

Corporate Sustainability Due Diligence: Combining Human Rights and the Environment

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Ever since the concept of Corporate Social Responsibility (CSR) began to take off in the 1970s, multinational corporations (MNCs) and international organizations have attempted to implement a variety of voluntary initiatives to detect and prevent human rights and environmental abuses within corporate supply chains. Despite these voluntary initiatives, however, human rights violations and environmental damage have continued to occur frequently within the supply chains of MNCs, leading to increased calls for binding, “hard law” remedies. The adoption of the United Nations’ Guiding Principles on Business and Human Rights (UNGPs) in 2011 catalyzed efforts to adopt domestic mandatory human rights due diligence (mHRDD) laws, and since 2017, a growing number of nations have passed more comprehensive human rights and environmental due diligence (HREDD) laws that recognize the connection between human rights and the environment. The most ambitious HREDD proposal thus far is the European Union’s proposed Corporate Sustainability Due Diligence Directive (CS3D), which, when enacted, will impose mandatory human rights and environmental due diligence requirements on corporations that conduct business in the European Union.

This Note assesses the feasibility and desirability of adopting domestic HREDD legislation in the United States based on the framework provided by the EU’s proposed CS3D. The predominant reliance in the U.S. on voluntary CSR initiatives and limited disclosure regulations is insufficient to prevent human rights and environmental abuses in the supply chains of US-based MNCs. This Note argues that the proposed CS3D provides a promising model for how Congress could take stronger action in this area. Although it would not completely prevent ad-

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verse impacts and could be initially challenging to implement because of the ambiguity surrounding its scope, comprehensive federal HREDD legislation based on the CS3D framework would be a significant step towards filling in the gaps in U.S. corporate accountability.

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I. INTRODUCTION

The decade of the 1970s was a critical turning point in the development of the Corporate Social Responsibility (CSR) movement. The term CSR—which generally refers to “voluntary activities undertaken by firms in environmental or social areas”²—was first coined in

2. Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 187–88 (2018) (explaining that “the notion that CSR is ‘voluntary’ or ‘beyond law’ persists” despite recent efforts by some governments and scholars to incorporate actions in adherence with the law into the defini-

1953, but didn't become widely used until the 1970s.³ In 1971, the Committee for Economic Development, an influential nonprofit policy organization, set the movement in motion by endorsing the idea of a “social contract” between businesses and society under which businesses have an obligation to contribute to society beyond just supplying goods and services.⁴ CSR became increasingly popular over the next decade and was influenced by other contemporary social movements (such as the environmental movement) and new social and environmental legislation (like the Clean Air Act and the Occupational Safety and Health Act).⁵ At the same time, beginning with the Guidelines on Multinational Enterprises adopted by the Organisation for Economic Co-operation and Development (OECD) in 1976, many international organizations created non-binding, “soft law” guidelines that, if followed, would protect individuals from human rights violations and other abuses committed by corporations.⁶ Later on, a subset of CSR initiatives that focus exclusively on the environment—referred to by some scholars as Corporate Environmental Responsibility (CER)—emerged in the 1990s and have only grown in popularity since.⁷

Despite these voluntary initiatives, human rights violations and environmental damage continued to occur frequently within the supply chains of multinational corporations (MNCs), leading to increased calls for binding, “hard law” remedies. In 2011, the United Nations' Guiding Principles on Business and Human Rights (UNGPs) were introduced in an attempt to address the shortcomings of prior voluntary efforts by proclaiming an obligation for corporations to respect human rights and perform human rights due diligence (HRDD).⁸ In response, there has been a steady increase in legal efforts to impose mandatory human rights due diligence (mHRDD) requirements on corporations, and major European nations such as

tion). CSR policies are sometimes alternatively labeled under Environmental, Social and Governance (ESG), but this Note refers to all such policies as CSR for the sake of uniformity.

3. Mauricio Andrés Latapí Agudelo et al., *A Literature Review of the History and Evolution of Corporate Social Responsibility*, INT'L J. CORP. SOC. RESP., 2019, at 5.

4. *Id.* at 5–6; *Corporate Social Responsibility: A Brief History*, ASS'N OF CORP. CITIZENSHIP PROS., <https://accp.org/resources/csr-resources/accp-insights-blog/corporate-social-responsibility-brief-history/> [<https://perma.cc/TXZ7-2R9V>] (last visited Jan. 20, 2024).

5. Agudelo et al., *supra* note 3, at 6.

6. *See* Part II(A)(1) *infra*.

7. Olga Martín-Ortega et al., *Towards a Business, Human Rights and the Environment Framework*, SUSTAINABILITY, May 2022, at 12.

8. UNITED NATIONS OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011) [hereinafter GUIDING PRINCIPLES].

the United Kingdom,⁹ France,¹⁰ and Germany¹¹ have enacted domestic mHRDD legislation.¹² Much of this legislation has focused exclusively on human rights impacts, but since 2017, a growing number of nations have passed more comprehensive human rights and environmental due diligence (HREDD) laws that recognize the connection between human rights and the environment and the need for due diligence to cover both types of impacts. The most ambitious HREDD proposal thus far is the European Union's proposed Corporate Sustainability Due Diligence Directive (CS3D), which, when enacted, will impose mandatory human rights and environmental due diligence requirements on corporations that conduct business in the European Union.¹³

This Note seeks to consider the feasibility and desirability of adopting domestic HREDD legislation in the United States by analyzing the EU's proposed CS3D. Part II surveys the history and development of human rights and environmental due diligence initiatives and their progression from voluntary policies and soft law guidelines to mandatory legal requirements. Part III examines the current application of human rights principles to businesses in the United

9. Section 54 of the U.K. Modern Slavery Act of 2015 requires commercial organizations of a certain size to submit an annual slavery and human trafficking statement that describes the steps the organization has taken to ensure that slavery and human trafficking is not taking place within its supply chains or any part of its own business. If the organization has taken no such steps, it must say that on the statement. Modern Slavery Act 2015, c. 30 (U.K.).

10. The 2017 French Law on the Corporate Duty of Vigilance requires French corporations of a minimum size to implement annual human rights vigilance plans covering their activities and the activities of their subsidiaries, subcontractors, and suppliers with whom the corporation has an established business relationship. The plan must establish measures to mitigate identified human rights risks and address negative impacts, and corporations may be held civilly liable for failure to adhere to the law's vigilance requirements. Loi 2017-399 du 27 Mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses D'Ordre [Law 2017-399 of March 27, 2017 relating to the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017.

11. Germany's Supply Chain Due Diligence Act requires companies of a certain size to "exercise due regard for the human rights and environment-related due diligence obligations" contained in the Act "in their supply chains with the aim of preventing or minimising any risks to human rights or environment-related risks or of ending the violation of human-rights related or environmental-related obligations." Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021. BGBL I at 2959 (Ger.).

12. Rachel Chambers & Jena Martin, *Reimagining Corporate Accountability: Moving Beyond Human Rights Due Diligence*, 18 N.Y.U. J.L. & Bus. 773, 786 (2022).

13. *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM (2022) 71 final (Feb. 23, 2022) [hereinafter *Proposal*].

States and argues that the predominant reliance on voluntary CSR initiatives and limited disclosure regulations is insufficient to prevent human rights and environmental abuses in the supply chains of US-based MNCs. Part IV analyzes the main provisions of the CS3D and concludes that while the Directive is an imperfect attempt at comprehensive HREDD legislation, it still represents the most aggressive attempt so far, and analysis of its benefits and drawbacks is very helpful for considering what a future HREDD law might look like in the United States.

II. OVERVIEW OF HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE

HRDD is “a process by which companies identify, prevent, mitigate, and account for how they address their actual and potential adverse impacts on human rights.”¹⁴ The concept of HRDD was originally created in relation to adverse human rights impacts but has subsequently been extended to other types of adverse impacts, including those on the environment.¹⁵ While some commentators view environmental due diligence as simply one dimension of HRDD,¹⁶ others consider them to be distinct but interdependent concepts.¹⁷ Indeed, policy discourses are increasingly relabeling HRDD as ‘human rights and environmental due diligence’ (HREDD).¹⁸ Regardless of how

14. Andreas Hösli & Rolf Weber, *Climate Change Reporting and Due Diligence: Frontiers of Corporate Climate Responsibility*, 18 EUR. CO. & FIN. L. REV. 948, 970 (2022) (summarizing how the concept of human rights due diligence is framed by the 2011 UN Guiding Principles on Business and Human Rights (UNGPs)).

15. Claire Bright & Karin Buhmann, *Risk-Based Due Diligence, Climate Change, Human Rights and the Just Transition*, SUSTAINABILITY, Sept. 2021, at 4.

16. See, e.g., CHIARA MACCHI, BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT: THE EVOLVING AGENDA 94 (2022) (“[T]he concept of human rights due diligence under the UNGPs has environmental and climate change dimensions which must be adequately captured by corporate policies and processes.”); Mikko Rajavuori et al., *Mandatory Due Diligence Laws and Climate Change Litigation: Bridging the Corporate Climate Accountability Gap?*, 17 REGUL. & GOVERNANCE 944, 946 (2023) (stating that human rights due diligence is a set of distinct corporate responsibilities that “entail the creation of processes through which companies themselves manage their potential and actual adverse human rights and environmental impacts.”).

17. See Hösli, *supra* note 14, at 970; Bright & Buhmann, *supra* note 15, at 4–6 (discussing environmental due diligence as an example of the concept of risk-based due diligence which builds on HRDD and extends it to other areas).

18. Almut Schilling-Vacaflor, *Integrating Human Rights and the Environment in Supply Chain Regulations*, SUSTAINABILITY, Aug. 2021, at 2. See also EUR. COAL. FOR CORP. JUST., BACKGROUND NOTE, EVIDENCE FOR MANDATORY HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE LEGISLATION (Jan. 2021), <https://corporatejustice.org/wp-content/uploads/2021/03/evidence-for-mhredd-january-2021-.pdf> [<https://perma.cc/LGL4-7BVA>] (“In the past years, several European coun-

they are labelled, and despite largely developing in separate “silos,”¹⁹ the modern concepts of human rights and environmental due diligence have both emerged out of a relatively recent set of legal developments that have sought to create an enhanced sense of corporate responsibility under which the rights of external stakeholders are integrated as priorities into company policies and processes.²⁰ This shared foundation, in addition to the widely recognized connection between human rights and the environment, suggests that corporations should adopt a more holistic approach to due diligence that accounts for the interdependence between human rights and the environment.²¹

A. Human Rights Due Diligence

1. The Evolution of the Human Rights Regime

The application of human rights principles to corporate conduct is a relatively new phenomenon that challenges the traditional understanding of our modern international human rights system. According to the conventional view, this system is designed primarily to protect individuals from acts of government.²² The state is central to both international human rights law and international law more generally: only states can become parties to the vast majority of international treaties,²³ which are arguably the most important source of law in the field of human rights.²⁴ This focus on state conduct is

tries, as well as the EU, have adopted or started to consider legislation that embeds elements of Human Rights and Environmental Due Diligence (“HREDD”) into law.”).

19. Lise Smit et al., European Commission, Directorate-General for Justice and Consumers, *Study on Due Diligence Requirements Through the Supply Chain*, Final Report, at 16 (2020).

20. See MACCHI, *supra* note 16, at 93.

21. As discussed *infra* in Part IV, the European Commission’s Corporate Sustainability Due Diligence Directive attempts such a holistic approach by combining the human rights and environmental components under the banner of “corporate sustainability.”

22. David Weissbrodt, *Business and Human Rights*, 74 U. CIN. L. REV. 55, 59 (2005) (“Given their importance in the world, it is really remarkable that corporations have not received more attention in the evolution of international law, particularly international human rights law. International law and human rights law have principally focused on protecting individuals from violations by governments.”).

23. See PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* 1461 (2013).

24. The “International Bill of Human Rights,” for example, refers to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), plus the Universal Declaration of Human Rights, which was largely codified by ICCPR and ISESCR. *The Foundation of International Law Rights Law*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights->

understandable given that the United Nations Charter and the Universal Declaration of Human Rights, which together laid the foundation for the current international human rights regime, were written in the immediate aftermath of and heavily influenced by the atrocities of World War II, such as the Holocaust, that were perpetuated by states.²⁵

In the decades following the establishment of the modern international human rights system, however, there were a number of global shifts that exacerbated the inherent flaws of a state-centric human rights system. Global trade increased dramatically, and multinational corporations (“MNCs”) became larger and more complex.²⁶ Many functions that were traditionally performed by governments, such as social welfare services, prisons, schools, and health-care provision for the poor, became increasingly privatized.²⁷ Moreover, the adoption of market deregulation and trade liberalization policies led to an increase in the mobility of capital and the importance of foreign investment flows.²⁸ These changes were, and still are, problematic from a human rights perspective because globalization and the enhanced power of MNCs have created new and uniquely dangerous risks for human rights abuses:

law (last accessed visited Mar. 10, 2023) [<https://perma.cc/HPN5-5SSG>] (last visited Mar. 10, 2023).

