

Modern Slavery in Global Supply Chains: Towards a Legislative Solution

David Hess†

Modern slavery is a global problem. Over 25 million people are in forced labor, with many of those people directly or indirectly involved in the production of goods sold in the U.S. through multinational corporations' supply chains. Corporations benefit from modern slavery, and their business practices are often one of its root causes, which is why modern slavery persists despite a societal repulsion to the practice. To hold corporations accountable for their efforts to ensure they are not linked to modern slavery, governments, such as the state of California and the United Kingdom, have relied on mandatory disclosures requirements. This Article shows that such transparency initiatives are ineffective and, despite attempts to improve on their shortcomings, they will continue to be ineffective for achieving corporate accountability. This ineffectiveness results from corporations approaching transparency as an end in itself, with the production of disclosures being disconnected from operational changes. In addition, these disclosures rely heavily on social audits to demonstrate a company's due diligence efforts, but social audits have not proven to be a reliable way to monitor human rights related impacts in the supply chain. Instead, efforts towards a legislative solution must focus on mandatory human rights due diligence. Such an approach would be consistent with a developing trend in Europe. This Article advocates for the U.S. to move away from transparency-based regulation and towards mandatory human rights due diligence for regulating modern slavery in global supply chains.

Introduction	248
I. The Problem of Modern Slavery	251
A. Defining Modern Slavery	251
B. Risk Factors for Modern Slavery	253
C. Summary	256
II. Soft Law and Hard Law Responses	256
A. Soft Law: The Responsibility to Respect Human Rights .	258
B. Hard Law: Transparency-Based Regulation	260
III. The Impact of Transparency-Based Regulation	262
A. Disclosure Requirements	262
B. Evaluating the Effectiveness of the CTSCA and UKMSA.	266

† Professor of Business Law, University of Michigan. Early versions of this Article were presented at the annual meetings of the Global Business and Human Rights Scholars Association and the Academy of Legal Studies in Business. I also thank Justine Nolan and Rachel Chambers for their comments.

1. <i>Slavery and Human Trafficking Report Quality</i>	267
2. <i>Reliance on Social Audits</i>	269
3. <i>The Problem of Business Defining Compliance</i>	274
IV. Towards a Legislative Solution in the United States	276
A. Current U.S. Proposals	279
B. Trends in Mandatory Human Rights Due Diligence	280
C. Moving Forward	285
Conclusion	291

Introduction

As consumers, we are connected to modern slavery in numerous ways. As one example, consider the seafood shrimp. Almost fifty percent of American families purchase shrimp at the grocery store every year.¹ Unknown to most consumers, however, is that purchases made at major retailers, such as Walmart and Costco, may connect that consumer to modern slavery through the seafood supply chain.²

This connection starts with “ghost ships” in Thailand, which are unregistered ships that avoid government authorities by staying at sea for years at a time.³ These ships are staffed by victims of modern slavery from countries such as Burma, Cambodia, and Myanmar.⁴ Workers leave those countries due to human traffickers’ promises of work in factories or construction, but are instead sold into slavery in the fishing industry.⁵ On those ships, there are allegations of regular beatings, torture, and even murder.⁶ It is common for those men to spend years on those ships being forced to work multiple days and nights straight without sleep.⁷ The connection with consumers is that ghost ships collect “trash fish” in international waters, which is ground into fishmeal⁸ and used to feed farmed shrimp that is sold in grocery stores throughout the world.⁹

1. See Melissa Clark, *What Are We Supposed to Think About Shrimp?*, NY TIMES, (Oct. 15, 2019), <https://www.nytimes.com/2019/10/15/dining/shrimp-sourcing-united-states.html> [https://perma.cc/72QT-2QMB].

2. See Kate Hodal et al., *Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US, UK*, GUARDIAN (June 10, 2014), <https://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour> [https://perma.cc/7JSZ-WRXT].

3. See Ian Urbina, ‘Sea Slaves’: *The Human Misery That Feeds Pets and Livestock*, NY TIMES (Jul. 27, 2015), <https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html> [https://perma.cc/72P3-STNY].

4. See Hodal et al., *supra* note 2; Urbina, *supra* note 3.

5. See Hodal et al., *supra* note 2; Urbina, *supra* note 3.

6. See Hodal et al., *supra* note 2; Urbina, *supra* note 3.

7. See U.N. Inter-Agency Project on Human Trafficking (UNIAP), *Exploitation of Cambodian Men at Sea: Facts About the Trafficking of Cambodian Men onto Thai Fishing Boats*, U.N. Doc. CB-03 (Apr. 22, 2009), https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-declaration/documents/publication/wcms_143251.pdf [https://perma.cc/Q54M-SLF9]. The boats are able to stay at sea for years due to supply boats, which bring supplies, pick up fish, and engage in human trafficking. *Id.*

8. See Hodal et al., *supra* note 2.

9. See *id.* The fishmeal also ends up in the U.S. in pet food, or in feed for farm animals. Urbina, *supra* note 3.

The low price of shrimp is driving the demand from consumers,¹⁰ but those low prices are also helping drive those human rights abuses. That same pattern shows up in many other industries.¹¹ For example, it is estimated that the G20 countries import over \$125 billion worth of fashion garments that are at-risk of modern slavery.¹² In fall 2020, there was a concern that children at home for virtual school due to the pandemic were using laptop computers made with forced labor.¹³

Forced labor does not just occur in low-income countries. For example, in the United Kingdom, there are allegations of forced labor finding its way into the domestic value chains in construction and agriculture through the use of labor market intermediaries and subcontracting.¹⁴ In the United States, human trafficking is not uncommon in the hotel and agriculture industries.¹⁵

Overall, modern slavery is big business. For example, it is conservatively estimated that there are 25 million people in the world currently in forced labor,¹⁶ which, as the term suggests, is someone being forced to work against their will due to a threat of punishment.¹⁷ Half of those victims of forced labor are in the private sector working to pay off a debt (referred to as debt bondage).¹⁸ These victims of non-domestic work forced labor generate profits of over \$40 billion annually for businesses.¹⁹

10. See Clark, *supra* note 1.

11. For a list of products suspected of being made with forced labor and child labor, see U.S. DEPT. OF LABOR, 2018 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 8-14 (2019), <https://www.dol.gov/sites/dolgov/files/ILAB/ListofGoods.pdf> [<https://perma.cc/9FD5-DP7M>]. The list of suspected goods using forced labor includes peanuts from Bolivia, nails from China, cotton from Pakistan, and electronics from Malaysia. *Id.*

12. See Anika Kozlowski, *Fashion Production is Modern Slavery: 5 Things You Can do to Help Now*, CONVERSATION (Apr. 24, 2019), <https://theconversation.com/fashion-production-is-modern-slavery-5-things-you-can-do-to-help-now-115889> [<https://perma.cc/W883-6TJE>].

13. See Mara Hvistendahl & Lee Fang, *Kids May Be Using Laptops Made With Forced Labor This Fall*, INTERCEPT (Aug. 21, 2020), <https://theintercept.com/2020/08/21/school-laptops-lenovo-chromebooks-china-uyghur/> [<https://perma.cc/B27L-GGKC>].

14. See Andrew Crane et al., *Governance Gaps in Eradicating Forced Labor: From Global to Domestic Supply Chains*, 13 REG. & GOV. 86, 93-95 (2019) (discussing forced labor in the domestic value chains of companies in the United Kingdom).

15. See Dara Lind, *Forced Labor in America: Thousands of Workers are Being Held Against Their Will*, VOX (Feb. 20, 2015), <https://www.vox.com/2014/10/22/7024483/labor-trafficking-immigrants-exploitation-forced-us-agriculture-domestic-servants-hotel-workers> [<https://perma.cc/CBC3-64XB>]; see generally, KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* (2010).

16. See INT'L LAB. OFF. & WALK FREE FOUND., *GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE* 5 (2017), <https://www.ilo.org/global/topics/forced-labour/statistics/lang-en/index.htm> [<https://perma.cc/4LDG-PGMG>].

17. Article 2 of the International Labor Organization [ILO] Forced Labour Convention (NO. 29), C029 (1930), defines forced labor as "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily."

18. See INT'L LAB. OFF. & WALK FREE FOUND., *supra* note 16, at 5.

19. INT'L LAB. OFF., *PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR* 21 (2014), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf [<https://perma.cc/CQ8U-HLQA>]. If sexual

Current events are likely increasing the number of people in modern slavery. COVID-19 and its lasting impacts are expected to increase the risks of modern slavery and bring more products tainted by modern slavery into international markets.²⁰ The increases in global unemployment rates and working poverty rates mean that more individuals are at risk as these vulnerable individuals are more likely to turn to jobs that are a high risk for exploitive employment.²¹ Or, vulnerable families may take out loans to pay for basic living necessities, which then puts them at risk for debt bondage.²² On the other side of the employment relationship, financially stressed employers are facing even stronger pressures to resort to using forced labor, or to look the other way when they become aware of its use.²³

In response to these situations, and due to the governance gap created by local governments not being able to effectively regulate modern slavery,²⁴ countries have sought to hold multinational corporations accountable for modern slavery that may occur in the supply chains of the products they produce and sell. To date, the primary method of accountability is through transparency mechanisms. These laws require corporations to disclose what efforts, if any, they have taken to eliminate modern slavery in their supply chains.²⁵ Unfortunately, such mechanisms have many problems that make them an ineffective regulatory tool for these issues.²⁶ Instead, consistent with and supportive of an emerging trend in Europe, the U.S. should consider legislation that requires corporations to conduct human rights due diligence and face civil liability for adopting inadequate diligence plans.²⁷

exploitation and domestic work are included in the total, then human trafficking amounts to \$150 billion in profits each year. *Id.* at 13. This places human trafficking behind only drug trafficking in terms of criminal enterprise size. E. Christopher Johnson, Jr., et al., *The Business Case for Lawyers to Advocate for Corporate Supply Chains Free of Labor Trafficking and Child Labor*, 68 AM. U.L. REV. 1555, 1563 (2019).

20. See Angharad Smith & James Cockayne, *The Impact of COVID-19 on Modern Slavery*, DELTA 8.7 (March 27, 2020), <https://delta87.org/2020/03/impact-covid-19-modern-slavery/> [<https://perma.cc/WX5J-JA9Z>].

21. See *id.*

22. See Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences, Impact of the Coronavirus Disease Pandemic on Contemporary Forms of Slavery and Slavery-like Practices, U.N. Doc. A/HRC/45/8, at 4-11 (Aug. 4, 2020), <https://undocs.org/A/HRC/45/8> [<https://perma.cc/6DSN-GDM4>]; Anuradha Nagaraj and Roli Srivastava, *No Work, New Debt: Virus Creates Perfect Storm for Slavery in India*, REUTERS (April 13, 2020), <https://www.reuters.com/article/us-health-coronavirus-india-slavery/no-work-new-debt-virus-creates-perfect-storm-for-slavery-in-india-idUSKCN21V0PP> [<https://perma.cc/7TJP-MXUA>].

23. See Smith & Cockayne, *supra* note 20.

24. See *infra* notes 40-42 and accompanying text (discussing the inadequacy of domestic law enforcement in countries at high-risk for modern slavery).

25. See *infra* Part III.A (discussing legislative efforts in the United States, the United Kingdom, and Australia).

26. See *infra* Parts III.A and III.B (setting out the features of the disclosure laws that contribute to their ineffectiveness and reviewing the empirical studies on those laws).

27. See *infra* Part IV.C (discussing options for a mandatory human rights due diligence law in the United States).

This Article proceeds by first describing modern slavery. After discussing the current definition of the term, which includes forced labor and human trafficking, Part I discusses the factors that have allowed modern slavery to persist despite strong societal norms against the practice. These risk factors show both a supply and a demand side, where business practices are one of the root causes for the persistence of modern slavery. Part II begins by describing the United Nations Guiding Principles for Business and Human Rights, which is a voluntary (or soft law) mechanism that has established the responsibility of business to respect human rights through the adoption of human rights due diligence practices. The second section of Part II focuses more specifically on modern slavery and discusses the hard law approaches taken by governments in this area, which are primarily transparency-based regulations. Part III describes the existing transparency-based regulations focused on modern slavery and how those laws have evolved. This is followed by an evaluation of those laws, which finds that they are ineffective, and, despite attempts to improve on their shortcomings, that they will continue to be ineffective. This part also shows that social audits—which corporations indicate are a primary component of their current due diligence processes—are ineffective for monitoring businesses' human rights related impacts in the supply chain. Next, in Part IV, this Article evaluates two current U.S. legislative proposals and compares them to recent developments in mandatory human rights due diligence laws in Europe and the draft United Nations Business and Human Rights Treaty. This Part then advocates for the U.S. to move away from transparency-based regulation and towards mandatory human rights due diligence for regulating modern slavery in global supply chains.

I. The Problem of Modern Slavery

As indicated above, modern slavery is a significant global problem.²⁸ The United Nations Sustainable Development Goals seek to “eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour” by 2025.²⁹ Multinational corporations can play a significant positive role in obtaining this goal. However, multinational corporations are also a contributing factor to the use of modern slavery in global supply chains. After defining modern slavery, this Part sets out the risk factors leading to modern slavery, including the risks created by the actions of corporations.

A. Defining Modern Slavery

Slavery is a violation of human rights. Article 4 of the Universal Declaration of Human Rights (UDHR) states, “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their

28. See *supra* notes 16–19 and accompanying text.

29. U.N., Sustainable Dev. Goals, Goal 8, Target 8.7, <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> [https://perma.cc/J4FJ-YYW6].

forms.”³⁰ Likewise, the International Covenant on Civil and Political Rights (ICCPR) prohibits “slavery,” “servitude,” and “forced or compulsory labor.”³¹

Modern slavery includes both forced labor and human trafficking. The ILO’s Forced Labour Convention defines forced or compulsory labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”³² In brief, forced labor (and labor trafficking) involves the inability of a worker to quit a job due to some form of “force, fraud, or coercion.”³³

Although not listed in the above human rights instruments, reference to human trafficking has come to dominate discussions of modern slavery.³⁴ The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children defines “human trafficking” as,

the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability

30. Universal Declaration of Human Rights art. 4, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948). In addition, Article 23 states that everyone has the right “to free choice of employment” and Article 24 provides for a right to “rest and leisure,” which includes “reasonable limitation of working hours.” *Id.* arts. 23, 24.

