar*, VIGILANCE-PLAN, https://perma.cc/H9GM-EV8V (highlighting the civil society initiative attempting to rectify the lack of formal monitoring and oversight).

70 Brabant & Savourey, *supra* note 61.

71 ANNE DUTHILLEUL & MATTHIAS DE JOUVENEL, EVALUATION DE LA MISE EN ŒUVRE DE LA LOI N° 2017-399 DU 27 MARS 2017 RELATIVE AU DEVOIR DE VIGILANCE DES SOCIÉTÉS MÈRES ET DES ENTREPRISES DONNEUSES D'ORDRE (2020).

B. Targeted Human Right Due Diligence and Disclosure

Targeted HRDD and transparency legislation focuses on specific issues such as modern slavery, child labor, or conflict minerals. In this Section, we will first examine laws mandating disclosure on modern slavery. The design of the three statutes dealing directly with modern slavery is similar, although each legislative scheme has slight variation. We will then examine a law mandating transparency on conflict mineral due diligence, and lastly a law mandating due diligence on child labor. A common theme relevant for the purposes of this Article is that these laws rely on market-led oversight to ensure compliance with the law, to a greater or a lesser extent.

The CTSCA, which came into force in January 2012, requires certain large retail sellers and manufacturers doing business in the state of California to disclose their efforts to eradicate slavery and human trafficking from their direct supply chain for tangible goods offered for sale.[72] The disclosed information should be posted on the retail seller or manufacturer's website. Specifically, a company to which the legislation applies must disclose to what extent, if any, it: verifies product supply chains to evaluate and address risks of human trafficking and slavery; conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains; requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business; maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking; and provides relevant training.[73] There is no requirement to update the report on a periodic basis. The California Franchise Tax Board produces an annual list of companies covered by its provisions based on information from tax returns.[74] There is, however, no official repository where these reports must be deposited for public access. While the presence of an official list is crucially important for stakeholders to identify the companies covered by the law, the lack of a central repository for accessing the reports renders it challenging for stakeholders to identify companies failing to comply with the law. A large number of covered businesses fail to disclose information on all the required areas of activity, and many do not have a disclosure statement.[75] The only

72 CTSCA, *supra* note 6.

73 *Id.* § 3(b).

74 KAMALA HARRIS, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE 3 (2015). Note, however, that the CTSCA does not require companies to report on an annual basis, meaning that companies can comply with the law by reporting just once.

75 *See* Barna, *supra* note 6, at 1463 (noting that only sixty-two percent of covered companies disclosed).

state-based relief under the CTSCA for failure to report is injunctive.[76] Following a compliance review in 2015, the California Department of Justice took steps to improve compliance with the Act by writing to companies and asking them to provide either an explanation of why the legislation does not apply to them or a link to a compliant disclosure.[77] To date, the Attorney General of California has not yet brought an action against a corporation for nondisclosure under the Act.[78] From the foregoing, it is not possible to conclude that the CTSCA provides robust oversight and enforcement of the transparency obligations, leaving the "market" to exercise checks and hold businesses accountable.

In the U.K., Section 54 of the MSA introduced a modern slavery and human trafficking transparency requirement for certain "commercial organizations" with a turnover of at least £36 million that "carry on" business in the U.K.[79] The law adopts a comply-or-explain approach by requiring companies to publish either a statement of the steps the organization has taken to ensure slavery and human trafficking is not taking place in any of its supply chains or in any part of its business, or a statement that the organization has taken no such steps.[80] The MSA does not prescribe specific content for the disclosures, but provides a nonexhaustive list of items that *may* be included in the "slavery and human trafficking statement." These items include information about a commercial organization's[81] policies and due diligence processes in relation to slavery and human trafficking in its business and supply chain; the parts of its business most at risk of slavery; and human trafficking and steps put in place to assess and manage that risk, including performance indicators for the success of these steps.[82] The statement must be approved by the board of directors of a limited company or all members of a limited liability partnership.[83] The MSA covers steps taken in "any of [a corporation's] supply chains," a broader requirement than that in the

76 CTSCA, *supra* note 6, § 3(d).

77 Sarah Altschuller, *The California Transparency in Supply Chains Act: New Guidance and Increased Enforcement Efforts*, FOLEY HOAG (May 10, 2015), https://perma.cc/L3ZM-XFV8.

78 Memorandum from Jena Martin on Policy Options for Addressing and Preventing Forced Labor, Modern Slavery, and Human Trafficking in Supply Chains (May 2020).

79 MSA, *supra* note 3, § 54; COMM. OF PUB. ACCT., Reducing Modern Slavery, 2017–19, HC 886, at 10 (U.K.).

80 CORE COAL., *supra* note 5, at 3 (estimating that Section 54 covers between 12,000 and 17,000 companies).

81 *See* MSA, *supra* note 3, § 54(12) (defining a commercial organization as it as a body corporate or partnership "which carries on a business, or part of a business, in the United Kingdom").

82 *Id.* § 54(5).

83 *Id.* § 54(6).

CTSCA, which covers the direct supply chain only.[84] The MSA also requires yearly updates, in contrast to the CTSCA's one-off approach.[85] There is no official list,[86] however, of companies that are required to report, meaning that stakeholders are not able to verify if a company is covered by the law or not, although the U.K. Home Office has written to 10,000 companies to which it believes the law may be applicable.[87] Nor is there an official database where such reports are deposited.[88] If a business falling under section 54 fails to report, the Secretary of State may bring court proceedings for injunctive relief.[89] As of yet, there has been no instance of this happening in practice. There is no other means of enforcement or oversight in the Act. Furthermore, there are no mechanisms to ensure the accuracy of the report contents (though the report contents can be so vague under this law that there seems little need for assurance). Thus, oversight and enforcement are left to the "market."

There have already been four reporting cycles under the MSA. Generally, however, disclosure has been of a low standard, not always meeting even the minimum requirements of the Act including approval of the statement by senior management[90] and visibility on the company website.[91] Many companies have not reported at all.[92] Acknowledging deficiencies of the MSA, an independent review of the Act published in 2019 recommended to the U.K. Government to: abandon the comply-or-explain approach; adopt a comply approach with prescribed minimum content for the report; create a repository for statements; establish a monitoring and enforcement mechanism; and strengthen sanctions for failure to comply.[93]

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84 *Id.* § 54(4)(a)(i). Commercial organizations caught within the definition are not, however, required to report on all the supply chains in their groups overseas, such as those of wholly owned foreign subsidiaries. *See* Parosha Chandran, *A Loophole in the Slavery Bill Could Allow Companies to Hide Supply Chain Abuses*, THE GUARDIAN (Mar. 24, 2015), https://perma.cc/R2WL-J8EY.

85 MSA, *supra* note 3, § 54(4)(a).

86 See Section VI.A.1 for a discussion on the importance of a formal list.

87 COMM. OF PUB. ACCT., *supra* note 79, at 10.

88 *See About Us*, MODERN SLAVERY REGISTRY, https://perma.cc/YA5W-56KU.

89 MSA, *supra* note 3, § 54(11).

90 MSA, § 54(6). Depending on the type of entity, senior management could consist of the board of directors, members, partners, or a general partner.

91 *See* BUS. AND HUM. RTS. RES. CTR., FTSE 100 AT THE STARTING LINE: AN ANALYSIS OF COMPANY STATEMENTS UNDER THE UK MODERN SLAVERY ACT (2016); CORE COAL., *supra* note 5; BUS. & HUM. RTS. RES. CTR., FIRST YEAR OF FTSE 100 REPORTS UNDER THE MODERN SLAVERY ACT: TOWARDS ELIMINATION? (2017).

92 CORE COAL., WRITTEN EVIDENCE SUBMITTED FROM CORE ¶ 8 (2018) (noting that sixty percent of companies that are covered by section 54 have failed to produce a report).

93 SEC'Y OF ST. FOR THE HOME DEP'T, INDEPENDENT REVIEW OF THE MODERN SLAVERY ACT 2015: FINAL REPORT, 2019, Cp. 100, ¶ 17 (U.K.); *see also* COMM. OF PUB. ACCT., *supra* note 79, at 6

Like the CTSCA and the MSA, the Australian Modern Slavery Act 2018 (AMSA) requires companies that meet a prescribed size threshold to report on the risks of modern slavery in their operations and supply chains and actions taken to assess and address those risks.[94] This law abandons the comply-or-explain approach adopted in the U.K. MSA. It is mandatory for companies to provide the particular information on policies and processes to detect and address modern slavery listed in the Act, meaning that companies cannot be selective about what to report. The AMSA also makes provision for a government-funded central repository for slavery and human trafficking statements,[95] but it does not penalize companies for noncompliance, though the Minister for Home Affairs can make an inquiry if a company has not complied. If a company fails to respond, the minister may publicly disclose information about the company's failure to comply.[96] The law was passed in November 2018, and the first disclosure under the Act was made in 2019. In terms of "enforcement," the AMSA creates a mechanism through which noncompliant entities can be asked to explain and remedy their failure to report, or they risk being named on the government-maintained register. The relevant minister reports to Parliament annually on compliance trends, enabling oversight of overall compliance patterns by Parliamentarians. Otherwise, as with the other modern slavery reporting laws, oversight and enforcement is left to the "market."