25. ALSTON & GOODMAN, *supra* note 23, at 140–41; *see also* Stewart Waters & William B. Russell III, *The World War II Era and Human Rights Education*, 76 SOC. EDUC. 301, 301 (“The effects of World War II on international understanding and protection of human rights have been far-reaching . . .”).

26. Kellie R. Tomin, *Germany Takes Action on Corporate Due Diligence in Supply Chains: What the United States Can Learn from International Supply Chain Regulations*, 18 LOY. U. CHI. INT’L L. REV. 189, 191 (2022) (citing *Human Rights and Business: How The U.N. Guiding Principles Have Influenced Supply Chain Due Diligence Laws*, SEDEX (July. 6, 2021), <https://www.https://www.sedex.com/human-rights-and-business-how-the-un-guiding-principles-have-influenced-supply-chain-due-diligence-laws/> [<https://perma.cc/BG8P-MEDK>]); *see* Eric W. Orts, *The Legitimacy of Multinational Corporations*, in PROGRESSIVE CORPORATE LAW 247, 248 (Lawrence E. Mitchell ed., 1995) (“global political conditions after World War II fostered another especially rapid growth of multinational enterprise”).

27. ALSTON & GOODMAN, *supra* note 23, at 1461. The trend of privatization of government functions grew in the 1980s and became a “global economic phenomenon” in the 1990s. The debate surrounding privatization is complex and controversial, but proponents of privatization generally claim that it increases economic efficiency by reducing the size of government and introducing a profit incentive, while its critics tend to argue that (excessive) privatization harms the public interest and undermines important values like justice and equity in the name of increasing efficiency. *See generally* John B. Goodman & Gary W. Loveman, *Does Privatization Serve the Public Interest?*, HARV. BUS. REV., (Nov.–Dec. 1991), <https://hbr.org/1991/11/does-privatization-serve-the-public-interest> [<https://perma.cc/NKL3-AC4D>].

28. ALSTON & GOODMAN, *supra* note 23, at 1461.

The corporate world touches the lives of people more closely than any other constituency, giving it immense potential for good or harm [In addition to its great benefits] has come collateral damage—to individuals, to the environment, to communities. Whether directly or indirectly, companies encounter problems which we would now classify under the generic heading of human rights. In their supply chains they can meet exploitative child labour, discrimination, risks to health and life, forced labour. The extractive industries can be involved in the spoliation of the environment and the destruction of communities. In contexts of conflict and human rights violations they confront a need for security which is too often provided by ill-disciplined state security forces.²⁹

Reacting to the increasing need for a set of standards surrounding the conduct of MNCs, the Organization for Economic Co-operation and Development (OECD) created the OECD Guidelines for Multinational Enterprises (OECD Guidelines) in 1976 in an effort to curb human rights violations by encouraging voluntary action by MNCs in their global labor supply chains.³⁰ The first initiative of its kind, the Guidelines have now been revised many times and today provide “voluntary principles and standards for responsible business conduct in areas such as human rights, employment and industrial relations, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.”³¹ As a “soft law” initiative without binding legal force, the OECD Guidelines rely primarily on the forces of social responsibility and self-interest on the part of MNCs to encourage compliance with its principles and standards.³² However, non-binding approaches

29. *Id.* at 1463.

30. Ronald C. Brown, *Due Diligence “Hard Law” Remedies for MNC Labor Chain Workers*, 22 *UCLA J. INT’L L. & FOR. AFF.* 119, 120 n.4 (2018) (“The OECD Guidelines embed the expectation that enterprises carry out due diligence to avoid causing or contributing to adverse impacts through their own activities and address such impacts when they occur.”).

31. *ORG. FOR ECON. COOP. AND DEV., ANNUAL REPORT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 11 (2013).

32. Brown, *supra* note 30, at 127 (“As MNCs developed and chains were used, pressures from consumers and internal institutions also grew for better treatment of workers on the labor supply chain. Such pressures, possibly affecting corporate reputation and profits, along with intense public opposition of these conditions, prompted many of the MNCs to adopt codes of conduct and corporate social responsibility in line with international institutional guidance that applied to corporate and supply chain workers.”). States that adhere to the OECD Guidelines are required to establish National Contact Points (NCPs) that promote the Guidelines and hear complaints, referred to as “specific instances,” but the specific instance process is non-binding on corporations, and corporations have no legal obligation to comply with any resolutions that result from the process. Stéfanie Khoury & David Whyte, *Sidelining Corporate Human Rights Violations: Corporate Human Rights Violations: The Failure of the OECD’s Regulatory Consensus*, 18 *J. HUM. RTS.* 363, 364–66 (2019).

like the OECD Guidelines have been criticized for their lack of effective enforcement mechanisms and other weaknesses, and the continued occurrence of human rights violations within the value chains of MNCs has led to increased calls for binding “hard law” remedies.³³

2. Human Rights Due Diligence and the UNGPs

Beginning in the mid-1990s, numerous voluntary initiatives—including accreditation and certification standards, industry-based codes, and reporting frameworks—were developed “to form an infrastructure intended to pressure companies to be more responsible in their business activities.”³⁴ These developments, in addition to the continuing failure of the UN to establish a corporate code of conduct for transnational corporations with respect to human rights, eventually led to the adoption of the UN Guiding Principles on Business and Human Rights.³⁵ The UNGPs, developed by Special Representative of the UN Secretary-General John Ruggie and unanimously endorsed by the UN Human Rights Council in 2011, inspired a “paradigm shift in corporate responsibility” by introducing the concept of HRDD and catalyzing its widespread adoption.³⁶

The UNGPs are based on three fundamental “pillars”:

I: States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

II: The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;

33. See Brown, *supra* note 30, at 124–25 (“While the OECD’s Guidelines are regarded by some to be meaningfully shaping the conduct of MNCs with their ‘due diligence’ requirements toward human rights and overlapping labor rights, others lament their lack of meaningful enforcement absent the consent of the parties.”); Khoury & Whyte, *supra* note 32, at 376 (finding four major weakness with the OECD Guidelines: “First, companies continue to refuse to engage with the NCPs. Second, NCPs display a lack of political will to intervene in ways that challenge corporations. Third, even if there is a clearer political will, because compliance with the Guidelines is effectively voluntary, there is no way for NCPs to oblige or coerce companies to participate in the process. Finally, given the lack of accountability for decisions made by NCPs, there is no adequate redress for complainants.”).

34. Andreas Rasche & Sandra Waddock, *The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research*, 6 BUS. & HUM. RTS. J. 227, 228–29 (2021).

35. *Id.* at 229.

36. YOUSUF AFTAB & AUDREY MOCLE, BUSINESS AND HUMAN RIGHTS AS LAW: TOWARDS JUSTICIABILITY OF RIGHTS, INVOLVEMENT, AND REMEDY (2019); Rachel Chambers & Jena Martin, *Reimagining Corporate Accountability: Moving Beyond Human Rights Due Diligence*, 18 N.Y.U. J.L. & BUS. 773, 783 (2022) (stating that the UNGPs are “the key international soft law framework on business and human rights”).

III: The need for rights and obligations to be matched to appropriate and effective remedies when breached.³⁷

While Pillar I is largely a restatement of existing international human rights law, Principle 3 of Pillar I specifies that States should “[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps.”³⁸ Although the Guiding Principles do not require States to compel companies to conduct HRDD, the U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises has issued guidance indicating “that HRDD should be the foundational principle guiding governments on the issue of business and human rights.”³⁹

Pillar II, the main innovation of the Guiding Principles, outlines how corporations should use HRDD to “operationalize” their responsibility to respect human rights.⁴⁰ According to the Guiding Principles, “HRDD entails a business identifying whether it has caused or contributed to adverse human rights impacts by integrating and acting upon the findings, tracking responses, and remediating the harm if it has caused or contributed to an adverse impact.”⁴¹

Pillar III, which focuses on access to remedies, implicates both the public and private sectors, but its key requirement for businesses is that they provide access to private dispute-resolution mechanisms: “business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”⁴²

Importantly, while the general concept of due diligence is already well-established in the field of business management, “human rights due diligence” as framed by the UNGPs differs from that general concept in several key ways.⁴³ For example, unlike traditional due diligence, which simply focuses on identifying risks to the corporation itself and its shareholders, HRDD requires identification of actual and potential impacts on the internationally recognized rights of ex-

37. GUIDING PRINCIPLES, *supra* note 8.

38. *Id.*

39. Chambers & Martin, *supra* note 36, at 785; see U.N. WORKING GRP. ON BUS. & HUM. RTS., GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS (Nov. 2016).

40. Chambers, *supra* note 36, at 785–86.

41. *Id.* at 786.

42. AFTAB & MOCLE, *supra* note 36, at 189–190; GUIDING PRINCIPLES, *supra* note 8, at 31.

43. MACCHI, *supra* note 16, at 92.

ternal stakeholders and communities.⁴⁴ Additionally, while traditional due diligence often consists of a single one-off process to be conducted before a specific transaction,⁴⁵ the UNGPs recognize that HRDD “should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.”⁴⁶

Although technically voluntary, the Guiding Principles have nonetheless “been widely embraced by governments, industry associations, businesses, international organizations and bar associations” as “the authoritative standard on business and human rights.”⁴⁷ They have also influenced the content of other international standards, such as the OECD Guidelines and the International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.⁴⁸

B. Translating HRDD into Domestic Law

The UNGPs do not obligate states to adopt domestic due diligence legislation, but their adoption by the Human Rights Council and subsequent widespread endorsement led to what has been referred to as a “norm cascading” process “that, firstly, gradually consolidated a consensus around the principle that corporations are bearers of human rights responsibilities and, secondly, led several states, as well as the EU, to explore the possibility to translate human rights due

44. *Id.*; see also Sarianna Lundan & Peter Muchlinski, *Human Rights Due Diligence in Global Value Chains*, 7 *PROGRESS IN INT’L BUS. RSCH.* 181, 189 (2012); Bright, *supra* note 15, at 5 (“[H]uman rights due diligence focuses on risks to people and society, as opposed to standard corporate risk management due diligence, which aims at preventing the legal, technical and financial risks to the company.”).

45. Robert McCorquodale et al., *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 *BUS. & HUM. RTS J.* 195, 200 (2017).

46. GUIDING PRINCIPLES, *supra* note 8, at 18 (Principle 17(c)); see also McCorquodale et al., *supra* note 45, at 200.

47. AFTAB & MOCLE, *supra* note 36, at 6–7; Aviva Freudman, *The Road From Principles to Practice*, *ECONOMIST IMPACT* (Mar. 16, 2015), <https://impact.economist.com/perspectives/strategy-leadership/road-principles-practice> [<https://perma.cc/47UL-7447>] (describing the UN Human Rights Council’s endorsement of the UNGPs as a “watershed event” that best represents the “dramatic evolution” in the field of business and human rights “from a situation in which companies and human rights activists were at odds, to one in which stakeholders have begun to approach a common understanding of the risks, challenges, and opportunities involved”).

48. Surya Deva, *Business and Human Rights: Alternative Approaches to Transnational Regulation*, 17 *ANN. REV. L. & SOC. SCI.* 139, 142 (2021).

diligence, or at least some of its elements, into hard law.”⁴⁹ Legislation translating HRDD into “hard law” can be split into two categories: transparency legislation that creates reporting requirements, and mandatory human rights due diligence (mHRDD) legislation.⁵⁰

1. Transparency Legislation

Over the last decade or so, there has been an increase in domestic legislation requiring corporations to disclose non-financial information, including human rights and environmental information.⁵¹ The general premise underlying transparency laws in the context of human rights and the environment is that “when investors and consumers understand corporate activity and its impact, they will make informed choices which would then pressure corporations to ‘clean their act’, thus building on the premise that information is key to accountability.”⁵² Laws falling under this category include the ‘modern slavery’ acts in the UK and Australia, the EU’s Non-Financial Reporting Directive (NFRD) (later revised by the Corporate Sustainability Reporting Directive (CSRD)),⁵³ the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),⁵⁴ and the California Transparency in Supply Chain Act (TSCA).⁵⁵ Most of these laws are limited to specific human rights issues like modern slavery and conflict minerals, while some, like the CSRD, require disclosure of both human rights and environmental/climate information and data.⁵⁶ The weaknesses of this type of legislation are discussed in Part II(C) *infra*.