31. International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. According to the Special Rapporteur on contemporary forms of slavery, the distinction between slavery and servitude is that slavery involves a perpetrator claiming to “own” the victim, whereas servitude does not involve a formal ownership claim, even though it is an exploitive relationship that the victim cannot end on their own. Vladislava Stoyanova, *United Nations Against Slavery: Unravelling Concepts, Institutions and Obligations*, 38 MICH. J. INT’L L. 359, 385 (2017). For a detailed discussion of the use of the terms “slavery,” “servitude,” and “forced or compulsory labor in international law,” see *id.* at 413-42. In addition, the International Covenant on Economic, Social and Cultural Rights (ICESCR)—the third part of the International Bill of Human Rights—effectively, though not expressly, prohibits forced labor. Marley S. Weiss, *Human Trafficking and Forced Labor: A Primer*, 31 ABA J. LAB. & EMP. L. 1, 11-12 (2015). For example, Article 6 provides for the “right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.” *Id.*

32. Int’l Labour Org. [ILO], Forced Labour Convention (No. 29), art. 2 (1930).

33. Weiss, *supra* note 31, at 3-4 (2015). Examples of fraud, force, and coercion can involve perpetrators that “assert actual or fraudulent debt against victims or their families, prevent victims from travelling by confiscating victims’ passports, and threaten victim imprisonment or deportation.” *Id.* at 4. The Trafficking Victims Protection Reauthorization Act of 2008 defines forced labor as knowingly providing or obtaining “the labor or services of a person” by any of the following:

- (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
- (2) by means of serious harm or threats of serious harm to that person or another person;
- (3) by means of the abuse or threatened abuse of law or legal process; or
- (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint

18 U.S.C. § 1589(a) (2018).

34. Stoyanova, *supra* note 31, at 375.

or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.³⁵

Overall, modern slavery is an umbrella term that includes a range of severe exploitative labor practices that includes all of the above terms.³⁶ It is not a legal term, but a “a non-legal advocacy term that has contemporary resonance.”³⁷ By encompassing forced labor and human trafficking within the idea of slavery, the term has “been extremely effective in motivating states to pass legislation, foundations to donate funds, and the broader populace to take up the ‘anti-slavery’ cause.”³⁸ In short, the term itself conjures up such repulsion that it has motivated political will to pass legislation to prohibit the practice.³⁹ Combatting the practice requires understanding its causes, which are addressed in the next subsection.

B. Risk Factors for Modern Slavery

The International Labour Organization (ILO) places the key risk factors for modern slavery into three categories. First, there are gaps in the regulatory environment, including inadequate domestic laws in high-risk countries and an inability to effectively enforce those laws that do exist.⁴⁰ Enforcement efforts are hampered by a lack of resources available to inspect workplaces and the fact that modern slavery often occurs in the informal economy, which is outside a labor agency’s inspection process.⁴¹ Likewise, there is a lack of capacity to effectively pursue modern slavery through the criminal justice system.⁴²

35. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), 2237 U.N.T.S. 319 (Nov. 15, 2000).

36. Justine Nolan & Gregory Bott, *Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices*, 24 *AUSTL. J. HUM. RTS.* 44, 47 (2018); Special Rapporteur on Contemporary Forms of Slavery, U.N. Off. High Comm’r Hum. Rts., Introduction, <https://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SRSlaveryIndex.aspx> (stating that contemporary slavery “includes but is not limited to issues such as: traditional slavery, forced labour, debt bondage, serfdom, children working in slavery or slavery-like conditions, domestic servitude, sexual slavery, and servile forms of marriage”) [<https://perma.cc/JP42-CU4E>].

37. Nolan & Bott, *supra* note 36, at 47.

38. Janice A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 *AM. J. INT’L L.* 609, 629 (2014). Chuang’s article is an exploration of the potential effects from broadening the term “slavery” to include these various forms of exploitation.

39. *Id.* See *infra* notes 242-258 and accompanying text (discussing US efforts to combat modern slavery).

40. INT’L LABOUR ORG. ET AL., *ENDING CHILD LABOUR, FORCED LABOUR AND HUMAN TRAFFICKING IN GLOBAL SUPPLY CHAINS* 18-19 (2019), https://www.ilo.org/ipsec/Informationresources/WCMS_716930/lang-en/index.htm [hereinafter, ILO ET AL., *ENDING CHILD LABOUR*] [<https://perma.cc/P8TG-PVMA>].

41. *Id.*

42. *Id.* at 19.

Second, socio-economic factors, such as poverty, lack of government-provided social services, and discrimination, cause people to take or stay with jobs that are abusive, to utilize coercive forms of credit, or to migrate in search of better jobs.⁴³ Migration is a significant risk factor for modern slavery because migrants often make use of informal channels rather than the formal migration system, which may make the migrants vulnerable to forced labor or human trafficking.⁴⁴ For example, the migrant may owe a fee to the job recruiter or employer, and that debt may increase due to housing and food charges and other fees, all designed to capture the migrant in debt bondage.⁴⁵ Even within formal systems, migrants are at risk of fraudulent recruitment practices that deceive migrants about job opportunities, compensation, and charge exploitive recruitment fees.⁴⁶

Lack of educational opportunities is another key socio-economic factor connected to modern slavery. Low educational attainment and illiteracy are associated with forced labor and human trafficking because those individuals are unable to attain jobs in the formal economy.⁴⁷ This factor especially impacts women. For example, girls are less likely to attend school due to social norms or household needs, which then reduces future job prospects.⁴⁸ As a result, the ILO estimates that women make up 58% of all people subjected to forced labor in the private economy.⁴⁹ Likewise, discrimination in society and at schools can force those in marginalized groups into poverty and the informal economy.⁵⁰

The ILO's third risk factor for modern slavery involves business conduct. Here, we will focus on the companies further downstream in the supply chain, such as the multinational companies that are buyers of goods from lower income countries, because they are the focus of the regulations discussed in the subsequent Parts of this Article.⁵¹ An initial factor is that companies may not be aware of where modern slavery exists in their supply chains, or how to address the issues the company does become aware of.⁵² For example, a garment buying company in the U.S. may not know how to address issues of modern slavery that are found not in the factory that it contracted with to make the garments, but in a raw materials supplier to that factory.⁵³ This is especially problematic since modern slavery

43. *Id.*

44. *Id.*

45. *Id.* at 23-25.

46. ILO ET AL., ENDING CHILD LABOUR, *supra* note 40, at 24.

47. *Id.*

48. *Id.*

49. *Id.* at 23.

50. *Id.* at 21-23. Discrimination at schools may cause children to drop out early, or even run away from home, which puts them at risk for exploitation. *Id.* at 21.

51. See *infra* notes 79-80 and accompanying text (discussing lead firms in global supply chains). This Article will follow the ILO's use of the term "upstream" to refer "to production processes in supply chains that occur closest to raw material production" and the term "downstream" to "those production activities in supply chains that occur closest to retail." ILO ET AL., ENDING CHILD LABOUR, *supra* note 40, at 2.

52. *Id.* at 26.

53. See *id.*

can be connected to a company's final products through indirect business relationships in the supply chain, such as in the earlier example of forced labor being used to catch the fish that are fed to the farm-raised shrimp sold in grocery stores.⁵⁴

In general, these exploitive forms of labor are often found further upstream in the production process, such as with raw materials suppliers and other businesses that provide inputs to the exporting industries.⁵⁵ Thus, although there are industries in certain regions where the use of exploited labor is well documented due to its direct contribution to the exported good, an analysis limited to just those goods misses exploited labor's indirect contribution to both those goods and other goods.⁵⁶ For example, exploited labor in the production of cotton is a direct contribution to exported cotton, but it is also an indirect contribution to the production of apparel.⁵⁷ In short, "efforts against trafficking for forced labour in global supply chains will be inadequate if they do not extend beyond immediate suppliers to include actors operating further upstream in global supply chains."⁵⁸

The economic pressures from downstream buyers is another risk factor for modern slavery due to business conduct.⁵⁹ The pressures buyers place on upstream suppliers include cost pressures, late changes of orders, delays in payments, and constantly shifting, short-term relationships.⁶⁰ For example, if labor is 80 percent of the supplier's cost of the product, and the costs of other inputs are increasing (e.g., machinery and gasoline), but the market is placing downward pressure on the price of the final product, then the supplier is often driven to exploit labor.⁶¹ These cost pressures, and pressures to meet a contractual deadline, can also lead to worker exploitation indirectly if the supplier outsources (or subcontracts) part of the order to meet the buyer's demands. This outsourcing may include production being completed in the informal part of the economy, which is at higher risk for worker exploitation.⁶² Eventually, this results in multinational corporations having highly fragmented supply chains with subcontractors entering and leaving the picture at various points in time.⁶³ This fragmentation distances the downstream companies from the risks of negative human rights impacts further upstream.⁶⁴

Crane refers to this systematic problem with supply chains—as opposed to a problem caused by a few "bad" actors—as "value trap slav-

54. See *supra* notes 1-9 and accompanying text.

55. ILO ET AL., ENDING CHILD LABOUR, *supra* note 40, at 9-10, 15.

56. *Id.* at 11.

57. *Id.* at 12.

58. *Id.* at 15.

59. *Id.* at 26.

60. *Id.*

61. ILO ET AL., ENDING CHILD LABOUR, *supra* note 40, at 27 (discussing the example of a tea plantation owner).

62. *Id.* at 28-29.

63. Nolan & Bott, *supra* note 36, at 49.

64. *Id.* at 49-50.

ery.”⁶⁵ The nature of the supply chain places pressure on upstream businesses (such as farmers) to reduce labor costs to as close to zero as possible due to the power of downstream businesses (such as supermarkets) to demand lower prices.⁶⁶ This is especially problematic in labor intensive industries “where margins are narrow and where value is captured further downstream by larger and more powerful interests.”⁶⁷ These industry pressures lead to labor exploitation and explain why modern slavery can persist despite strong regulatory and societal norms against the practice.⁶⁸

C. Summary

Modern slavery has both supply side and demand side issues.⁶⁹ The supply side issues result from poverty, discrimination, and other systemic socio-economic issues.⁷⁰ The demand side issues result from economic pressures that downstream businesses place on upstream businesses, especially in labor intensive industries.⁷¹ By framing modern slavery as, in part, a demand side problem, it shows that modern slavery is not a phenomena exogenous to business, but that business shares responsibility for the problem.⁷²

The next Part discusses the soft law and hard law responses that attempt to control the demand side. These demand side responses focus on multinational corporations because business is uniquely situated to address the problems of modern slavery in supply chains.⁷³ As opposed to consumers or shareholders, or even local government agencies in many cases, businesses have the ability to monitor their supply chains, and already do such monitoring for efficiency purposes.⁷⁴ Thus, the private sector is a vital component for combatting modern slavery in supply chains.

II. Soft Law and Hard Law Responses

Although treaties and conventions have prohibited modern slavery for decades, the international community heightened its attention to issues of modern slavery in the last 15 years, including efforts from the International Labour Organization and the United Nations.⁷⁵ This attention coin-

65. Andrew Crane, *Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation*, 38 *ACAD. MGMT. REV.* 45, 54 (2013).

66. *Id.*

67. *Id.*

68. *Id.* at 51-52.

69. Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 *CALIF. L. REV. CIRCUIT* 80, 94 (2012).

70. *See id.*; *supra* notes 43-50 and accompanying text.

71. *See* Todres, *supra* note 69, at 85; *supra* notes 59-68 and accompanying text.

72. Nolan & Bott, *supra* note 36, at 54-55.

73. Todres, *supra* note 69, at 95.

74. *Id.*

75. Nolan & Bott, *supra* note 36, at 46-47. These efforts included the International Labour Organization's "Global Alliance Against Forced Labour" in 2005, the United

cided with increased attention on issues of business and human rights more generally.⁷⁶ This Part first sets out the United Nations Guiding Principles for Business and Human Rights (UNGPs),⁷⁷ which is the soft law initiative that has shaped our understanding of a corporation's responsibility to respect human rights. Next, this Part focuses more specifically on modern slavery and discusses the hard law approaches taken by governments in this area, which are primarily transparency-based regulation.

The focus of this Part is on multinational corporations. As stated by John Ruggie, the developer of the UNGPs in his role as the United Nations Special Representative on the issue of business and human rights, "Multinational corporations became the central focus of business and human rights concerns because their scope and power expanded beyond the reach of effective public governance systems, thereby creating permissive environments for wrongful acts by companies without adequate sanctions or reparations."⁷⁸

When discussing global supply chains, the focus is on multinational corporations that are the "lead firm[s]." A lead firm can be a brand name apparel or technology company, for example, that sells products to consumers.⁷⁹ Beneath the lead firm are the variety of suppliers and subcon-

Nations Human Rights Council appointment of a Special Rapporteur on Contemporary Forms of Slavery in 2007, and the California Transparency in Supply Chains Act in 2010. *Id.*

76. First, in 2000, the United Nations Global Compact was launched. Ambassador Betty King, *The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations*, 34 CORNELL INT'L L.J. 481, 481-82 (2001). This was a voluntary initiative that involved corporations pledging to support and implement ten basic principles related to human rights, labor rights, the environment, and combatting corruption. Oliver F. Williams, *The United Nations Global Compact: The Challenge and the Promise*, 14 BUS. ETHICS Q. 755, 755-56 (2004). Next, the UN Sub-Commission on the Promotion and Protection of Human Rights drafted and adopted UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights in 2003. David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 903-907 (2003). The Draft Norms were controversial and were not adopted by the UN Commission on Human Rights. David Kinley et al., 'The Norms are Dead! Long Live the Norms!' *The Politics Behind the UN Human Rights Norms for Corporations*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 459, 461-66 (Doreen McBarnet et al., eds. 2007). This led to the appointment of John Ruggie to the role of Special Representative on the issue of business and human rights. *Id.* at 461. Ruggie's appointment led to the 2008 United Nations Protect, Respect, and Remedy Framework, and then the 2011 United Nations *Guiding Principles for Business and Human Rights*, which is discussed *infra* note 77 and accompanying text.

77. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter UNGPs] [<https://perma.cc/QR2A-3ETC>].

78. JOHN GERALD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* xxiii (2013).

79. Robert C. Bird & Vivek Soundararajan, *From Suspicion to Sustainability in Global Supply Chains*, 7 TEX. A&M L. REV. 383, 388 (2020).

tractors that produce the raw materials, assemble components and final products, and perform the other tasks that create the final product.⁸⁰ In this Article, the lead firm may also be referred to generally as the buyer.

A. Soft Law: The Responsibility to Respect Human Rights

The UNGPs are the leading instrument on business and human rights. They are “soft law” because they do not create legal obligations and do not have legal sanctions for noncompliance.⁸¹ The principles are organized as three pillars, which are the state’s duty to protect human rights,⁸² businesses’ responsibility to respect human rights,⁸³ and the obligation of both states and business to provide a remedy to victims of human rights abuse.⁸⁴ The responsibility to respect human rights means a businesses must “[a]void causing or contributing to adverse human rights impacts through their own activities,” and to “prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”⁸⁵ Thus, the UNGPs set out three ways in which a business may be connected to a negative human rights impact. First, the business can directly *cause* violations, such as through hazardous conditions at its own factory.⁸⁶ Second, a business *contributes* to a violation when another party may have caused the problem, but the business contributed to the impact in some way.⁸⁷ For example, a business contributes to a violation by “[c]hanging product requirements for suppliers at the eleventh hour without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver.”⁸⁸ Third, a business is directly linked to a violation through the action of others, such as a supplier subcontracting a portion of the contract (even if that is a violation of the contract) to a third party that is using exploitive labor practices.⁸⁹ To meet the responsibility to respect human rights, businesses must adopt a “due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.”⁹⁰ The due diligence process was a key contribution of the UNGPs and “should include assessing actual

80. *Id.* at 388–89.

81. OFF. HIGH COMM’R HUM. RTS., U.N. DEP’T HUM. RTS., FREQUENTLY ASKED QUESTIONS ABOUT THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, U.N. DOC. HR/PUB/14/3, U.N. Sales No. E.14.XIV.6 (2014).

82. UNGPs, *supra* note 77, at Part I.

83. *Id.* at Part II.