Outside the arena of modern slavery, in the U.S., the Conflict Minerals Rule, adopted in 2012[97]—with the first reports filed in 2014—requires companies reporting to the U.S. Securities and Exchange Commission (SEC) to conduct due diligence and to report on the sourcing of certain minerals (tin, tungsten, tantalum, and gold). These companies must make reasonable and good faith efforts to determine whether the specified minerals used in the manufacture of their products originated in the Democratic Republic of Congo or its neighboring countries. The companies must also disclose their determinations and describe their country of origin inquiries to the SEC and on their company websites. Where

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(recommending that the government should consider publishing a list of companies that have complied and not complied with the legislation, rather than falling back on civil society to undertake this work). The government has responded to the report, agreeing to this recommendation. *See* HM TREASURY, TREASURY MINUTES: GOVERNMENT RESPONSE TO THE COMMITTEE OF PUBLIC ACCOUNTS ON THE THIRTY FIRST TO THE THIRTY SEVENTH REPORTS FROM SESSION 2017–19, 2018, Cm. 9634, 23 (U.K.).

94 *See* Modern Slavery Act 2018 (Cth) s 5 (Austl.) (requiring companies to report if they carry on business in Australia with a minimum annual consolidated revenue of AU$100 million).

95 *Id.* ss 18–20.

96 *Id.* s 16A.

97 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C. § 78(m) (amending Securities Exchange Act of 1934, ch. 404, § 13, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78(m)). The Final Rule for the implementation of § 1502 was approved by the SEC in August 2012. *See* 17 C.F.R. §§ 240, 249b.400.

this inquiry reveals that the minerals did originate in these countries, the company must exercise due diligence on the source and chain of custody of the mineral, in accordance with a nationally or internationally recognized due diligence framework.[98] Where the due diligence confirms the company's determination, it must file a Conflict Minerals Report with the SEC and post the same on its website. There is no list of companies that must comply with the Conflict Minerals Rule, but an annual Government Audit Office report to congressional committees examines how companies responded to the Conflict Minerals Rule in the previous calendar year and analyzes a generalized random sample of company reports.[99] In terms of enforcement and sanctions, the Conflict Minerals Rule imposes penalties on companies for not reporting or complying in good faith. Form SD (the form used for submitting the disclosure) is deemed filed under the Securities Exchange Act of 1934 and subject to § 18 of the Exchange Act, which attaches liability for any false or misleading statements. There has, however, been no SEC enforcement action against companies for failure to comply with the Conflict Mineral Rule,[100] despite the mixed record of engagement and compliance among companies.[101] In the absence of enforcement by the regulator, the oversight and enforcement functions are left to the "market."

The E.U. has also passed a disclosure law aimed at supply chain due diligence for the use of conflict minerals.[102] This is company law, not securities law, "laying down supply chain due diligence obligations for [E.U.] importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and high-risk areas."[103] The Regulation will enter into force in 2021. The geographical scope of the E.U. Regulation is broader than § 1502 of the Dodd-Frank Act, targeting imports not only from conflict zones and areas where a risk of armed confrontation exists but also from failed states and areas where widespread and

98 *See* 15 U.S.C. § 78(m); 17 C.F.R. §§ 240, 249b.400. For more detail of what is required, see Olga Ortega-Martin, *Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?*, 32 NETH. Q. HUM. RTS. 44, 64–65 (2014).

99 U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-607, *Conflict Minerals* (2019).

100 *See* Public Statement, U.S. Securities and Exchange Commission, Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule (Apr. 17, 2017), https://perma.cc/FZ67-VK3B (indicating that the staff of the SEC would not recommend enforcement action if companies only file a Form SD, and not a Conflict Minerals Report). Companies are being encouraged to continue to file Conflict Minerals Reports, and many continue to do so. *See id.*

101 *See Mining the Disclosures 2019: An Investor Guide to Conflict Minerals and Cobalt Reporting in Year Six*, RESPONSIBLE SOURCING NETWORK (2019), https://perma.cc/SZ5H-4H8Z.

102 Regulation 2017/821, of the European Parliament and of the Council of 17 May 2017, Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, art. 6, 2017 O.J. (L 130) 1 (EU) [hereinafter Regulation 2017/821].

103 *Id.*

systematic violations of international law, including human rights abuses, occur.[104] Nationally, implementing the Regulation depends on the responsible authorities designated by E.U. member states.[105] These authorities should conduct ex-post checks on how E.U. importers comply with the Regulation.[106] This includes audits of records as well as on-the-spot inspections.[107] The Regulation has been criticized for its lack of sanctions.[108] Member states set the rules that apply to infringements of the Regulation. When an infringement occurs, the competent authorities issue a notice of remedial action to be undertaken by the company.[109] Whether compliance will be achieved without penalties for failure to take remedial action remains to be seen.

The only example of a targeted HRDD law is the Dutch Child Labor Due Diligence Act, which was approved by the Dutch Senate in 2019, and is yet to go into effect.[110] Like the French law, the Act brings together the HRDD and transparency elements of the UNGP's second pillar by pushing companies to examine their supply chains for child labor, act upon their findings, and report that they have done so. Specifically, the Act requires all companies that supply goods or services to Dutch end-users to issue a declaration that HRDD is conducted to prevent child labor from being used in the production of goods and services.[111] In order to make the requisite declaration, it is implicit that the company must conduct the necessary HRDD. Should the HRDD give the company a reasonable suspicion of child labor in the production of the company's goods or services, it must adopt and implement a plan of action to address this.

Once the obligation is in place, a new regulator [*toezichthouder*] will be created that will publish the corporate human rights due diligence statements in an online

104 No definitive list of "conflict-affected" or "high-risk" countries has been published yet, and E.U. importers are encouraged to make this assessment themselves based on non-binding guidelines issued by the European Commission. *See* Commission Recommendation (EU) No. 2018/1149 of 10 Aug. 2018, 2018 O.J. (L 208) 94.

105 EUR. COMM'N, Conflict Minerals: List of Member State Competent Authorities Designated Under Article 10(1) of Regulation (EU) 2017/821 (Jan. 9, 2020).

106 *See* Regulation 2017/821, *supra* note 102, art. 10–11.

107 Sascha Arnold, *The EU Conflict Minerals Regulation – New Due Diligence Requirements for Importers*, FRESHFIELDS BRUCKHAUS DERINGER LLP (June 5, 2020), https://perma.cc/44FH-VTPM.

108 John Williams, *The Battle for Stronger EU Conflict Minerals Legislation*, GLOBAL MINING REVIEW (Feb. 4, 2020, 11:25 AM), https://perma.cc/JDB2-KHBL.

109 *See* Regulation 2017/821, *supra* note 102, art. 16.

110 The expectation is that the Act will become effective sometime in 2022. The three-year period between the Act's approval and it going into effect would give the government time to prepare a General Administrative Order that appoints the regulator and fleshes out the obligations of companies under the Act in more detail, see *Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies*, ROPES & GRAY (June 5, 2019), https://perma.cc/NS4E-BZZB.

111 *Id.*

public registry.[112] There will not be a formal list of companies that must comply with the law, however, meaning that third parties cannot check if a company is covered or not. Affected third parties such as victims cannot sue companies under the Act, but they can submit complaints that may trigger enforcement by the regulator.[113] Any individual or entity wishing to submit a complaint must first submit the complaint to the company itself. If the company's reaction is "inadequate" according to the complainant, and on the basis of concrete evidence of non-compliance with the Act, a complaint can be filed with the regulator.[114] A company can be fined up to €8,200 for failing to submit a statement declaring that it exercises due diligence.[115] If a company fails to carry out due diligence in accordance with the Act or to draw up a plan of action, or to comply with any further requirements that are established pertaining to due diligence and the plan of action, a fine of up to €870,000 or 10% of the worldwide annual turnover of the company can be imposed.[116] Thus, in terms of regulatory oversight, the Act provides the most comprehensive oversight among the laws discussed. However, the scheme still has gaps: in particular, the Dutch authorities will not actively enforce the law except in response to a third-party complaint, meaning the law relies on the watchdog role of civil society to ensure its effectiveness.[117] We discuss the problems with this approach in Section V.

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112 Wet Zorgplicht Kinderarbeid 24 Oktober 2019 [Child Labor Duty of Care Act], Stb. 2019, 401 (2019) (Neth.); *see* Anneloes Hoff, *Dutch Child Labor Due Diligence Law: A Step Towards Mandatory Human Rights Due Diligence*, OXFORD HUMAN RIGHTS HUB (June 10, 2019), https://perma.cc/TLY5-34GW.

113 *See* Anneloes Hoff, *Dutch Child Labor Due Diligence Law: A Step Towards Mandatory Human Rights Due Diligence*, OXFORD HUMAN RIGHTS HUB (June 10, 2019), https://perma.cc/TLY5-34GW. Plaintiffs under general Dutch tort law, nevertheless, would still be able to rely indirectly on the Act if the violation of the Act by the company could be construed as an indication of an act contrary to a duty of care to society. Where the compliance officer breaches their obligations, such as by a violation of the implementation of a due diligence process that causes serious bodily harm, the compliance officer themselves incur personal criminal liability. This can be punishment of a maximum of two years' imprisonment and a €20,500 fine. LISE SMIT ET AL., STUDY ON DUE DILIGENCE REQUIREMENTS THROUGH THE SUPPLY CHAIN 211 (2020).

114 Child Labor Duty of Care Act, Stb. 2019, 401.

115 ROPES & GRAY, *supra* note 110.

116 *Mandatory Human Rights Due Diligence Laws: The Netherlands Led the Way in Addressing Child Labour and Contemplates Broader Action*, ALLEN & OVERY (Sept. 2, 2020), https://perma.cc/49ME-QLU9.

