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With the rise of globalization, corporations have imposed themselves as powerful actors in the international arena. Their production methods, notably their outsourcing in developing countries where few labor or environmental standards are applicable, are sometimes criticized for the risks they pose to local workers, and society as a whole. Many corporations are eager to protect their reputation and are starting to grasp the importance of complying with minimum human rights and environmental norms.[1]

The empowerment of corporations has led to the notion of corporate social responsibility (CSR), where corporations consider the problems that may be attributed to their activities.[2] CSR is composed of a combination of national laws and regulations imposed on corporations by states with regard to environmental protection or workers' health and safety, together with codes

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1 Peter Forstmoser, *Corporate Responsibility und Reputation—zwei Schlüsselbegriffe an der Schnittstelle von Recht, Wirtschaft und Gesellschaft* [Corporate Responsibility and Reputation – Two Key Terms at the Interface of Law, Economy and Society], *in*, UNTERNEHMEN—TRANSAKTION—RECHT, FESTSCHRIFT FÜR ROLF WATTER [Company - Trasnaction – Law: Liber Amicorum for Wolf Watter's 50th birthday] 204 (Nedim Peter Vogt et. al. eds., Dike Verlag, 2008); Klaus Leisinger, *Menschenrechte als unternehmerische Verantwortungsdimension*, *in* GESELLSCHAFTLICHE VERANTWORTUNG VON UNTERNEHMEN – VON DER IDEE DER CORPORATE SOCIAL RESPONSIBILITY ZUR ERFORLGREICHEN UMSETZUNG 127 (Arnd Hardtke & Annette Kleinfeld eds.,Gabler Verlag, 2010).

2 MICHAEL KERR ET. AL., CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS 51 (LexisNexis Canada, 2009), https://store.lexisnexis.ca/en/categories/products/ corporate-social-responsibility-a-legal-analysis-skusku-cad-00708/details [https://perma.cc/9H8Q-XBDV].

of conduct and other voluntary instruments adopted by companies.[3] CSR aims at making corporations integrate social and environmental considerations in their practice.[4]

The question of corporate social responsibility started to emerge in the late 1970s,[5] focusing on the legal obligations of enterprises rather than simply on their moral considerations. Its aim is to prevent harm from occurring and provide remedies to victims. The notion was first considered a soft law concept, as corporations were encouraged to auto-regulate their business conduct and voluntarily integrate social and environmental norms.[6] Corporations have a strong interest in showing a willingness to comply with these standards. Indeed, a company's reputation on the market is one of its most valuable assets.[7] Therefore, CSR represents an effective marketing policy for corporations, as this allows them to gain respectability and credibility among customers and investors.[8] In fact, most of the world's biggest companies now integrate non-financial data in their annual reports.[9]

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[3] JENNIFER ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 32 (Cambridge University Press, 2006).

[4] *See generally* Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct,* 38 (3) BUS. & SOC. 268, 268-95 (1999).

[5] *See generally* Gayle C. Avery & Harald Bergsteiner, *A Theoretical Responsibility and Accountability Framework for CSR and Global Responsibility*, 1(1) J. OF GLOBAL RESPONSIBILITY 8, 8–33 (2010).

[6] *See* Edouard Dubois & Jérôme Chacornac, *Les limites de l'autorégulation en droit des sociétés,* Bull. Joly Sociétés 2013, pp. 758ss.

[7] AMIS BREW L.P. & CAROLINE ERSMARKER, *Human Rights: It Is Your Business—The Case for Corporate Engagement*, The Prince of Wales International Business Leader Forum, 2005, p.4.

[8] ROMAN BRETSCHGER, UNTERNEHMEN UND MENSCHENRECHTE—ELEMENTE UND POTENZIAL EINES INFORMELLEN MENSCHENRECHTSSCHUTZES [Business and Human Rights – Elements and Potential of Informal Human Rights Protections], Schweizer Studien zum Internationalen Recht Band 55 (Schulthess, 2010); Hans Caspar Von Der Crone, *Verantwortlichkeit, Anreize und Reputation in der Corporate Governance der Publikumsgesellschaft*, ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 239, 271 (2000); ROBERT REICH, SUPERCAPITALISM—THE TRANSFORMATION OF BUSINESS, DEMOCRACY AND EVERYDAY LIFE 178 (Vintage Books, 2007).

[9] *See* KPMG, *The Road Ahead: The KPMG Survey of Corporate Responsibility Reporting, 2017*, https://home.kpmg.com/content/dam/kpmg/campaigns/csr/pdf/CSR_

Yet, this voluntary character of corporate social responsibility also represents one of its main weaknesses, as no real compliance mechanisms have been set up to ensure the enforcement of the commitments taken by multinational firms. The lack of enforcement mechanisms, which comprises risks of non-compliance, has led to the consideration of imposing binding obligations on corporations, the culmination of which is illustrated by the current discussions on a binding treaty for corporations in international law[10] taking place at the United Nations.

Nowadays, references to CSR tend to insist more on the responsibility that private entities have towards society as a whole: "each business enterprise, as a member of society, has a responsibility to operate ethically and in accordance with its legal obligations and to strive to minimize any adverse effects of its operations and activities on the environment, society and human health."[11] Nevertheless, assessing a responsibility can only be efficient if adequate remedies are provided to enforce this responsibility.

An innovative approach that has progressively emerged as a means of imposing certain obligations on companies is the notion of corporate codes, whose content many claim is binding.[12] Corporate codes of conduct are policy statements that outline the ethical standards of conduct a corporation adheres to. Corporate codes may take the form of a general policy statement or be inserted in the corporation's contracts with suppliers, in the sense that

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Reporting_2017.pdf [https://perma.cc/AGX7-UFC9] (non-financial reporting includes information on environmental protection measures implemented by the companies, social responsibility and treatment of employees, respect for human rights but also measures to fight against corruption and bribery).

[10] OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES RITH RESPECT TO HUMAN RIGHTS, LEGALLY BINDING INSTRUMENTS TO REGULATE, in INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSATIONAL CORPORTATIONS AND OTHER BUSINESS ENTERPRISES (July 16, 2018), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf [https://perma.cc/YTW5-Q63T].

[11] Zerk, *supra* note 3, at 32.

[12] *See* Carola Glinski, *Corporate Codes of Conduct: Moral or Legal Obligation?*, *in* DOREEN MCBARNET ET AL., THE NEW CORPORATE ACCOUNTABILITY, CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 119–47 (Cambridge University Press, 2009).

they must agree to abide by the company's ethical standards. Codes of conduct do not have the status of legal norms.[13] They are self-regulatory systems that govern business practices and are valid by virtue of agreement. However, one can legitimately wonder if a novel duty of care can be created through the emergence of codes of conduct. This article shall notably study the case law that was developed in the United States[14] and in Spain[15] in that regard.