49. MACCHI, *supra* note 16, at 96; *see generally* Chiari Macchi & Claire Bright, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, in LEGAL SOURCES IN BUSINESS AND HUMAN RIGHTS: EVOLVING DYNAMICS IN INTERNATIONAL AND EUROPEAN LAW 218–47 (2020).

50. MACCHI, *supra* note 16, at 96.

51. Olga Martin-Ortega et al., *Towards a Business, Human Rights and the Environment Framework*, SUSTAINABILITY, May 2022, at 12.

52. *Id.*

53. *Id.*; *see also* Hösli & Weber, *supra* note 14, at 961.

54. The Dodd-Frank Act is currently the only piece of federal legislation that mandates disclosure of human rights impacts by corporations. Chambers & Martin, *supra* note 36, at 789 (citing the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1502, 1504 (2010)).

55. CAL. CIV. CODE § 1714.43.

56. Martin-Ortega, *supra* note 51, at 12.

2. Mandatory Human Rights Due Diligence (mHRDD) Legislation

Other legislation has gone even further by imposing a substantive requirement on corporations to prevent and address human rights violations within their supply chains.⁵⁷ In particular, a number of European countries have recently enacted or considered legislation that attempts to translate the non-binding provisions of the Guiding Principles into mHRDD requirements for corporations.⁵⁸ Indeed, “[v]irtually all of these developments are derived, directly or indirectly, from the Guiding Principles’ governance-based civilization of human rights.”⁵⁹ Importantly, however, these initiatives have varied significantly in terms of their scope and the mechanisms they employ to ensure compliance.⁶⁰ For example, the French Duty of Vigilance Law, enacted in 2017, explicitly allows civil liability claims to be brought when harm occurs as the result of a corporation’s failure to conduct adequate HRDD.⁶¹ Germany’s Supply Chain Due Diligence Act, on the other hand, has no provision for civil liability, instead relying on administrative enforcement.⁶² In addition, most existing HRDD laws are limited to human rights violations and do not explicitly include environmental impacts, although this is beginning to change.⁶³ For example, the European Commission in February 2022 adopted a proposal for arguably the most ambitious law yet: a comprehensive Corporate Sustainability Due Diligence Directive (“CS3D”) that would impose mandatory human rights and environmental due diligence requirements on corporations that conduct

57. *Id.* at 13.

58. Chambers & Martin, *supra* note 36, at 796.

59. AFTAB & MOCLE, *supra* note 36.

60. Chambers & Martin, *supra* note 36, at 796.

61. Loi 2017-399 du 27 Mars 2017 Relative au Devoir de Vigilance des Societes Meres et des Entreprises Donneuses D'Ordre [Law 2017-399 of March 27, 2017 relating to the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, No. 0074.

62. Chambers & Martin, *supra* note 36, at 800; Sebastian Runz, *Overview of the German Supply Chain Due Diligence Act*, TAYLORWESSING (July 28, 2021), <https://www.taylorwessing.com/en/insights-and-events/insights/2021/07/overview-of-the-german-supply-chain-due-diligence-act#:text=After%20long%20and%20tough%20negotiations,force%20on%201%20January%202023> [https://perma.cc/LQX6-YMUM].

63. Discussed further in Part II(D), *infra*.

business in the European Union.⁶⁴ The CS3D is discussed in detail in Part III.

C. Environmental Due Diligence

In comparison to HRDD, the concept of environmental due diligence (as distinct from the environmental aspects of traditional due diligence in the area of business management) is still in its infancy.⁶⁵ The UNGPs do not explicitly focus on environmental impacts or principles of international environmental law, although several scholars have argued that at least some business impacts on the environment should be considered within the scope of the corporate responsibility of due diligence established by the UNGPs, in light of the potential human rights consequences of environmental harm and emerging human rights that include an environmental element.⁶⁶

Since the UNGPs were adopted in 2011, there have been a small number of initiatives aimed at encouraging environmental due diligence independently of HRDD. Most importantly, the OECD Guidelines were amended in 2011 to add a new section exclusively dedicated to the environment.⁶⁷ Section VI encourages corporations to conduct environmental due diligence by, among other things, establishing an environmental management system, collecting and evaluating information related to the environmental impacts of their activities, establishing measurable objectives and targets for improved environmental importance (including strategies for the reduction of GHG emissions), assessing the foreseeable environmental impacts associated with its activities, maintaining contingency plans for preventing and mitigating serious environmental damage, and engaging

64. European Commission Press Release IP/22/1145, Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains (Feb. 23, 2022).

65. Hösli & Weber, *supra* note 14, at 972; *see also* Bright & Buhmann, *supra* note 15, at 2 (“[L]ittle attention has been turned to the human rights implications of climate mitigation and adaption strategies and the role that the concept of due diligence could play in this respect in order to ensure a just transition.”).

66. *See, e.g.*, MACCHI, *supra* note 16, at 82 (“[I]t is clear that the human rights consequences of environmental harm do fall within the scope of the corporate responsibility to respect.”); DAMILOLA S. OLAWUYI, THE HUMAN RIGHTS-BASED APPROACH TO CARBON FINANCE 103 (2016) (arguing that the UNGPs condemn the deprivation of the right to life during business operations by corporations, and “a number of cases establish a direct link between environmental quality and the right to life”).

67. ORG. FOR ECON. COOP. & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 42 (2011).

in communication and consultation with affected communities.⁶⁸ In addition to the amended OECD Guidelines, the 2015 Oslo Principles on Global Climate Change Obligations (Oslo Principles) were supplemented in 2018 by the Principles on Climate Obligations of Enterprises, which recommend imposing climate due diligence obligations on corporations such as comprehensive disclosure requirements and mandatory environmental impact assessments.⁶⁹ Environmental due diligence expectations are also included in the IFC's performance standards, which inform the Equator Principles.⁷⁰

D. Linking Human Rights and Environment Due Diligence

Despite a well-established connection between human rights and the environment, “there is an absence of a coherent and systematic integration of environmental considerations within the wider [Business and Human Rights] framework.”⁷¹ This lack of integration can cause adverse human rights and environmental outcomes and produce inefficient due diligence processes. Therefore, adopting a more holistic approach to due diligence that accounts for and integrates both human rights and environmental considerations will better protect the rights of vulnerable individuals and communities while also making it easier for companies to fulfill their due diligence obligations efficiently and effectively.

Recognized by the United Nations General Assembly (UNGA) as early as 1968 and subsequently reiterated in both the Stockholm and Rio Declarations,⁷² the link between human rights and environment protection has been comprehensively analyzed by legal scholars and is now indisputable.⁷³ The adverse human rights impacts of environmental harm have been widely recognized by regional human

68. *Id.* at 42–43.

69. Hösli & Weber, *supra* note 14, at 974.

70. Bright & Buhmann, *supra* note 15, at 6.

71. Martin-Ortega, *supra* note 51, at 11.

72. G.A. Res 2398 (XXIII), Problems of the Human Environment (Dec. 3, 1968); U.N. Conference on the Human Environment, *Stockholm Declaration on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 5–16, 1972); *Rio Declaration on Environment and Development*, 3–14 U.N. Doc. A/CONF.156/26 (Vol. I) (Aug. 12, 1992).

73. Martin-Ortega, *supra* note 51, at 2; *see generally* STEPHEN J. TURNER, A SUBSTANTIVE ENVIRONMENTAL RIGHT: AN EXAMINATION OF THE LEGAL OBLIGATIONS OF DECISION-MAKERS TOWARDS THE ENVIRONMENT (2008); DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS (2011).

rights courts and UN treaty bodies,⁷⁴ as well as the OHCHR's own Interpretive Guide to the UNGPs.⁷⁵ Environmental harm can negatively impact the enjoyment and realization of human rights in a myriad of ways.⁷⁶ To provide just one example, anthropogenic climate change and its effects can threaten the rights to "life, water and sanitation, food, health, housing, self-determination, culture, and development."⁷⁷ Even more fundamental is the recognition—advanced by the UN Human Rights Council⁷⁸ and Human Rights Committee⁷⁹—that the environment "is a precondition to the enjoyment of human rights . . . and that human rights are tools through which environmental issues (both procedural and substantive) can be addressed."⁸⁰ Furthermore, the independent right to a safe, clean, healthy, and sustainable environment (R2E) is increasingly recognized as a human right both regionally/internationally⁸¹ and domestically.⁸²

74. MACCHI, *supra* note 16, at 82 (citing cases that appeared before the European Court of Human Rights and the Inter-American Court of Human Rights); *see also* Greta Reeh, *Human Rights and the Environment: The UN Human Rights Committee Affirms the Duty to Protect*, EJIL: TALK! (Sept. 9, 2019), <https://www.ejiltalk.org/human-rights-and-the-environment-the-un-human-rights-committee-affirms-the-duty-to-protect/> [<https://perma.cc/6ZRR-UZLQ>].

75. Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights— An Interpretive Guide*, U.N. Doc. HR/PUB/12/02 at 8, 53 (2012), <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf> [<https://perma.cc/Q58Y-F7GB>].

76. *See* Hösli, *supra* note 11, at 972 ("More and more, it is acknowledged that climate change (and environmental degradation) directly and indirectly interferes with the enjoyment of all human rights, to include the rights to life, housing, water and sanitation, food, health, development, and an adequate standard of living.").

77. *Climate Change and Environment*, OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/topic/climate-change-and-environment> [<https://perma.cc/V3P7-AXDZ>].

78. Rep. of the U.N. High Comm'r for Human Rights, *Analytical Study on the Relationship Between Human Rights and the Environment*, U.N. Doc. A/HRC/19/34 (Dec. 16, 2011).

79. U.N. Human Rights Committee, *General Comment No. 36—Article 6: Right to Life*, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

80. Martin-Ortega, *supra* note 51, at 2.

81. *See, e.g.*, G.A. Res 76/300, *The Human Right to a Clean, Healthy and Sustainable Environment* (July 28, 2022); Human Rights Council, *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/48/L.23/Rev.1 (2021); Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017).

82. As of 2021, over one hundred national constitutions explicitly recognize the human right to a healthy environment, and the vast majority of countries recognize the right in some form. David Boyd, John Knox & Marc Limon, *The Time is Now—The Case for Universal Recognition of the Right to a Safe, Clean, Healthy and Sustainable Environment*, UNIVERSAL RTS. GRP. (2021), <https://www.universal-rights.org/urg-policy-reports/the-time-is-now-the-case-for-universal-recognition-of-the-right-to-a-safe-clean-healthy-and-sustainable-environment-2/> [<https://perma.cc/2BA6-RZ4L>].

Despite this, the concepts of corporate responsibility for human rights and the environment have generally developed independently and are still largely considered separately. For historical and technical reasons, human rights law and (international) environmental law developed as distinct legal regimes with different underlying principles and priorities.⁸³ As a result, the two legal systems differ significantly with respect to the nature,⁸⁴ scope,⁸⁵ and subjects⁸⁶ of the obligations they impose. This separation has carried over to recent initiatives focused on corporate accountability for human rights and the environment: the majority of domestic laws adopted to regulate corporations' supply chains "focus exclusively on either environmental or human rights, resulting in a framework that produces a fragmented due diligence response where human rights and environmental issues are considered in isolation of each other."⁸⁷ For example—and as noted in the final report of the European Commission's supply chain due diligence study which provided supporting analysis for the proposed CS3D—while the majority of businesses cover climate change in their due diligence, their human rights and climate change due diligence processes often take place in "silos,"⁸⁸ and "corporations that adopt internal carbon footprint and GHG pol-

83. Stephen J. Turner, *Business, Human Rights and the Environment—Using Macro Legal Analysis to Develop a Legal Framework That Coherently Addresses the Root Causes of Corporate Human Rights Violations and Environmental Degradation*, SUSTAINABILITY, Oct. 2021, at 3 ("Therefore, from these different historical starting points, it is understandable that human rights law and environmental law have developed along different trajectories and have ultimately resulted in different institutions and seemingly different priorities."); compare ILIAS BANTEKAS & LUTZ OETTE, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 11 (2013) ("At the core of human rights lie fundamental questions about the nature of human beings and their relationship with each other as members of society, including 'international society.'") with PHILIPPE SANDS & JACQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 187–237 (2012) (explaining that international environmental law reflects principles such as the precautionary principle, the principle of common but differentiated responsibility, and the principle of sustainable development) and Martin-Ortega, *supra* note 51, at 3 (stating that principles of international environmental law "are concerned with regulating and minimising the extent of environmental harm (to other states or areas beyond national jurisdiction such as the global commons) caused by states.").