117 Chiara Macchi & Claire Bright, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, *in* LEGAL SOURCES IN BUSINESS AND HUMAN RIGHTS: EVOLVING DYNAMICS IN INTERNATIONAL AND EUROPEAN LAW 12 (M. Buscemi et al. eds., forthcoming 2020).

IV. Benefits of Transparency and HRDD Requirements to Corporate Accountability for Human Rights Impacts

Despite their shortcomings, which are discussed in later sections, the current transparency and HRDD requirements do move the legal framework closer toward bringing human rights standards to bear on corporate activities. The most obvious positive impact is that these laws place human rights on the corporate agenda at the highest levels of management for the covered businesses.[118] Placing an expectation on companies to consider at the board level and, ideally, engage in the issues that external reporting and HRDD raise[119] may influence internal business decisions which produce adverse human rights impacts.[120]

Corporations may be prompted to monitor and change their own behavior, as well as to push for change in supplier practices. The different degrees of expectations placed on companies by different types of legislation will influence the extent of the positive changes (if any) that may occur. Whereas a mandatory HRDD law such as the French Law on the Corporate Duty of Vigilance may achieve a greater commitment from the businesses covered and more substantial change on the ground for those adversely impacted, a light-touch disclosure law, such as the U.K. MSA, is less likely to bring a substantial change for the workers and communities affected. [121]

Human rights disclosures may reveal information that stakeholders could not previously access, if at a minimum the disclosures include a description of policies and processes. In other words, reporting on human rights impacts can contribute to legal and non-legal accountability by providing shareholders and other stakeholders with formal acknowledgement by the company of its human rights risks, policies, and processes.[122] In terms of enhancing legal accountability, HRDD laws play a crucial role by expressly placing a legal duty on businesses to prevent, mitigate, and remediate human rights impacts. Various enforcement and liability measures reinforce these duties. As for disclosures, information disclosed

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118 Equality and Human Rights Commission, Submission to the Joint Human Rights Committee of the U.K. Houses of Parliament, reported that in their consultations with businesses on the transparency in supply chains clause "businesses told [them] that the Modern Slavery Act had prompted their boards to discuss human rights issues." WRITTEN EVIDENCE FROM THE EQUALITY AND HUMAN RIGHTS COMMISSION, HRB 0030 ¶ 7.1 (July 2016), https://perma.cc/K72T-VWW7.

119 CHARLOTTE VILLIERS, CORPORATE REPORTING AND COMPANY LAW 51 (2006).

120 Eccles & Serafeim, *supra* note 12, at 3. For a discussion of how social disclosure can catalyze internally driven changes in corporate behavior, see Park, *supra* note 50. For an analysis of the shortcomings of the EU NFRD on affecting organizational change, see Buhmann, *supra* note 12, at 36–39.

121 CORE COAL, *supra* note 5, at 6–7.

122 *See generally* Written Evidence Submitted From CORE, *supra* note 92, ¶ 6.

in human rights reports can be relied on as evidence in litigation brought against parent or lead companies by individuals harmed at subsidiary and supplier sites[123] or by consumers misled by the company's disclosures.[124] Most recently, corporate-sustainability reports have been relied on by the plaintiffs in *Lungowe v. Vedanta* in England and *Jabir v. KiK* in Germany to demonstrate the existence of a prima facie duty of care assumed by the parent or the lead company toward the communities or workers harmed by the subsidiary or supplier's activities.[125]

On the non-legal accountability side, the approach of a company to its HRDD and reporting can inform stakeholder decisions in relation to the company, including investment decisions, purchasing decisions of consumers and customers, and employment decisions.[126] It is expected that the stakeholders informed by the human rights disclosures will put pressure on businesses to improve their policies and practices. External agencies, such as international finance institutions or government agencies, may scrutinize these reports if they require evidence that companies have identified and managed human rights risks as a condition of providing support to them. Such support could be the provision of export credit, the granting of a procurement contract, or the loan of finance.[127] CSOs have made use of the information in various ways that help the public and policymakers see the shortcomings of the legislation but also highlight the contrasts between a company's statements on human rights and its actual performance. The value of these developments should not be overstated, however. The next Section discusses the inadequacies of the existing legal frameworks for improving corporate accountability for adverse human rights impacts.

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123 For more on this, see 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 (2016).

124 *Id.*

125 *See* Vedanta Resources v. Lungowe [2019] UKSC 20 (appeal taken from Eng.); Sheldon Leader et al., LEGAL OPINION ON ENGLISH COMMON LAW PRINCIPLES ON TORT - JABIR AND OTHERS V KIK TEXTILIEN UND NON-FOOD GMBH (Dec. 7, 2015).

126 Choudhury, *supra* note 31, at 207; *see* SHIFT & MAZARS LLP, *supra* note 44.

127 *See* SHIFT & MAZARS LLP, *supra* note 44. In the U.K., the MSA and other relevant legislation do not require public procurement processes to consider company reports under the MSA, § 54. It has been recommended by an independent review that the U.K. Government introduce standards to exclude non-compliant companies from eligibility for public contracts. INDEPENDENT REVIEW OF THE MODERN SLAVERY ACT 2015, *supra* note 93, ¶ 2.6.4.

V. Weaknesses and Pitfalls of this Mode of Market-led Accountability

A. Overview

Our analysis of the existing disclosure and HRDD laws in Section III demonstrates that, despite the variation in the obligations imposed, they rely predominantly or exclusively on the "market" to exercise checks and hold businesses accountable for human rights impacts.[128] This is not unusual as, at least for corporate disclosures, the main objective is to empower market actors with information. But when the disclosure rules themselves are not designed effectively, the empowerment and accountability functions are hindered by businesses' lack of disclosure, inadequate disclosures, and misleading disclosures. While HRDD laws represent a crucial step for improving corporate accountability by imposing substantive obligations on businesses to identify, prevent, mitigate, and remediate human rights impacts and to communicate these steps, they still heavily rely on initiatives from stakeholders for oversight and enforcement. Communication of the HRDD processes and outcomes to stakeholders via corporate disclosures is a key tool for those stakeholders to understand and react to the human rights performance of businesses. To effectively and meaningfully exercise this role, stakeholders need the support of regulatory tools to ensure completeness and accuracy of HRDD disclosures.

Studies have shown that disclosure laws have had very limited success in improving human rights conditions for affected groups and improving accountability for impacts.[129] This is unsurprising if these laws fail to elevate human rights and environmental impact considerations on the priorities list of the corporate world driven primarily by increasing profits.[130] We argue here that to improve the accountability function of HRDD and reporting obligations, two main weaknesses in the current rules need to be overcome. The first one relates to the content of the reports and the information that should be or is disclosed under the relevant legislation. According to benchmarking reports analyzing these disclosures, the content of the disclosures remains largely limited to disclosure of

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128 *See, e.g.*, HOME OFFICE, MODERN SLAVERY AND SUPPLY CHAINS CONSULTATION 1, 8, 13 (2015) ("We believe that once it is made clear what activity major businesses are undertaking to ensure slavery and human trafficking is not taking place in their supply chains or own business, pressure from consumers, shareholders and campaigners and competition between businesses will encourage those who have not taken effective steps to do so." The document continues, "[i]nstead of relying on heavy-handed regulation, this measure will encourage businesses to do the right thing, by harnessing consumer and other stakeholder pressure, which will encourage and influence businesses to do more.").

129 *See* Rao & Bernaz, *supra* note 41; FOCUS ON LABOR EXPLOITATION (FLEX), SEEING THROUGH TRANSPARENCY: MAKING CORPORATE ACCOUNTABILITY WORK FOR WORKERS (2018).

130 Bartley, *supra* note 15, at 49, n.56.

information on commitments and policies rather than disclosing concrete risks to workers and communities and also the substantive steps taken to address them.[131] This is particularly problematic when the reporting requirements are not accompanied by a due diligence obligation. We join scholars who have argued that the lack of a due diligence obligation preceding the disclosure places serious limitations on the law's promise to increase corporate accountability and contribute to eradicating human rights abuses.[132] Most disclosures have been largely limited to descriptions of the company's commitments and processes in addressing human rights and modern slavery issues in their supply chains.[133] Little space, if any, is dedicated to issues of substance, such as the specific risks to employees and communities identified within the company's own business and its supply chain, as well as references to the concrete steps they have taken to eliminate those risks and remediate the grievances.[134] More advanced reports typically present case studies, the company's declared approach and commitment to tackling modern slavery or human rights issues, expectations from its suppliers, links to a list of first tier suppliers, identification of the most salient risks, and the plans, policies, programs, and procedures it has established to assess and address the risks.[135] The pattern of focus on procedures and policies resembles the audit and certification processes that are widely employed by lead firms to regulate labor, human rights, and environmental performance in their supply chains and which typically focus on process rather than substance.[136] Since audits and certification processes have so far been the central tool used to deal with human rights impacts in supply chains, it is unsurprising that most disclosures are limited to process as well.

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131 *See, e.g.*, Michelle Langlois, *Human Rights Reporting: Are Companies Telling Investors What They Need to Know?*, SHIFT (May 2017), https://perma.cc/DEY5-GC4R.

132 Justine Nolan & Gregory Bott, *Global Supply Chains and Human Rights: Spotlight on Forced Labor and Modern Slavery Practices*, 24 AUSTL. J. HUM. RTS. 44, 56 (2018); *see also* Nolan, *supra* note 5; GENEVIEVE LEBARON & ELLIE GORE, POLICY BRIEF #1: KEY FINDINGS AND RECOMMENDATIONS FOR UK POLICYMAKERS 4–5 (2018).