The regulation of corporations has primarily been introduced via the establishment of reporting duties which aim to impose on companies a duty to monitor their activities and those of their supply chains.[16] Such an approach was already called for in the Guidelines on Multinational Enterprises drafted by the Organisation for Economic Co-operation and Development (OECD),[17] as well as by the European Commission in its 2014 proposal for a regulation on the acquisition of minerals from conflict areas. The European Commission defines due diligence in the supply chain as measures such as "risk management, third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks… to prevent or mitigate adverse impacts associated with their… activities."[18] This article, therefore, assesses the efficiency of the reporting duties established in both common law and civil law countries.

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[13] Ada-Iuliana Popescu, *In Brief: Pros and Cons of Corporate Codes of Conduct,* 9 J. OF PUB. ADMIN., FIN. AND L.125, 128 (2016).

[14] Doe v. Wal-Mart Stores Inc., 572 F.3d 677 (9th Cir. 2009).

[15] S.T.S., [Supreme Court of Spain] Mar. 7, 2007, No. 132/2005 (Sp.).

[16] Justine Nolan, *Enhancing Corporate Accountability: Prospects and Challenges Conference Proceedings* 8-9 Feb. 2006 181–210. (also available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=975414 [https://perma.cc/WD9F-WYUA]).

[17] ORG. FOR ECON. CO-OPERATION AND DEV., GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf [https://perma.cc/QW7V-T799].

[18] REPORT ON THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL SETTING UP A UNION SYSTEM FOR SUPPLY CHAIN DUE DILIGENCE SELF-CERTIFICATION OF RESPONSIBLE IMPORTERS OF TIN, TANTALUM AND TUNGSTEN, THEIR ORES, AND GOLD ORIGINATING IN CONFLICT-AFFECTED AND HIGH-RISK AREAS, COM (2014) 0111 (Apr. 24, 2015).

As we shall develop throughout this article, the commitments made by companies, both in their corporate codes of conduct or as part of their reporting duties, should be accompanied by sanctions in case of non-compliance. Sole reliance on corporations' goodwill and assertions are not sufficient to secure a thorough implementation of social and environmental standards. This article seeks to analyze and compare the enforcement of corporations' CSR policies in Western countries, both in the United States and in European countries. First, we shall conduct a comparative analysis between different Western countries as to the enforceability of corporate codes of conduct before national tribunals. Then, we shall assess the reporting duties imposed by the law in several Western countries and determine what method shall better encourage companies to comply with corporate social responsibility standards.

I. THE UNCERTAIN ENFORCEABILITY OF CORPORATE CODES OF CONDUCT

Corporate codes of conduct can be defined as "guidelines that intend to describe companies' responsibilities in the areas of human rights, labor, the environment, and socially sensitive business in general."[19] The codes codify the fundamental values and norms that govern the conduct of directors, employees, and suppliers. Corporate codes of conduct can take the form of a general policy statement or be inserted in the corporation's contracts with suppliers. However, codes of conduct do not have the status of legal norms. They are self-regulatory systems that govern business practices and are valid by virtue of agreement. Corporate codes of conduct have gained the

[19] Jan Smits, *Enforcing Corporate Social Responsibility Codes Under Private Law: On The Disciplining Power of Legal Doctrine,* 24 IND. J. GLOBAL LEGAL STUD. 99, 101-02 (2017); *See also* RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY 58 (Stephen Tully, eds., Edward Elgar, 2005).

role of voluntary tools that enable companies to comply with their corporate responsibilities.[20]

Codes of conduct have been issued both at the international and national levels. At the international level, we can notably quote the OECD Guidelines and the Ruggie Principles. Some states have also elaborated draft codes of conduct, such as the 2014 British Ethical Trading Initiative Base Code,[21] the 2008 Dutch Corporate Governance Code,[22] and the 2011 German Sustainability Code.[23] Corporations can choose to adopt these draft codes, or they can elaborate their own guidelines, as some major transnational corporations (TNCs) have done, like Coca Cola's Code of Business Conduct or Primark's Code of Conduct.[24] Over the past few years, corporations are

[20] *See* Alexander Dahlsrud, *How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions,* 15CORPORATE SOC. RESPONSIBILITY AND ENV'T MGMT. 1, 4–11 (2008) (in an analysis of 37 different CSR definitions, Alexander Dahlsrud found that one of the common features of the notion of corporate social responsibility was its claimed voluntary nature.); Olivier De Schutter, *Corporate Social Responsibility European Style,* 14 EUR. L. J. 203, 203–36 (2008) (a critique of the voluntary nature of CSR); Jan Eijsbouts, Extraordinary Professor Corporate Social Responsibility at the Faculty of Law, Inaugeral Lecture at Maastricht University: *Inaugural Lecture: Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the License to Operate* (Oct. 20, 2011). (Transcript available at http://www.l4bb.org/ articles/OBS_7885_-_Eijsbouts_digitale-1.pdf [https://perma.cc/WQM3-BGCK]).

[21] Ethical Trading Intiative, THE ETHICAL TRADING INITATIVE BASE CODE, https://www.ethicaltrade.org/sites/default/files/shared_resources/ETI%20Base%20Code%20%28English%29.pdf [https://perma.cc/4JSU-2B75] (last visted Nov. 09, 2017, 04:45 PM).

[22] Dutch Corporate Governance Code: Principles of Good Corporate Governance and Best Practices Provisions (2008), https://www.mccg.nl/download/?id=609 [https://perma.cc/3HXL-GGFD].

[23] Rat für Nachhaltige Entwicklung (Council for sustainable development), the German Sustainability Code (GSC) : Recommendations of the German Council for Sustainable Development (2012) (the German has been updated in 2017. Its fourth edition is available here: https://www.nachhaltigkeitsrat.de/wpcontent/uploads/2018/03/The_SustainabilityCode_2017.pdf [https://perma.cc/PM65-U2PP]).

[24] THE COCA-COLA CO., CODE OF BUSINESS CONDUCT: ACTING WITH INTEGRITY AROUND THE GLOBE (2008), http://assets.cocacolacompany.com/45/34/04efe22946d7903f05ec108d95e5/COBC_France_English.pdf [https://perma.cc/9JHT-VNZE]; Primark Supplier Code of Conduct (2016), https://www.primark.com/en/our-ethics/workplace-rights/code-of-conduct [https://perma.cc/7V6C-EXWK].

increasingly adopting corporate codes of conduct. In fact, "[m]ost, if not all, leading companies now have strategies relating to CSR."[25]

Originally, corporate codes were voluntary in the sense that corporations were free, from a legal point of view, to decide whether or not to adopt a code of conduct and to determine its content. However, an increasing number of hard law prescriptive provisions have progressively required the adoption of corporate codes. We can notably quote the U.S. Congressional Federal Sentencing Guidelines for Organizations (FSG) of 1991. The FSG were aimed to be adopted by all U.S. and non-U.S. multinational companies to respect American rules relating to anti-trust.[26] Moreover, in the past, corporations benefited from a certain flexibility to draft their codes of conduct; this flexibility is now restricted, notably by societal expectations in terms of management of adverse impacts of business activities.[27]

However, even though corporate codes of conduct are supposed to relate to international standards, they lack an international mechanism to hold violators liable.[28] Therefore, claimants need to turn to domestic remedies to enforce the codes.[29] In consequence, this makes the success of the claim dependent on different national substantive laws which may differ in terms of conditions of responsibility or damages awarded. Different jurisdictions have reached different results as to the direct applicability of corporate codes of conduct.