84. *Id.* at Part III.

85. *Id.* at 14 (Principle 13).

86. OFF. HIGH COMM’R HUM. RTS., U.N. DEP’T HUM. RTS., THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE, U.N. DOC. HR/PUB/12/02 (2012) [hereinafter INTERPRETIVE GUIDE].

87. *Id.* at 15.

88. *Id.* at 17.

89. *Id.*

90. UNGPs, *supra* note 77, at 15 (Principle 15). Businesses must also adopt policy commitments to respect human rights and implement processes to enable remediation of negative human rights impacts they cause or contribute to. *Id.*

and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”⁹¹

The Organisation for Economic Co-operation and Development (OECD) has developed important guidance on human rights due diligence (sometimes referred to HRDD). The OECD process involves six steps:

1. Embed responsible business conduct into policies and management systems
2. Identify and assess actual and potential adverse impacts associated with the enterprise’s operations, products or services
3. Cease, prevent and mitigate adverse impacts
4. Track implementation and results
5. Communicate how impacts are addressed
6. Provide for or cooperate in remediation when appropriate⁹²

The OECD has also developed sector-specific guidance for certain industries, including the garment sector.⁹³ Within the garment sector guidance, the OECD provides specific information on the issue of forced labor for each of the six steps.⁹⁴ For example, the guidance sets out specific risk factors to assist in identifying potential and actual harms under step two.⁹⁵ In addition, due to the fact that forced labor takes different forms and organizations have a strong incentive to disguise its use, the guidance recommends the use of interviews with employees and engagement with other stakeholders to help in identifying potential problems.⁹⁶ This should not be done in just one on-site assessment, but requires ongoing monitoring and likely the assistance of trade unions, civil society, and community members.⁹⁷

As indicated in step five of the OECD due diligence guidance, communication with stakeholders is an important part of the due diligence process.⁹⁸ Likewise, communication is an important part of the UNGPs. Under pillar one, the UNGPs state that “[i]n meeting their duty to protect, States should . . . [e]ncourage, and where appropriate require, business enterprises to communicate how they address their human rights

91. *Id.* at 17 (Principle 17). The Interpretive Guidance states that a company’s due diligence requirements will depend on its size, industry, and other factors, but that “the key elements of human rights due diligence—assessing, integrating and acting, tracking, and communicating—when taken together with remediation processes, provide the management of any enterprise with the framework it needs in order to know and show that it is respecting human rights in practice.” INTERPRETIVE GUIDE, *supra* note 86, at 32.

92. ORG. FOR ECON. CO-OPERATION & DEV. [OECD], OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT 21 (2018).

93. OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS IN THE GARMENT AND FOOTWEAR SECTOR (2018).

94. *Id.* at 126-33.

95. *Id.* at 127-29.

96. *Id.* at 130. The guidance states, “In recognition that traditional document assessments are generally insufficient in assessing forced labour, supplier assessments should rely heavily on interviews with workers, management and other stakeholders.” *Id.*

97. *Id.* at 133.

98. OECD, *supra* note 92, at 33.

impacts.”⁹⁹ The commentary to Principle Three provides that a “requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights.”¹⁰⁰ In the area of modern slavery, as discussed in the next section, state regulation has focused on such a communication requirement.

B. Hard Law: Transparency-Based Regulation

The primary legislative response to modern slavery in global supply chains is through transparency legislation. This approach started with the California Transparency in Supply Chains Act of 2010 (CTSCA), which requires certain corporations to disclose what steps (if any) they take to ensure there is no slavery in their supply chains.¹⁰¹ The CTSCA was followed by the U.K. Modern Slavery Act of 2015 (UKMSA)¹⁰² and then the Australia Modern Slavery Act of 2018.¹⁰³ As described further below, each successive act attempted to improve on the act that came before it. In the United States, at the federal level, members of Congress have proposed a similar law, the Business Supply Chain and Transparency on Trafficking and Slavery Act, multiple times, but little action has been taken on the proposed bill to date.¹⁰⁴

99. UNGPs, *supra* note 77, at 4 (Principle 3(d)).

100. *Id.* Businesses’ responsibility to respect human rights under pillar two also emphasizes the importance of information and communication. A business is expected to “know” it is respecting human rights and be able to “show” that it is doing so. *Id.* at 23–24. Showing can involve communications that range from the informal to the formal; “[f]ormal reporting by enterprises is expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts.” *Id.* at 24 (Principle 21).

101. California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (Deering 2021).

102. Modern Slavery Act 2015, c. 30 (Eng.).

103. *Modern Slavery Act 2018* (Cth) No. 153 (Austl.).

104. Business Supply Chain Transparency on Trafficking and Slavery Act of 2020, H.R. 6279, 116th Cong. (2019–20), <https://www.congress.gov/bill/116th-congress/house-bill/6279?s=1&r=2> [<https://perma.cc/329B-CGWK>]. Additional regulations in the U.S. that impact business include the Federal Acquisition Regulations (FAR) for government contractors and section 307 of the Tariff Act of 1930, which are both discussed *infra* notes 242–258 and accompanying text. Also in this area, under the Trafficking Victims Protection Act of 2000 (TVPA), the U.S. State Department evaluates other countries’ efforts to eliminate trafficking in persons, and countries that are not making significant progress are at-risk of losing foreign aid and other assistance. Weiss, *supra* note 31, at 29–30. The TVPA also provides for criminal sanctions for perpetrators and restitution for victims. *Id.* at 30–31. The Trafficking Victims Reauthorization Act of 2018 provides for a private right of action for victims against their perpetrators. Gallant Fish, *No Rest for the Wicked: Civil Liabilities Against Hotels in Cases of Sex Trafficking*, 23 *BUFF. HUM. RTS. L. REV.* 119, 137–38 (2016/2017). This act allows the victim to recover damages from “whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter.” *Id.* at 138 (quoting William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, sec. 221, § 1595(a), 122 Stat. 5044, 5067). Thus, under the TVPA, a corporation could be held liable for benefitting from human trafficking or forced labor in its supply chain, even if the wrongful acts occurred outside the U.S., but there are significant issues with the drafting of the TVPA to know how useful the TVPA will be in holding corporations

This reliance on transparency is not surprising. Policymakers and business have an attraction to transparency-based regulation for several reasons. For legislatures, transparency measures are not based in political ideology and appeal to people across the political spectrum; they impose little cost on the government; and they allow policymakers to show they have taken some legislative action.¹⁰⁵ For business, transparency requirements are favorable because they are often easily managed and may not require any significant operational changes.¹⁰⁶ Thus, for challenging problems, such as human rights issues in corporate supply chains, it is not surprising that transparency-based regulation is a common response.

In this context, transparency operates as both a carrot and a stick.¹⁰⁷ The hope is that transparency will allow external stakeholders, such as consumers, investors, the media, and non-governmental organizations, to reward the companies that are leaders in the fight against modern slavery and to punish those that are the laggards.¹⁰⁸ Over time, the stakeholders will hold companies to higher standards, and all members of the industry will continually improve.¹⁰⁹

Unfortunately, for business and human rights—and for corporate social responsibility more generally—the reality is that transparency programs often have limited effect. In one review of the empirical evidence on disclosure-based regulation to increase corporate social performance, the author concluded: “[P]roblems such as selective disclosure, impression management, incomparable disclosures (over time and between companies), and treating disclosure as an end in itself (as opposed to a process that leads to organizational change) limit the effectiveness of these programs.”¹¹⁰

The evidence to date on the use of transparency-based approaches for the problem of modern slavery in supply chains shows a similar lack of effectiveness.¹¹¹ Although the legislative actions in California and the U.K. have improved the awareness of modern slavery, weaknesses in the approaches have created laws of limited effectiveness.¹¹² One significant problem with these initiatives—which they have in common with other social disclosure approaches—is a focus on the metrics that cover the most easily collected information, but are not necessarily the most important

accountable in these situations. See generally, Sara Sun Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, 50 CASE W. RES. J. INT’L L. 17 (2018).

105. David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5, 7-8 (2019) [hereinafter Hess, *Transparency Trap*].

106. *Id.*

107. Todres, *supra* note 69, at 202-03.

108. See David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency*, 17 BUS. ETHICS Q. 453, 466, 471 (2007).

109. *Id.*

110. Hess, *Transparency Trap*, *supra* note 105, at 26-27.

111. See *infra* Part III.B.

112. Hess, *Transparency Trap*, *supra* note 105, at 45-46.

metrics.¹¹³ The result is a focus on companies' policies and procedures, and not on actual performance outcomes.¹¹⁴ To measure performance, these regulatory approaches typically rely on social audits.¹¹⁵ Unfortunately, we have known for a long time that such audits are of limited effectiveness, and researchers continue to produce new evidence confirming this belief.¹¹⁶ Overall, the current legislative approaches to addressing modern slavery rely on transparency and social audits, both of which, as implemented, are unlikely to produce widespread, significant change. The next Part takes a closer look at the legislative approaches and the empirical evidence.

III. The Impact of Transparency-Based Regulation

This Part evaluates the effectiveness of current transparency-based regulation for dealing with modern slavery in global supply chains. The first section sets out the disclosure requirements of the modern slavery acts and how those acts have evolved over time. The next section evaluates the effectiveness of these laws and explains why they are not expected to significantly improve corporate performance in this area.

A. Disclosure Requirements.

The first legislation in this area was the California Transparency in Supply Chains Act of 2010 (CTSCA), which requires retail and manufacturing corporations doing business in California with over \$100 million in gross receipts to make disclosures in five different areas related to preventing modern slavery in supply chains.¹¹⁷ Specifically, the Act states that a company,

[S]hall, at a minimum, disclose to what extent, if any, that the retail seller or manufacturer does each of the following:

113. Casey O'Connor & Sarah Labowitz, NYU Stern Center for Business and Human Rights, *Putting the "S" in ESG: Measuring Human Rights Performance for Investors* 25 (Mar. 2017); Damiano de Felice, *Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities*, 37 HUMAN RIGHTS Q. 511, 537 (2015); see also Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. CORP. L. 267 (2004) ("Seduced by the appeal of controls as a first-order policy option, distinctions between control, audit and evaluation blur, and what is auditable is more important than what must be valued by judgment. At the extreme, this emphasis on controls can lead controls to take on the character of ends in themselves, rather than means of achieving ultimate goals.")

114. See 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, 577 (2018) (noting that disclosure initiatives on business and human rights issues often focus on a company's efforts and not the actual effects of those efforts).

115. See *infra* note 178 and accompanying text.

116. See *infra* Part III.B.2.

117. KAMALA D. HARRIS, ATT'Y GEN., CAL. DEP'T JUST., *THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAIN ACT: A RESOURCE GUIDE* 4 (2015), <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf> [<https://perma.cc/X9TL-82E7>]. In 2014, California estimated that approximately 1,700 companies were subject to the law. *Id.* at 3. The disclosure must be placed on the company's website with a conspicuous link on its homepage. *Id.* at 5.

- (1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.
- (2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
- (3) 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.
- (4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
- (5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.¹¹⁸

If a company is not taking actions in any (or all) of the five categories, then the company must affirmatively disclose that it is not doing so.¹¹⁹

Commentators noted several flaws with the CTSCA that were expected to limit its effectiveness. First, the disclosure requirements are vague, which allows companies significant leeway in how they choose to comply.¹²⁰ This lack of structured, uniform disclosure standards provides the opportunity for companies to produce disclosures that are misleading to the reader.¹²¹ Second, the CTSCA lacked an enforcement mechanism.¹²² The Attorney General can bring an injunctive action to require compliance from a non-disclosing company, but there are no penalties for noncompliance.¹²³

The second major piece of legislation in this area was in the United Kingdom with the U.K. Modern Slavery Act of 2015 (UKMSA). Under Section 54 of the UKMSA, a commercial organization doing business in the U.K. and generating over a certain amount of revenue, as specified by the Secretary of State, must publish an annual “slavery and human trafficking statement.”¹²⁴ The organization is required to state the steps it is taking “to ensure that slavery and human trafficking is not taking place (i) in any

118. CAL. CIV. CODE, *supra* note 101, § 1714.43(c).

119. *Id.*

120. Marcia Narine, *Disclosing Disclosure’s Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV. 84, 121 (2015).

121. *Id.*

122. Alexandra Prokopets, Note, *Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010*, 37 HASTINGS INT’L & COMP. L. REV. 351, 364–65 (2014); Narine, *supra* note 120, at 122; Adam S. Chilton & Galit A. Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT’L L. 1, 40 (2017).

123. CAL. CIV. CODE, *supra* note 101, § 1714.43(d) (“The exclusive remedy for a violation of this section shall be an action brought by the Attorney General for injunctive relief.”); Narine, *supra* note 120, at 122.

124. Modern Slavery Act (Eng.), *supra* note 102, § 54(1)–(3).

of its supply chains, and (ii) in any part of its own business.”¹²⁵ If the company is not taking any actions, then it must state that lack of action.¹²⁶ The UKMSA does not require the slavery and human trafficking statement to include specific information but provides examples of categories of information to include, which are similar to the CTSCA content requirements, and provides that the statement “may” include such information, as opposed to “must” include.¹²⁷

Overall, the UKMSA is very similar to the CTSCA and replicates the two major faults pointed out by critics of the CTSCA.¹²⁸ First, the UKMSA does not require slavery and human trafficking statements to include specified, uniform disclosures.¹²⁹ Second, the only enforcement mechanism is injunctive relief.¹³⁰ The UKMSA does, however, require companies to produce a statement each year, which is a requirement absent from the CTSCA.¹³¹ Importantly, it should also be noted that neither the UKMSA nor the CTSCA require a company to do anything with respect to modern slavery other than provide disclosure.¹³² For example, the laws do not require companies to develop and implement an appropriate due diligence process.¹³³

In an effort to improve the UKMSA, an independent committee presented a review of the UKMSA to Parliament in May 2019.¹³⁴ The review acknowledged that Section 54 of the UKMSA has had a limited impact beyond raising awareness of modern slavery and provided a variety

125. *Id.* § 54(4)(a).

126. *Id.* § 54(4)(b).

127. In its entirety, Section 54(5) states:

An organisation’s slavery and human trafficking statement may include information about—

- (a) the organisation’s structure, its business and its supply chains;
- (b) its policies in relation to slavery and human trafficking;
- (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
- (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate.
- (f) the training about slavery and human trafficking available to its staff.

Id.

128. See *supra* notes 120–123 and accompanying text.

129. Modern Slavery Act (Eng.), *supra* note 102 § 54(4)–(5).

130. *Id.* § 54(11).

131. *Id.* § 54(4)–(5).

132. See 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, 569 (2018) (noting that most mandatory disclosure laws on business and human rights issues “do not require companies to actively eradicate human rights abuses in their supply chains or even in their own operations.”)

133. *Id.* at 570.