133 An Ergon Associates study found that "most statements do not go further than general commitments and broad indications of processes." *See* ERGON, REPORTING ON MODERN SLAVERY: THE CURRENT STATE OF DISCLOSURE—MAY 2016 1 (2016); ERGON, MODERN SLAVERY REPORTING: IS THERE EVIDENCE OF PROGRESS? (2018). LeBaron and Rühmkorf's study shows that companies reporting on bribery under the U.K. Bribery Act are using much more firm and clear language, while modern slavery reporting uses a weaker and aspirational language. LeBaron & Rühmkorf, *supra* note 5, at 25; *see also* Langlois, *supra* note 131; CORE COAL., *supra* note 5, at 6.

134 ALLIANCE FOR CORPORATE TRANSPARENCY, 2018 RESEARCH REPORT 24 (2018).

135 *See, e.g.*, MARKS & SPENCER GROUP LLP, MODERN SLAVERY STATEMENT 2017/18 (May 2018).

136 BARTLEY, *supra* note 15, at 55. For a discussion of the duty of care of social auditors, see Tara Van Ho & Carolijn Terwindt, *Assessing the Duty of Care for Social Auditors*, 27 EUR. REV. PRIV. L. 379, 379–401 (2019).

The content of human rights disclosures can be strengthened by including a HRDD obligation. As the HRDD framework proposed by the UNGPs clarifies, the process should focus on the risks to the rights holders rather than focusing on the risks to the business itself. The focus of the reports attached to the HRDD processes should contain rights-holder oriented communication. But as we discuss in the following sections of this Article, an HRDD obligation alone may not enhance the usefulness of disclosures in terms of accountability. The analyses of initial disclosures under the French Law on the Corporate Duty of Vigilance demonstrate that, despite the improvements in disclosures, reporting remains relatively immature.[137] For those companies that have complied with the reporting requirement, disclosures of policies and processes remains the key message. The implementation of § 1502 of the Dodd-Frank Act also suggests that even with a due diligence requirement, more is needed to make these laws effective in achieving their aims.[138] Many HRDD disclosures focus on commitments and processes in the abstract, which fails to provide the kind of meaningful information that stakeholders may rely on in making investment, purchasing, and campaigning decisions about a particular company. This type of disclosure can also easily transform into a publicity tool, painting a misleading picture of a company's human rights performance.[139] More dangerously, it can mask and legitimize serious abuses, especially when they report successes based on audits and certification.[140]

This takes us to the second weakness in these laws, which is our focus in the rest of this Article. The lack or inadequacy of mechanisms for formal oversight and enforcement renders the role of the stakeholders, as guardians of accountability, extremely challenging and thus undermines the accountability objectives of these laws. It is hoped that the market forces alone will assume the oversight function and produce the desired accountability outcomes without having the support of appropriate regulatory tools in exercising this function. We

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137 SHIFT, HUMAN RIGHTS REPORTING IN FRANCE: A BASELINE FOR ASSESSING THE IMPACT OF THE DUTY OF VIGILANCE LAW 44–45 (2018).

138 Galit A. Sarfaty, *Shining a Light on Global Supply Chains*, 56 HARV. INT'L L.J. 419, 431 (2015). In this study Sarfaty finds that only about seven percent of companies report strong due diligence measures in their 2014 reports prepared in order to comply with the regulation.

139 *See* ALLIANCE FOR CORPORATE TRANSPARENCY, 2019 RESEARCH REPORT 90 (2019). An analysis of the sustainability reports of 1,000 companies pursuant to the E.U. NFRD Study found that "general human rights reporting requirements are not an effective tool to ensure the disclosure of information that can help to assess a company's management of individual risks of human rights impacts, and by extension of whether its business conduct is responsible." *Id.*

140 Genevieve LeBaron & Jane Lister, *Benchmarking Global Supply Chains: The Power of the 'Ethical Audit' Regime*, 41 REV. INT'L STUD. 905, 906–07 (2015); GENEVIEVE LEBARON, THE GLOBAL BUSINESS OF FORCED LABOR: REPORT OF FINDINGS 3 (2018) ("[C]ertification had little to no impact on labor standards within the tea industry . . . [and] [s]ome of the worst cases of exploitation documented within [their] research occurred on ethically certified plantations.").

argue here that even if the first weakness is overcome—as it has been in the French law—without a formal verification, oversight, and enforcement process, the utility of the disclosures to empower stakeholders to pressure for change will be undermined. This results from: (1) the reliability of the disclosed information remaining questionable; (2) stakeholders being left to search for a needle in a haystack in the absence of formal lists of covered businesses and central public repositories for reports; and (3) even where the inadequacy and the accuracy of disclosures are well established, the lack of enforcement measures and sanctions that can be triggered by stakeholders will weaken their leverage. The flaws of content and oversight are closely linked, and for mandated disclosure to contribute meaningfully to corporate accountability for adverse human rights impacts, both must be addressed by the policy and law makers. In the remaining sections of this Article, we engage in an in-depth discussion of oversight and enforcement issues.

B. Market Oversight

Even when companies do fulfill their obligation to report on issues of human rights and modern slavery, doubts remain as to the effectiveness of these reports from an accountability point of view. Early empirical research indicates that the legally mandated human rights and modern slavery disclosures are "quite limited"[141] and "more symbolic than substantive."[142] Some companies even appear to copy each other's explanations of their due diligence processes.[143] These practices of failing to comply or selective disclosures have reportedly been unwelcome by certain businesses that want to see serious monitoring and enforcement so as to level the playing field.[144] The Ethical Trading Initiative, in a submission to the U.K. Houses of Parliament Public Accounts Committee, reported that a large majority of companies they have engaged with stated that it is important for the Government to monitor compliance with section 54 of the

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141 Rachel N. Birkey et al., *Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010*, 152 J. BUS. ETHICS 827, 837 (2018).

142 *Id.*

143 Steve Gibbons, *What are Construction and Building Companies Reporting Under the Modern Slavery Act?*, LINKEDIN (Feb. 22 2017), https://perma.cc/33W6-WSY6; *see also* Hess, *supra* note 50, at 53 (examining human rights reporting and concluding that reports are "unbalanced, incomprehensive, and inconsistent" and that reporting under CTSA and MSA "face[s] similar challenges").

144 FLEX, *supra* note 129, at 20–22 ("One FLEX interview participant who is in favor of stronger enforcement of the Act, said that he was concerned that penalties in isolation could result in transparency reporting being a tick box exercise for many companies. He suggested that a penalty for non-compliance should only be introduced in combination with expectations or requirements on the content of statements as many statements otherwise are unlikely to provide meaningful information.").

Modern Slavery Act and that the Act could not be effective without such monitoring.[145]

We saw in Section III above that the reporting and HRDD laws analyzed in this Article take varying approaches to the regulation of oversight and enforcement. The common rationale behind each law is to empower key stakeholders, such as investors, consumers, and civil society, with information that will enable them to bring human rights standards to bear on corporate misconduct. In this respect, these stakeholders can play a crucial role of oversight and enforcement by making effective use of the information disclosed through these reports. In other words, the stakeholders will take notice of businesses that fail to report, or report inadequately, and will penalize them by not purchasing products, divesting or not investing, or by running campaigns to raise awareness about the businesses' failure.[146] These market interventions can, in their most legalized form, include consumer suits for misleading disclosures or advertising. The thinking is that these market pressures will result in companies improving their practices and processes on human rights and modern slavery risks in their supply chains.

There are a few overly optimistic assumptions here and this approach has been challenged already from several angles, particularly with respect to the scale of the desired transformative impact of human rights reports on consumer behavior.[147] Marcia Narine argues that company human rights disclosures, including on modern slavery, are not always widely disseminated or known and that stakeholders who do know about them do not use the information they contain adequately to press for corporate reform.[148] She concludes that evidence of consumer behavior changing as a result of such disclosure is "inconsistent, at best."[149] Narine's reasoning would also apply to HRDD related disclosures. Her viewpoint aligns with a study of human rights disclosure conducted by Adam Chilton and Galit Sarfaty, which found that consumers perceived non-compliant or inadequate supply chain disclosures in the same way as they did detailed disclosures showing a high level of due diligence.[150] Their study suggests that

145 Cindy Berman, *Written Evidence From the Ethical Trading Initiative* (2018), https://perma.cc/75GR-GQKJ.

146 *Responding to Modern Slavery – New UK Benchmarking Report*, *supra* note 36.

147 *See* Marcia Narine, *Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV. 84 (2015); Chilton & Sarfaty, *supra* note 14.

148 *See* Narine, *supra* note 147.

149 *Id.* at 137.

150 Chilton & Sarfaty, *supra* note 14, at 6.

"supply chain disclosures are unlikely to be understood and used by consumers making purchasing decisions."[151]

It is important to acknowledge the limitations of the impact HRDD and disclosure will have on the transformation of corporate behavior if they heavily or solely rely on a market-based enforcement model. Consumer and investor perceptions might change the longer these rules are in force, or as the ability of CSOs to raise public awareness of HRDD and reports increases, thus elevating their impact.[152] But we advance two arguments as to why this will not overcome the limitations of the impact HRDD and disclosure laws can have on improving business behavior. First, the passage of time alone will not overcome the weaknesses relating to the content of the reports discussed in the previous Section. Second, as we argue in this Article, improving content requirements alone will also not suffice to achieve the optimal accountability and transformation objectives envisaged by these disclosure laws. Chilton and Sarfaty identify the limitations of reliance on consumers as influencers in this area. They note that corporate disclosures are generally not sufficiently effective, but that they are less likely to produce meaningful outcomes in this particular area. This is because the information communicated to the consumer relates to processes used in the making of the product and not to its characteristics. They argue that consumers might not be willing to change their purchasing decisions based merely on process if all other qualities of the product are the same.[153] Their reasoning here would also apply to HRDD disclosures. The other obstacle they observe is the difficulty in interpreting the contents of the disclosure. For instance, MSA reports merely present the processes a company is using to try to tackle modern slavery in their supply chain, but do not report the incidences of modern slavery and how the company has responded to them. Also, companies will face different risks depending on variables like sector, business model, or location of sourcing. It is very unlikely that consumers will be able to interpret the contribution of these factors to eradicate modern slavery.