84. Martin-Ortega, *supra* note 51, at 4.

85. *Id.* ("Whilst there is a strong resistance in international law to recognise the extraterritorial reach of human rights obligations, International Environmental Law has developed on the basis that environmental harm knows no borders.").

86. *Id.* at 3 (explaining that while the right-holders in the human rights context are individuals, states are the right-holders in international environmental law).

87. *Id.* at 14.

88. Lise Smit et al., *supra* note 19.

icies often fail to pay equal attention to human rights risk management policies.”⁸⁹

Conceptually, the problem with assessing human rights and environmental risks in “watertight silos” is that it obscures the well-established connection between human rights and environmental degradation and results in inadequate consideration of the environmental and climate dimensions of HRDD in corporate policies and processes.⁹⁰ In practice, this can cause negative outcomes “when actions undertaken to mitigate environmental impacts have negative implications for human rights”; it can also simply be ineffective, for instance, “when a company’s human rights due diligence process fails to account for the particular climate change vulnerability of certain stakeholders,” or vice versa.⁹¹ Recognizing this dilemma, the UN appointed the first Special Rapporteur on human rights and the environment, John Knox, in 2015.⁹² In 2018, Knox, in his capacity as Special Rapporteur, recommended that businesses implement HRDD processes to “identify, prevent, mitigate and account for how they address their environmental impacts on human rights, and enable the remediation of any adverse environmental human rights impacts that they cause or to which they contribute.”⁹³

Since 2017, an expanding set of nations, including France, Germany, and Norway, have passed more comprehensive HREDD laws that require corporations to “identify, assess, appropriately address, and communicate risks to the public with respect to a range of internationally recognized human rights and environmental harms.”⁹⁴ In

89. MACCHI, *supra* note 16, at 94 (citing OLAWUYI, *supra* note 66).

90. *Id.*; see also Turner, *supra* note 83, at 24 (noting that “by focusing solely on human rights law or environmental law, there is the potential that the broad and very powerful landscape of legal rules that, to a large part, represent the root causes of the ways that companies make decisions in practice, are not factored into reform proposals or as is often the case, get ignored completely”).

91. MACCHI, *supra* note 16, at 94; see also OLAWUYI, *supra* note 66, at 394 (noting that “[f]ailure to effectively manage human rights issues associated with carbon projects carries significant financial, legal and reputational risks”).

92. See *John Knox Finishes Historic mandate as Special Rapporteur on the Environment and Human Rights*, INT’L UNION FOR CONSERVATION OF NATURE (Aug. 5, 2018), <https://www.iucn.org/news/world-commission-environmental-law/201808/john-knox-finishes-historic-mandate-special-rapporteur-environment-and-human-rights> [<https://perma.cc/KGK3-9UFK>].

93. U.N. Secretary-General, Report of The Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/73/188 (July 19, 2018).

94. DAVID R. BOYD & STEPHANIE KEENE, SPECIAL RAPPORTEUR ON HUMAN RIGHTS AND THE ENVIRONMENT, POLICY BRIEF NO. 3: ESSENTIAL ELEMENTS OF EFFECTIVE AND EQUITABLE HUMAN RIGHTS

addition, the governments of Austria, Belgium, Finland, the Netherlands, and Spain have expressed their intent to pass similarly comprehensive HREDD legislation,⁹⁵ and such legislation has been proposed in other countries as well.⁹⁶ While these initiatives are undoubtedly a step in the right direction, they are still insufficient to ensure adequate respect for the human right to a healthy environment. As the UN Special Rapporteur on human rights and the environment explained:

Existing human rights and environmental due diligence laws are fraught with inconsistencies, ambiguities, exemptions and other weaknesses that prevent them from adequately responding to the often-overlapping human rights and environmental abuses that are plaguing rightsholders and ecosystems worldwide. At the global level at which many large multinational enterprises operate, gross disparities in these laws' scope of application, due diligence duties, penalties and provisions facilitating judicial action create an atmosphere of incoherence, fragmentation and uncertainty that runs counter to the legal predictability and clarity necessary to maximize corporate compliance and facilitate access to justice for victims of human rights and environmental harms.⁹⁷

The CS3D represents a significant—though imperfect—step towards addressing the weaknesses of the existing HREDD landscape. Once enacted, the Directive will be legally binding on all EU member states, mitigating the issue of fragmentation.⁹⁸ By establishing a uniform and comprehensive HREDD framework, businesses should benefit from increased legal certainty when implementing their due diligence processes. Furthermore, the CS3D's substantive provisions are in some respects stronger than those of many existing HREDD laws, both in terms of the potential human rights and environmental impacts covered and the available enforcement mechanisms to en-

AND ENVIRONMENTAL DUE DILIGENCE LEGISLATION 5 (2022), <https://www.ohchr.org/sites/default/files/documents/issues/environment/srenvironment/activities/2022-07-01/20220701-sr-environment-policybriefing3.pdf> [<https://perma.cc/R6V4-PFK7>].

95. *Id.*

96. *See, e.g.*, Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill 2023-4, HL Bill [17] (UK); *National & Regional Movements for Mandatory Human Rights & Environmental Due Diligence in Europe*, BUS. & HUM. RTS. RES. CTR. (Mar. 6, 2024), <https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/> [<https://perma.cc/SKP3-DUQW>].

97. BOYD, *supra* note 94, at 5.

98. Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Jul. 6, 2016, 2016 O.J. (C 202) 166 (“A directive shall be binding, as to the result to be achieved, upon each Member state to which it is addressed”).

sure compliance and facilitate access to remedy. On the other hand, the CS3D suffers from a number of significant omissions and limitations that could potentially hinder achievement of the Directive's goals, such as overly narrow definitions and qualifying language that limits its scope.⁹⁹

III. BUSINESS, HUMAN RIGHTS, AND THE ENVIRONMENT IN THE UNITED STATES

In the United States, there is currently no legislative framework that requires U.S. companies to respect human rights throughout their global operations and supply chains.¹⁰⁰ Instead, most efforts by U.S. corporations to identify, prevent, mitigate, and account for human rights violations and adverse environmental impacts in their value chains are conducted voluntarily as part of their Corporate Social Responsibility (CSR) or Corporate Environmental Responsibility (CER) initiatives.¹⁰¹ However, relying on market and social pressures to encourage voluntary action by corporations is insufficient to compel substantial compliance with human rights and environmental standards.¹⁰² Although there has been some limited legislation and regulation at the state and federal level to compel corporations to make certain disclosures about the human rights and climate impacts of their activities, disclosure-based frameworks are inherently weak and “lack the rigor that many attribute to the mHRDD framework.”¹⁰³ As a result, victims of human rights violations and envi-

99. For a more detailed discussion of the CS3D, *see infra* Part III.

100. Chambers & Martin, *supra* note 36, at 778; Tomin, *supra* note 26, at 190 (noting that “the United States lacks a single, comprehensive federal law mandating human rights due diligence in supply chains, and although it has shown a strong commitment to the Guiding Principles, it has failed to introduce mandatory requirements for companies”).

101. *See* McCorquodale et al., *supra* note 45, at 209 (“where companies have undertaken dedicated HRDD, the department or function most often responsible for the identification of human rights impacts is corporate social responsibility (CSR)”).

102. *See generally* Chambers & Martin, *supra* note 36.

103. Chambers & Martin, *supra* note 36, at 778; *see also* Justine Nolan & Robert McCorquodale, *The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses*, 23 NETH. INT'L L. R. 455, 467 (2022) (positing that “[d]isclosure alone should not be mistaken for HRDD and while ‘sustainability reporting is assumed to drive organisational change within companies’, further research is needed on the positive link between corporate reporting and corresponding systemic change to corporate practices that would prevent harms occurring in the first place.”).

ronmental harm have few effective options for remedy in the United States.¹⁰⁴

A. Corporate Social Responsibility

In the United States, corporate efforts to prevent human rights abuses in their value chains by conducting due diligence, typically categorized under the label of CSR, are almost entirely voluntary. While there is considerable disagreement as to the precise definition of CSR and whether activities compelled by law are properly characterized as CSR, for the purposes of this Note, CSR will be defined narrowly as “voluntary activities undertaken by firms in environmental or social areas.”¹⁰⁵ In this sense, CSR can be viewed as a form of “private self-regulation” in which corporations submit to certain rules and policies on a voluntary and independent basis.¹⁰⁶ Typical forms of CSR include individual self-regulation, such as internal CSR policies and corporate codes of conduct (CCCs), industry-wide standards that are monitored by external actors like nongovernmental organizations (NGOs) and commercial auditing firms, and certification and labeling schemes that aim to empower buyers to make informed purchasing decisions.¹⁰⁷

Critically, these forms of CSR all primarily rely on social and/or market forces for enforcement.¹⁰⁸ CSR initiatives are often justified on the basis that they will reduce waste and improve efficiency by,

104. Chambers & Martin, *supra* note 36, at 783. For decades, victims of human rights abuses used the Alien Tort Statute (ATS) to have their claims adjudicated in federal court and seek a remedy, but the ability of federal courts to hear ATS claims was sharply limited by the Supreme Court in *Sosa v. Alvarez-Machain*, 42 U.S. 692 (2004), and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 399 (2018) (explaining that some commentators believe that *Kiobel* “brought an end to the era of human rights litigation in federal courts”).

105. Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 187–88 (2018) (explaining that “the notion that CSR is ‘voluntary’ or ‘beyond law’ persists” despite recent efforts by some governments and scholars to incorporate actions in adherence with the law into the definition). CSR policies are sometimes alternatively labeled under Environmental, Social and Governance (ESG), but this Note refers to all such policies as CSR for the sake of uniformity.

106. *Id.* at 192–94.

107. *Id.* at 194, 198, 201–02.

108. *Id.* See also DOREEN MCBARNET, *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* (2007); Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUM. RTS. 237, 239 (2015) (“CSR is portrayed as important to the competitiveness of enterprise. The concept is meant to bring benefits in terms of risk management, cost savings, access to capital, customer relationships, human resource management, and innovation capacity.”).

for example, revealing opportunities to optimize existing resources.¹⁰⁹ Civil society initiatives such as product boycotts and “name and shame” campaigns can generate significant social pressure for corporations to adopt CSR policies.¹¹⁰ The problem with the existing paradigm, however, is that social and market pressures are insufficient mechanisms to ensure consistent and substantial compliance with human rights standards.¹¹¹ Without independent monitoring or additional measures such as mandatory disclosure requirements, there is no way to verify that corporations are complying.¹¹² Most CCCs do not contain internal enforcement mechanisms or independent monitoring provisions.¹¹³ Indeed, one of the main criticisms of CCCs is that they are nothing more than public relations instruments and a way to signal the company’s good faith.¹¹⁴ The corporations themselves are in the best position to monitor compliance, but because of their bias they are unlikely to report conditions accurately and are rarely subject to sanctions for failing to do so.¹¹⁵ Another drawback of CCCs is their lack of uniformity and consistency: “Oil Company A might adopt a code prohibiting business ac-

109. Veronica Besmer, *The Legal Character of Private Codes of Conduct: More Than Just A Pseudo-Formal Gloss on Corporate Social Responsibility*, 2 HASTINGS BUS. L.J. 279, 291 (2006); Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENV’T L. & POL’Y F. 67, 75 (2011) (“Firms undertake corporate social responsibility (CSR) programs primarily to reduce waste, improve efficiency, increase profits, achieve market differentiation, adapt to shifting business norms and values, and enhance firm reputation with investors, markets, and consumers.”).

110. Roberts, *supra* note 109, at 80–81; Judith van Erp, *Naming and Shaming of Corporate Offenders*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 3209, 3209 (G. Bruinsma & D. Weisburd eds., 2014) (“The threat of negative publicity, reputation damage, and social stigma may prevent business offenses or socially irresponsible or unethical business behavior. Therefore, both public and private regulatory actors attempt to activate social control by *naming and shaming* firms that offend legal or social norms.”).