134. SEC’Y STATE FOR HOME DEP’T, INDEPENDENT REVIEW OF THE MODERN SLAVERY ACT 2015: FINAL REPORT (May 2019), <https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report> [hereinafter INDEPENDENT REVIEW].

of recommended reforms.¹³⁵ Among the suggested reforms were the following. First, to improve the quality of the statements, the UKMSA should be amended to require corporations to report against all categories of actions listed in the act, or affirmatively state that it has not taken any actions in that category, and the UKMSA should include a uniform template for corporations to report against.¹³⁶ Second, because modern slavery can exist in a company's supply chain beyond tier one suppliers,¹³⁷ companies should be required to consider their entire supply chains or explain why they have not.¹³⁸ Third, to encourage corporations to think about their approach to modern slavery in connection with their corporate cultures and other operations, each company should designate a board member to be personally accountable for the statement, and the statement should be included in the company's annual reports (as opposed to being a standalone report).¹³⁹ Fourth, to improve stakeholder access to reports, the government should create a central repository to collect the statements and make them available to the public.¹⁴⁰ Fifth, to correct the inadequacy of enforcement, the independent review recommended that the government monitor compliance with the UKMSA and issue penalties for noncompliance.¹⁴¹ The review recommended escalating penalties, such as "initial warnings, fines (as a percentage of turnover), court summons and directors' disqualification."¹⁴²

The U.K. Government's response rejected some of the recommendations, but stated a plan to receive further consultation on other recommendations.¹⁴³ From the above list of recommendations, the government rejected designating a board member to be responsible for the report,¹⁴⁴ requiring the slavery and human trafficking statement be included in the annual report,¹⁴⁵ and, while accepting the idea of increasing sanctions for noncompliance, rejected the independent review's inclusion of director disqualification as a penalty.¹⁴⁶

The third transparency legislation in this area is Australia's Modern

135. *Id.* at 39.

136. *Id.* at 41; *see supra* note 127 (quoting the categories listed in Section 54).

137. *See supra* notes 55-58 and accompanying text.

138. INDEPENDENT REVIEW, *supra* note 134, at 41-42.

139. *Id.* at 42.

140. *Id.* at 42-43.

141. *Id.* at 43.

142. *Id.* Other recommendations from the review included requiring the government to comply with the UKMSA with respect to public procurement and taking steps to clarify which companies must comply with the reporting requirements, which would help external stakeholders identify which companies have not filed a report. *Id.* at 40, 43-44.

143. HOME OFF., GOV'T OF U.K., GOVERNMENT RESPONSE TO THE INDEPENDENT REVIEW OF THE MODERN SLAVERY ACT 2015 (2019), <https://www.gov.uk/government/publications/government-response-to-the-independent-review-of-the-modern-slavery-act>.

144. *Id.* at 9.

145. *Id.* at 10.

146. *Id.*

Slavery Act 2018 (MSA).¹⁴⁷ The MSA specifically sought to avoid the perceived ineffectiveness of the UKMSA.¹⁴⁸ For instance, the act mandates reporting against the specified category of actions,¹⁴⁹ and that the government should host a free registry to provide any interested stakeholder easy access to the statements.¹⁵⁰ Similar to the UKMSA and the CTSCA, however, the MSA does not have financial penalties for noncompliance and does not require a company to undertake due diligence.¹⁵¹

B. Evaluating the Effectiveness of the CTSCA and UKMSA

The empirical evidence seems to confirm the general perceptions stated earlier that the CTSCA and UKMSA are not likely to cause corporations to produce reports that are useful to external stakeholders.¹⁵² More importantly, these transparency requirements seem unlikely to encourage organizational change.¹⁵³ It is important to remember that transparency is not an end in itself, but a means to improve corporate behavior.¹⁵⁴ The changes in corporate behavior can come from external pressures—such as from consumers or investors—or internal awareness—that is, the process of creating a required statement causes the company to become aware of its connection to negative impacts and then seek to implement appropriate

147. Modern Slavery Act (Austl.), *supra* note 103. In addition, a state-level modern slavery act was adopted in New South Wales. Amy Sinclair & Justine Nolan, *Modern Slavery Laws in Australia: Steps in the Right Direction?* 5 BUS. HUM. RTS. J. 164, 164 (2020).

148. Sinclair & Nolan, *supra* note 147, at 165.

149. Section 16(1) of the Modern Slavery Act (Aust.), *supra* note 103, states:

A modern slavery statement must, in relation to each reporting entity covered by the statement:

- (a) identify the reporting entity; and
- (b) describe the structure, operations and supply chains of the reporting entity; and
- (c) describe the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls; and
- (d) describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes; and
- (e) describe how the reporting entity assesses the effectiveness of such actions; and
- (f) describe the process of consultation with:
 - (i) any entities that the reporting entity owns or controls; and
 - (ii) in the case of a reporting entity covered by a statement under section 14—the entity giving the statement; and
- (g) include any other information that the reporting entity, or the entity giving the statement, considers relevant.

150. Sinclair & Nolan, *supra* note 147, at 167.

151. *Id.* at 167–68.

152. See *supra* notes 120–123, 128–130 and accompanying text (noting the problems with the modern slavery acts, such as lack of enforcement mechanisms).

153. Hess, *Transparency Trap*, *supra* note 105, at 38–40.

154. *Id.* at 26–27.

interventions.¹⁵⁵ Unfortunately, corporations often approach transparency as an end in itself, with the production of disclosures having little connection to changes in operations and instead being focused on managing external perceptions.¹⁵⁶ A second problem is that, even if any existing or future modern slavery act improves disclosure compliance and quality, the companies would still likely comply by relying heavily on social audits, which have not proven to be a reliable way to monitor human rights related impacts in the supply chain.¹⁵⁷ The following two sections address these concerns.

1. *Slavery and Human Trafficking Report Quality*

Corporate transparency is a commonly used regulatory measure—either through soft law or hard law—to encourage corporations to improve their social performance, including business and human rights concerns.¹⁵⁸ The most widely used approach is sustainability reporting.¹⁵⁹ Also referred to as non-financial reporting or ESG reporting (which stands for environmental, social, and governance), sustainability reports involve corporations disclosing their policies, practices, and performance on issues related to sustainability, including human rights.¹⁶⁰ The most widely used standard in this area is the Global Reporting Initiative (GRI), which, since 1999, has been providing guidance to organizations on the information they should include in a report.¹⁶¹ Although sustainability reporting was primarily voluntary, governments are moving to make it mandatory, such as with the 2014 EU Directive on non-financial disclosure.¹⁶²

Despite this long history with sustainability reporting, the evidence suggests, at least in the area of human rights, that it is not a useful tool for significantly improving corporate social performance.¹⁶³ Even with well-established standards such as the GRI, corporations are able to manipulate the process to produce disclosures focused on positive developments that demonstrate that the company is making significant progress towards meeting societal expectations, even if the company has not changed its

155. David Hess, *The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue and Development*, 18 *BUS. ETHICS Q.* 447, 456–62 (2008).

156. Hess, *Transparency Trap*, *supra* note 105, at 26–27.

157. See *infra* Part III.B.2 (outlining the reasons why social audits are ineffective in reducing human rights abuses in supply chains).

158. See *supra* notes 101–04 and accompanying text.

159. See Hess, *Transparency Trap*, *supra* note 105, at 32 (identifying sustainability reporting as a mainstream practice).

160. *Id.* at 19.

161. *Id.* at 22–23. The most recent GRI standards are available at GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/standards> (last visited Oct. 15, 2021) [<https://perma.cc/6VTK-VY2J>].

162. Directive 2014/95/EU of the European Parliament and of the Council, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, O.J. (L 330) (Oct. 22, 2014).

163. Hess, *Transparency Trap*, *supra* note 105, at 31–41.

practices.¹⁶⁴ Both before and after sustainability reporting became a mainstream practice, corporations had been able to use those reports for impression management—that is, corporations are managing stakeholder perceptions rather than producing information that can be used by stakeholders to hold corporations accountable for their actions.¹⁶⁵

In addition, the empirical evidence suggests that sustainability reporting has not led to organizational change.¹⁶⁶ Instead, the disclosure process is often decoupled from corporate operational decisions.¹⁶⁷ This occurs because companies treat disclosure as an end itself, with a focus only on finding ways to fit what they have already done within the disclosure framework, rather than using the disclosure process as a tool to improve behavior going forward.¹⁶⁸ In addition, rather than reflecting on and reporting their corporate practices, companies instead seek to develop reports that look similar to sustainability reports produced by other companies in their respective industries as way to maintain legitimacy with stakeholders.¹⁶⁹

Empirical studies on reports filed under the CTSCA and the UKMSA are starting to show that the problems found in sustainability reporting are also being found in slavery and human trafficking reports.¹⁷⁰ In general, the studies show that the reports are “more symbolic than substantive.”¹⁷¹ Companies often report on company policies and structures, but provide significantly less detail on risks assessments and trainings, for example.¹⁷² One review concluded that over half of the 100 largest companies listed on the London Stock Exchange “published generic statements providing little

164. *Id.* at 32-33.

165. *Id.* at 31-33.

166. *Id.* at 38. See also Giovanna Michelon et al., *The Marketization of a Social Movement: Activists, Shareholders and CSR Disclosure*, 80 ACCT. FORUM 1, 12-13 (2020) (finding that shareholder pressures to increase disclosure in the hopes of improving CSR performance only leads to more disclosure but does not lead to improved performance—and may actually lead to worse performance).

167. Hess, *Transparency Trap*, *supra* note 105, at 31-41.

168. *Id.* at 38-39; see also David Hess, *The Future of Sustainability Reporting as a Regulatory Mechanism*, in LAW AND THE TRANSITION TO BUSINESS SUSTAINABILITY 125, 130 (Daniel R. Cahoy & Jamison E. Colburn, eds., 2014) (noting that “readers of sustainability reports will learn that corporations have already ‘arrived’ at the end of goal of sustainable development, instead of being on a difficult journey towards that goal, which requires serious consideration of major changes in operations and strategies.”)

169. Hess, *Transparency Trap*, *supra* note 105, at 39.

170. 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, 827 (2018).

171. *Id.* at 835. This was a study of 105 retail company reports filed under the CTSCA. *Id.* at 832.

172. CHARTED INST. BLDG., CONSTRUCTION AND THE MODERN SLAVERY ACT: TACKLING EXPLOITATION IN THE UK 42 (May 2018), <https://www.ciob.org/campaigns/tackling-modern-slavery-construction> (citing the results from a review of 49 UKMSA statements from the construction and building materials industry) [<https://perma.cc/XJ35-X56N>]; Birkey et al., *supra* note 170, at 835 (showing that very few companies provide “extensive disclosure” on trainings, audits, and evaluation of risks, for example).

to no meaningful information on any of the reporting areas.”¹⁷³ As mentioned, in some industries, companies seem to copy the reports of others.¹⁷⁴ Likewise, a study on universities’ compliance with the UKMSA found that many universities started with the same shared template, which encouraged a “box ticking” approach to developing their statements.¹⁷⁵

This templated approach shows that companies are treating modern slavery statements as an end in themselves. This is further shown by the U.K. universities study’s finding that those responsible for completing the statements stated that they were advised simply on how to comply with the UKMSA, as opposed to thinking about how the university could change its procurement practices.¹⁷⁶ The procurement functions at the universities were focused simply on cost, and, rather than using the UKMSA statement as an opportunity to rethink how they handle the issue of modern slavery, the universities focused simply on basic compliance with the standards.¹⁷⁷

2. *Reliance on Social Audits*

A common inclusion in slavery and human trafficking statements is the company’s disclosure of its reliance on social audits to identify violations of its modern slavery policies.¹⁷⁸ Social audits have a long history. In brief, social audits are used to determine if suppliers have complied with the company’s code of conduct and other relevant standards.¹⁷⁹ The use of social audits for suppliers began in the 1990s due to concerns over the

173. BUS. & HUM. RTS. RES. CTR., FTSE 100 & THE UK MODERN SLAVERY ACT: FROM DISCLOSURE TO ACTION 24 (2019), <https://www.business-humanrights.org/en/ftse-100-the-uk-modern-slavery-act-from-disclosure-to-action> (conducting a review of the reports filed by the 100 companies in the Financial Times Stock Exchange [FTSE] 100 Index) [<https://perma.cc/WBQ6-V9SC>]. The study also found that even the companies with the highest rated statements, “appear to be selective about what they disclose, providing individual examples with positive endings rather than detailing widespread, embedded risks.” *Id.* at 25.

174. CHARTED INST. BLDG., *supra* note 172, at 42.

175. Michael Rogerson et al., *Organisational Responses to Mandatory Modern Slavery Disclosure Legislation: a Failure of Experimentalist Governance?*, ACCT., AUDITING & ACCOUNTABILITY J. 12 (forthcoming). By contrast, however, a study of 101 statements from the clothing and textiles sector—an industry with more of a focus on brand reputation with consumers than the construction industry, for example—found “huge heterogeneity” in the reports, with statements ranging from a single paragraph to 26 pages in length. Mark Stevenson & Rosanna Cole, *Modern Slavery in Supply Chains: a Secondary Data Analysis of Detection, remediation and disclosure*, 23 SUPPLY CHAIN MGMT.: INT’L J. 81, 91 (2018). However, one-third of those reports fell into their category of “compliance only,” which involved short statements pointing only to basic policies. *Id.* at 91–92.

176. Rogerson et al., *supra* note 175, at 12–13.

177. *Id.* at 16–17.

178. Stevenson & Cole, *supra* note 175, at 86; David Monciardini et al., *The Organizational Dynamics of Compliance With the UK Modern Slavery Act in the Food and Tobacco Sector*, BUS. & SOC’Y, at 22 (forthcoming).

179. Sarosh Kuruvilla et al., *Field Opacity and Practice-Outcome Decoupling: Private Regulation of Labor Standards in Global Supply Chains*, 73 INDUS. & LAB. RELATIONS REV. 841, 843–44 (2020).

use of “sweatshop” labor by major brands, such as Nike and The Gap.¹⁸⁰

Although this reliance on social audits may sound like a positive development that is encouraged by the modern slavery disclosure laws, it is potentially problematic for two general reasons. First, it is problematic if corporations rely on social audits as the full extent of their responsibility to combat modern slavery.¹⁸¹ Social audits are a common part of current due diligence processes,¹⁸² but they should be only a part of that process and not the dominant process. Second, as described below, social audits are well-known to be ineffective.¹⁸³ Thus, modern slavery acts such as the CTSCA and UKMSA will be ineffective in creating organizational change if companies are able to rely on ineffective social audits to meet their disclosure obligations, as opposed to adopting due diligence processes that are consistent with the UNGPs and OECD Guidelines.¹⁸⁴

There are many problems with relying on social audits to improve corporations’ human rights performance. In practice, corporations are using social audits as a binary system: Either the supplier passed the compliance audit or it did not.¹⁸⁵ Corporations are not rewarding suppliers for exceeding their basic obligations and seeking continuous improvement.¹⁸⁶ Although suppliers with poor performance are being terminated, the remaining suppliers are not rewarded for improving their performance over time.¹⁸⁷ In fact, in one study, suppliers that were able to pass their social audit even though they increased their number of violations from the prior time period subsequently received more orders from the buyer.¹⁸⁸ Thus, the authors of that study concluded, “If factories are rewarded with access to lucrative supply chain relationships based upon their adherence to minimal standards, but not rewarded for incremental improvements in compliance, we should not be surprised that private regulation quickly reaches a ceiling on what it can deliver.”¹⁸⁹

The above findings, even though they are troubling, assume that an audit is effective in finding violations of a code of conduct by a supplier, but researchers and practitioners agree that little faith can be placed in the

180. Carolijn Terwindt & Amy Armstrong, *Oversight and Accountability in the Social Auditing Industry: The Role of Social Compliance Initiatives*, 158 INT’L LAB. REV. 245, 248 (2019); Tara Van Ho & Carolijn Terwindt, *Assessing the Duty of Care for Social Auditors*, 27 EUR. REV. PRIVATE L. 379, 380–81 (2019).