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[25] Zerk, *supra* note 3, at 7.

[26] *See* 15 U.S.C. §78dd-2 (2016) (prohibited Foreign Trade Practices by Domestic Concerns of the Foreign Corrupt Practices Act of 1977).

[27] Jan Eijsbouts, *Corporate Codes as Private Co-Regulatory Instruments in Corporate Governance and Responsibility and Their Enforcement*, 24 (1) IND. J. GLOBAL LEGAL STUD. 181, 205 (2017).

[28] Yousef Farah, *Improving Accountability through the Contractualisation of Human Rights*, 2 BUS. AND HUM. RTS. REV. 11, 13 (2013).

[29] *See, e.g.,* Ruggie, J., *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts* (2007), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/108/85/PDF/G0710885.pdf?OpenElement (last visited May 30, 2019, 6:19 PM).

The question of the binding character of corporate codes of conduct was notably raised in the United States in the *Doe v. Walmart* case.[30] In this case, Chinese, Bengali, Indonesian, and Nicaraguan workers alleged before the Los Angeles courts that Walmart (a multinational supermarket chain) had not respected its code of conduct contracted with its workers and subcontractors. This code of conduct required foreign suppliers to respect a certain amount of commitments relating to safety at work, minimum wage, and discrimination.[31] The workers claimed that Walmart did not adequately monitor its suppliers and that the short deadlines and low prices it imposed in its supply contracts forced suppliers to violate the labor standards.[32] The Ninth Circuit Court of Appeals held that the supply contracts did not aim to protect the workers, and that no duty could be held to stem from the code of conduct.[33] The court instead considered that Walmart had reserved itself in this code of conduct the right to inspect the suppliers, but that this did not amount to a duty to inspect them.[34]

Similarly, in France, in a decision called *Association France-Palestine Solidarité 'AFPS' v. Société Alstom Transport SA*,[35] the Versailles Court of Appeal held that the failure to abide to a company's code of ethics was not a breach of international law (in this case, the defendant company had adhered to the Global Compact's rules).[36] The Court considered that the code of ethics and the Global Compact did not create any obligations or commitments towards third parties who may wish to see them observed.

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[30] Walmart Stores, Inc., 572 F.3d at 682 ("Plaintiffs' allegations are insufficient to support the conclusion that Wal-Mart and the suppliers intended for Plaintiffs to have a right of performance against Wal-Mart under the supply contract").
[31] *Id.* at 679–80.
[32] *Id.*
[33] *Id.* at 682.
[34] *Id.*
[35] Cour d'appel [CA] [regional court of appeal] Versailles, civ., 59A, Mar. 20, 2013, 11/05331 (Fr.).
[36] *See* Alstom, U.N. GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/participants/523-Alstom [https://perma.cc/99FF-M5HB] (Alstom is included as a participant in the UN Global Compact).

Moreover, in a similar French case, SHERPA introduced an action against Samsung an electronic device company, claiming that it violated its commitments as expressed in its code of conduct entitled "Global Harmony with People, Society and the Environment." In fact, the French association accused Samsung of violating its workers' labor rights, exposing them to deplorable working conditions, and requiring workers to "work up to eleven hours a day, without overtime compensation and without any social insurance."[37] The case was rejected by the court, which chose not to follow up on the claim.[38]

However, the binding nature of corporate codes of conduct is occasionally recognized. In the United States, the University of Wisconsin presented a claim for breach of contract against its contracting partner, Adidas, for not complying with the anti-sweatshop provisions of the contract, as evidence had been brought regarding abusive labor conditions in the brand's supply chain factories in Indonesia.[39] This claim was finally settled out of court where Adidas agreed to pay compensation to the supply chain workers in

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[37] *See* Pierre Barbin, *Une ONG Française Dénonce les Conditions de Travail chez Samsung*, LE FIGARO (Dec. 18, 2015) http://www.lefigaro.fr/societes/2015/12/17/20005-20151217ARTFIG00139-une-ong-francaise-denonce-les-conditions-de-travail-chez-samsung.php [https://perma.cc/X5G5-5CAN].

[38] *See also* Sherpa, *Classement sans suite des plaintes contre Samsung et Auchan : la loi sur le devoir de vigilance des multinationales doit être adoptée sans attendre*, (Jan. 21, 2015), https://www.asso-sherpa.org/classement-sans-suite-des-plaintes-contre-samsung-et-auchan-la-loi-sur-le-devoir-de-vigilance-des-multinationales-doit-etre-adoptee-sans-attendre#.VL_f5UeG91Y [https://perma.cc/44NG-TPHT] (ranking without follow-up of the complaints against Samsung and Auchan: the law on the duty of vigilance of the multinationals must be adopted without waiting. However, the SHERPA Association has chosen to present another civil claim against Samsung for deceptive marketing practices in June 2018, available at: https://www.asso-sherpa.org/samsung-sherpa-actionaid-france-deposent-plainte-constitution-de-partie-civile-contre-leader-mondial-smartphone [https://perma.cc/M6WL-XN6Z]).

[39] PR Watch, *Univ. of WI Launches Historic Challenge to Adidas over Sweatshop Conditions for College-Branded Apparel*, THE CENTER FOR MEDIA AND DEMOCRACY (July 14, 2012), https://www.prwatch.org/news/2012/07/11641/university-wisconsin-launches-historic-challenge-adidas-over-sweatshop-conditions [https://perma.cc/ED53-SRLL].

Indonesia.[40] The fact that Adidas finally opted for an out-of-court settlement indicates that it felt compelled by its code of conduct and that the claimants had a strong case.

In Spain, the Supreme Court considered that a code of conduct signed between a firm and workers' unions must be respected, and that it may generate disciplinary sanctions in case of non-compliance.[41] In France, the Cassation Court has also conceded that the declaration of CEOs could be considered a unilateral commitment, but no indication as to the available remedies in case of a breach was provided.[42] Finally, the Criminal Chamber of the French Court of Cassation adopted a very interesting position in the *Erika*[43] case by using the codes of conduct adopted on a voluntary basis by Total, the defendant company, to serve as a basis for its criminal liability.