111. See OLUFEMI AMAO, CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS AND THE LAW: MULTINATIONAL CORPORATIONS IN DEVELOPING COUNTRIES 108 (arguing that CSR is insufficient to deal with human rights violations and other externalities that result from MNCs’ operations); Ramasastry, *supra* note 108, at 239 (“Businesses are, of course, constrained by societal expectations and market forces, but this does not lead to a consistent approach to human rights protections in their operations.”).

112. John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 489 (2000).

113. *Id.*

114. *Id.* (“Since codes are strictly voluntary, multinationals may simply choose not to adopt or adhere to such a code. Moreover, many codes act only as guiding principles rather than as a definitive statement of policy. The result is a blurred line between acts that employees cannot and should not commit.”).

115. William Bradford, *Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 141, 148 (2012).

tivities in a country such as Burma, while Oil Company B simply promises to meet the highest ethical standards in all of its business activities. This situation allows Oil Company B to profit despite Burmese atrocities, while placing Oil Company A at a competitive disadvantage, and accomplishing little with respect to furthering human rights.”¹¹⁶

An example that illustrates these issues is the long-running controversy surrounding the working conditions in Nike’s overseas factories. Nike’s business partners are required to comply with both its internal CCC and an additional set of guiding principles, and in 1997, Nike even hired former United Nations Ambassador Andrew Young to inspect its international plants and ensure that corporate policies were being followed.¹¹⁷ Young largely absolved Nike of any wrongdoing at the time, but his work was heavily criticized as “superficial” for failing to address key issues such as wages. In the same year that Young’s report was released, a separate internal audit (which only became public after it was leaked to the New York Times) revealed that many of Nike’s plants were still not in compliance with its own code.¹¹⁸ Nike faced renewed criticism in 2003 when the Supreme Court granted certiorari on a case in which Nike was sued for allegedly misrepresenting the employment conditions of its international plants in its advertising, but the Court ultimately dismissed the appeal as improvidently granted without considering the constitutional issues.¹¹⁹ Most recently, in 2020, the Australian Strategic Policy Institute published a report revealing that Nike, among other well-known global brands, was working with factories in Xinjiang, China that exploit forced Uyghur labor in their supply chains, despite Nike’s CCC prohibiting the use of forced labor.¹²⁰

The fact that multiple instances of substantial public pressure across several decades were not enough to compel Nike into full compliance with its voluntary CSR initiatives demonstrates the prob-

116. Anderson, *supra* note 112, at 490 (“Adhering to a code may also be confusing to company employees because a single factory might have more than one code. The apparel industry has sought to overcome this inconsistency problem by enacting an industry-wide code.”).

117. *Id.* at 487–88.

118. *Id.* at 489.

119. Besmer, *supra* note 109, at 281 (citing Nike, Inc. v. Kasky, 539 U.S. 654 (2003)).

120. AUSTL. STRATEGIC POL’Y INST., REPORT NO. 26/2020, UYGHURS FOR SALE (2020), https://ad-aspi.s3.ap-southeast-2.amazonaws.com/2022-10/Uyghurs_for_sale-11OCT2022.pdf?VersionId=N2JQOako7S4OTiSb6L7kKE5nY2d_LD25 [<https://perma.cc/JAX6-ETWF>]; NIKE, INC., CODE OF CONDUCT (1997), <http://hrlibrary.umn.edu/links/nikecode.html> [<https://perma.cc/65A2-7XSD>].

lem with relying on corporations to voluntarily address adverse human rights impacts in their value chains. This is especially true in the case of the vast majority of corporations that are subject to less public scrutiny than companies like Nike, as “without a legal obligation to adopt CCCs it is perhaps difficult to understand why a corporation that has not yet been subjected to media assault or boycotts, whether by virtue of its size or its stealth, would feel compelled to create and implement a CCC.”¹²¹ Accordingly, only a small percentage of the more than 50,000 MNCs have a CCC that explicitly includes respect for human rights, and among companies that do have such a policy, an even smaller percentage actually comply with it.¹²²

While there are certainly many factors that contribute to CSR’s inadequacy for protecting human rights in the corporate context, chief among them is the persisting dominance of shareholder primacy in the United States, as Gerlinde Berger-Walliser and Inara Scott clearly explain:

The shareholder primacy norm continues to be rooted firmly in U.S. culture. As such, activities undertaken in the name of social responsibility are ultimately judged by their potential to generate value: if they do not create value, or if they conflict with the maximization of shareholder wealth, they will be vulnerable to challenge. It should not be surprising, then, that CSR regulation in the United States remains consistent with the notion of CSR as a tool for enhancing the value of the corporation. The primary form of mandatory CSR regulation in the United States—disclosure—is particularly well adapted for value creation, as it provides corporations with opportunities to tout popular initiatives and build brand recognition for CSR initiatives in which the company chooses to engage.¹²³

In sum, the voluntary nature of CSR initiatives in the United States, coupled with the reliance on social and market forces for enforcement, highlights the inherent limitations of this approach in consistently ensuring substantial compliance with human rights standards.

B. Corporate Environmental Responsibility

While “[t]he emergence of CSR as a concept in academic discussion can be traced back to the 1920s and 1930s,” the subset of CSR initiatives that focus exclusively on the environment—referred to by

121. Bradford, *supra* note 115, at 158.

122. *Id.*

123. Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 208 (2018).

some scholars as Corporate Environmental Responsibility (CER)—did not emerge until the 1990s.¹²⁴ There is no definitive definition of CER, but, for present purposes, it can be defined as “those voluntary practices...that seek to benefit the environment or mitigate adverse corporate impacts on the environment, beyond those practices required of corporations by law.”¹²⁵ Like CSR, CER practices have been defended by scholars on the basis that, rather than harming business, CER can actually deliver economic benefits, especially in the long-term, by facilitating innovation and economic growth.¹²⁶ In addition, CER can create intangible benefits such as “better [corporate] reputation, higher employee morale and competitive advantage in attracting high quality employees.”¹²⁷

Despite its potential benefits from a business perspective, however, CER has significant weaknesses. The biggest issue is the fact that “[m]ainstream corporate governance tends to prioritize (often short-term) financial interests of shareholders over other interests such as a healthy climate, or put more drastically, a liveable planet for future generations.”¹²⁸ Since many environmental investments are only profitable in the medium or long term, investors and executives in public companies that are focused on short-term performance may have insufficient incentive to implement robust CER policies.¹²⁹ This could help to explain why many of the corporations leading the push towards sustainability, such as Patagonia, are private companies (and thus face less pressure to maximize short-term profits).¹³⁰

While there may be evidence to suggest that voluntary environmental initiatives by corporations have, in fact, improved corporate

124. Martin-Ortega, *supra* note 51, at 8.

125. *Id.* (citing Neil Gunningham, *Shaping Corporate Environmental Performance: A Review*, 19(4) ENV'T POL'Y AND GOVERNANCE 215–31 (2009) (similarly defining CER as “practices that benefit the environment (or mitigate the adverse impact of business on the environment) that go beyond those that companies are legally obliged to carry out.”)). This definition is generally consistent with how the term is used by businesses in practice. *Id.*

126. Martin-Ortega, *supra* note 48, at 8. *See also* Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. ECON. PERSPS. 97, 98 (1995) (“[P]roperly designed environmental standards can trigger innovation that may partially or more than fully offset the costs of complying with them.”); Gunningham, *supra* note 119, at 216.

127. Gunningham, *supra* note 119, at 221. *See generally* Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 78 (2006).

128. Hösli & Weber, *supra* note 14, at 956.

129. Gunningham, *supra* note 125, at 218.

130. *Id.*

performance on environmental issues to some extent,¹³¹ the reality is that there is still a large gap “between current business performance and the changes needed to achieve sustainability,” i.e., to confine human activity within environmental thresholds that allow for a “safe and just operating space for humanity.”¹³²

C. Existing Human Rights Disclosure Legislation

Currently, the federal Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and California’s Transparency in Supply Chains Act (TSCA) are the only laws in the U.S. that require any form of HRDD within corporate supply chains. Because these laws are based on a disclosure model that only imposes reporting requirements on corporations, however, they “have been viewed by many as a failed attempt to advance efforts to mitigate negative human rights impacts.”¹³³

The Dodd-Frank Act is the only piece of federal legislation that mandates disclosure of human rights impacts by corporations.¹³⁴ Passed in 2010 in the wake of the financial crisis, the Dodd-Frank Act contains two provisions that directly address corporate human rights reporting.¹³⁵ The first is the Conflict Mineral Rule, which aims to prevent money from conflict minerals from being used to finance human rights abuses in the Democratic Republic of Congo (DRC) by, inter alia, imposing reporting requirements on companies that use

131. *Id.* at 221 (citing “increasing evidence of (1) application of ‘total quality management’ and ‘continuous improvement’ strategies to corporate environmental management; (2) voluntary environmental audits and ecological life-cycle analysis of inputs, product and wastes; (3) environmental cost accounting; and (4) industry association-led environmental management certification plans.”).

132. Valerie Nelson & Michael Flint, *Critical Reflections on Responsible Business Initiatives and Systemic Constraints for Achieving a Safe and Just Operating Space for Humanity*, in BUSINESS AND DEVELOPMENT STUDIES: ISSUES AND PERSPECTIVES 180, 180 (2019). See also Hope M. Babcock, *Corporate Environmental Social Responsibility: Corporate “Greenwashing” or a Corporate Culture Game Changer?*, FORDHAM ENV’T. L. REV., 2010, at 2 (2010) (“[V]oluntary [CER] programs, even when properly designed, should only function as supplements, not replacements, to existing regulatory programs and will only be effective if judicially enforceable by third parties.”).

133. Chambers & Martin, *supra* note 36, at 789. See also 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, 579 (2018) (“Given the problems with disclosure, and alternative paths available to advance the business and human rights agenda, disclosure is a less attractive regulatory mechanism than widely believed. Although some have argued that sunlight is the best disinfectant, it is no panacea.”).

134. Chambers & Martin, *supra* note 36, at 789 (citing the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1502, 1504 (2010)).

135. Chambers & Martin, *supra* note 36, at 789.

conflict mineral rules as a necessary part of their business model.¹³⁶ The second is the Resource Extraction Payment Rule, which is meant to “prevent the exploitation of citizens and the enrichment of corrupt government officials in resource-rich states” through similar reporting and disclosure requirements.¹³⁷ Both of these rules are aimed at only a narrow subset of all potential human rights abuses.

On the state level, California is currently the only state that has passed any legislation requiring corporate human rights reporting. The TSCA, also passed in 2010, imposes a reporting requirement on companies with global annual revenues above \$100 million to inform the state about what they have done to identify and address human trafficking and forced labor in their supply chains.¹³⁸ Like the Dodd-Frank Act, the TSCA “does not directly require companies to eliminate human trafficking from their supply chains. [It] simply requires companies to report on what steps, if any, they are taking to address trafficking.”¹³⁹

The main problem with these types of laws from a human rights perspective is that they only mandate disclosure and stop short of compelling corporations to take specific actions to prevent and/or remedy human rights violations in their value chains. This disclosure model, which has been referred to as a “comply or explain approach,” has only limited effect.¹⁴⁰ For example, in the California case, businesses “must *comply* with the law by disclosing on their website any initiatives they undertake to eliminate coercive labor practices in their supply chain. However, corporations can also satisfy this obligation by *explaining* that they have not taken any initiatives to eliminate trafficking in their supply chains.”¹⁴¹ Similarly, the Dodd-Frank Act does not impose any substantive obligations on corporations to stop using conflict minerals in their products or take action to prevent further human rights abuses in their supply chains; essentially, as long as the lack of actions taken to address such abuses is disclosed, the corporation has fulfilled its requirements under the Act.¹⁴²

136. *Id.* at 790.

137. *Id.* (quoting Martin, *supra* note 133, at 538).

138. Chambers & Martin, *supra* note 36, at 788; CAL. CIV. CODE § 1714.43.

139. Martin, *supra* note 133, at 550.

140. *Id.* at 794.

141. *Id.* at 790–91.