181. EUR. COMM’N, STUDY ON DUE DILIGENCE REQUIREMENTS THROUGH THE SUPPLY CHAIN: FINAL REPORT 73 (2020), <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en/format-PDF/source-search> [<https://perma.cc/8ZBJ-54RL>].

182. *Id.*

183. See *infra* notes 185–225 and accompanying text.

184. See *supra* notes 90–100 and accompanying text.

185. Matthew Amengual et al., *Global Purchasing as Labor Regulation: The Missing Middle*, 73 INDUS. & LAB. RELATIONS REV. 817, 836 (2020).

186. Kuruvilla et al., *supra* note 179, at 865; Amengual et al., *supra* note 185, at 817; RICHARD M. LOCKE, THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY 38–39 (2013).

187. Kuruvilla et al., *supra* note 179, at 865; Amengual et al., *supra* note 185, at 817.

188. Amengual et al., *supra* note 185, at 837.

189. *Id.* at 838.

results of social audits.¹⁹⁰ For example, the well-known business and human rights consulting firm, Shift, bluntly stated, “Despite the hundreds of thousands of social compliance audits conducted each year to ensure minimum workplace conditions in companies’ supply chains, there is little evidence that they alone have led to sustained improvements in many social performance issues, such as working hours, overtime, wage levels and freedom of association.”¹⁹¹ Likewise, interviewees from business and civil society in a recent European Commission study on human rights due diligence stated that it is common knowledge that audits do not work.¹⁹² In another study, one NGO director went so far as to state that the auditing practice is ineffective by design: The buyer can claim they have met their responsibility, the supplier can receive a passing grade with little actual oversight, and the auditors can continue to get paid and provide legitimacy to the entire regime.¹⁹³ These concerns are supported by instances of significant human rights violations occurring shortly after a supplier passed an audit, such as the identification of forced labor in an agricultural setting and a garment factory fire that killed over 100 people.¹⁹⁴

Furthermore, there is systematic evidence showing that we expect too much from social audits. First, there are measurement difficulties inherent in the social auditing process. For example, Kuruvilla and colleagues find

190. See *infra* notes 193–225 and accompanying text.

191. SHIFT, FROM AUDIT TO INNOVATION: ADVANCING HUMAN RIGHTS IN GLOBAL SUPPLY CHAINS 3 (2013), https://shiftproject.org/wp-content/uploads/2013/08/Shift_audittoinnovationsupplychains_2013.pdf [<https://perma.cc/EC3W-W9U3>].

192. EUR. COMM’N, *supra* note 181, at 73–74. One civil society interviewee went so far as to state, “I would say 90% of all social auditing reports are false. They either write down lies or the report may not be deliberately lying but such reports are not able to capture the reality of human rights violations on the ground, already for methodological shortcomings.” *Id.* at 74. See also, CORE ET AL., TACKLING MODERN SLAVERY THROUGH HUMAN RIGHTS DUE DILIGENCE 2 (June 2017), <http://www.respect.international/wp-content/uploads/2017/10/Tackling-Modern-Slavery-through-Human-Rights-Due-Diligence-CORE-2017.pdf> (stating that the inability of social audits to identify human rights abuses “is broadly accepted by social compliance professionals.”) [<https://perma.cc/N2F3-Y8UV>]. In one case, a social auditor surveyed its stakeholders, who “complained of inconsistent audit results, discrepancies, the certification of facilities that were not in fact compliant, and a general lack of trust in the system.” Terwindt & Armstrong, *supra* note 180, at 265.

193. See Genevieve LeBaron et al., *Governing Global Supply Chain Sustainability through the Ethical Audit Regime*, 14 GLOBALIZATIONS 958, 970 (2017) [hereinafter LeBaron et al., *Ethical Audit Regime*].

194. Genevieve LeBaron & Jane Lister, *Ethical Audits and Supply Chain of Global Corporations*, SHEFFIELD POL. ECON. RSCH. INST. [SPERI] BRIEF NO. 1, 1, 4 (Jan. 2016), <http://speri.dept.shef.ac.uk/wp-content/uploads/2018/11/Global-Brief-1-Ethical-Audits-and-the-Supply-Chains-of-Global-Corporations.pdf> [<https://perma.cc/XBL5-7WUH>]. For example, a factory fire at the Ali Enterprises factory in Pakistan occurred just three weeks after passing an audit that failed to note any fire safety problems. Terwindt & Armstrong, *supra* note 180, at 251. In 2013, the Rana Plaza building in Bangladesh, which housed multiple factories, collapsed and caused over 1,100 deaths. Van Ho & Terwindt, *supra* note 180, at 380. One of the factories in the building had recently been inspected by a social auditor, but the inspection failed to note the structural problems with the building. *Id.* Other examples of violations at certified facilities include the presence of child labor on cocoa farms and forced labor at garment suppliers. Bird & Soundararajan, *supra* note 79, at 394–95.

that even presumably easy-to-measure metrics are made difficult due to variations based on the supplier's country (or region within a country), the supplier's industry, employment practices, management practices, and so on.¹⁹⁵ In addition, different auditors use different auditing approaches that can vary significantly in how heavily they weigh the various factors being audited.¹⁹⁶ As a result, different auditors may come to completely different conclusions based on the same evidence.¹⁹⁷ Even auditors presumably using the same standards can come to different conclusions. For example, one study found that it was common for the same supplier to receive different ratings (such as, acceptable versus unacceptable, or good versus major deficiencies) from different auditors, including auditors from the same audit firm, without a clear sense of how the final ratings were calculated.¹⁹⁸

Second, as practiced, social auditing is a limited process. The auditors have limited time in their visits to factories, and there is a significant time lapse between visits.¹⁹⁹ Auditors typically have limited ability to conduct thorough investigations of factories, as they can only see what information is presented to them and interview people that the supplier's management allows them to.²⁰⁰ In many cases, the physical inspection of the factory is conducted not by the lead social auditor but by a local subcontracted firm.²⁰¹ In addition, workers at the supplier's facilities typically have a very limited role in the process.²⁰²

The auditing process is also limited by normally covering only tier one suppliers (i.e., the final supplier before the products reaches the lead firm), and not suppliers further upstream in the supply chain.²⁰³ As a result, social audits fail to identify unauthorized subcontracting arrangements.²⁰⁴ Auditing only tier one suppliers creates a risk that "audits have worsened conditions by shifting problems further down the supply chain."²⁰⁵ Overall, one study stated that corporations "practice auditing as an annually recurring, low-cost, outsourced, 'check the box' activity which does not seem to be related to actual compliance and is clearly decoupled from their sourcing practices."²⁰⁶ A "check the box" audit means that auditors are

195. Kuruville et al., *supra* note 179, at 850.

196. *Id.* at 849-50.

197. *Id.* at 855, 857.

198. *Id.*

199. See Stephanie Clifford & Steven Greenhouse, *Fast and Flawed Inspections of Factories Abroad*, N.Y. TIMES (Sept. 1, 2013), <http://www.nytimes.com/2013/09/02/business/global/superficial-visits-and-trickery-undermine-foreign-factory-inspections.html> ("A single inspector might visit a 1,000-employee factory for six to eight hours to review all types of manufacturing issues, like wages, child labor or toxic chemicals") [<https://perma.cc/X6U5-NPB6>].

200. LEBARON & LISTER, *supra* note 194, at 4.

201. Terwindt & Armstrong, *supra* note 180, at 250.

202. See *id.* at 251.

203. See LEBARON & LISTER, *supra* note 194, at 3.

204. *Id.*

205. *Id.*

206. Kuruville et al., *supra* note 179, at 868-69.

not actively investigating actual or potential violations but instead are simply “trying to prove that something is not there.”²⁰⁷

Third, social audits face accountability problems. In general, social auditors are not held accountable for producing substandard or negligent audits.²⁰⁸ The companies that contract for the social audits are not holding social auditors accountable, and the workers or governments that are supposed to benefit from the audits cannot either.²⁰⁹

Worsening the accountability problem are significant, unaddressed conflicts of interest. In short, when auditors are not accountable for conducting low-quality inspections, auditors willing to supply low-quality reports can enjoy significant demand for their work.²¹⁰ In some cases, a conflict of interest is created when the supplier (the factory owner) is the party paying the auditor.²¹¹ The supplier that wants a passing audit without investing in changing its operations will actively seek out lenient auditors.²¹² In other cases, the conflict is due to the buyer hiring the auditor when it is clear that the buyer does not want the auditor to find any problems.²¹³ In those cases, because the auditors are seeking return business from the buyer, they strictly follow instructions limiting the audit (e.g., by not looking any further than requested and avoiding investigating the use of subcontractors)²¹⁴ and engage in “covering up and understating problems out of concern for losing business [from that buyer].”²¹⁵ In short, the market for social auditors rewards low costs, low effort, and low standards.²¹⁶

Fourth, there are problems related to corruption, fraud, and cheating. Suppliers use many methods of cheating, such as inappropriately claiming that they made goods that were actually made by subcontractors in unaudited factories.²¹⁷ Some suppliers falsely tell buyers that they have received passing audit results or other certification, even going so far as using falsified certifications.²¹⁸ In other cases, suppliers simply pay a

207. LeBARON & LISTER, *supra* note 194, at 4 (quoting the director of an audit firm).

208. See Terwindt & Armstrong, *supra* note 180, at 247; see also Van Ho & Terwindt, *supra* note 180, at 384.

209. Terwindt & Armstrong, *supra* note 180, at 247.

210. See *id.* at 252.

211. See Kuruvilla et al., *supra* note 179, 854.

212. Van Ho & Terwindt, *supra* note 180, at 381.

213. LeBARON & LISTER, *supra* note 194, at 968.

214. *Id.* at 968–69 (“Several of the auditors interviewed expressed concern that their clients are guiding audits down pathways that circumvent the most vulnerable workers”). In other cases, the auditors noted that they were only to pay attention to overtime violations by employees, and not violations concerning contractors, for example. *Id.* at 969.

215. *Id.*

216. Terwindt & Armstrong, *supra* note 180, at 252.

217. David Hess, *Business, Corruption, and Human Rights: Towards a New Responsibility for Corporations to Combat Corruption*, 2017 WISC. L. REV. 641, 668–69. See also Clifford & Steven Greenhouse, *supra* note 199 (providing an example of a Wal-Mart supplier falsifying forms to state that an approved subcontractor made goods that were actually made by an unaudited subcontractor).

218. LeBARON & LISTER, *supra* note 194, at 970.

bribe to pass the audit.²¹⁹

Such cheating is not surprising because it is well known that suppliers face conflicting demands from buyers. On the one hand, they are supposed to improve on a variety of social performance dimensions; on the other hand, they are required to produce the same quantity and quality at the same (or lower) price and in the same (or faster) time frame.²²⁰ Failing on either requirement can mean lost business. Thus, it is not surprising that suppliers feel pressured to cheat the system.²²¹

Finally, social audits are likely to be especially ineffective for modern slavery.²²² Modern slavery is illegal and is facilitated by those that are intentionally engaging in egregious behavior.²²³ Anyone investigating or standing up to such people is likely putting themselves at risk.²²⁴ In addition, the victims of forced labor may fear retribution, and therefore may not notify anyone in a position of authority.²²⁵

3. *The Problem of Business Defining Compliance*

The prior sections of this Part set out two general problems with transparency-based regulation of modern slavery in corporate supply chains. First, the modern slavery statements are likely to be decoupled from corporate operations. Second, corporations are likely to rely on ineffective social audits as the means for demonstrating the effectiveness of their approach to modern slavery.

These two problems are unlikely to improve over time. The problems with sustainability reporting have remained even though such reports have been widely used for years and are even mandated in some jurisdictions.²²⁶ In addition, as pointed out by Monciardini and colleagues, these modern slavery acts are susceptible to what Lauren Edelman has called the “managerialization of the law.”²²⁷ In brief, this concept shows how corporations can define what compliance with modern slavery transparency laws means, even if that definition of compliance is limited to the adoption of ineffective, reactive measures, and not proactive measures.²²⁸

219. Hess, *supra* note 217, at 668-69.

220. Bird & Soundararajan, *supra* note 79, at 392-93.

221. *See id.*

222. Jolyon Ford & Justine Nolan, *Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: The Discrepancy Between Human Rights Due Diligence and the Social Audit*, 26 *AUSTL. J. HUM. RTS.* 27, 35 (2020); Stephen John New, *Modern Slavery and the Supply Chain: The Limits of Corporate Social Responsibility?*, 20 *SUPPLY CHAIN MGMT.: INT'L J.* 697, 699 (2016).

223. New, *supra* note 222, at 699.

224. *Id.* (“Put bluntly, staff from a buying [organization] who poke about in potentially dubious situations face the risk of putting themselves—and, potentially, their families, say—in harm’s way”); *see also* Ford & Nolan, *supra* note 222, at 35 (“Workers may be afraid to talk openly with auditors about slavery risks”).

225. New, *supra* note 222, at 699.

226. Hess, *Transparency Trap*, *supra* note 105, at 31.

227. Monciardini et al., *supra* note 178, at 6.

228. *Id.* at 41.

Under Edelman's idea, once organizational structures become institutionalized (i.e., widely and uncritically accepted by business as the appropriate response), then outsiders come to defer to that business definition of compliance.²²⁹ For example, in reviewing empirical work on this issue in the area of civil rights laws in employment, Edelman and colleagues stated:

In the context of civil rights law, which tends to be highly ambiguous, organizations create specific compliance structures like [Equal Employment Opportunity (EEO)] offices and discrimination grievance procedures. They also formalize their personnel practices by creating structures like progressive discipline policies and formal multiperson decision-making bodies. Over the first few decades after the enactment of the civil rights legislation of the 1960s, these structures became widely accepted, or institutionalized, as evidenced by their diffusion across organizations. . . . Importantly, empirical work has established that these organizational structures, although they appear to further legal ideals, are often ineffective. . . . Thus, organizations adopt antidiscrimination policies, but often decouple their formal policies from their informal practice. . . . They create special EEO compliance offices and affirmative action managers, but give those offices and managers no real authority to change discriminatory organizational behavior. . . . They institute performance evaluation procedures and progressive discipline policies, but fail to discern when managers use these policies to cover up discrimination rather than to prevent it.²³⁰

The situation is likely to be the same with modern slavery transparency laws. To the extent that regulators, investors, consumers, or other stakeholders rely on disclosures of decoupled practices and social audits as evidence of a corporation's positive performance on modern slavery issues, then transparency legislation can deliver nothing more than symbolic compliance. As stated by Monciardini and colleagues in their discussion of the managerialization of the UKMSA, "By creating anti-slavery programs and policies, employers and managers are extolled for tackling slavery while they actually maintain existing organizational practices."²³¹ Thus, although at first glance the use of social audits can be viewed as a positive example of private regulation, with corporations taking responsibility for human rights issues related to the production of their goods, the reality is that social audits should be viewed as an example of corporations taking regulatory responsibility away from governments in attempt to prevent more onerous regulation.²³² In addition, businesses' reliance on social audits "frustrate the more fundamental solutions to address working conditions."²³³

229. Linda Hamilton Krieger et al., *When "Best Practices" Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 *LAW & SOC. INQUIRY* 843, 847 (2015).