Some authors consider that corporate codes of conduct are voluntary instruments which should be interpreted as unilateral commitments "that indicate a corporation's willingness to take on a global regulatory role in the absence of a global political government—a phenomenon that is difficult to grasp from the perspective of traditional private law categories."[44] If these commitments are considered unilateral, they become more difficult to enforce, as private law focuses on the enforcement of reciprocal obligations.[45]

Under the doctrine of the privity of contract, which is recognized in most jurisdictions, any party that is not part of a contract or of an agreement cannot

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[40] Bus. and Hum. Rts. Resource Centre, *Adidas Lawsuit (re Univ. of WI),* BUS. AND HUM. RTS. RESOURCE CENTRE (Jan. 1, 2001), https://www.business-humanrights.org/ en/adidas-lawsuit-re-university-of-wisconsin#c18941 [https://perma.cc/GS5H-3UB8].

[41] S.T.S., *supra* note 15.

[42] Cour de Cassation, Chambre Sociale, 25 Nov. 2003, no. 01-17501.

[43] Cour de Cassation[Cass.], Chambre criminelle, Sept. 25, 2012, Bull. Crim., No. 10-82.938.

[44] *See* Gunther Teubner & Anna Beckers, *Expanding Constitutionalism*, 20 IND. J. GLOBAL LEGAL STUD. 523, 533–36 (2013).

[45] Anna Beckers, *Legislation Under the Premises of Globalization: Why and Where to Enforce Corporate Social Responsibility Codes*, 24 IND. J. GLOBAL LEGAL STUD. 15, 15 (2017).

enjoy the benefits of the contract, nor can this third party seek to enforce it.[46] However, a doctrine has developed in recent years known as the "Third-Party Beneficiary Rule." Under this doctrine, a third party, who is not a party to a contract, can seek to enforce a promise made for his or her benefit under the contract, although this third person was not a party to the contract,[47] at the condition that it was the parties' intention at the time of the contract.[48] However, this doctrine presents a problem; it leaves the possibility for companies to invoke that they do not wish to allow third parties to enforce the promises that it made in corporate codes.

This raises the question as to which beneficiaries can rely on the rules stated in the corporate codes of conduct.[49] Common law has developed the notion of "intended beneficiaries," which designates all persons to whom a right is intended to be conferred in a contract.[50] This rule has even been statutorily fixed in the United Kingdom under the Contracts (Rights of Third Parties)

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[46] Jesse Warren Lilienthal, *Privity of Contract*, 1 HARV. L. REV. 226, 226 (1887).

[47] RESTATEMENT (SECOND) OF CONTRACTS § 304 (published in 1981 by the American Law Institute provides that « parties to a contract have the power if they so intend to create a right in a third party »); *See also* Anthony Jon Waters, *The Property in the Promise: A Study on the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1111–12 (1985) (explaining that the possibility for a third party to enforce a contract is well accepted in the United States).

[48] Oyeniyi Abe, *Untying the Gordian Knot: Re-Assessing the Impact of Business and Human Rights Principles on Extractive Resource Governance in Sub-Saharan Africa*, 32 AM. U. INT'L. L. REV. 895, 920 (2017).

[49] *See* ANNA BECKERS, ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES: ON GLOBAL SELF-REGULATION AND NATIONAL PRIVATE LAW 81 (Hart Publishing, 2015); ANDREAS RÜHMKORF, CORPORATE SOCIAL RESPONSIBILITY, PRIVATE LAW AND GLOBAL SUPPLY CHAINS 196 (Elgar, 2015).

[50] RESTATEMENT (SECOND) OF CONTRACTS § 302 (INTENDED AND INCIDENTAL BENEFICIARIES, 2012) (replaced two terms previously used in § 133 of Restatement (First) of Contracts: "creditor beneficiary" and "donee beneficiary." Notably, the Second Restatement does not restrict the definition of "intended beneficiary" to only the creditor or donee beneficiary scenarios. The Second Restatement broadened the term to recognize situations in which the "purpose of the promise" was not "to make a gift" but also to confer a right).

Act of 1999. Under this act, a third party can enforce rights under a contract if it "purports to confer a benefit" on the third party.[51]

Some authors have argued in favor of the application of this rule for corporate codes of conduct so that third-party beneficiaries of the corporate codes can enforce them.[52] Therefore, environmental and social commitments taken by a company in its corporate code of conduct could be interpreted as intending to confer third-party rights to claimants who could be affected by corporate breaches and could thus invoke these commitments to obtain reparation.

Moreover, in the United States, the Second Restatement of Contracts recognizes that a third party can reasonably seek enforcement of a promise made. The condition is that the reliance on the promise is both "reasonable and probable."[53] For example, in the case *Chen v. Street Beat Sportswear Inc.*,[54] workers sued a domestic clothing manufacturer alleging third-party beneficiary status on the basis of an agreement between the defendant and the United States Department of Labor. The workers required the manufacturer to comply with the Fair Labor Standards Act.[55] The court held that the corporation was indeed liable towards the workers of the supply chain on the basis of the agreement it had concluded.[56]

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[51] Contracts (Rights of Third Parties) Act of 1999 §§ 1(a) & (b) (allowing a third party to a contract to enforce rights under the contract if (a) the contract expressly provides that he may or (b) the term purports to confer a benefit on him, as the parties intended the term to be enforceable by the third party. Under this Act, the third party must be expressly identified in the contract by name, as a member of a class, or by particular description).

[52] John N. Adams et al., *Privity of Contracts - The Benefits and the Burdens of Law Reform*, 60 MOD. L. REV. 238, 242 (1997); ANDREAS RÜHMKORF, CORPORATE SOCIAL RESPONSIBILITY, PRIVATE LAW AND GLOBAL SUPPLY CHAINS 211 (Elgar, 2015) (both defend the idea that third parties should be able to enforce the rights that parties to contracts intended to grant them. This better ensures the performance of the contract).

[53] RESTATEMENT (SECOND) OF CONTRACTS § 302.

[54] Chen v. Street Beat Sportswear, Inc., 226 F. Supp.2d 355 (E.D.N.Y. 2002); s*ee also*, Katherine Kenny, *Code or Conduct: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation Between Wal-Mart and the Employees of its Foreign Suppliers,* 27 NW. J. INT'L. L. & BUS. 453, 463–67 (2007).

[55] *Id*. at 356–57.

[56] *Id*. at 366.