142. *Id.* at 791–92. The Act does require corporations to employ a due diligence mechanism if it discovers that any of its necessary products contain conflict minerals from the DRC, but the phrase “due diligence” is not defined in the Act, which allows companies apply a more

The theory behind these laws appears to be that, once corporations have been forced to make the disclosures, civil society organizations, consumers, investors, and other stakeholders will then act on that information and pressure the corporations to improve their human rights record.¹⁴³ In reality, however, “studies have shown that disclosure laws have had very limited success in improving human rights conditions for affected groups and improving accountability for impacts.”¹⁴⁴ In the case of the TSCA, there is no central disclosure system or repository that lists the names of companies that would be subject to the Act.¹⁴⁵ As a result, civil society actors and advocates have no reliable way of knowing which companies must comply with the law.¹⁴⁶ Additionally, neither the TSCA nor the Dodd-Frank Act creates a private right of action, so only the government can take enforcement action in the case of non-compliance.¹⁴⁷ As of 2021, however, the Attorney General of California has not brought a single enforcement action against a corporation for non-disclosure under the TSCA, nor has the SEC brought an enforcement action against a company for failure to comply with the Dodd-Frank Act’s Conflict Mineral Rule.¹⁴⁸ This lack of access to effective remedies can be seen as a failure to implement Pillar Three of the UNGPs, which explicitly recognizes that “State regulation proscribing certain corporate conduct will have little impact without accompanying mechanisms to investigate, punish, and redress abuses.”¹⁴⁹

Furthermore, even if the TSCA were fixed and strengthened, state-level legislation is an inefficient method of requiring HREDD. While it may not pose challenges for California due to the size and strength of its economy, enacting such legislation in a smaller state could run the risk of companies simply deciding not to do business in that state

limited due diligence model compared to the ideal human rights due diligence framework. See also Nolan & McCorquodale, *supra* note 103, at 6 (“... functionally, [the Dodd-Frank Act] relies on the adverse reputational impact of such a disclosure rather than mandating penalties for actually sourcing minerals from conflict-afflicted regions.”).

143. Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHI. J. INT’L L. 323, 337–38 (2021).

144. *Id.* at 346.

145. Chambers & Martin, *supra* note 33, at 794–95. This is also a problem with the UK Modern Slavery Act, which has no official public list detailing which companies need to report. Nolan & McCorquodale, *supra* note 103, at 8.

146. *Id.*

147. *Id.*

148. *Id.* at 795; Chambers & Yastardis, *supra* note 143, at 338, 341.

149. Martin, *supra* note 133, at 568 (citing the UNGPs).

to avoid the need to comply. Existing businesses in that state could also face unfair competition with companies from other states that are not burdened with the cost of complying with mandatory HREDD legislation. And from the national perspective, as more states adopt HREDD laws with different requirements, it would become increasingly burdensome for companies to ensure that they are complying with the HREDD laws of every state in which they do business. This is analogous to the current situation in Europe—which the CS3D aims to address—where the adoption of various HRDD and HREDD laws has created a fragmented legal landscape that makes it increasingly difficult for MNCs to ensure full compliance. Therefore, comprehensive federal legislation similar to the CS3D is necessary to establish uniform requirements and avoid the negative consequences of divergent state legislation.

IV. THE CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE

On February 23, 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence (“CS3D”).¹⁵⁰ The proposal was issued in response to the European Parliament’s request in March 2021 for a legislative proposal on mandatory value chain due diligence, as well as the Council of the European Union’s call for an “EU legal framework on sustainable corporate governance” that includes “cross-sector corporate due diligence along global value chains.”¹⁵¹ After the European Council and European Parliament adopted their negotiating positions, triologue negotiations took place between the Commission, the Council, and the Parliament.¹⁵² A provisional agreement between the Council and the Parliament was eventually reached in December 2023.¹⁵³ Some

150. European Commission Press Release IP/22/1145, Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains (Feb. 23, 2022).

151. *Id.*

152. *The EU’s Corporate Sustainability Due Diligence Directive*, KPMG, <https://kpmg.com/xx/en/home/insights/2023/02/the-eu-corporate-sustainability-due-diligence-directive.html> [<https://perma.cc/ZYN5-DYKR>] (last visited Jan. 20, 2023).

153. Hannah Edmonds-Camara et al., *Provisional Agreement on the EU’s Corporate Sustainability Due Diligence Directive: Key Elements of the Deal*, INSIDE ENERGY & ENV’T (Dec. 15, 2023), <https://www.insideenergyandenvironment.com/2023/12/provisional-agreement-on-the-eus-corporate-sustainability-due-diligence-directive-csddd-key-elements-of-the-deal/> [<https://perma.cc/PWR3-XB4T>]. Because the full text of the provisional agreement has not been published yet, this Note references the language in the Commission’s proposed text ex-

details still need to be finalized, and the full text of the agreement has yet to be published, but the provisional agreement appears to have settled many of the most heavily debated issues, including the definition of “value chain,” applicability to the financial sector, and civil liability for non-compliance.¹⁵⁴ While the final version of the CS3D may not be identical to the provisional agreement, its basic structure and critical elements will likely remain mostly unchanged given the late stage of the negotiations. If the final version is subsequently approved by both the Parliament and the Council, EU Member States will then have two years to implement the Directive through domestic legislation.¹⁵⁵

The objectives and justifications provided for the CS3D—as well as the underlying human rights and environmental concerns—are equally applicable to the United States. The Directive’s primary objectives are to “advance respect for human rights and environmental protection, create a level playing field for companies within the Union and avoid fragmentation resulting from Member States acting on their own.”¹⁵⁶ As discussed in Part II, the need to create a level playing field for companies and avoid fragmentation of the legal landscape is just as important in the US. And, like the US, one of the main justifications listed in the CS3D is that “[v]oluntary action does not appear to have resulted in large scale improvement across sectors.”¹⁵⁷ In light of this, the rest of this Part analyzes critical provisions of the proposed CS3D to provide a starting point for policymakers and academics considering the feasibility and desirability of a federal HREDD law modeled on the CS3D.

A. General Due Diligence Requirements

The subject matter of the Directive is set out in Article 1: it concerns “obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship,” as

cept where the language of the provisional agreement is known to be different according to press releases from the Council, Parliament, and Commission.

154. *Id.*

155. European Commission Press Release, *supra* note 64.

156. Proposal, *supra* note 13, at 2–3.

157. *Id.*

well as liability for violations of those obligations.¹⁵⁸ The key phrase “actual and potential” indicates that the scope of the Directive includes both prevention and remediation. In terms of prevention, Article 7 requires companies to “take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate potential adverse human rights impacts and adverse environmental impacts that have been, or should have been, identified pursuant to Article 6.”¹⁵⁹ Where relevant, compliance with Article 7 requires companies to, *inter alia*, develop and implement a prevention action plan, seek contractual assurances from a business partner that it will ensure compliance with the company’s code of conduct, and make necessary investments, such as into management or production processes and infrastructure.¹⁶⁰ Additionally, contractual assurances must be accompanied by appropriate measures to verify compliance.¹⁶¹ If the potential adverse impacts are unable to be prevented or adequately mitigated, “the company shall be required to refrain from entering into new or extending existing relations with the partner in connection with or in the value chain of which the impact has arisen.”¹⁶²

Remediation of actual adverse impacts is addressed by Article 8, which requires that “companies take appropriate measures to bring actual adverse impacts that have been, or should have been, identified pursuant to Article 6 to an end.”¹⁶³ Accordingly, companies must “neutralise the adverse impact or minimise its extent, including by the payment of damages to the affected persons and of financial compensation to the affected communities”, and if the adverse impact cannot be immediately brought to an end, they must develop and implement a corrective action plan.¹⁶⁴

A helpful way to illustrate the potential significance of these and other provisions if included in a US federal law is to reconsider the Nike example from Part II. Although Nike requires its business partners to comply with its CCC and an additional set of guiding principles, the lack of an independent monitoring system makes it difficult to publicly verify compliance in a timely manner. For example, the

158. *Id.* at 46.

159. *Id.* at 55.

160. *Id.*

161. *Id.*

162. *Id.* at 56.

163. *Id.*

164. *Id.*

1997 internal audit report that revealed serious non-compliance with Nike's CCC at a large Nike factory was not issued until 17 months after that factory was opened, and it took almost two more years until the report was leaked to the public.¹⁶⁵ Under the CS3D, however, Nike would have been required to identify (Article 6) and take action to prevent (Article 7) the potential adverse human rights impacts before the factory initially opened. If Nike did not identify the adverse impacts until they actually materialized, they would have been required to neutralize the adverse impacts or minimize their extent (Article 8).

Even if the factory's adverse human rights impacts were not revealed under the company's normal due diligence procedures, they may have come to light through other provisions of the CS3D. The monitoring requirements established by Article 10 require companies to periodically assess "their own operations and measures, those of their subsidiaries and, where related to the value chains of the company, those of their established business relationships, to monitor the effectiveness of the identification, prevention, mitigation, bringing to an end and minimisation of the extent of human rights and environmental adverse impacts."¹⁶⁶ These assessments must be carried out at least once a year "and whenever there are reasonable grounds to believe that significant new risks of the occurrence of those adverse impacts may arise."¹⁶⁷ Thus, the Nike factory's human rights conditions may have also been revealed by a mandatory periodic assessment.

A final possibility is that the factory's conditions might have been reported to Nike under the CS3D-mandated complaints procedure. In this regard, Article 9 requires companies to provide a procedure for certain persons to "submit complaints to them where they have legitimate concerns regarding actual or potential adverse human rights impacts and adverse environmental impacts with respect to their own operations, the operations of their subsidiaries and their value chains."¹⁶⁸ Complaints can be submitted by:

- (a) persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact,

165. Steven Greenhouse, *Nike Shoe Plant in Vietnam Is Called Unsafe for Workers*, N.Y. TIMES, Nov. 8, 1997, at A1.

166. *Proposal*, *supra* note 13, at 58.

167. *Id.*

168. *Id.*

- (b) trade unions and other workers' representatives representing individuals working in the value chain concerned,
- (c) civil society organisations active in the areas related to the value chain concerned.¹⁶⁹

In the case of Nike, for example, a complaint might have been submitted by a worker in a factory that manufactures Nike products, a trade union representing workers in the apparel industry, or an NGO that reports on labor issues. Importantly, Article 9 also states that when a complaint is well-founded, the adverse impact addressed in the complaint “is deemed to be identified within the meaning of Article 6,” thus triggering all of the due diligence obligations contained in Articles 7 and 8.¹⁷⁰

Unlike with its internal audit report, under the CS3D, once the potential or actual adverse human rights impacts had been identified, Nike would not have been able to hide that information from the public: Article 11 requires companies to publish an annual statement on their website reporting on the matters covered by the Directive.¹⁷¹

B. Environment-specific Provisions and Definitions

1. ‘Adverse Environmental Impact’

The CS3D requires due diligence with respect to actual and potential “adverse environmental impacts,” which are defined as “adverse impact[s] on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex [to the CS3D], Part II.”¹⁷² With the exception of the Paris Agreement, which was omitted,¹⁷³ the list of international environmental conventions in the Annex is

169. *Id.*

170. *Id.*

171. *Id.* at 59.

172. *Id.* at 51.

173. The European Commission’s decision to exclude the Paris Agreement from the list may have been partly based on “uncertainty about the extent to which international environmental conventions have ‘horizontal’ effects that can be applied to companies.” Tim Gore & Agata Meysner, *EU Climate Change Due Diligence: Addressing Climate Change in the Corporate Sustainability Due Diligence Proposal*, INST. FOR EUR. ENV’T POL’Y at 26 (2022), <https://ieep.eu/wp-content/uploads/2022/12/Discussion-Paper-EU-Climate-Change-Due-Diligence.pdf> [<https://perma.cc/A7AR-D98M>] [hereinafter Discussion Paper]. See also Part IV(B)(3), *infra*, for discussion of how climate change is addressed by the CS3D.

comprehensive.¹⁷⁴ However, defining environmental due diligence solely in relation to existing international conventions risks creating blind spots around environmental impacts that are not addressed by any international conventions, such as soil pollution and degradation.¹⁷⁵ This is especially problematic given the highly fragmented nature of international environmental law.¹⁷⁶

Some commentators have recommended that HREDD laws like the CS3D define ‘adverse environmental impacts’ through a general or catch-all clause instead.¹⁷⁷ For example, the French Duty of Vigilance Law requires certain companies to implement monitoring measures to identify and prevent risks of serious “environmental damage,” but “environment” is left undefined.¹⁷⁸ This approach would make it possible to address environmental harms in a more comprehensive way and would avoid the fragmentation problem posed by the current definition based on international conventions.¹⁷⁹ On the other hand, however, such a broad clause would reduce clarity and legal

174. The list includes the Convention on Biological Diversity (including the Cartagena and Nagoya Protocols), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), The Minamata Convention on Mercury, the Stockholm Convention on Persistent Organic Pollutants (POPs Convention), the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the Vienna Convention for the protection of the Ozone Layer (and the Montreal Protocol), and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. *Annex to the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, at 5–6, COM (2022) 71 final (Feb. 23, 2022) [hereinafter *Annex to the Proposal*].