Another important reality to note is that even where awareness is high and there is a sustained reaction against a business because of its performance in this area, this can only cover businesses and brands that are consumer facing.[154] This leaves many large businesses operating in industries, such as mining, construction, shipping, or defense, outside one of the main radars of the transparency

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151 *Id.* Chilton and Sarfaty do note that the study had several limitations, like the fact that these reporting requirements are new.

152 Narine, *supra* note 147, at 40.

153 Chilton & Sarfaty, *supra* note 14, at 23; FLEX, *supra* note 129, at 20–21 ("[O]ne company representative [interviewed] suggested the idea that consumers are going to challenge companies for failure to comply with the Act or for publishing statements of poor quality is flawed, saying 'we're so far away from this being the reality.'").

154 Berman, *supra* note 145.

legislation. These businesses may still be on the CSO or investor radar, but it may be harder for CSOs to garner public interest to a campaign against a non-consumer facing company, and some investors might place less importance on reputational risk posed to a business that is non-consumer facing.

In view of these hurdles for consumers, it is more likely that the greatest pressure on businesses to improve their human rights performance will come from CSOs and investors rather than from consumers. Interested CSOs and investors scrutinize human rights and modern slavery disclosures actively.[155] CSOs publish their analyses of these reports, highlighting the levels of compliance as well as the weak and notable practices.[156] They also invite companies to respond to allegations of human rights abuses in their supply chains, informally or as part of a process established in law—such as the process available under the French Law on the Corporate Duty of Vigilance.[157] The information contained, or the lack of information, in a human rights or modern slavery statement can shine the spotlight on the policies and performance of the reporting companies. Similarly, investors can raise concerns and questions with businesses in which they are investing during annual meetings or directly with management.[158] Investors might also take into consideration the human rights record of a business or its efforts to eliminate modern slavery in its supply chain when making their investment or divestment decisions.[159] Both groups of stakeholders can also engage with policy makers to increase efforts to eliminate modern slavery, if they find the legislative framework inadequate. Recently, the CEO and two senior executives resigned from Rio Tinto after reported investor pressure prompted by the company's

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155 In fact, it has been observed that "due to insufficient regulation, a large burden lies with the international civil society which, in various ways, monitors the functionality of transnational corporations." Jernej Letnar Černič, *Moving Towards Protecting Human Rights in Global Business Supply Chains*, 36 B.U. INT'L L.J. 101, 109 (2018); *see also*, *Join the Alliance*, INVESTOR ALLIANCE FOR HUMAN RIGHTS: AN INITIATIVE OF ICCR, https://perma.cc/BMD5-6DJR.

156 *See, e.g.*, CORE ET AL., MODERN SLAVERY REPORTING: WEAK AND NOTABLE PRACTICE (2017); CORE COAL., *supra* note 5.

157 *See* Brabant & Savourey, *supra* note 61; Savourey, *supra* note 65; Cossart et al., *supra* note 66; CHLOE STEVENSON ET AL., THE LAW ON DUTY OF VIGILANCE OF PARENTS AND OUTSOURCING COMPANIES (Juliette Renauld et al. eds., 2019). NGOs make allegations to the company in the first instance and may elevate their concerns to the court if the company does not respond adequately.

158 *See* CORE ET AL., ENGAGING WITH COMPANIES ON MODERN SLAVERY – A BRIEFING FOR INVESTORS (2017).

159 For instance, investment fund BlackRock divested from Nevsun Resources Ltd. because of the allegations that the latter uses forced labor in its Eritrean mining operations, after receiving pressure from NGOs. *See Campaigners Welcome Blackrock's Divestment from Nevsun Following Campaign Over Alleged Use of Forced Labor in Eritrea*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, https://perma.cc/4PPX-APFQ.

decision to blow up a 46,000-year-old aboriginal site in Australia.[160] It is yet to be seen how far the company will go to affect structural change in preventing adverse human rights impacts caused by its business. While public relations scandals, such as this recent one involving Rio Tinto, can lead to short-term positive changes within certain parts of a company's business, it is important to continue keeping companies accountable beyond large scandals to trigger structural improvements.[161] Regulatory oversight and enforcement of disclosures and HRDD are among the essential ingredients of such a structural change.

The amount, accuracy, and type of information presented in the reports or, in many cases, the lack of reporting, place a substantial limit on the contribution of investors and CSOs to improving corporate accountability in this area.[162] Businesses are required to disclose very little to comply with the reporting requirements, and under some of the laws, this includes the option of disclosing lack of action in this area. The disclosures, even the most detailed ones available, mainly focus on process and contain little information on concrete problems. It is difficult for an investor or a CSO to extract actionable information from these disclosures on a company's actual human rights performance. These factors significantly limit these stakeholders' ability to use the disclosures to hold businesses accountable for human rights violations in their supply chains. With only a very small number of CSOs monitoring the legislation, it is unreasonable for policy makers to expect civil society actors with limited resources to drive the push toward business compliance with the transparency laws without any serious regulatory support.[163]

One of the only means of private legal action challenging the accuracy of human rights disclosure is consumer litigation. When activist consumers sue companies, this has the potential to send a powerful message.[164] The cause of action could be a suit under consumer protection law or some other statutory prohibition on misrepresentation, unfair competition, or false advertising, thereby challenging the accuracy or adequacy of the disclosure and arguing that consumers

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160 *See* Ben Butler, Lorena Allam & Calla Wahlquist, *Rio Tinto CEO and Senior Executives Resign From Company After Juukan Gorge Debacle*, THE GUARDIAN (Sept. 11, 2020), https://perma.cc/X8UD-EQRG.

161 For an analysis of how corporations can act as crucial actors for advancement and enforcement of international human rights standards even in the absence of home or host state willingness to do so and the limitations of this approach, see Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT'L L. 189–220 (2020).

162 *See* ALLIANCE FOR CORPORATE TRANSPARENCY, *supra* note 134.

163 Berman, *supra* note 145.

164 Ryan J. Turner, *Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier*, 17 MELB. J. INT'L L. 188, 197 (2016).

were ill informed or misled when purchasing products, causing them harm.[165] The disclosure that is challenged through this litigation has in some instances been made pursuant to one of the laws discussed in this Article, but many of these cases concern product information from labels or other product literature.[166] On the whole, the impact of these lawsuits has been quite limited so far. A series of cases brought against companies in California alleging inadequate and/or misleading disclosure of documented modern slavery in their supply chains were rejected by the courts.[167] There is a concern that, even if these cases were successful, companies would make changes to their labels and product literature, rather than seek to improve conditions for workers in their supply chains.[168] Damages are complicated to calculate in this type of case because it is hard to value the loss to the plaintiffs, when the harm they have suffered is that they would not have bought the products if they had known about the use of child and forced labor in the supply chain. The lack of success in claims to date has not prevented new

165 For a full list of cases, see note 167. There have been similar cases outside the U.S. In Germany, a successful complaint was filed against German retailer Lidl in 2010 for false advertising and unfair competition arising from the retailer's claims of fair working conditions in its supply chain. Following the complaint, Lidl agreed to retract the claims made in its marketing material on working conditions in its supply chain. Although this was a successful outcome of the litigation, and it had an impact on the company's public statements on these issues, it is not possible to determine whether it had any substantive impact on the company's sourcing policies or practices. *See Complaint re Fair Working Conditions in Bangladesh: Lidl Forced to Back Down*, ECCHR, https://perma.cc/RX3G-VPUZ. This complaint did not relate to disclosure made under modern slavery legislation but rather to statements on its supply chain that the company made voluntarily.

166 One of the early cases in this line, *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), concerned representations that Nike had made about working conditions in its supply chain. A settlement was agreed for $1.5 million and involved investments by Nike to strengthen workplace monitoring and factory worker programs.

167 *See* Sud v. Costco Wholesale Corp., No. 15-CV-03783-JSW, 2016 U.S. Dist. LEXIS 5524 (N.D. Cal. Jan. 15, 2016) (dismissing case for lack of standing); Barber v. Nestle, 154 F. Supp. 3d 954 (9th Cir. 2018) (dismissing plaintiffs' false advertising and unfair competition claims on the grounds that the CTSCA creates a safe harbor from liability by defining what a company is required to disclose regarding the use of forced labor in its supply chain, and dismissing plaintiffs' misrepresentation claim, finding that the statements about supplier adherence to law and industry standards were "aspirational"); Hodsdon v. Mars, Inc., 891 F.3d 857 (9th Cir. 2018) (dismissing the case and finding that Mars does not have a duty to disclose forced labor in its supply chain because it is not a physical defect that affects the central function of the chocolate products); *see also* Tomasella v. Nestlé USA, Inc., 962 F.3d 60 (1st Cir. 2020); Tomasella v. Nestlé USA, Inc., 364 F. Supp. 3d 26 (D. Mass. 2019), aff'd, 962 F.3d 60 (1st Cir. 2020); Tomasella v. Hershey Co., No. 18-CV-10360-ADB, 2019 U.S. Dist. LEXIS 14488 (D. Mass. Jan. 30, 2019) (dismissing the case because the consumers' claims were not actionable under Massachusetts law and they failed to show that the companies deceived them).