230. *Id.* at 846-47 (citations omitted).

231. Monciardini et al., *supra* note 178, at 43.

232. LEBARON & LISTER, *supra* note 194, at 6-7 ("The increasing use of audits as a tool of governance is bolstering corporate interests and influence over consumers and policy-makers and, ultimately, deepens corporations' power to make their own rules and norms and evaluate and report on their own performance").

233. Terwindt & Armstrong, *supra* note 180, at 247.

IV. Towards a Legislative Solution in the United States

Why do these transparency initiatives continue to be proposed even though they are, or should be, expected to be of limited effectiveness? As previously stated, policy makers and business are motivated to advocate for transparency initiatives because it allows policy makers to claim to have taken action and allows business to continue operations with few changes.²³⁴ In addition, due to what has been termed a “despondence trap,” civil society has settled for advocating for transparency because the NGOs have given up hope that they can encourage legislators to adopt more stringent regulation.²³⁵

The situation is starting to change, however. The success in France of the Duty of Vigilance legislation, which requires corporations to undertake human rights due diligence, has spurred a push for more stringent regulation throughout Europe.²³⁶ In response, we have seen pushes for similar actions in Switzerland, the Netherlands, Germany, and others, including an announcement by the European Commissioner for Justice that the European Commission will introduce legislation on mandatory human rights due diligence for European Union companies in 2021.²³⁷ In fact, well-known multinational corporations such as Adidas, Nestle, and Unilever have signed a joint statement in support of mandatory human rights due diligence in Europe.²³⁸

The potential for new legislation on mandatory human rights due diligence has parallels with the global spread of anti-bribery legislation. For years, the U.S. was the only country that criminalized the payment of bribes to foreign officials, as other countries feared such legislation would be harmful to business interests.²³⁹ Eventually, however, an anti-corruption norm developed, which involved OECD and U.N. conventions, fol-

234. See *supra* notes 105-07 and accompanying text.

235. In the context of business and human rights legislation, Evans has termed this lack of hope for better legislation a “despondence trap.” Alice Evans, *Overcoming the Global Despondency Trap: Strengthening Corporate Accountability in Supply Chains*, 27 REV. INT’L POL. ECON. 658, 665 (2020).

236. *Id.* at 676-77.

237. *2021 Law Will Make Human Rights Mandatory for EU Companies*, HERBERT SMITH FREEHILLS: LEGAL BRIEFINGS (May 6, 2020), <https://www.herbertsmithfreehills.com/latest-thinking/2021-law-will-make-human-rights-due-diligence-mandatory-for-eu-companies> [<https://perma.cc/667F-866A>].

238. Statement of Businesses, Adidas et al., Support for EU Framework on Mandatory Human Rights and Environmental Due Diligence (Sept. 2, 2020), https://media.business-humanrights.org/media/documents/EU_Business_Statement_Mandatory_Due_Diligence_02092020.pdf [<https://perma.cc/JER6-HQZH>]. The letter states the following benefits of legislation:

Mandatory legislation can contribute to a competitive level-playing field, increase legal certainty about the standards expected from companies to respect human rights and the environment, clarify legal consequences for when responsibilities are not met, promote engagement and impactful actions between supply chain partners and, above all, trigger and incentivise impactful and effective actions on the ground.

Id.

239. Evans, *supra* note 235, at 677-78.

lowed by State legislation criminalizing bribes extraterritorially.²⁴⁰

This Part explores the possibility of moving away from transparency-based regulation and towards mandatory human rights due diligence for the problem of modern slavery in global supply chains. There are several reasons to be hopeful for such a movement. The current and expected future ineffectiveness of the CTSCA, UMKSA, and the Australian act, as explained in the previous Part, show the need for a new approach. As stated by Sinclair and Nolan, “It may transpire that [modern slavery acts’] failings are, in fact, their greatest achievement, should this provide the impetus required to move towards mandated due diligence regimes.”²⁴¹

The U.S. already has laws that attempt to reach the use of forced labor in global supply chains. However, the overall impact of those laws seems to be limited. First, Section 307 of the Tariff Act of 1930 prohibits entry into the U.S. any goods “mined, produced or manufactured wholly or in part in any foreign country” by forced or indentured labor.²⁴² Anyone may file a report with the Customs and Border Patrol (CBP) stating that they have a reasonable belief that goods in violation of Section 307 may be imported into the U.S.²⁴³ If the information available to the Commissioner of Customs reasonably indicates that the merchandise is in violation of Section 307, then the Commissioner may issue a Withhold Release Order (WRO), which prevents the merchandise from entering the U.S.²⁴⁴ If the Commissioner conclusively determines that the merchandise violates Section 307, then the Commissioner will publish such a finding in the Customs Bulletin and the Federal Register, and the goods will be prohibited from entering the U.S. unless the importer can refute the finding.²⁴⁵

The CBP has recently increased its use of WROs. In fiscal year 2019, the government issued six WROs compared to two in the prior year.²⁴⁶ Between September 2019 and August 2020, the CBP issued eleven WROs.²⁴⁷ For example, in July 2020, the CBP issued a WRO on medical

240. Hess, *supra* note 217, at 655–57; see generally Anita Ramasastry, *Closing the Governance Gap in the Business and Human Rights Arena*, in *HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT?* 162–90 (Surya Deva & David Bilchitz, eds., 2013).

241. Sinclair & Nolan, *supra* note 147, at 170.

242. 19 U.S.C.A. § 1307 (2016). Before it was repealed by the Trade Facilitation and Trade Enforcement Act of 2015, the Tariff Act was limited by a clause that created an exception for goods where the demand of those goods exceeded the ability to produce those goods in the U.S. Johnson, Jr. et al., *supra* note 19, at 1595.

243. 19 C.F.R. § 12.42(b) (2017). Port directors and other Customs officers are required to report such matters to the Commissioner of Customs. *Id.* at § 12.42(a).

244. Johnson, Jr. et al., *supra* note 19, at 1595. See also 19 C.F.R. § 12.42(e) (2017).

245. *Id.* § 12.42(g).

246. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 522* (June 2020), <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> [<https://perma.cc/GP29-M3YM>]. In 2019, the government received 53 allegations. *Id.*

247. Press Release, U.S. Customs and Border Protection, *CBP Collects \$575,000 from Pure Circle U.S.A. for Stevia Imports Made with Forced Labor* (Aug. 13, 2020), <https://www.cbp.gov/newsroom/national-media-release/cbp-collects-575000-pure-circle-usa-stevia-imports-made-forced-labor> [<https://perma.cc/X52C-ZHVX>].

gloves produced in Malaysia.²⁴⁸ In August 2020, the CBP collected \$575,000 in penalties against Pure Circle U.S.A., Inc., for the importation of stevia (a food product) produced with forced labor in China.²⁴⁹ The CBP press release stated, “This action is the first penalty that CBP has issued for imports made with forced labor since the passage of the Trade Facilitation and Trade Enforcement Act in 2015, and demonstrates another enforcement tool in CBP’s ongoing effort to prevent goods made with forced labor from entering the United States.”²⁵⁰

Second, under Federal Acquisition Regulations (FAR), all government contractors (including their employees and agents), are prohibited from engaging “in severe forms of human trafficking” or “using forced labor in the performance of a contract.”²⁵¹ In addition, they are prohibited from engaging in various actions that are indicators of modern slavery, such as denying an employee access to identification or immigration documents, using misleading or fraudulent recruitment practices, or charging employees recruitment fees.²⁵² For most contracts with a value over \$500,000,²⁵³ the contractor is required to maintain a compliance plan.²⁵⁴ In addition to raising awareness of the issue among employees and providing employees with a process to report any suspected violations,²⁵⁵ the compliance program must also include “[p]rocedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in trafficking in persons (including activities in paragraph (b) of this clause [such as forced labor]) and to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees that have engaged in such activities.”²⁵⁶ Penalties for noncompliance include termination of the contract and suspension or debarment.²⁵⁷ In fiscal years 2019 and 2018 combined, the Department of Defense investigated twenty-six cases of forced labor in federal acquisitions.²⁵⁸

These laws and their recent changes in enforcement show the U.S.’s strong support for combatting modern slavery. The next step is adopting additional supportive legislation and encouraging business to help address the structural conditions that contribute to modern slavery. The remain-

248. Liz Lee, *Amid Virus Crisis, U.S. Bars Imports of Malaysia’s Top Glove Over Labor Issues*, REUTERS (Jul. 16, 2020), <https://www.reuters.com/article/us-top-glove-usa/amid-virus-crisis-us-bars-imports-of-malysias-top-glove-over-labor-issues-idUSKCN24H0K2> [<https://perma.cc/9SRP-L6AT>].

249. U.S. Customs and Border Protection, *supra* note 247.

250. *Id.*

251. Federal Acquisition Regulations [FAR] 52.222-50(b)(1), (3) (2018).

252. *Id.* at (b)(4)-(6) (2018).

253. *Id.* at (h)(1) (2018). This provision “applies to any portion of the contract that— (i) [i]s for supplies, other than commercially available off-the-shelf items, acquired outside the United States, or services to be performed outside the United States; and (ii) [h]as an estimated value that exceeds \$500,000.” *Id.*

254. FAR 52.222-50(h)(2).

255. *Id.* at (h)(3)(i)-(ii).

256. *Id.* at (h)(3)(v).

257. *Id.* at (e)(6) & (7).

258. U.S. DEP’T OF STATE, *supra* note 246, at 522.

der of this Part proceeds by first discussing two proposed bills in the U.S. on business and human rights, which are both focused on the transparency-based approach. Next, this Part discusses the developments in Europe on mandatory human rights due diligence and the different approaches countries have adopted, as well as the proposals in the current draft of a possible United Nations treaty on business and human rights. This is followed by a discussion of next steps that the U.S. should take to address modern slavery in global supply chains.

A. Current U.S. Proposals

In March 2020, Representatives Maloney (New York) and Smith (New Jersey) proposed the “Business Supply Chain Transparency on Trafficking and Slavery Act of 2020.”²⁵⁹ This bill has been proposed multiple times, and was first proposed by Representative Chris Smith in 2013 as an amendment to the Trafficking Victims Protection Act (TVPA).²⁶⁰ In short, this bill closely tracks the existing modern slavery acts. The bill would amend section 13 of the Securities Exchange Act of 1934 to require “covered issuers” (defined under the SEC Act as an issuer with over \$100 million in global receipts) to provide annual disclosures on “to what extent, if any” the company conducts activities such as maintaining policies on modern slavery and evaluating the risks of modern slavery in the supply chain.²⁶¹ This bill would require the SEC to disclose—in a searchable format—what companies are required to file modern slavery reports, and to make those reports publicly available on the SEC’s website.²⁶² Overall, however, it replicates the problems identified above with the California, U.K., and Australian acts.²⁶³

A different approach is the “Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019.”²⁶⁴ This is not a proposed bill, but is a draft bill that was issued for discussion at a U.S. House Finan-

259. See H.R. 6279, 116th Cong. (2nd Sess. 2020). Not addressed in this Article is the *Uyghur Forced Labor Prevention Act*, which is a more limited bill focused only on forced labor in supply chain factories located in in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China. See *Uyghur Forced Labor Prevention Act*, H.R. 6210, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/6210> [<https://perma.cc/DV6P-PLYP>]. Under this bill, any good manufactured, in whole or in part, in the Xinjiang Uyghur Autonomous Region of China, or with its government, would be denied entry into the U.S. under section 307 of the Tariff Act of 1930, unless the Commissioner of U.S. Customs and Border Protection determines, “by clear and convincing evidence,” that convict, forced, or indentured labor was not used in its production. *Id.* §4. The bill was passed in the House of Representatives by a vote of 406 to 3, and the Senate subsequently referred the bill to the Committee on Foreign Relations.

260. Weiss, *supra* note 31, at 37–39.

261. Business Supply Chain Transparency on Trafficking and Slavery Act of 2020, H.R. 6279, 116th Cong., § 3 (2020).

262. *Id.*

263. See *supra* Part III.B.

264. See Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019 [Discussion Draft], H.R. ____, 116th Cong. (2019), <https://financialservices.house.gov/uploadedfiles/bills-116pjh-corphuman.pdf> [hereinafter Corporate Human Rights Risk Assessment] [<https://perma.cc/P7V2-G4EV>].

cial Services Subcommittee on Investor Protection, Entrepreneurship and Capital Markets hearing on “Building a Sustainable and Competitive Economy: An Examination of Proposals to Improve Environmental, Social, and Governance Disclosures.”²⁶⁵ Similar to the bill just discussed, this draft bill would amend the Securities Exchange Act of 1934 and its disclosure requirements; however, it would also recognize the importance of due diligence under the UNGPs and require such an assessment.²⁶⁶ Section 3(a) states that a company required to file an annual report under the 1934 Act “shall conduct an annual analysis” to identify both human rights risks and impacts in its “operations and the value chain” and to then rank those risks and impacts “based on their severity.”²⁶⁷ Thus, in contrast to the modern slavery acts, this bill would require companies to conduct due diligence (although the bill would leave it to the company to determine the form and extent of that due diligence).²⁶⁸ The disclosure provisions would require companies to describe the results of that assessment, how the assessment was conducted, and what steps, if any, the company has taken to avoid or mitigate any risks or impacts identified.²⁶⁹ It is important to note that, as part of the 1934 Act, a company’s liability would be limited to materially false and misleading statements.²⁷⁰ The bill would not create liability for adverse human rights impacts, and it would not give victims of human rights abuses a cause of action. In contrast, in Europe, the legislative trends have moved past a focus only on disclosure to also mandate human rights due diligence, including, in some cases, liability towards victims of human rights abuses.²⁷¹

B. Trends in Mandatory Human Rights Due Diligence

In response to the challenge of holding multinational corporations liable for the negative human rights impacts that occur in their supply chains overseas, which are typically due to actions of legally separate entities such as subsidiaries or suppliers,²⁷² several countries have started experi-

265. Building a Sustainable and Competitive Economy: An Examination of Proposals to Improve Environmental, Social, and Governance Disclosures: Hearing Before the Subcomm. on Inv. Prot., Entrepreneurship & Capital Mkts. of House Comm. on Fin. Servs., 116th Cong. (July 10, 2019), <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=404000#Wbcast03222017> [<https://perma.cc/2AWH-FNXU>].

266. Corporate Human Rights Risk Assessment, *supra* note 264, §§ 2, 3.

267. *Id.* § 3(a).

268. *Id.*; see *supra* notes 113, 151 and accompanying text.

269. Corporate Human Rights Risk Assessment, *supra* note 264, § 3.

270. For a discussion of a company’s limited potential liability for similar disclosures, see Connor Kuratek et al., *Legal Liability for ESG Disclosures*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 3, 2020), <https://corpgov.law.harvard.edu/2020/08/03/legal-liability-for-esg-disclosures> [<https://perma.cc/DW5X-PZMG>].

271. Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 U. CHI. J. INT’L L. 323, 326, 331–32 (2021).