Therefore, if an enterprise adopts corporate social commitments without expressly rejecting any third-party enforcement rights, affected victims of corporate wrong may be considered to have third-party beneficiary rights. The doctrine has identified several factors to assess whether a promise is binding or not and whether it can be invoked by a third party,[57] notably the proximity between the promisor and the third party, the fact that the third party could reasonably understand the declaration as an intention to be legally bound, and the intention of the promisor to be bound.[58] This approach has also been used to determine whether a corporate code of conduct can have a binding effect, as in *Doe v. Walmart*, where the court analyzed the proximity between the suppliers' employees and Walmart.[59]

It has been claimed that when two companies agree to comply with a CSR code, there is a presumption that they have an intention to be legally bound by this code.[60] The challenging situation is when the claimants have not entered into any contract with the company that promised to abide to a certain code of conduct. As illustrated in the case *Doe v. Walmart Stores*, an employee of a supply chain cannot bring an action against the co-contractor of its employer.[61] However, if the claimants and the co-contractor of the employer are considered part of a chain of contracts, who share profits

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[57] PATRICK ATIYAH, ESSAYS ON CONTRACT 40–72 (Clarendon Paperbacks, 1986) (discussing the moral and legal approach to hold a promise as binding); s*ee generally* JAN SMITS, CONTRACT LAW: A COMPARATIVE INTRODUCTION (Elgar, 2014).

[58] *See* Principles of European Contract Law ch. 2, § 1, art. 2:101, European Union 1998 ("A contract is concluded if the parties intend to be legally bound, and they reach a sufficient agreement without any further requirement."); *see also* Restatement (Second) of Contracts § 2(1) (American Law Institute 1981 ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made").

[59] Wal-Mart Stores Inc., 572 F.3d at 680.

[60] *See* Jan Smits, *Enforcing Corporate Social Responsibility Codes Under Private Law: On the Disciplining Power of Legal Doctrine,* 24 IND. J. GLOBAL LEGAL STUD. 99, 99–113 (2017).

[61] Wal-Mart Stores Inc., 572 F.3d at 681.

and liabilities and operate in a coordinated way for a same specific goal, then the claimants could enforce the rules of the corporate code of conduct.[62]

One can wonder if the corporate code reflects an intention to be legally bound by the company towards its customers, or if it does not simply constitute an ethical commitment to produce some efforts.[63] Yet, the protection of consumers' legitimate interests could be a fair argument to enforce corporate codes of conduct.[64] According to Article 2(2) let.d of the European Consumer Sales Directive, it is now possible to enforce public declarations that traders use in marketing.[65] The Vienna Sales Convention (CISG) discussed the question of the introduction of the enforcement of unilateral promises, notably related to Article 8 and Article 9 CISG. In the United States, the discussion has also started regarding Section 90 of The Restatement (Second) of Contracts to determine whether corporate promises could be enforced to protect workers abroad.[66]

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[62] Marie-Caroline Caillet, *Le droit à l'épreuve de la responsabilité sociétale des entreprises : étude à partir des entreprises transnationales*, 263–67 (Mar. 7, 2015) (Fr.), https://tel.archives-ouvertes.fr/tel-01127610/document [https://perma.cc/W6X4-RAVD].

[63] *See* Jan Eijsbouts, *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*, MAASTRICHT U. (2011), http://www.l4bb.org/articles/OBS_7885_-_Eijsbouts_digitale-1.pdf (Nov. 09, 2017, 09:41 AM); s*ee also* BECKERS, *supra* note 48, at 81; ANDREAS RÜHMKORF, CORPORATE SOCIAL RESPONSIBILITY, PRIVATE LAW AND GLOBAL SUPPLY CHAINS 175 (Elgar, 2015) (reaching a different result and arguing in favor of legislative intervention to regulate third-party rights).

[64] *See* John N. Adams et al., *Privity of Contracts - The Benefits and the Burdens of Law Reform*, 60 MOD. L. REV. 238, 242 (1997); ANDREAS RÜHMKORF, CORPORATE SOCIAL RESPONSIBILITY, PRIVATE LAW AND GLOBAL SUPPLY CHAINS 211 (Elgar, 2015).

[65] PARL. EUR. DOC. (SEC 319999L0044) 12–16 (1999) ("Consumer goods are presumed to be in conformity with the contract if they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling").

[66] RESTATEMENT (SECOND) OF CONTRACTS § 90(1) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires").

However, none of these discussions have amounted to a clear recognition of the enforceability of corporate codes of conduct's commitments by third parties. Yet, international trade law contains principles, such as the protection of legitimate expectations and *venire contra factum proprium*,[67] which prohibit private actors from issuing declarations that may raise some expectations, whereas the promisors then adopt a contradictory behavior.[68] Corporate codes should be assimilated to such promises.[69]

One suggestion to avoid these problems of enforcement is to integrate codes of conduct into contracts. The underlying idea is that this integration of corporate codes should confer them a certain binding character by joining them to the main contract. For Jan Smith, enforcement of corporate codes is only possible when the codes are incorporated into bilateral contracts, whereas the codes are not enforceable when victims try to seek the enforcement of a unilateral promise.[70] Jane Smith's underlying idea is that if unilateral promises were to be enforced, this would go against the basic principles of legal systems and lead, as Niklas Luhmann has qualified it, to the decline of the relevance of the legal system, as the elaboration of self-made rules will be considered enforceable.[71] However, we can counter-argue that corporate codes of conduct then have no purpose and no "*raison d'être*" if they are just tiger papers which have no practical effect and do not contribute to the improvement of the companies' human rights' compliance.

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[67] No one may set himself in contradiction to his own previous conduct.

[68] *See* Fabrizio Marrella, *Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade,* in ECONOMIC GLOBALISATION AND HUMAN RIGHTS: EIUC STUDIES ON HUMAN RIGHTS AND DEMOCRATIZATION 266, 302 (Wolfgang Benedek et al. eds., 2007).

[69] *See* BECKERS, *supra* note 49, at 266–69; Gunther Teubner, *Corporate Codes in the Varieties of Capitalism: How Their Enforcement Depends Upon the Difference Between Production Regimes*, 24 IND. J. GLOBAL LEGAL STUD. 81, 81 (2017).

[70] Smits, *supra* note 60, at 99–113.

[71] Niklas Luhmann, *Law As A Social System*, 490 OXFORD U. PRESS (2008).

Furthermore, some authors argue that corporate codes of conduct do not need to be integrated into contracts to be enforced.[72] Anna Beckers notably sees the enforcement of codes of conduct as the flexibility of the law to adapt to new social phenomena.[73] She explains that corporate codes of conduct reflect an emerging system of non-state law which should be regarded as binding.[74]

The enforceability of corporate codes of conduct is not systematic. As long as these commitments are not enforceable, they shall remain empty shells. Therefore, it appears necessary for codes of conduct to be recognized as binding on the companies that claim to adopt them. Otherwise, the adoption of such codes amounts to vain promises. As we shall see in our second section, states have progressively started to impose reporting duties on companies as to their level of compliance with corporate social responsibility standards. Hence, the article shall analyze the relevance of these reporting duties in the improvement of corporate practices.