168 *See Complaint re Fair Working Conditions in Bangladesh: Lidl Forced to Back Down*, *supra* note 165. The consumer complaint against the retailer Lidl regarding its advertising campaign claiming fair working conditions in its supply chain led to the company withdrawing the advertisements, rather than the company being compelled to take steps to ensure fair working conditions.

cases being brought, however.[169] Thus, consumer litigation has the potential to provide enforcement of reporting accuracy and adequacy but in an ancillary role compared to other types of enforcement.

VI. The Importance of Regulatory Oversight and the Institutional Options

We argue in this Article that to achieve their stated accountability goals, human rights due diligence and disclosure requirements should be accompanied by rules establishing: (1) a formal list of businesses covered by the requirements and a publicly accessible repository for storing annual disclosures; (2) an institutional structure to exercise oversight; and (3) enforcement functions. The institutional structure should have subject matter expertise, in order to provide training and guidelines to ensure accuracy and completeness of disclosures.[170] Without these features accompanying the disclosure requirements, stakeholders' ability to make effective use of the information disclosed becomes significantly diminished. The presence of an oversight body with the powers to check accuracy and completeness and impose sanctions for misleading and incomplete disclosures will allow the stakeholders targeted by the transparency rules to exercise their leverage more systematically and effectively.

Admittedly, it may be a huge task for a regulatory body to scrutinize all submitted reports, especially as the number of covered companies grows, but the body could routinely review a random sample each financial year and be prompted by investors, consumers, and civil society to carry out additional reviews or investigations. Stakeholders should have standing to initiate complaints regarding suspected discrepancies and inaccuracies in reports to an expert body, equipped with legal authority and sufficient resources, that can investigate the accuracy or adequacy of the information; if needed, compel the business to correct and complement the disclosure; and impose penalties for failure to comply. In this approach, stakeholders—equipped with and empowered by the regulatory tools and the institutional infrastructure to exercise their watchdog role more effectively—continue to play a key role in holding businesses accountable. This

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169 Walker v. Nestle USA, Inc., No. 3:19-CV-723-L-BGS, 2020 U.S. Dist. LEXIS 106858 (S.D. Cal. June 17, 2020); Myers v. Starbucks Corp., 5:20-CV-00335-CBM-SHK (C.D. Cal. Feb. 19, 2020). Both cases allege affirmative misrepresentation by the defendant companies in relation to statements made on product labels and literature that cocoa is "sustainably sourced," "certified," and "supports" or "helps" farmers. They rely on allegations of child and forced labor in the cocoa farms and of environmental destruction, as part of clearing the land for farms, to evidence that these statements are misrepresentations.

170 We are not alone in concluding that verification and oversight are needed. Doorey, for instance, in an article on using domestic disclosure to influence foreign labor practices, argues that the information needs to be verified by the state (and/or a credible outside auditor). *See* Doorey, *supra* note 30.

way, the role of oversight is not entirely or largely left to the voluntary efforts of investors and CSOs whose abilities to push for compliance can be limited by several factors, such as scarce financial and human resources, lack of authority to compel further disclosures, and inability to impose financial penalties. At the same time, the oversight role would not be left exclusively to the regulatory authorities. Stakeholders would continue to play a crucial role in the accountability framework from a strengthened position both by having access to a centralized list and a repository and, more importantly, by having standing to bring complaints before a body with powers to investigate and impose penalties.

A. Key Functions of Meaningful Regulatory Oversight

Among the HRDD and transparency laws discussed in this Article, the regulatory oversight feature remains either inadequate or non-existent. Even the French Law on the Corporate Duty of Vigilance—with its advanced accountability features providing legal standing for civil society before courts to bring actions to enforce the duty to publish an adequate vigilance plan—lacks a regulatory body to exercise oversight over the law's implementation and to hold a central list and repository, thus leaving the challenging and resource-intensive monitoring function almost exclusively to stakeholders. Taking stock of the initial experiences with the transparency laws discussed in the earlier sections of this Article and most recently with the French Law on the Corporate Duty of Vigilance, we argue that all of the elements elaborated below are needed to achieve greater level of accountability via transparency and HRDD laws.

1. List and Repository

CSOs have expressed concern about the lack of information regarding companies covered by various HRDD and reporting laws currently in force.[171] It is often left to their investigative skills to identify which companies may be covered by disclosure requirements and confirm whether covered companies have published disclosures. Having an annually-updated, formal list of companies covered by human rights disclosure requirements provides the stakeholders and the regulator with an essential tool for identifying which companies have complied with the most basic obligation under these laws. A central repository accessible by the public to store annual disclosures will allow stakeholders more efficient access both to the most recent reports and all the other years since the introduction of the relevant laws.

As discussed in Section III, some disclosure laws already provide for a list and/or a repository, such as the Australian MSA. For the disclosure laws that fail to provide for the establishment of a formal list and a central repository for

171 *See, e.g.*, Savourey, *supra* note 65.

reports, there have been calls for governments to introduce these safeguards (for example, the U.K. MSA) to improve the effectiveness of these laws.[172] In agreement with these calls, we argue that the establishment of a formal list and a repository to be an essential ingredient for improving the accountability mission of HRDD and disclosure laws.

2. Monitoring Function and the Content of Reports

The added value brought by having a regulator with monitoring responsibility is in ensuring submissions are made in a timely fashion and in exercising checks on the content of an appropriate size sample each year. These sample checks can ensure coverage of all required elements and accuracy disclosures. As we discussed above in Section V, the existing HRDD and disclosure laws rely primarily on stakeholders to monitor business performance and compliance with the applicable law's requirements. Even the most evolved statutory regime, the French Law on Corporate Duty of Vigilance, does not establish regulatory oversight and relies on stakeholders to monitor whether covered businesses have developed and published an adequate vigilance plan. The enforcement and sanctions mechanisms of the French law (discussed in Section III) depend solely on the stakeholders identifying the lack of compliance with the law or the misleading statements within published plans and triggering the relevant court processes stipulated in the law. We will return to the subject of stakeholders raising complaints as a trigger for regulator action below, but first we address the primary source of monitoring currently in place in this legislative field, namely the monitoring of non-financial disclosure.[173] Auditors usually monitor non-financial disclosure, as the complement to financial disclosure, in the first instance, with financial regulators holding a further oversight function. The level of monitoring provided by the financial regulator varies from state to state.

In some countries, limited oversight of human rights disclosures is exercised by accounting or securities regulators such as the U.K. Financial Reporting Council (FRC) and the U.S. SEC. For instance, the SEC enforces liability for any false or misleading statements under Dodd Frank § 1502. The Trump Administration opposed § 1502 and made a proposal to repeal it.[174] Verification and enforcement were stepped down.[175] Whether coincidentally or as a result of these developments, there is very little verification and enforcement of this law

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172 Independent Review of the Modern Slavery Act 2015, *supra* note 93.

173 The other potential source of monitoring under existing legal regimes is the US securities regulator, the SEC. In theory at least, the SEC enforces liability for any false or misleading statements under Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, § 1502, 111 P.L. 203, 124 Stat. 1376 (2010).

174 Ed Pilkington, *Proposed Trump Executive Order Would Allow US Firms to Sell 'Conflict Minerals'*, THE GUARDIAN (Feb. 8, 2017), https://perma.cc/CF63-C6YL.

175 RESPONSIBLE SOURCING NETWORK, *supra* note 101, at 4, 9.

that has occurred in practice. The appropriateness of the SEC as a regulator on corporate social impacts is debated.[176] The current civil society effort in the U.S. to push for a new corporate transparency law on social and environmental impacts is focused on publicly listed companies—its press statement arguing that "the SEC is the right agency, given its expertise in corporate disclosures, and broad mandate to protect investors and the public interest."[177] On the other hand, the ability of the SEC to be a "humanitarian watchdog" has been questioned, due to the organization's lack of specialist knowledge.[178]

The E.U. NFRD, which has been transposed into the law of E.U. Member States, provides a sample of instances on the monitoring of human rights disclosures. Eight states require that disclosure under the NFRD forms part of the company's management report.[179] The allocation of the human rights report within the management report allows for a basic level of auditor scrutiny over the content of the report, as the E.U. Accounting Directive requires that an auditor check the entire management report to verify its consistency with the financial statements and its compliance with legal requirements and also to check for the presence of material misstatements.[180]

For a verification of a human rights report, there is not much to be gained by consistency checks with financial statements. Compliance with legal requirements is also easily verifiable as the legal requirements for human rights reporting are minimal and relatively vague. Only the checks for material misstatements could prove useful in the human rights reporting context, but such checks will require expertise and access to information that may exist either within the company as well as beyond the company, and often beyond the country. Four states require verification of information beyond checks for consistency with the management report.[181] In Denmark, for instance, the implementing legislation envisages a regulatory review of ten to twenty percent of listed companies that are selected for full scope enforcement each year, checking presence and content of

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176 *See generally* Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1325 (2012).

177 International Corporate Accountability Roundtable, Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019 2 (June 10, 2019). On the SEC as a regulatory of human rights issues, see Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97 (2013).

178 *See* Woody *supra* note 176.

179 GLOBAL REPORTING INITIATIVE, *supra* note 56, at 16, 17, 19, 24, 26, 27, 30, 31. (Belgium, Bulgaria, Denmark, Latvia, Netherlands, Romania, U.K., and Iceland).