272. For an overview of the issues that prevent victims of human rights abuse from holding multinational parent companies legally accountable in their home countries, see Dalia Palombo, *The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals*, 4 BUS. & HUM. RTS. J. 265, 267–69 (2019).

menting with mandatory human rights due diligence (sometimes referred to as mHRDD) legislation.²⁷³ France was the first country to adopt such legislation with its Duty of Vigilance law in 2017.²⁷⁴ This law sets out a due diligence obligation for corporations coupled with liability for failure to exercise reasonable care.²⁷⁵ The due diligence obligation requires companies with at least 5,000 employees in France (or 10,000 worldwide) in their corporate group²⁷⁶ to develop, implement, and publish a vigilance plan that identifies serious risks of human rights violations (and environmental harms), creates measures to prevent those abuses, and monitors compliance with the plan throughout the company's supply chain.²⁷⁷ If a company fails to establish an appropriate vigilance plan and that failure allowed a human rights abuse to occur in the company's supply chain (which includes suppliers with whom the company has an established commercial relationship), then a private party may sue for the harm they suffered.²⁷⁸ There is an open question on the level of proof needed for a plaintiff to show a causal link between the vigilance plan's inadequacy and the harm suffered for purposes of liability.²⁷⁹ It is clear, however, that the

(discussing issues of limited liability and extraterritoriality); Gwynne Skinner, *Beyond Kiobel: Providing Remedies for Violations of International Human Rights Norms By Transnational Businesses in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158 (2014) (discussing a wide range of barriers, including limited liability, *forum non conveniens*, and litigation costs).

273. See, e.g., Mina Aryobsei & Marius Scherb, *Germany Takes a Step Closer to Mandatory Human Rights Supply Chain Due Diligence*, FRESHFIELDS BRUCKHAUS DERINGER: SUSTAINABILITY (July 15, 2020), <https://sustainability.freshfields.com/post/102gbky/germany-takes-a-step-closer-to-mandatory-human-rights-supply-chain-due-diligence> (providing an overview of how business and human rights practitioners have also been monitoring developments in Germany on mandatory human rights due diligence legislation) [<https://perma.cc/HW4L-ZBGD>].

274. Palombo, *supra* note 272, at 275.

275. See *id.*; Sarah 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, 318 (2017).

276. This requirement includes "direct or indirect subsidiaries." Johnson, Jr. et al., *supra* note 19, at 1596-97. In practice, this requirement significantly limits the number of companies subject to the law, with only 150 to 300 companies meeting the standard. Elsa Savourey, *France Country Report*, in STUDY ON DUE DILIGENCE REQUIREMENTS THROUGH THE SUPPLY CHAIN: PART III, COUNTRY REPORTS 56, 56 (Lise Smit et al., eds., 2020), <https://op.europa.eu/en/publication-detail/-/publication/0268dfcf-4c85-11ea-b8b7-01aa75ed71a1/language-en> [<https://perma.cc/EP8G-49NU>].

277. Palombo, *supra* note 272, at 275-76.; Cossart et al., *supra* note 275, at 317, 320. The plan should be drafted in consultation with the company's stakeholders and should include "risk mapping" (the identification and prioritization of risks), a "regular evaluation process," "actions to mitigate risks or prevent severe impacts," a "complaint mechanism," and a "system monitoring implementation measures and evaluating their effectiveness." Savourey, *supra* note 276, at 64-66.

278. Palombo notes,

[W]hen assessing civil liability, the company entering into the scope of the Vigilance Law would not be exposed to liability as a result of the fault of the subsidiary, supplier or subcontractor which led to the damage. The company would be exposed to liability for its own fault in the sense that it did not comply with its Vigilance Obligations, and this non-compliance led to damage that "the execution of these obligations (i.e., the Vigilance Obligations) could have prevented.

Palombo, *supra* note 272, at 276.

279. Palombo, *supra* note 272, at 282, 284.

further down the supply chain the harm occurs, the harder it will be for a plaintiff to show a breach of the duty of vigilance and then a causal link between that breach and the harm.²⁸⁰ In addition, and creating a further challenge to the plaintiff, the burden of proof is on the plaintiff to show that the inadequacy led to the harm.²⁸¹

In the Netherlands, the Child Labor Due Diligence Act requires companies to conduct due diligence to determine if child labor was used in the production of the company's goods and services, to develop an action plan to deal with the problem if there is a reasonable suspicion of child labor, and to provide a statement declaring its actions to regulatory authorities.²⁸² To enforce the act's provision, any individual with evidence that child labor was used in the production of a company's goods or services may file a complaint.²⁸³ The complaint first goes to the company, and if the company's response is "inadequate," then the regulatory authority will intervene.²⁸⁴ If the regulatory authority determines that the company is not conducting adequate due diligence, then the authority will instruct the company to do so under threat of penalty for noncompliance.²⁸⁵ At this point, it is unclear what evidence of child labor is sufficient for a complaint, or how the regulatory authority will assess due diligence.²⁸⁶ It is also important to note that this act does not provide for a remedy for any victims.²⁸⁷

Although it has not yet passed legislation, Switzerland has received significant attention for its consideration of due diligence legislation. In 2015, the Swiss parliament rejected a due diligence law, but public support for such a law led to a constitutional referendum.²⁸⁸ In response, this led to a legislative counterproposal.²⁸⁹ Both proposals utilize due diligence as a defense to liability—that is, a corporation is liable for abuses committed by foreign subsidiaries, but that corporation may defend and avoid liability by demonstrating that it had complied with its due diligence obligations.²⁹⁰ One commentator applauds this approach and states, "This is an innovative approach allowing corporations, which should have the relevant

280. Savourey, *supra* note 276, at 69.

281. Elise Groulx Diggs, et al., *Business and Human Rights as a Galaxy of Norms*, 50 GEO. J. INT'L L. 309, 311 (2019).

282. *The Netherlands Adopts Business and Human Rights Legislation to Combat Child Labor*, JONES DAY: INSIGHTS (Feb. 2020), <https://www.jonesday.com/en/insights/2020/02/the-netherlands-tackling-child-labor-with-new-act> [<https://perma.cc/N83G-29KV>]; Palombo, *supra* note 272, at 276.

283. *Update: Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law*, MVO PLATFORM (June 3, 2019), <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/> [<https://perma.cc/W9ZB-7WDZ>].

284. *Id.*

285. *Id.* The penalty begins with a fine, but a third violation within five years may result in imprisonment for the responsible director of the company. *Id.*

286. *Id.*

287. *See id.*

288. Palombo, *supra* note 272, at 276.

289. *Id.* at 276–77.

290. *Id.* at 277.

information concerning their business activities, to defend themselves against nuisance lawsuits, while at the same time, not [overburdening] human rights victims with a high standard of proof that they are unlikely to meet.”²⁹¹ The company’s potential liability does not extend to its entire supply chain, but only to its subsidiaries.²⁹² In addition, whereas the constitutional referendum would apply to all Swiss companies, the counterproposal would only apply to companies that meet a certain size threshold.²⁹³

These approaches show the different ways that mHRDD can be incorporated into legal liability determinations.²⁹⁴ First, the law can be limited to an explicit requirement that a corporation conduct HRDD. The child labor law in the Netherlands is an example of limiting mHRDD to just the adoption and implementation of a plan.²⁹⁵ Second, mHRDD legislation can require courts to use evaluations of the due diligence plan to determine whether the company was negligent in failing to prevent the harm. The French Duty of Vigilance law is an example of this category.²⁹⁶ Third, as with the Swiss proposals,²⁹⁷ HRDD can be used a statutory defense to a liability claim.

Further developments in mHRDD include negotiations on a Business and Human Rights Treaty.²⁹⁸ In 2014, the United Nations Human Rights

291. *Id.* at 284.

292. *Id.* at 277–78. The two proposals differ on a requirement of whether the parent corporation must have “effective control” over the subsidiary to be liable for its actions. *Id.* The higher standard of control required by the counter proposal may significantly limit the ability of a plaintiff to hold a parent company liable. *Id.* at 284. In addition, the constitutional referendum proposal has the potential to include actors beyond subsidiaries. That proposal states that companies “must ensure that human rights and environmental standards are also respected by companies under their control. Whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship.” SWISS COALITION FOR CORPORATE JUSTICE, THE INITIATIVE TEXT WITH EXPLANATIONS, https://corporate-responsibility.org/wp-content/uploads/2019/10/KVI_Factsheet_5_E.pdf [<https://perma.cc/28HE-DJ3Q>]. The explanation of that provision states,

Controlled companies are generally subsidiaries of parent companies. However, in certain cases, a multinational company could also de facto control another company outside its strict legal structure through the exercise of economic control. For example, a relationship of control may exist if a Swiss company is the only purchaser from a supplier even if the latter is not a direct subsidiary.

Id.

293. Palombo, *supra* note 272, at 282.

294. These different ways are based on the following: U.N. OFF. HIGH COMM’R HUM. RTS., THE RELEVANCE OF HUMAN RIGHTS DUE DILIGENCE TO DETERMINATIONS OF CORPORATE LIABILITY: CONCEPT NOTE 3 (Oct. 2017), <https://www.ohchr.org/Documents/Issues/Business/HRDDConsultationConceptNote.pdf> [<https://perma.cc/SM37-89HU>]. A fourth category not discussed in the text above is using an evaluation of a company’s due diligence efforts to determine the appropriate penalty or remedy after a determination that the company is legal liable for the harm. *Id.*

295. See *supra* notes 282–87 and accompanying text.

296. See *supra* notes 274282–81 and accompanying text.

297. See *supra* notes 288282–93 and accompanying text.

298. Doug Cassel, *Progress in the Newest UN Draft Treaty on Business and Human Right*, BUS. & HUM. RTS. RES. CTR. (Aug. 25, 2020), <https://www.business-humanrights.org/en/blog/progress-in-the-newest-un-draft-treaty-on-business-and-human-rights/> [<https://perma.cc/7WGS-U6UJ>].

Council adopted a resolution to establish an open-ended intergovernmental working group (OEIGWG) to elaborate on a treaty.²⁹⁹ The OEIGWG released its most recent draft (referred to as the second revised draft) in August 2020.³⁰⁰ Article 6 of the draft treaty provides that states should require companies to adopt HRDD.³⁰¹ Article 8 covers legal liability, and provides for liability for companies that fail to prevent another person (or legal entity) from “causing or contributing to a human rights abuse” in two different situations.³⁰² First, if the company “legally or factually controls or supervises” the entity that caused or contributed to the harm.³⁰³ This provision would apply, for example, to hold a multinational corporation liable for the actions of a subsidiary that it controls in another country.³⁰⁴ The second situation expands liability for the multinational corporation to other actors in the supply chain. In this situation, the company faces liability if it “should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to put adequate measures to prevent the abuse.”³⁰⁵ A business relationship is defined broadly to include suppliers.³⁰⁶

Article 8.7 states,

Human rights due diligence shall not automatically absolve [a company] from liability for . . . failing to prevent such abuses by a natural or legal person [Instead a] court or other competent authority will decide the liability of such entities after an examination of compliance with applicable human rights due diligence standards.³⁰⁷

Thus, both the French and Swiss approaches to liability would meet the requirements of the treaty. However, the treaty makes it clear that due diligence conducted with a “check the box” approach will not be adequate to protect the company from liability.³⁰⁸ Instead, an authority, such as a

299. G.A. Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014), https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9 [<https://perma.cc/Y83D-CCCA>].

300. Open-Ended Intergovernmental Working Group [OEIGWG] Chairmanship, Second Revised Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Aug. 6, 2020), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf. [hereinafter OEIGWG Chairmanship] [<https://perma.cc/43AR-DVUS>].

301. *Id.* art. 6.1.

302. *Id.* art. 8.7.

303. *Id.*

304. *Id.* arts. 1.5, 8.7.

305. OEIGWG Chairmanship, *supra* note 300.

306. Article 1.5, OEIGWG Chairmanship, *supra* note 300, defines a “business relationship” as “any relationship between natural or legal persons to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State, including activities undertaken by electronic means.”

307. *Id.* art. 8.8.

308. See EUR. COMM’N, *supra* note 181, at 107-08.

court, must examine the facts to determine if the company's due diligence was appropriately designed and carried out.³⁰⁹ Under the UNGPs, such a determination should depend on a variety of factors, such as "the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations."³¹⁰ Thus, rather than rest on a safe harbor for having completed a due diligence process that relied heavily on ineffective social audits, for example, the company must be prepared to defend its choices, which should encourage a more proactive and engaged due diligence process. Due diligence that is conducted with a "tick the box" approach, and is "reactive, instead of proactively trying to identify potential human rights impacts before they arise,"³¹¹ should not be sufficient to avoid liability.

C. Moving Forward

The next steps in the U.S. regulatory efforts should move away from viewing the encouragement of human rights due diligence as only a disclosure matter and instead follow the trends in Europe and the draft Business and Human Rights Treaty, and mandate human rights due diligence. The current approach to modern slavery—focused only on disclosure—is having a limited impact. In fact, that approach may be contributing to the situation: Corporations can claim to be tackling the problem while they are instead adopting ineffective practices and not addressing their collective role as a factor causing modern slavery.³¹² In addition, the path forward must not create a process that relies extensively on social audits. Current approaches to regulating modern slavery have allowed this by granting corporations too much freedom to determine how they choose to combat modern slavery. Although corporations need the freedom to adopt due diligence processes that match their situations, they must be held accountable for inadequate due diligence, or else operational efficiency concerns will drive corporations toward adopting primarily symbolic practices.

309. Some interviewees of the European Commission study stated that if due diligence was simply a regulatory requirement and not connected with the potential for liability under a duty of care, then the process would become a box-ticking exercise dominated by compliance personnel rather than contributing to an effort to "proactively address human rights." EUR. COMM'N, *supra* note 181, at 107-08. Another interviewee stated that a duty of care approach will create a different mindset in companies, such as "[w]hen you are really doing things and you do not want to hide, you want questions that can actually show how you are managing your impacts." *Id.*

310. UNGPs, *supra* note 77, at 17-18 (Principle 17(b)).

311. Rep. of the G.A., Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/73/163, at 8-9, ¶¶ 25(c)-(d) (July 16, 2018), https://ap.ohchr.org/documents/dpage_e.aspx?si=A/73/163 [<https://perma.cc/Y8Q4-A6P2>].

312. Discussing corporate social responsibility (CSR) and modern slavery more generally, New argues that CSR may be considered "part of the enabling mechanisms for modern slavery to persist." New, *supra* note 222, at 703. On the one hand, corporations' CSR policy statements give "the appearance of working to reduce the problem." *Id.* On the other hand, "the brutal exercise of commercial power, hard negotiation on prices and trading terms[,] generates the conditions in which forced labour emerges." *Id.*

In short, the goal for any legislative proposal should be to properly incentivize corporations to meaningfully implement human rights due diligence programs, and not engage in “box ticking,” as has been the experience with transparency approaches. As seen with the diversity of mandatory human rights due diligence approaches adopted and being debated in Europe, there are multiple paths forward for mandating human rights due diligence. The remainder of this section sets out the important decisions facing policy makers for implementing mandatory HRDD.