II. THE PROGRESSIVE EMERGENCE OF CORPORATE SOCIAL RESPONSIBILITY REPORTING DUTIES

Several transparency initiatives and laws emerged in recent years, seeking to ensure that companies communicate their production methods in their supply chains. These initiatives appeared in many Western jurisdictions, both of common law and civil law traditions. However, reporting duties generally concern a limited sector of the industry to prevent only certain types of abuses. Moreover, most of these mandatory disclosure

[72] *See generally* Pierre Thielbörger & Tobias Ackermann, *A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop?* 24 IND. J. GLOBAL LEGAL STUD. 43, 43–79 (2017).
[73] Beckers, *supra* note 45 at 15–42.
[74] *Id*. at 26–27; *See generally* Gunther Teubner, *Self-Constitutionalising TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct,* 18 IND. J. GLOBAL LEGAL STUD. 617, 617–38 (2011).

laws do not create a real due diligence duty for companies, nor do they provide any legal sanctions in case of non-compliance.

Reporting duties are imposed on lead firms in a supply chain because these firms are deemed to exercise considerable power in the global chain.[75] Indeed, "it is the firm at the top of the chain that makes the decision to structure its enterprise through subcontracting relationships, presumably because such a structure allows the firm to increase profits by lowering the costs and risk of liability that come with being a direct employer."[76] Therefore, lead firms can influence suppliers down the chain to act in responsibly.

This segment of the article will explore the different reporting requirements that were recently developed in both common law and civil law countries.

A. Common Law Countries

1. The United States

Legislation in the United States is generally adopted to respond to a specific need for regulation of a narrow area of the law, often in response to a public demand concerning a specific problem, as notably illustrated by the Dodd-Frank Act.[77] Under this act adopted in 2010, the United States became the first country to require reporting duties from extractive companies.[78]

The United States Securities and Exchange Commission (SEC) passed Section 1502 of the United States Dodd-Frank Wall Street Reform and

[75] Galit Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L. J. 419, 432 (2015).
[76] Jennifer Gordon, *Joint Liability Approaches to Regulating Recruitment,* FORDHAM L. LEGAL STUDIES, Research Paper No. 2518519 2 (2014).
[77] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (codified as amended at 111 U.S.C. (2010)).
[78] Mvemba Phezo Dizolele, *Dodd-Frank 1502 and the Congo Crisis*, CTR. STRATEGIC & INT'L STUDIES (Aug. 22, 2017), https://www.csis.org/analysis/dodd-frank-1502-and-congo-crisis [https://perma.cc/QQ45-QRFJ].

Consumer Protection Act[79] in August 2012.[80] It requires companies to disclose annually whether certain minerals (gold, tin, tungsten, and tantalum) are sourced from the Democratic Republic of Congo or neighboring countries.[81] The aim is to determine whether mineral purchases are used to fund armed groups in the Democratic Republic of Congo.[82]

The act provides indications stating that due diligence measures must conform to a nationally or internationally recognized due diligence framework, such as the due diligence guidance approved by the Organization for Economic Co-operation and Development (OECD).[83] Therefore, the Dodd-Frank Act requires companies to conduct mandatory non-financial reporting in "good faith."[84] Section 1504 of the Dodd-Frank Act also requires extractive companies to provide reports on the amount of money paid to each government for the exploitation of resources such as oil, natural gas, and minerals.[85]

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[79] U.S. Dodd–Frank Wall Street Reform and Consumer Protection Act (codified as amended 12 U.S.C. § 5301 (2010)); *but see Trump Orders Review That Could Relax Dodd– Frank Bank Rules*, BRITISH BROADCASTING CORPORATION (Feb. 3, 2017) http://www.bbc.co.uk/news/business-38858009 (explaining United States President Donald Trump has ordered a review which may result in the repeal of this law).

[80] Press Release, U.S. Sec. Exch Comm'n, SEC Adopts Ruling for Disclosing Use of Conflict Materials (Aug. 22, 2012).

[81] *See OECD Work on Responsible Mineral Supply Chains and the U.S. Dodd Frank Act*, OECD (2011), http://www.oecd.org/daf/inv/mne/OECD-Guidance-and-Dodd-Frank-Act.pdf [https://perma.cc/T5JT-9683].

[82] On the topic, see Galit Sarfaty, *Shining Light on Global Supply Chains,* 56(2) HARV. INT'L L.J. 419, 419-63 (2015).

[83] *See OECD Work on Responsible Mineral Supply Chains and the U.S. Dodd Frank Act*, OECD (2011), http://www.oecd.org/daf/inv/mne/OECD-Guidance-and-Dodd-Frank-Act.pdf [https://perma.cc/T5JT-9683].

[84] Securities and Exchange Commission, *Fact Sheet: Disclosing the Use of Conflict Minerals* 25, 117 (2012), available at: https://www.sec.gov/rules/final/2012/34-67716.pdf [https://perma.cc/95PT-SJBW].

[85] *Id*. at 92.

Therefore, the law aims to provide transparency to consumers and investors.[86] The law does not provide any sanctions in case of non-compliance, but rather creates a name and shame mechanism, relying on the idea that the company, to preserve its public image, will be drawn to comply with the law. Many criticize this lack of enforcement mechanisms.[87] Moreover, many have criticized the Dodd-Frank Act for worsening the situation in the Democratic Republic of Congo, as it resulted in a "de facto boycott on minerals from the eastern Democratic Republic of Congo."[88] As a consequence, thousands of minors were deprived of their livelihood and the conflicts in Congo continued to thrive, as the Dodd-Frank Act failed "to cut off resources to war lords or do anything to resolve the reasons for their violence."[89] Today, the future of the Dodd-Frank Act is quite uncertain. Indeed, in November 2017, the United States House of Representatives Financial Services Committee passed a bill, the Financial CHOICE Act, that

[86] Christiana Ochoa & Patrick J. Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 GOETTINGEN J. INT. LAW 129, 147–48 (2011).

[87] Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank Act's Corporate Governance Disclosure Won't Solve a Human Rights Crisis*, 25 U. L. REV. 351, 360 (2013).

[88] Dominic Parker, *Conflict Minerals or Conflict Policies? New research on the unintended consequences of conflict-mineral regulation*, 37 PERC Reports 36, 36-40 (2018), https://www.perc.org/2018/07/13/conflict-minerals-or-conflict-policies/ [https://perma.cc/HR68-EJ26].