180 Council Directive 2013/34/EU, 2013 O.J. (L 182) 19, art. 53 (mandating that Member States implement the new directive by July 20, 2015).

181 GLOBAL REPORTING INITIATIVE, *supra* note 56, at 19, 20, 23, 26 (Denmark, France, Italy, and the Netherlands).

statements.[182] The enforcement approach is based on the materiality of the disclosed information. Material misstatements may result in the imposition of fines in accordance with the Danish Financial Statements Act.[183]

The experience with the human rights transparency laws to date shows that the unique features of human rights reporting call for a *sui generis* approach to oversight and enforcement. As with financial reporting, the rules on the required information and the oversight and enforcement related to the completeness and accuracy of the content disclosed may be designed around the concept of "materiality," but the meaning of "materiality" in a human rights context is unclear in the existing reporting regulations.[184] Materiality has been viewed as a misleading concept in the human rights context, and instead the use of "salient risks" has been proposed by the UNGP Reporting Framework.[185] Companies are typically required to disclose material information in non-financial reports including human rights disclosures. The E.U. Accounting Directive, for instance, describes material information as "the status of information where its omission or misstatement could reasonably be expected to influence decisions that users make on the basis of the financial statements of the undertaking. The materiality of individual items shall be assessed in the context of other similar items."[186] For non-financial statements, the E.U. NFRD adds that the required disclosures shall contain information "to the extent necessary for an understanding of the . . . impact of [the company's] activity."[187] The NFRD recognizes that in determining materiality, the context in which the business is operating needs to be taken into account. Recital 8 of the Directive states that the information disclosed should cover "principal risks of severe impacts," which will be assessed by the scale and gravity of impact. One study points out that this standard introduces a different approach to materiality by focusing on the "scale and gravity of the materialization of the risk, rather than whether knowledge of a principal risk would influence readers'

182 *See generally* Forslag Til Lov om Ændring af Årsregnskabsloven og Forskellige Andre Love [Act Amending the Danish Financial Statements Act], LOV nr 738 af 01/06/2015 (2015); GLOBAL REPORTING INITIATIVE, *supra* note 56, at 19.

183 *See generally* Bekendtgørelse af Årsregnskabsloven [Danish Financial Statements Act] LBK nr 838 af 08/08/2019 (2019).

184 Note the difference here between due diligence and reporting obligations. The due diligence laws are not framed in terms of materiality, but for instance, the French Law requires companies to detect risks and prevent serious violations with respect to human rights (the threshold is "serious").

185 *See* SHIFT & MAZARS LLP, *supra* note 44.

186 Council Directive 2013/34/EU, 2013 O.J. (L 182) 19, art. 2(16).

187 Council Directive 2014/95/EU, 2014 O.J. (L. 330) 1, art. 1(1).

economic decisions."[188] The approach fleshed out in the Recital 8 does align with the conception of "salient risk" embedded in the Pillar Two of the UNGPs.[189]

In a shift away from the usual investor-risk rationale for non-financial reporting, UNGP Pillar Two focuses on risks to rights-holders, and the importance of taking into account the perspectives of those who may be directly affected by companies' actions. One study notes that this aspect of the "materiality" concept has not been reflected in the Member State implementing legislation covered in the study, however.[190] A guidance published by the U.K.'s FRC on the non-financial reporting, for instance, emphasizes materiality for investors, thus following the classic shareholder-centric understanding of materiality in the reporting context.[191] But such an understanding of materiality for human rights reports does not align with the understanding of risk under the UNGPs, which are instead centered around the affected individuals and communities. We argue here that human rights disclosure laws should impose mandatory minimum content, covering salient human rights risks posed to individuals and communities affected by the activity of the business and the steps taken to prevent, mitigate, and remediate impacts.[192]

In assessing the completeness of human rights disclosures, auditors and regulatory bodies will have to determine which human rights issues relating to a company's business can be categorized as salient. The size and geographical spread of a covered company's business is likely to render checking the completeness of the disclosure challenging due to external information covering each overseas or domestic subsidiary or supplier's human rights impact not being readily available to the external auditors and the regulatory bodies.[193] The distinction between this type of reporting and reporting on diversity and governance is apparent here: diversity and governance reports are more amenable to verification by domestic regulatory bodies because they are driven by quantitative data, meaning they are more easily fact checked. Local and international CSOs and inter-governmental bodies, such as the International Labor Organization, can play a supportive role here. They are aware of business-related human rights impacts on the ground, and their documentation of impacts

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188 CLAIRE JEFFREY ET AL., COMPARING THE IMPLEMENTATION OF THE EU NON-FINANCIAL REPORTING DIRECTIVE IN THE UK, GERMANY, FRANCE, AND ITALY 5 (2017).

189 SHIFT & MAZARS LLP, *supra* note 44, at 48–51 (explaining salient risk).

190 JEFFREY ET AL., *supra* note 188, at 4.

191 FINANCIAL REPORTING COUNCIL, GUIDANCE ON THE STRATEGIC REPORT (2018), https://perma.cc/5E4K-W338.

192 *See* SHIFT & MAZARS LLP, *supra* note 44, at 48–51 (explaining salience in this context).

193 There are also restrictions under international law on extraterritorial verification and enforcement. As Doorey reminds us, "Canada obviously cannot send inspectors to examine workplaces in Bangladesh to verify the accuracy of the information provided by MNCs." Doorey, *supra* note 30, at 385.

can at least help regulators raise red flags for problematic areas that may prompt a more detailed investigation. The dichotomy in approaches to human rights reporting identified in this Section highlights the need for a state-based approach to monitoring and enforcement for human rights disclosures that marries human rights with business and accounting expertise.

Civil society and investor groups can alert the regulators and other relevant authorities of suspected false or misleading statements or to omissions of salient risks from reports. The effectiveness of the existing procedures is variable. As noted above, the French Law on the Corporate Duty of Vigilance allows any person with legitimate interest to give official notice to the company to comply with the law. If the company does not comply within three months of the notice, a judge could oblige the company to publish a plan, under financial penalty if necessary. The judge would also rule on whether a vigilance plan is complete and appropriately fulfills the obligations described in the law. But much of the heavy work of identifying and locating vigilance plans and identifying and investigating their inadequacies falls to the civil society actors. Under the Dutch Child Labor Law, any stakeholder with concrete evidence that a company's goods or services were produced with child labor will be able to submit a complaint to that company. If the issue is not resolved, the stakeholder will be able to submit the complaint to a regulator. Once a complaint is filed, the regulator may issue a legally binding instruction ordering the company to conduct the required due diligence and make the appropriate declaration. Again, the process of monitoring is very much stakeholder led. Even without specific power contained within the disclosure law, a regulator can invite and welcome complaints from external parties such as CSOs, as the Attorney General of California has with respect to CTSCA. As discussed above in Section III, this has not proven an effective means of oversight and enforcement. Reports from external parties are also used as part of the operating procedure for regulators reviewing companies' non-financial reports, such as the FRC in the U.K., which accepts complaints and reviews reports on the basis of these.[194] The FRC's procedures are fairly limited in their effectiveness, however, as the discussion that follows in next Section illustrates.

194 FINANCIAL REPORTING COUNCIL, THE CONDUCT COMMITTEE: OPERATING PROCEDURES FOR REVIEWING CORPORATE REPORTING (2017). For information about making a complaint to the FRC or raising a whistleblowing concern, see *Whistleblowing*, FINANCIAL REPORTING COUNCIL https://perma.cc/Y2GF-WK9Q. The U.K. implemented the E.U. NFRD in the Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016, which added § 414CB to the Companies Act 2006. On March 11, 2019, the Business Secretary announced that the FRC will be abolished and replaced by a new regulator, the Audit, Reporting and Governance Authority. *Audit Regime in the UK to Be Transformed with New Regulator*, GOV.UK (Mar. 11, 2019), https://perma.cc/R8DG-8UBX.

3. Enforcement Function

The added value brought by having a regulator with enforcement responsibility is the investigation of instances of alleged noncompliance and the imposition of sanctions and penalties when noncompliance is found. On the other hand, sanctions for noncompliance are not the hallmark of transparency provisions but do feature in the two due diligence laws.[195] Although the French Law on the Corporate Duty of Vigilance is relatively new, the enforcement mechanism was triggered for the first time in 2019 and has now been used in five instances, with two cases so far having reached a court.[196] There is yet to be a substantive judgment on whether a company has breached its duty of vigilance, however, because the question of which court is competent is still being litigated; this nonetheless represents a significant departure from the status quo of minimal, if any, enforcement under the other laws discussed.[197]

Most transparency laws discussed in this Article lack an effective enforcement mechanism for noncompliance. Efforts have been made to seek sanctions for noncompliance with human rights reporting requirements placed on certain large or listed companies under U.K. law. In one instance, CSO ClientEarth referred mining company, Rio Tinto, to the relevant regulator, the FRC, for failing to report the reality of the company's environmental and social impacts.[198] The regulator found that Rio Tinto had failed to make material disclosures about serious environmental, employee, social, and community issues at a mine site in Indonesia.[199] Following this finding, Rio Tinto's directors included more information, as advised by the FRC, in their report and accounts for the following year, and the regulator closed its inquiry. No other sanction was

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195 Loi 2017-399 du 27 Mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses D'Ordre (1) [LAW No. 2017-399 of March 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies] Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 28, 2017; Child Labor Duty of Care Act, Stb. 2019, 401.

196 The two cases are against oil company Total. *See Total Lawsuit (re Failure to Respect French Duty of Vigilance Law in Operations in Uganda)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, https://perma.cc/2XFJ-L2ZG.