175. Gore & Meysner, *supra* note 173, at 26 (“[t]here is no convention covering, for example, soil pollution or degradation, among many other blind spots”); Press Release, Sherpa, Directive on Corporate Sustainability Due Diligence: the proposal finally unveiled by the Commission must be improved (Feb. 23, 2022), <https://www.asso-sherpa.org/directive-on-corporate-sustainability-due-diligence-the-proposal-finally-unveiled-by-the-commission-must-be-improved> [<https://perma.cc/9XCL-CMS>].

176. See Margaret A. Young, *Fragmentation*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 85 (Lavanya Rajamani & Jacqueline Peel eds., 2019) (explaining that fragmentation within the field of international environmental law means that environmental governance often occurs outside of multilateral environmental agreements). The Global Pact for the Environment is a proposed treaty that seeks, in part, to fill the gaps within international environmental law, but the treaty has yet to be adopted. *Objectives*, GLOB. PACT FOR THE ENV'T, <https://globalpactenvironment.org/en/the-pact/objectives/> [<https://perma.cc/M3Q3-8L3C>] (last visited Jan. 13, 2024).

177. Gore & Meysner, *supra* note 173, at 26.

178. Code de Commerce [C. Com.] [Commercial Code] art. L.225-102-4, I. (Fr.).

179. See David Krebs, *Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains*, in CORPORATE LIABILITY FOR TRANSBOUNDARY HARM 245, 296–98 (Peter Gailhofer et al. eds., 2023) (discussing the merits of using general or catch-all clauses to determine the material scope of environmental due diligence policies).

certainty, making it difficult for companies to design adequate due diligence processes.¹⁸⁰ One possible solution to this issue would be to adopt a combined approach that uses international environmental treaty law as a minimum standard while also including a general clause to serve a subsidiary ‘catch-all’ function when there is a regulatory gap in international environmental conventions.¹⁸¹

2. Human Rights Impacts of Environmental Degradation

The CS3D goes even further than the French Duty of Vigilance Law by explicitly including certain human rights impacts of environmental harm in the scope of its due diligence framework. Part I, Article 18 of the Annex to the CS3D includes in the list of covered human rights violations:

Violation of the prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions or excessive water consumption or other impact on natural resources, that

- (a) impairs the natural bases for the preservation and production of food or
- (b) denies a person access to safe and clean drinking water or
- (c) makes it difficult for a person to access sanitary facilities or destroys them or
- (d) harms the health, safety, the normal use of property or land or the normal conduct of economic activity of a person or
- (e) affects ecological integrity, such as deforestation, in accordance with Article 3 of the Universal Declaration of Human Rights, Article 5 of the International Covenant on Civil and Political Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights;¹⁸²

While only certain human rights impacts, such as denial of access to safe drinking water, are included, the provision marks a significant improvement over most other existing supply chain due diligence laws that deal exclusively with either environmental or human rights and fail to integrate the two concepts.¹⁸³ One exception, the German Supply Chain Due Diligence Law, includes a very similar list

180. *Id.*

181. *Id.* at 301-02.

182. *Annex to the Proposal*, *supra* note 173, at 3.

183. Schilling-Vacaflor, *supra* note 18, at 8 (“[T]he analysis of the extent to which supply chain regulations integrate the environment and human rights revealed that the large majority of adopted laws can be characterized either as exclusively environmental or exclusively human rights norms, pointing to significant shortcomings in institutionalizing policy integration.”).

of environment-related human rights violations,¹⁸⁴ but the law has been criticized by German environmental organizations for failing to also include a general obligation to protect the environment.¹⁸⁵ By contrast, as discussed *supra*, the CS3D also includes adverse environmental impacts as an independent element of corporate due diligence obligations (although it does so by reference to international environmental treaties rather than to a general obligation to protect the environment).¹⁸⁶ In this way, the CS3D's imperfect coverage of both 'adverse environmental impacts' and human rights impacts caused by environmental degradation can be viewed as a way of limiting major gaps in environment due diligence obligations while still benefiting from the clarity and legal certainty that those narrower definitions provide.

C. Scope

The CS3D applies to large corporations that exceed a minimum threshold number of employees and net worldwide annual turnover.¹⁸⁷ However, those thresholds are lowered for companies in certain high-risk sectors such as extractives, mining and natural resources; agribusiness and food production; infrastructure and construction; and textiles and manufacture of clothing.¹⁸⁸ By applying to all corporations of a certain size, the CS3D avoids the current problem in the US system where only companies that receive sufficient media coverage and public pressure (such as Nike) have sufficient profit-oriented incentives to implement HRDD procedures.¹⁸⁹

184. The law includes "[t]he prohibition of causing harmful soil alteration, water pollution, air pollution, harmful noise emission or excessive water consumption, which is likely to: (a) significantly affect the natural basis for the preservation and production of food; (b) deny a person access to safe drinking water; (c) impede or destroy a person's access to sanitary facilities; or (d) harm the health of a person;"

And "[t]he prohibition of unlawful eviction and the prohibition of unlawful deprivation of land, forests and waters in the acquisition, construction or other use of land, forests and waters, the use of which secures the livelihood of a person." *Id.* at 8.

185. Schilling-Vacaflor, *supra* note 18, at 8.

186. *See supra* p. 38.

187. *Proposal, supra* note 13, at 46-47.

188. *Id.* at 33-34.

189. Chambers & Vastardis, *supra* note 143, at 351-52 ("[E]ven where awareness is high and there is a sustained reaction against a business...this can only cover businesses and brands that are consumer facing...These businesses may still be on the CSO or investor radar, but it may be harder for CSOs to garner public interest to a campaign against a non-consumer facing company, and some investors might place less importance on reputational risk posed to a business that is non-consumer facing.").

In addition, companies in high-risk but less public-facing sectors such as extractives and agribusiness are likely to receive less public pressure to voluntarily implement due diligence,¹⁹⁰ so lowering the thresholds for corporations in these industries may also help to minimize the risk of adverse human rights impacts.

Another key feature of the CS3D is that it employs an expansive definition of human rights by applying to all “violations of rights and prohibitions included in international human rights agreements.”¹⁹¹ A significant weakness of CSR and existing HRDD laws in the United States is that their scope tends to be narrowly tailored to address specific human rights issues, such as human trafficking with the TSCA and human rights abuses surrounding conflict minerals in the DRC with the Dodd-Frank Act.¹⁹² Adopting a broad and inclusive definition of human rights like in the CS3D would dramatically expand the scope of U.S. corporations’ human rights due diligence requirements and minimize the risk of adverse human rights impacts across the board. Furthermore, adopting an expansive definition of human rights also makes it more likely that environmental harms with human rights implications will fall within the scope of the due diligence obligation.

Other aspects of the CS3D’s scope, however, have met with significant criticism. The European Commission’s proposal creates obligations for companies “with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship.”¹⁹³ An “[e]stablished business relationship” (EBR) is defined as a direct or indirect business relationship “which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain.”¹⁹⁴ The problem with this definition is that its broadness could make it difficult to apply; it is unclear which intensity or duration is sufficient to make a relationship “established”, what it means for a relationship to be “lasting”, or what would constitute a

190. See *id.*

191. *Id.*

192. See *supra* Part II(B)(1).

193. *Proposal, supra* note 13, at 46.

194. A “business relationship” is defined separately as “a relationship with a contractor, subcontractor or any other legal entities (“partner”) (i) with whom the company has a commercial agreement or to whom the company provides financing, insurance or reinsurance, or (ii) that performs business operations related to the products or services of the company for or on behalf of the company.” *Proposal, supra* note 13, at 51.

“negligible or ancillary part of the value chain.”¹⁹⁵ Unlike in the United States where a single federal agency might be responsible for promulgating binding regulations that interpret vague statutory language, EU directives leave it up to individual Member States to transpose directives into national law.¹⁹⁶ Since Member States are given discretion to choose the ‘form and method’ to achieve the objectives set out in a directive,¹⁹⁷ “[a] fundamental choice to be made by national drafters during the transposition is the extent to which national transposing provisions will depart from the wording of a directive, which may range along a cline from the copy-out technique to the elaboration technique at the other extreme.”¹⁹⁸ Because of this, as the interest group BusinessEurope argues, “[t]here is a substantial risk of different interpretations from Member State to Member State and from judge to judge” which could potentially undermine the Directive’s goals of legal clarity and uniformity within the European Union.¹⁹⁹

Additionally, the concept of EBR is essentially a new concept that has not been employed by any existing frameworks such as the UNGPs or OECD Guidelines which companies are already familiar with.²⁰⁰ At the same time, the EBR requirement has been criticized by civil society organizations for excessively limiting the scope of corporations’ due diligence obligations²⁰¹; a corporation could, for example, constantly shift their suppliers in order to avoid creating any “established businesses relationships” that could lead to liability under the Directive.

The proposal’s scope has also been criticized for applying due diligence requirements to a corporation’s entire value chain, including downstream activities. BusinessEurope argues that it is “very chal-

195. BUSINESSEUROPE, COMMENTS PAPER ON CORPORATE SUSTAINABILITY DUE DILIGENCE PROPOSAL 17 (2022), https://www.besuisseurope.eu/sites/buseur/files/media/position_papers/legal/2022-05-31_corporate_sustainability_due_diligence_-_comments.pdf [<https://perma.cc/4DCE-6P4G>].

196. *European Union Directives*, EUROPEAN UNION, <https://eur-lex.europa.eu/EN/legal-content/summary/european-union-directives.html> (last updated Mar. 16, 2022) [<https://perma.cc/5U5Z-8L7H>].

197. *Id.*

198. Łucja Biel & Agnieszka Doczekalska, *How Do Supranational Terms Transfer Into National Legal Systems? A Corpus-Informed Study of EU English Terminology in Consumer Protection Directives and UK, Irish and Maltese Transposing Acts*, 26 *TERMINOLOGY INT’L J. THEORETICAL & APPLIED ISSUES IN SPECIALIZED COMM’N* 184, 190 (2020).

199. BUSINESSEUROPE, *supra* note 195, at 17.

200. *Id.*

201. Chambers & Martin, *supra* note 36, at 802.

lenging, if not practically impossible” for a corporation to conduct due diligence throughout its whole value chain, particularly with regard to downstream activities such as customers and users.²⁰² Likely in response to such criticism, the European Council’s Negotiating Position on the CS3D, which is an informal document meant to help the European Parliament understand the Council’s position on the Commission’s proposal during negotiation of the final text, replaces “value chain” with the narrower term “chain of activities” and limits downstream due diligence requirements by explicitly exempting the phase of the use of the company’s products or the provision of services.²⁰³

The concerns over the perceived expansive scope of the proposed CS3D are to some extent addressed by the inclusion of the ostensibly ambiguous EBR requirement. Indeed, as noted above, proponents of more expansive HRDD legislation have actually criticized the CS3D’s EBR requirement for excessively limiting due diligence obligations in contradiction to the UNGPs.²⁰⁴ In this sense, the EBR requirement might balance out other provisions that are wider in scope. Additionally, if U.S. federal legislation were modeled on the CS3D, the implementing agency could reduce this ambiguity by promulgating regulations that more precisely define EBR. Doing so could potentially kill two birds with one stone: first, it could alleviate concerns that the imprecise scope of due diligence requirements would harm businesses by undermining legal certainty and their ability to plan ahead. Second, if drafted well, the regulations could theoretically tailor the scope of the statute in a way that strikes an appropriate balance between business interests and human rights considerations. In practice, however, there is a serious risk that partisan politics and administrative shifts every four years would perpetuate legal uncertainty and make a balanced compromise impossible.

202. *Id.*

203. Will Chalk et al., *The Corporate Sustainability Due Diligence Directive Proposal*, LEXOLOGY (Feb. 8, 2023), <https://www.lexology.com/library/detail.aspx?g=a38f22da-d1e3-4be9-a031-e38671938a98> [<https://perma.cc/8LZ8-QNY8>]; Press Release, Council of the EU, Council Adopts Position on Due Diligence Rules for Large Companies (Dec. 1, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/> [on file with the Journal].

204. Jeffrey Vogt et al., *A Missed Opportunity to Improve Workers’ Rights in Global Supply Chains*, OPINIOJURIS (Mar. 18, 2022), <https://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/> [<https://perma.cc/QH8G-ELRJ>] (“While many Tier 1 suppliers may be ‘established,’ this is not the case for all Tier 1 suppliers and even less so for Tier 2 suppliers and beyond. From the start, the proposed directive limits the reach up the value chain in a manner inconsistent with the UNGPs . . .”).