[89] *See* Nik Stoop, Marijke Verpoorten & Peter van der Windt, *Trump threatened to suspend the 'conflict minerals' provision of Dodd-Frank. That might actually be good for Congo.*, Wash. Post, Sept. 27, 2018 (Oct. 8, 2018, 5:20 PM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/27/trump-canceled-the-conflict-minerals-provision-of-dodd-frank-thats-probably-good-for-the-congo/?noredirect=on&utm_term=.3fd621c89832, [https://perma.cc/PQK8-7HWU]; *See also* Nik Stoop et al. *More Legislation, More Violence? The Impact of Dodd-Frank in the DRC,* 13 PLOS ONE 1 (2018).

should repeal Section 1502 of the Dodd-Frank Act.[90] The United States Senate now has to approve the Bill.[91]

The United States have adopted other due diligence legislation other than the Dodd-Frank Act. U.S. lawmakers have notably taken action following an intensive press coverage over forced labor issues in Asia by adopting the "Business Supply Chain Transparency on Trafficking and Slavery (BSCT) Act of 2015."[92] The BSCT aims to increase supply chain transparency and gather information on human trafficking.[93] Here again, the BSCT requires companies to file annual reports that the SEC then comments.[94] The requirement is only imposed on companies that have an annual revenue greater than $100 million United States dollars.[95]

Criticism can be raised as to the real efficiency of the BSCT. Indeed, companies can theoretically satisfy the provisions of the BSCT without undertaking any actual change in their policies, notably, because the wording of the BSCT is ambiguous, and because there are no real enforcement mechanisms within the BSCT. Moreover, companies which do not abide to

[90] *See* Arving Ganesan, *Business and Human Rights During the Trump Era*, 3(02) BUS. & HUM. RTS. J. 265, 266 (2018).
[91] *See* Financial CHOICE Act of 2017, HR 10, 115th Cong. (2017–2018), https://www.congress.gov/bill/115th-congress/house-bill/10 [https://perma.cc/MMR4-P9JM].
[92] Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, HR 3226, 114th Cong. (2015). On the topic, *see* Ian Urbina, *Consumers and Lawmakers Take Steps to End Forced Labor in Fishing*, N.Y. TIMES (Sept. 13, 2015), https://www.nytimes.com/2015/09/14/world/consumers-and-lawmakers-take-steps-to-end-forced-labor-in-fishing.html [https://perma.cc/79YY-MDN2].
[93] *See* Christiana Ochoa & Patrick Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 GOETTINGEN J. IN'L L. 129, 129–54 (2011) (analyzing the strengths and shortcomings of a provision in the Frank-Dodd Wall Street Reform Act, which addresses conflict minerals originating from the Democratic Republic of Congo, to regulate conflict commerce as a tool to cease the violent conflict taking place in the region).
[94] HR 3226, *supra* note 92, §3(s)(1).
[95] This threshold is defined in Section 3, Part 3(A) of the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015. *Id.* at §3(3)(A).

the BSCT rules face few consequences and thus lack an incentive to comply.[96] In fact, some corporations might consider that the effort is too costly and they could thus pretend to agree to respect certain goals without bringing any changes to their business practices. Therefore, the BSCT does not hold companies accountable for their failure to make their supply chains more transparent. It rather seems like a mere obligation of means is required. Some companies can thus gain good public standing without having conducted any significant changes to reduce forced labor in their supply chains.

The California Transparency in Supply Chains Act of 2010 (California Transparency Act), a piece of legislation enacted in California in 2012, probably has provided the inspiration for the drafting of the BSCT.[97] The California Transparency Act was aimed at companies with more than $100 million United States dollars in annual revenue.[98] Specifically, the California law requires companies to disclose on their website their initiatives to eradicate slavery and human trafficking from their supply chains.[99] A company must notably communicate to what extent it evaluates the risks of human trafficking and slavery and to what extent it provides employees and management training on slavery and human trafficking.[100] However,

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[96] Katharine Fischman, *Adrift in the Sea: The Impact of the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 on Forced labor in the Thai Fishing Industry,* 24 IND. J. GLOBAL LEGAL STUD. 227, 239 (2017).

[97] Cal. Civ. Code § 1714.43; *See* Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CAL. L. REV. CIRCUIT 80, 96-98 (2012) (discussing the potential implications of requiring companies to disclose to what extent they meet certain requirements).

[98] See Section 1714.43 (a) (1) of the Californian Civil Code.

[99] See Section 1714.43 (2) (D) (b) of the Californian Civil Code.

[100] Cal. Civ. Code § 1714.43. It is estimated that the reporting requirement will impact about 3,200 companies headquartered in California or doing business in the state. *See* VERITÉ, COMPLIANCE IS NOT ENOUGH: BEST PRACTICES IN RESPONDING TO THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT (2011), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2772&context=globaldocs [https://perma.cc/9JCZ-2YMC]. For suggestions on how investors can go beyond mere compliance, *see* INTERFAITH CENTRE ON CORPORATE RESPONSIBILITY, EFFECTIVE SUPPLY CHAIN ACCOUNTABILITY: INVESTOR GUIDANCE ON IMPLEMENTATION OF THE CALIFORNIA

compliance here again entirely depends on the willingness of the company to cooperate because no sanctions are directly provided in case of non-compliance.[101]

3. Commonwealth Countries

Commonwealth countries have also started introducing reporting duties in several statutes. The United Kingdom has introduced three pieces of legislation on corporate human rights reporting. In addition, Australia has implemented both national and regional bills; however, as explained in this section, these bills fail to provide sufficient penalties for non-compliance and reporting requirements are too broadly framed.

Inspired by the California Transparency Act, the United Kingdom has been a forerunner in the field of corporate human rights reporting. In fact, in 2015, the United Kingdom Parliament passed the Modern Slavery Act, which requires commercial organizations to report on the measures they are taking to ensure that slavery and human trafficking is not taking place in their operations or supply chains.[102] This duty to report applies to all companies with a minimum annual turnover of £36 million, which carry at least part of their business in the United Kingdom.[103] The statement may include information about the organization's structure, company's policies, due diligence processes, risks, performance indicators, and training relating

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TRANSPARENCY IN SUPPLY CHAINS ACT AND BEYOND (2011), https://www.iccr.org/effective-supply-chain-accountability-investor-guidance-implementation-california-transparency [https://perma.cc/82D3-63YD].

[101] For further discussion on the question of tribunals' involvement over corporate social responsibility issues in the U.S., *see* Adeline Michoud, *The Exercise by U.S. Courts of Their Extraterritorial Jurisdiction Over Corporate Wrongs Claims: Overview and Perspectives*, YEARBOOK OF PRIVATE INTERNATIONAL LAW (2019) (forthcoming).

[102] Modern Slavery Act 2015, c.30, § 54(4) (Eng.), http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted/data.htm [https://perma.cc/7XD7-XZ77].

[103] *Id.* § 54(2)(b) and (12). Read with Regulations 2 and 3 of the Modern Slavery Act (Transparency in Supply Chains) Regulations 2015.

to slavery and human trafficking.[104] However, the Modern Slavery Act has a rather narrow scope that omits many violations of labor rights.