197 *Id.*

198 The complaint concerned, in particular, the group's non-managed Grasberg mine in Indonesia. The Norwegian Sovereign Wealth Fund had divested from Rio Tinto on account of "severe environmental damage" at Grasberg. The mine had been subject to bombings and other attacks from local resistance groups, and the mine operators continued to pay for mine security provided by the Indonesian military, despite the military's history of human rights violations in Papua New Guinea. *See* CLIENTEARTH, REFERRAL TO THE FINANCIAL REPORTING REVIEW PANEL, RE: THE RIO TINTO GROUP ANNUAL REPORT 2008 (2010); *see also* Charlotte Villiers, *Narrative Reporting and Shareholder Value*, *in* DIRECTORS' DUTIES AND SHAREHOLDER LITIGATION IN THE WAKE OF THE FINANCIAL CRISIS 120–126 (Joan Loughrey ed., 2012).

199 CLIENTEARTH, *supra* note 198.

applied.[200] There is power under the Companies Act 2006 for the regulator to apply to court for a declaration that the annual reports of a company do not comply with the relevant requirements and for an order requiring directors of the company to prepare revised accounts. However, this power has never been used.[201] This case is illustrative of the role adopted by regulators thus far with respect to human rights reporting: accepting complaints, reviewing reports, but using sanctions as very much a last resort. To avoid situations of ineffective enforcement, we envisage the introduction of sanctions and penalties prescribed by the transparency or HRDD regulations that have to be imposed by the regulator in accordance with established law and not on a discretionary basis. A further added value of having a regulator with the power to impose sanctions and penalties for noncompliance is the possibility of channeling financial penalties applied to a fund that can be used as a contribution to reparations to individuals or communities affected adversely by the acts and omissions of the penalized corporation.[202]

B. Institutional Options and Subject Matter Expertise

With political will and support, a regulator can be empowered and resourced to acquire subject matter expertise on human rights and also business and accounting. A regulator staffed with appropriate experts and supported by sufficient resources would develop greater expertise over time to establish indicators on human rights risks on a sectoral and geographical basis. This knowledge would enable the regulator to evaluate corporate disclosure and due diligence to determine whether it reflects the salient risks to human rights from the company's operations.[203] In this respect, the regulatory body is not expected to penalize companies for human rights violations in their supply chains directly. Rather, it would focus on the company's compliance with the HRDD and disclosure standards. The regulator would not evaluate the substance of a human rights claim against the company, nor apply international human rights standards to determine a violation of such standards. For instance, the regulator would have

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200 Statement by the Financial Reporting Review Panel in Respect of the Report and Accounts of Rio Tinto Plc, FINANCIAL REPORTING COUNCIL (Mar. 15, 2011), https://perma.cc/VFE5-DP3Z.

201 Companies Act 2006, c. 46, § 456 (U.K.); FINANCIAL REPORTING COUNCIL, ANNUAL REVIEW OF CORPORATE REPORTING 2018/2019 6 (2019).

202 The fund envisaged here is different than the reparation orders made by U.K. courts under the MSA §§ 8–9. In a similar vein, in June 2018 the relevant U.K. authorities established the "General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases," a common framework set up "to identify cases where compensation is appropriate and act swiftly in those cases to return funds to the affected countries, companies or people." *See New Joint Principles Published to Compensate Victims of Economic Crime Overseas*, SERIOUS FRAUD OFFICE (June 1, 2018), https://perma.cc/BQ4X-Y5JD.

203 JOINT COMM. ON HUM. RTS., *supra* note 5.

the power to inspect whether a lead company has adequately disclosed the human rights risks that are present in its supplier factories and the HRDD steps it has taken to prevent, mitigate, and remediate any impacts. The regulator can sanction the lead company, if it is satisfied that either the disclosed information does not adequately capture the risks present and the steps taken or that the information is misleading or inaccurate.

In terms of understanding risk, the U.S. Department of Labor commissions an annual child labor report known as "Sweat and Toil."[204] These are detailed reports of instances of child labor around the world and the gravity of each case. This subject matter expertise, if held by regulators of corporate HRDD and disclosure, would serve to enhance the ability of stakeholders to verify the content of company reports and would also provide information for companies to consider when they assess human rights and modern slavery risks. An additional function of the regulator could be disseminating this information and developing guidelines for businesses and other stakeholders.

We see slow movement in this direction. For instance, proposals made so far to improve the MSA disclosures from an oversight perspective include provision for a government funded central repository for published statements;[205] for the government to publish a list of companies that must report under the Transparency in Supply Chains clause of the Act;[206] and for the establishment of an independent review of modern slavery statements made by companies.[207] The last of these is the crucial piece, according to our argument for regulatory oversight. Whether through an enhanced role for the Anti-Slavery Commissioner, or through the creation of the *sui generis* body we recommend, independent review is a necessary step toward the accountability goal of the legislation. As noted above, there is a proposal currently under consideration in France for additional state oversight for the Law on the Corporate Duty of Vigilance. Rather than taking the form of a regulator, this would entail designated individuals within the relevant ministry providing guidance to companies on implementation and checking on compliance.[208]

Commentary to the UNGPs Principle 3 acknowledges the role which can be played by national human rights institutions (NHRIs) "in helping states identify

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204 The series began as actual published reports in the 1990s and today is in mobile application form. *Sweat and Toil: Child Labor, Forced Labor, and Human Trafficking Around the World,* U.S. DEP'T OF LAB., https://perma.cc/967Y-TULN.

205 As noted above, a government funded central repository was set up by the Australian Act; it was also recommended by the U.K. Houses of Parliament Joint Committee on Human Rights in its 2017 report on the MSA. JOINT COMM. ON HUM. RTS., *supra* note 5.

206 FLEX, *supra* note 129, at 20.

207 JOINT COMM. ON HUM. RTS., *supra* note 5.

208 Duthilleul & de Jouvenel, *supra* note 71.

whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-state actors."[209] To move the business and human rights agenda forward meaningfully at the domestic level, there are multiple benefits to be gained from a specialized regulator in this area, as acknowledged in the UNGPs regarding the role that can be played by NHRIs for guidance and enforcement. While we do not envisage the role of the regulator proposed here to be carried out by a NHRI,[210] close cooperation between NHRIs and the regulator overseeing human rights reporting would be beneficial for the latter to establish and develop human rights expertise.

We recommend the establishment of a *sui generis* body, or a specialized department within an existing body, to tackle both corporate and human rights aspects of the reporting. This independent oversight mechanism should have responsibility for reviewing reports and providing feedback to a sample of companies on an annual basis, similar to the process established through the Danish implementation of the E.U. NFRD. We take the view that there should be provision for external parties to alert the oversight body, which can then investigate the accuracy or adequacy of the information, and, if needed, compel the company to correct and complement the disclosure. The oversight body should be able to impose meaningful penalties for failure to comply akin to those in the Dutch Child Labor Due Diligence Law. We stress the need for the oversight body to have specialist subject matter knowledge that goes beyond that of a corporate regulator to include the complexities of the human rights and modern slavery issues which are the subject of the reports. Such specialist knowledge could, for instance, come from the commission of "Sweat and Toil" type reports or from close cooperation with NHRIs. The oversight body should analyze trends in reporting and company practice, and also develop training and guidance in relation to human rights, modern slavery, cases of forced labor, and human trafficking, including their drivers and outcomes.[211]

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209 UNGPs, *supra* note 11, at 6.

210 Though this does not mean that NHRIs cannot be tasked with such a role. In the U.K., the Equality and Human Rights Commission oversees and enforces gender pay gap reporting regulations that place obligations on the public and private sector. *See* EQUALITY & HUM. RTS. COMM'N, CLOSING THE GENDER PAY GAP (2018).

211 The SEC Foreign Corrupt Practices Act Resource Guide is an example of the kind of guidance that can be offered to companies by a regulator. CRIM. DIV. OF U.S. DOJ & ENF'T DIV. OF U.S. SEC, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2020). The lack of equivalent state-sponsored guidance for the French Law on the Corporate Duty of Vigilance is conspicuous.

VII. CONCLUSION

We began this Article by acknowledging that HRDD and transparency can contribute to improving human rights and labor conditions in global production networks. But for due diligence and transparency to make a genuine contribution to improving corporate accountability and to avoid potentially masking and legitimating abuses, legislation should move away from heavily relying on a market-based model of accountability. Numerous studies and reports show that the existing frameworks have been inadequate. One obvious area of improvement concerns the content of the disclosures.

There have also been calls for more regulatory involvement and a move away from the market-led model of oversight, such as the establishment of a registry of MSA reports in the U.K., or the introduction of effective sanctions for noncompliance with the reporting standards. In this Article, we argued that state-based oversight and enforcement is an essential element for human rights reporting to be effective. Without this element, even where mandatory HRDD is introduced, there remain serious limitations on ensuring accuracy and completeness of reports.

Our contribution to this reform agenda is twofold. First, we argue that there is a need to support HRDD and transparency frameworks with a state-based oversight mechanism that can also be supported by stakeholders. Second, we emphasize that oversight for human rights reporting requires a fundamentally different approach to institutional expertise and to risks and materiality than financial or governance reporting. So far, oversight of a limited number of reporting frameworks were entrusted to bodies specializing in traditional corporate reporting without staffing these bodies adequately with human rights expertise. We urged policymakers to move away from this one-size-fits-all model and adopt a *sui generis* model of oversight marrying knowledge of corporate reporting with human rights expertise to verify and enforce human rights and modern slavery transparency regulations.