Federal agencies frequently exercise interpretive authority in the face of statutory ambiguity. Under the doctrine of Chevron deference, federal courts defer to agency interpretations of statutes so long as 1) Congress has not directly spoken to the precise question at issue, and 2) the agency's interpretation is reasonable.²⁰⁵ It follows, then, that the agency charged with implementing the statute modeled on the CS3D could, for example, promulgate a rule precisely defining the intensity and/or duration of a business relationship that would render the relationship "lasting" and therefore an EBR.

The main issue, however, is whether agency rulemaking is the most effective vehicle for striking a satisfactory balance between the competing political interests involved. On the one hand, political considerations are by no means foreign to the administrative state; "regulatory agencies must operate in a political environment, for regulation is intended to preserve the sometimes-fragile balance between the interests of economic activity on the one hand and the public welfare on the other. Agencies are extremely sensitive to their political environment."²⁰⁶ On the other hand, however, previous attempts by federal agencies to regulate in politically controversial areas have often met significant resistance by federal courts and outright reversal by subsequent political administrations. For example, the Clean Power Plan was an effort by the Obama administration to limit carbon pollution from U.S. power plants by setting carbon dioxide emissions standards that states would be required to meet.²⁰⁷ The Plan was issued by the Environmental Protection Agency (EPA) under the authority granted to it by Section 111 of the Clean Air Act (CAA).²⁰⁸ After the Plan was issued, however, it was subsequently stayed by the Supreme Court in 2016; repealed and (unsuccessfully) replaced by the Trump administration in 2019; and

205. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). However, the Supreme Court may be on the verge of overruling *Chevron* in a pending case, *Loper Bright Enterprises v. Raimondo*, that involves a challenge to a government program to monitor overfishing off the coast of New England. Adam Liptak, *Conservative Justices Appear Skeptical of Agencies' Regulatory Power*, N.Y. TIMES (Jan. 17, 2024), <https://www.nytimes.com/2024/01/17/us/supreme-court-chevron-case.html> (on file with the Journal). See *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part* 143 S. Ct. 2429 (2023).

206. Jodi L. Short, *The Politics of Regulatory Enforcement and Compliance: Theorizing and Operationalizing Political Influence*, 15 REGUL. & GOVERNANCE 653, 653 (2021) (citing KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION 9 (1984)).

207. *What is the Clean Power Plan?*, NAT. RES. DEF. COUNCIL (Sept. 29, 2017), <https://www.nrdc.org/stories/what-clean-power-plan> [<https://perma.cc/8UNR-JDJG>].

208. *West Virginia v. EPA*, 142 S. Ct. 2587, 2593 (2022).

ultimately declared in excess of the EPA's regulatory authority under the CAA by virtue of the major questions doctrine.²⁰⁹

Scope-clarifying regulations under a CS3D-modeled U.S. statute, regardless of their underlying political motivations, would likely face the same issues as the Clean Power Plan. For instance, if they defined EBR broadly in a way that created significant new obligations for corporations, they could be challenged under the major questions doctrine. If they instead went the other direction by construing EBR narrowly to limit corporations' due diligence obligations, they could potentially be challenged under the Administrative Procedure Act (APA) for being arbitrary and capricious or not in accordance with law for not going far enough.²¹⁰ In either case, there is also a serious risk that the next political administration will simply roll back the regulations like the Trump administration did to the Clean Power Plan. These potential hiccups, which would take years to fully resolve, would hurt businesses and discourage investment by creating legal uncertainty and preventing corporations from understanding the precise extent of their due diligence obligations under the statute. All of this could be avoided, however, if the statute itself provided a clearer definition of EBR and the scope of its application.

D. Enforcement

The CS3D's enforcement regime, which provides for individual complaints, sanctions, and civil liability, is simultaneously one of the Directive's most innovative and controversial elements. Article 9 essentially compels corporations to establish an internal grievance mechanism to receive individual complaints in case of legitimate concerns regarding potential or actual adverse impacts, including in the company's value chain.²¹¹ Member States must ensure that complainants are entitled to request appropriate follow-up on the complaint from the company and meet with the company's representatives to discuss the potential or actual severe adverse impacts.²¹² Complaints may be submitted by:

209. *Id.* at 2593, 2595–96.

210. 5 U.S.C. § 706(2)(A); The Affordable Clean Energy (ACE) Rule, which the Trump administration issued to replace the Clean Power Plan, was vacated in part because the D.C. Circuit determined it to be arbitrary and capricious. That determination was based on the CAA, but courts apply the same standard of review under the CAA as they do under the APA. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 941 (D.C. Cir. 2021).

211. Proposal, *supra* note 13, at 24.

212. *Id.* at 58.

- (a) persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact,
- (b) trade unions and other workers' representatives representing individuals working in the value chain concerned,
- (c) civil society organisations active in the areas related to the value chain concerned.²¹³

Article 20 requires Member States to set out and implement rules on sanctions applicable to violations of national provisions adopted pursuant to the Directive; such sanctions must be “effective, proportionate and dissuasive.”²¹⁴ In accordance with Principle 25 of the UNGPs, Article 22 creates the possibility of civil liability: corporations are liable for damages if they a) failed to comply with Articles 7 and 8, and b) “as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage.”²¹⁵

The controversy surrounding these enforcement provisions points to a major disconnect in how different groups understand HRDD as a concept. From the industry perspective, HRDD is largely seen as a risk management tool and a means of prevention that is independent from legal liability.²¹⁶ Rather than penalizing companies for non-compliance, it is a way “to guide companies in their journey for continuous learning and improvement.”²¹⁷ BusinessEurope’s argument in its Comments Paper on the CS3D encapsulates this perspective:

There needs to be a shift from the apparent punitive nature of the provisions to a more engagement- and learning-oriented one which recognizes that companies want and can be catalysts for the positive sustainability transition by building a due diligence system, within the limits of a supply chain approach on a risk-based model. A system of ‘stay and behave’ rather than ‘cut and run’ must be incentivized.²¹⁸

In line with this viewpoint, European industry groups have criticized the CS3D’s complaints procedure for its broad standing requirement that could encourage more complaints, and they strongly oppose its civil liability provisions, arguing that they are unneces-

213. *Id.*

214. *Id.* at 63. Article 20 also stipulates that pecuniary sanctions must be based on the corporation’s turnover, meaning that the potential financial risk of sanctions is independent of a company’s size. *Id.*

215. *Id.* at 65.

216. Gabriela Quijano & Carlos Lopez, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?*, 6 BUS & HUM RTS J. 241, 246 (2021).

217. *Id.*

218. BUSINESSEUROPE, *supra* note 195, at 5.

sarily complex, disproportionate, and incentivize frivolous litigation.²¹⁹

In contrast, much of the legal community has come to accept a distinct interpretation of HRDD that links it with enforcement and legal accountability. According to this viewpoint, failure to comply “with HRDD as a standard of conduct for businesses to discharge their responsibility to respect human rights would trigger civil liability.”²²⁰ This is essentially the interpretation adopted by the UNGPs, which state that “States must take appropriate steps to ensure . . . that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy Remedy may include . . . financial or non-financial compensation and punitive sanctions.”²²¹

Weighing in favor of strong enforcement and liability is the emerging academic consensus, supported by studies of existing HRDD and HRDD-related legislation, that weak enforcement creates significant gaps in compliance and limits uptake by companies of due diligence requirements.²²² One study, which looked at five HRDD laws including the UK Modern Slavery Act, California’s TSCA, and the French Duty of Vigilance Law, concluded that compliance mechanisms are essential to the success of HRDD legislation.²²³ This conclusion was

219. BUSINESS EUROPE, *supra* note 195, at 22 (“the introduction of extensive, unclear, and disproportionate civil liability rules would create enormous legal uncertainty and the risk of excessive litigation for companies with complex supply chains.”); *see also* EBF position paper on the Corporate Sustainability Due Diligence Directive, EUROPEAN BANKING FEDERATION (June 20, 2022) <https://www.ebf.eu/wp-content/uploads/2022/06/EBF-position-paper-Corporate-Sustainability-Due-Diligence-20.05.2022.pdf> [<https://perma.cc/56Y5-EC6U>] (“[the proposed civil liability provisions] go against the established principles of national civil law and create an unaccountable and uncertain legal risk for companies, which might go against the objectives of the Directive. We believe that the powers granted to the supervisory authorities without civil liability would be sufficient for the effective enforcement of the Directive.”).

220. Quijano, *supra* note 216, at 246.

221. GUIDING PRINCIPLES, *supra* note 8, at 27.

222. *See generally* Smit et al., *supra* note 19; *see also* Nolan & McCorquodale, *supra* note 103, at 469 (“The issues of liability and enforcement are significant as HRDD by itself does not include liability or enforcement, and reporting or transparency without liability and enforcement is rarely effective as a means of changing conduct. Reliance on self-regulation in the business and human rights field has been long been criticized.”).

223. Justine Nolan, *Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights*, 15 *BRAZ. J. INT’L L.* 64 (2018). According to Nolan, “[t]ransparency and due diligence must be coupled with accountability in order to make the process meaningful.” *Id.* at 76. Nolan also opines that “[p]rovisions incorporating both penalties for, and defences to, alleged misconduct could give business a strong incentive to exercise due diligence, without depriving them of the ability to defend themselves, or depriving victims of a remedy for serious violations of human rights.” *Id.*

demonstrated in practice through the ineffective implementation of the UK Modern Slavery Act, the corporate response to which “falls short of any serious effort to address modern slavery in their supply chains.”²²⁴ The law’s failure to ensure compliance was primarily due to its lack of express penalties for non-compliance and overall weak monitoring and enforcement.²²⁵ Recognizing this problem, the UK Joint Committee on Human Rights, which conducted a review of the law’s operation in 2017, ultimately recommended that the government should introduce new legislation to strengthen human rights due diligence compliance by, inter alia, enabling civil remedies against companies when abuses occur.²²⁶ Thus, by including comparatively strong enforcement and liability provisions such as those in the CS3D, a HRDD law in the U.S. may be able to avoid the compliance issues that have accompanied existing domestic HRDD legislation such as the UK Modern Slavery Act.

V. CONCLUSION

As globalization progresses and MNCs become increasingly powerful, the need for human rights and environmental due diligence on the part of corporations will only continue to grow. In line with the three Pillars of the UNGPs, states must ensure that corporations conduct due diligence throughout their value chains and that effective remedies are available to victims of abuse. Given the demonstrated connection between human rights and the environment, adopting a more holistic approach to due diligence that accounts for and integrates both human rights and environmental considerations

224. *Id.* at 69.

225. See Smit et al., *supra* note 19, at 247, 347 (“According to an independent review led by Amnesty International, the UK Modern Slavery Act has failed to compel companies to respect their duties and implement proper due diligence. Weak monitoring and enforcement, of an already lenient reporting requirement, has allegedly meant that almost half of all companies under the legislation’s jurisdiction have failed to publish a statement.”); *UK Modern Slavery Act: Missed opportunities and urgent lessons*, BUS. & HUM. RTS. RES. CTR. (Feb. 25, 2021), <https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/> [<https://perma.cc/Q2MC-YBB4>] (“Transparency is necessary but relying on voluntary disclosure is insufficient to prevent the worst forms of labour abuse. Not even the government’s proposed amendments to the Act will save it. There is an urgent need for legally binding obligations on companies - properly and forcefully implemented - that go beyond hollow reporting requirements.”).

226. House of Lords, House of Commons & Joint Committee on Human Rights, Human Rights and Business 2017: Promoting responsibility and ensuring accountability, Report, 2016–17, HL PAPER 153/HC 443; see also Nolan & McCorquodale, *supra* note 103, at 10 (discussing the conclusions of the Joint Committee on Human Rights).

will better protect the rights of vulnerable individuals and communities while also making it easier for companies to fulfill their due diligence obligations efficiently and effectively.

Preventing adverse impacts by relying on the voluntary commitments of corporations is insufficient to ensure broad and effective human rights and environmental protection, and existing disclosure-based legislative initiatives in the US are both ineffective and far too narrow in application. Emerging mandatory HREDD legislation in Europe, epitomized by the proposed CS3D, provides a promising model for how Congress could take stronger action in this area. Although it would not completely prevent adverse impacts and could be challenging to implement at first because of the ambiguity surrounding its scope, comprehensive federal HREDD legislation based on the CS3D framework would be a significant step towards filling in the gaps in U.S. corporate accountability.