First, there is a fundamental question of whether legislation should focus only on modern slavery, which has been the focus of this Article, or whether mandatory human rights due diligence should include all human rights.³¹³ On the one hand, there is significant political will to address issues of modern slavery, and the U.S. has already demonstrated a strong and growing commitment to combatting modern slavery.³¹⁴ Moreover, modern slavery is without a doubt a gross human rights abuse that must be addressed,³¹⁵ and it is against the law to import goods into the U.S. that were produced, at least in part, by modern slavery.³¹⁶ On the other hand, there is a risk that limiting human rights due diligence to just modern slavery may cause some companies to focus on this issue to the exclusion of negative human rights impacts that may be more significant and likely for that company.³¹⁷ Even if a broader approach is ultimately followed, the specific issues of modern slavery and how it appears in global supply chains must be kept in mind.

To avoid the problems of corporations’ lack of action on modern slavery, and their adoption of ineffective practices when action is taken, the

313. UNGPs, *supra* note 77, at 13–14. Principle 12 states,

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

Id. at 13. The “International Bill of Human Rights” consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. *Id.* at 14.

314. See *supra* notes 242–45 and accompanying text.

315. Principle 23(c) of the UNGPs states that businesses should “[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.” UNGPs, *supra* note 77, at 25. The Interpretive Guide to the UNGPs notes that there “[i]s no uniform definition of gross human rights violations in international law,” but that “slavery and slavery-like practices” would be included. INTERPRETIVE GUIDE, *supra* note 86, at 6.

316. See *supra* note 218–26 and accompanying text (discussing section 307 of the Tariff Act of 1930 and the use of Withhold Release Orders).

317. Rep. of the G.A., *supra* note 311, at 8, ¶ 25(b); see also *id.* at 19, ¶ 74 (“both Governments and business enterprises need to make sure that a focus on one particular challenge is not done at the cost of other significant issues.”). As an example of this potential risk in a different context, see generally Veronica Root Martinez, *The Outsized Influence of the FCPA?*, 2019 U. ILL. L. REV. 1205 (arguing that many corporations have focused too much of their compliance efforts on the Foreign Corrupt Practice Act, which has been to the detriment of attention to other, often more important, compliance issues).

legislation must require corporations to conduct HRDD, including disclosures related to the efforts undertaken. There should be two aspects to this mandate: a broad due diligence mandate focused on conducting a minimum level of due diligence, and then more narrow provisions related to civil liability for harm caused due to inadequate due diligence. First, because modern slavery can exist deep in a company's supply chain,³¹⁸ the broad mandate must require companies to conduct due diligence over their entire supply chains and provide disclosure on those actions.³¹⁹ Similar to the CTSCA, this requirement should apply to a wide range of businesses.³²⁰ The government should establish a minimum standard for due diligence for this broad mandate, which may include modifications based on factors such as industry, locations of suppliers, and size of the company. Without such a standard, corporations have too much leeway and may only adopt symbolic structures, as seen under the modern slavery disclosure laws.³²¹ As with the French law, there should be penalties for non-compliance, and civil society organizations may play a role in identifying noncomplying corporations.³²²

Second, the more narrow provisions should hold corporations accountable for inadequate due diligence through potential civil liability "for harm reasonably foreseeable by the exercise of due diligence, and only with regard to harm that might reasonably have been avoided by the exer-

318. See *supra* notes 55–58 and accompanying text.

319. Especially if legislation covers all human rights impacts—and does not just focus on modern slavery—it may be more accurate to use the term "value chain" instead of supply chain. Michael Porter coined the term "value chain" to describe the systematic analysis of the multiple interconnected activities necessary to design, develop, and deliver goods or services to a customer, for purposes of determining where the company has the potential to create and capture value for purposes of developing a competitive advantage. See MICHAEL PORTER, *COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE* chap. 2 (1985). Thus, an analysis of the "value chain" would include what is referred to here as the "supply chain," but also a broader array of business relationships. For a general overview of how to map the connections between social issues, including human rights issues, and the value chain, see Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, *HARV. BUS. REV.* 78, 81 (Dec. 2006). Note, however, that Porter and Kramer are seeking to find opportunities where a corporation's positive contribution to society can create a competitive advantage, as opposed to preventing and mitigating adverse human rights impacts. See UNGPs, *supra* note 77, at 13 (stating, in the commentary to Principle 11, that undertaking activities to "support and promote" human rights "does not offset a failure to respect human rights throughout their operations") and 18 (stating, in the commentary to Principle 17, that due diligence should focus on "the business enterprise's potential adverse human rights impacts," which may be included in, but is different from the perspective of "enterprise risk-management systems" that focus on "managing material risks to the company itself").

320. Any company with over \$100 million in annual gross receipts must comply with the CTSCA. See Harris, *supra* note 117, at i.

321. See Monciardini et al., *supra* note 178, at 15, 39–40 (arguing that the vague standards of the UKMSA allowed for significant managerial "discretion and room for interpretation" and "formalistic compliance").

322. See Savourey, *supra* note 276, at 71–73. Likewise, Section 6.6 of the Revised Second Draft Treaty provides for sanctions for noncompliance with Sections 6.2 and 6.3 on mandatory due diligence.

cise of due diligence.”³²³ An approach that relies only on disclosure of due diligence efforts and the attendant, market-driven positive organizational change has been shown to be ineffective.³²⁴ Under those approaches, corporations are responsible only for setting up a process, but are not being held accountable to ensure that the process works. Civil liability creates an incentive for corporations to adopt due diligence practices to ensure that their subsidiaries and suppliers respect human rights and combat modern slavery.³²⁵

There are many challenges in creating a civil liability system that is both fair and effective. The foundational questions include how far down the supply chain liability should extend (that is, which business relationships are included), what connection to the harm creates liability (such as the UNGPs’ concepts of “cause”, “contribute”, and “directly linked”³²⁶), and how a government authority determines if a due diligence program was inadequate. In addition, there is the question of whether enforcement should come from the parties suffering harm, a regulator, or both.

With respect to liability for the supply chain, there is a significant difference between the French law and the Swiss proposals on the scope of responsibility. Under the Swiss proposals, a corporation is generally only liable for the actions of its subsidiaries.³²⁷ By contrast, under the French law, a corporation is liable not only for its subsidiaries, but also for “the activities of subcontractors or suppliers with whom they have an established commercial relationship, when those activities are related to this relationship.”³²⁸ Although this provision is open to interpretation,³²⁹ commentators state that it suggests that companies have an obligation to look beyond just tier one suppliers if the company has reason to be aware of human rights risks further down the supply chain.³³⁰ Thus, the legislative debate must determine what nature of “business relationship”—to use

323. Doug Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1 BUS. & HUM. RTS. J. 179, 183 (2016). Cassel is arguing for a common law duty of care requirement for parent corporation with respect to its subsidiaries. See *id.* at 186.

324. See *supra* Part III.B.

325. See Gwynne Skinner, *Beyond Kiobel: Providing Remedies for Violations of International Human Rights Norms By Transnational Businesses in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158, 260–61 (2014) (discussing parent liability for a subsidiary’s actions under a due diligence requirement, as opposed to the current “pierce the corporate veil” requirement under U.S. laws on limited liability which encourage parent corporations to avoid exercising control over their subsidiaries).

326. See *supra* notes 89–91 and accompanying text.

327. See *supra* note 292 and accompanying text.

328. See Diggs et al., *supra* note 281, at 346 (quoting the English translation of the French law).

329. See Savourey, *supra* note 276, at 67; Stéphane Brabant et al., *The Vigilance Plan: Cornerstone of the Corporate Duty of Vigilance Law*, *International Review of Compliance and Business Ethics*, REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L’ETHIQUE DES AFFAIRES 1, 1, 2–3 (Dec. 14, 2017), <https://media.business-humanrights.org/media/documents/ba571b729431e42b3605af7cc4eeaad149c33b2.pdf> [https://perma.cc/B388-2V4W].

330. See Diggs et al., *supra* note 281, at 346–47. Such an interpretation would also be consistent with the requirement in the UNGPs that companies have certain responsibili-

the term in the second revised draft of Business and Human Rights Treaty³³¹—is sufficient to create liability for a corporation.

A second question relates to the nature of a corporation's connection to the harm. To determine a company's responsibility for negative human rights impacts in its supply chain, the UNGPs rejected consideration of a company's control over the subsidiary or supplier and instead focused on whether the focal company caused, contributed to, or was directly linked to the harm.³³² The second revised draft of the Business and Human Rights Treaty requires states to create liability for companies that "fail to prevent another [company] with whom it has a business relationship, from causing or contributing to human rights abuses" ³³³ This responsibility extends to companies under the focal company's control, such as a subsidiary.³³⁴ However, the responsibility also extends to foreseeable risks of human rights abuse by those with whom the company has a business relationship "but failed to put adequate measures to prevent the abuse."³³⁵ Thus, if the company's required due diligence activities turned up evidence that a supplier was causing or contributing to a human right abuse, and the company did not take appropriate action to prevent the abuse, then the company may face liability for the harm resulting from that supplier's actions.³³⁶ The legislative debate should consider whether such an approach may be necessary to help prevent modern slavery, as opposed to an approach focused only on responsibility for control relationships.

Next is the question of determining the adequacy of a company's human rights due diligence for purposes of liability. Allowing victims of modern slavery to sue corporations for inadequate due diligence programs places a duty of care on the company.³³⁷ As stated in the draft Business and Human Rights Treaty, the presence of a due diligence program should not "automatically" release a company from liability.³³⁸ Instead, the rele-

ties for negative human rights impacts with which they are "directly linked." *See id.* at 348.

331. *See* OEIGWG Chairmanship, *supra* note 300, § 8.7.

332. *See* Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat'l Corp. and Other Bus. Enter., Hum Rts. Council, *Report Clarifying the Concepts of "Sphere of Influence" and "Complicity,"* U.N. Doc. A/HRC/8/16, at 5-6 (May 15, 2008), <https://digitallibrary.un.org/record/633721?ln=EN> (arguing against the idea of assigning responsibility for human rights impact based on influence) [<https://perma.cc/P3NC-ZKPT>]. The UNGPs do use the concept of "leverage," which is "where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm." UNGPs, *supra* note 77, at 21 (commentary to Principle 19). The concept of leverage comes into play when determining a company's appropriate response to the discovery that the company is causing, contributing to, or directly linked with, an adverse human rights impact. *See id.* at 20-21 (Principle 19).

333. OEIGWG Chairmanship, *supra* note 300, art. 8.7

334. *See id.* arts. 1.5, 8.7.

335. *See id.* art. 8.7

336. *See id.* arts. 1.5, 8.7.

337. *See generally*, Palombo, *supra* note 272.

338. *See id.* Likewise, the commentary to the UNGPs Principle 17 states: Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises

vant authority should determine if the due diligence plan “was adequate in the circumstances, and whether it was followed in reality.”³³⁹ This requires corporations to ensure that they have adopted and implemented appropriate due diligence for their circumstances and in light of any information obtained by them.³⁴⁰ In other words, HRDD that is simply a “box ticking” exercise will not be sufficient. A related issue is determining which party has the burden of proof. Placing the burden on the plaintiff, as under the French law,³⁴¹ may create too significant of a barrier for plaintiffs to hold corporations accountable.³⁴²

This approach to civil liability—which does not create a safe harbor for HRDD conducted in compliance with any government standards—should help incentivize corporations to avoid treating HRDD as a *pro forma* exercise. Although corporations will want guidance on what due diligence is sufficient to protect themselves from liability if harm does occur despite conducting due diligence, this guidance cannot come from minimum standards set by the government—as it should for the mandatory HRDD requirement. Instead, for the civil liability provisions, the guidance could come from the various business and human rights soft law instruments and other areas of law, such as torts.³⁴³

Making decisions on the issues above, and other issues not addressed in this Article, and drafting those decisions into workable legislation is fraught with challenges. For example, with more stringent regulation, there is always the concern that corporations will abandon a region with a high risk of forced labor, which can make the situation even worse in that area.³⁴⁴ Ultimately, the way forward will need to include multi-stakeholder initiatives (MSIs) focused on bringing together actors from government, civil society, and the private sector, to improve the effectiveness of anti-slavery initiatives, attack the supply side of modern slavery, and increase the capacity of suppliers to protect human rights.³⁴⁵ A mandatory human right due diligence system can encourage such developments,

conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses. See UNGPs, *supra* note 77, at 19.

339. EUR. COMM’N, *supra* note 181, at 264.

340. See *id.* at 264–65.

341. See Palombo, *supra* note 272, at 284.

342. The focus of this Article is on the prevention and mitigation of adverse human rights impacts due to its critique of current regulatory approaches towards modern slavery, but these issues, especially the placement of the burden of proof, are also important for determining a victim’s access to remedy under Pillar III of the UNGPs.

343. See generally, Diggs et al., *supra* note 281 (identifying the various sources of hard law and soft law that should influence the interpretation and application of the French Duty of Vigilance law).

344. See Stefan Gold et al., *Modern Slavery Challenges to Supply Chain Management*, 20 SUPPLY CHAIN MGMT.: INT’L J. 485, 489 (2015).

345. See *id.* at 490. For a critique of Multi-Stakeholder Initiatives in this area, see generally MSI INTEGRITY, NOT FIT-FOR-PURPOSE: THE GRAND EXPERIMENT OF MULTI-STAKEHOLDER INITIATIVES IN CORPORATE ACCOUNTABILITY, HUMAN RIGHTS AND GLOBAL GOVERNANCE (July 2020), https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf [<https://perma.cc/Z3JT-P26E>].

whereas the prior system based on disclosure and social auditing has shown that it cannot.³⁴⁶

Conclusion

Modern slavery is a global problem. Over 25 million people are in forced labor, with many of those people directly or indirectly involved in the production of goods sold in the U.S. through multinational corporations' supply chains. Corporations benefit from modern slavery, and their business practices are often one of the root causes, which is why modern slavery persists despite a societal repulsion to the practice. To hold corporations accountable for their efforts to ensure they are not linked to modern slavery, governments, such as the state of California and the United Kingdom, have relied on mandatory disclosure requirements. Such transparency initiatives are ineffective, however, and, despite attempts to improve on their shortcomings, they will continue to be ineffective for achieving corporate accountability. Corporations approach transparency as an end in itself, where the production of disclosures is disconnected from operational changes. In addition, these disclosures rely heavily on social audits to demonstrate a company's due diligence efforts, but social audits have not proven to be a reliable way to monitor human rights impacts in the supply chain. Instead, efforts towards a legislative solution must focus on mandatory human rights due diligence. Such an approach would be consistent with a developing trend in Europe. There are, of course, still concerns with only symbolic adoption of human rights due diligence, similar to the problems with the existing regulatory approaches, but the inclusion of civil liability provisions may be one way to push past such problems.

It should also be noted that transparency is still essential to mandatory human rights due diligence legislation. A civil liability system should rest on the starting assumption that if an action was not disclosed, then the corporation did not take that action. In addition, transparency allows sharing of best practices and helps all companies improve. There are still many issues to be addressed with mandatory human rights due diligence, but it is the path we must start down.

346. See Core et al., *Tackling Modern Slavery through Human Rights Due Diligence* 1, 3 (June 2017), https://corporate-responsibility.org/wp-content/uploads/2017/06/Core_DueDiligenceFINAL-1.pdf [<https://perma.cc/XR2C-7J66>].