Section 54 (1) of the Modern Slavery Act provides "A commercial organization within subsection (2) must prepare a slavery and human trafficking statement for each financial year of the organization."[105]

Furthermore, the disclosure obligation in Section 54 is enforceable by the Secretary of State, who can bring civil proceedings before the High Court to ask for specific performance of this statutory duty.[106] The Modern Slavery Act also created the position of an Independent Anti-slavery Commissioner whose functions are to encourage good practice in the prevention, detection, investigation, and prosecution of slavery and human trafficking offenses.[107]

However, there is no penalty for non-compliance with the disclosure obligation: the Secretary of State can only require an injunction from the High Court.[108] The only sanction that corporations risk is to see their reputation being affected.[109] Professors Ian Ayres and John Braithwaite have emphasized that to ensure a successful regulation, states should secure a "synergy between punishment and persuasion."[110]

A primary analysis of the first 75 statements published by corporations following the Modern Slavery Act shows that only 29 percent of them complied with the act's basic procedural requirements; that is, the statement is approved by the Board and signed by a company director (or equivalent)

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[104] *Id.* § 54(5).
[105] Cal. Civ. Code § 1714.43 ("Section 54 was inspired by Section 1714.43 of the Civil Code of the State of California enacted by the California Transparency in Supply Chains Act of 2010 (ch 556 Cal Stat ß 2641).").
[106] Modern Slavery Act, *supra* note 98, at §54(11).
[107] *Id.* at §40.
[108] *Id.* at §54(11).
[109] Stephen Park, *Human Rights Reporting as Self-Interest: The Integrative and Expressive Dimensions of Corporate Disclosure*, in ROBERT BIRD ET AL. (eds.), LAW, BUSINESS AND HUMAN RIGHTS: BRIDGING THE GAP 53 (Edward Elgar, 2014).
[110] IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 25, (Oxford University Press, 1992).

and available on the homepage of the company's website.[111] Moreover, the study revealed that of the six content areas on which information may be included (like organizational structure, company policies or due diligence), only nine statements out of the 75 covered the six suggested areas.[112]

So far, the Modern Slavery Act has failed to provide adequate remedies to victims. The Modern Slavery Act does not provide any monitoring mechanism listing the businesses that are concerned with the reporting obligations set in the act. The legal requirements set in this piece of legislation are thus very weak. As summarized by Virginia Mantouvalou, who conducted an assessment of the efficiency of the Modern Slavery Act for the first three years of its enactment, "the statements produced are the product of a mechanical exercise without substantive engagement and detailed information on concrete steps taken to address the problem."[113]

Although the Modern Slavery Act has only recently been enacted and its effects might be better perceived over the long term, the primary analysis suggests that reporting requirements that are not sanctioned in case of non-compliance might not be effective in achieving transparency. The Modern Slavery Act is a piece of legislation whose real impact in practice remains to be assessed. As the primary analysis suggests, reporting requirements that are broadly framed and that do not provide any penalty for non-compliance are not effective mechanisms for achieving effective results.[114]

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[111] The analysis was conducted by civil society organizations: CORE Coalition and the Business & Human Rights Resource Centre. *Press Release: UK Modern Slavery Act*, BUS. & HUM. RTS. RESOURCE CENTRE, 2016 (Sept. 11, 2017), https://www.business-humanrights.org/en/press-releaseuk-modern-slavery-act-first-75-statements-in [https://perma.cc/PN3T-G3FF]. For a registry of statements made under the Modern Slavery Act, *see Modern Slavery Registry powered by Business & Human Rights Resource Centre*, BUS. & HUM. RTS. RESOURCE CENTRE (Nov. 17, 2017, 06:50 PM), https://www.business-humanrights.org/en/uk-modern-slavery-act-registry [https://perma.cc/9YYB-UFJ2].

[112] *Id.*

[113] Virginia Mantouvalou, *The UK Modern Slavery Act 2015: Three Years on*, 81(6) MOD. LAW REV. 1017, 1045 (2018).

[114] For a study on the topic, *see* Iris Chiu, *Unpacking the Reforms in Europe and UK Relating to Mandatory Disclosure in Corporate Social Responsibility: Instituting a Hybrid Governance Model to Change Corporate Behaviour?,* 14 EUR. COMP. L. J. 193, 193–208

In July 2018, the Home Secretary, at the request of the Prime Minister, announced a review of the Modern Slavery Act.[115] Nine expert advisors were appointed to report on reform possibilities.[116] In January 2019, three British Parliamentarians in charge of reviewing the United Kingdom's Modern Slavery Act issued an interim report suggesting amendments and improvements to the law.[117] They notably noted the lack of enforceability of the act, noting the lack of penalties in case of non-compliance.[118] They proposed the introduction of a gradual approach, which could include "initial warnings, fines (as a percentage of turnover), court summons, and directors' disqualifications."[119] Based on this interim report and the three others issued by the other experts, the British government is expected to take steps to propose a reform of the Modern Slavery Act to the Parliament.

Despite its shortcomings and the necessity to reform its functioning, the Modern Slavery Act seems to have represented an important source of inspiration in common-law countries. In 2017, the Hong Kong Legislative Council members proposed a draft modern slavery bill, explaining that action needed to be taken to meet global standards in the fight against modern

(2017) ; *See also* Review of the Modern Slavery Act 2015: Terms of reference, UK Home Office (Mar. 26, 2019, 02:51 PM), *available at* https://www.gov.uk/government/publications/modern-slavery-act-2015-independent-review-terms-of-reference/review-of-the-modern-slavery-act-2015-terms-of-reference [https://perma.cc/28AK-LCAS].

[115] HOME OFFICE, MODERN SLAVERY ACT 2015 REVIEW: FOURTH INTERIM REPORT (2018).

[116] *See* Review of the Modern Slavery Act 2015: Terms of reference, UK Home Office (Mar. 26, 2019, 02:51 PM), *available at* https://www.gov.uk/government/publications/modern-slavery-act-2015-independent-review-terms-of-reference/review-of-the-modern-slavery-act-2015-terms-of-reference [https://perma.cc/28AK-LCAS].

[117] FRANK FIELD ET AL., INDEPENDENT REVIEW OF THE MODERN SLAVERY ACT (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/773372/FINAL_Independent_MSA_Review_Interim_Report_2_-_TISC.PDF [https://perma.cc/3RM6-KX5R].

[118] *Id.* at 7, para. 1.4.

[119] *Id.* at 17, para. 5b.

slavery.[120] The bill provides that certain companies (whose turnover would exceed a certain amount to be determined) shall publish annual slavery and human trafficking statements. This bill would go further than the United Kingdom Modern Slavery Act as it would allow victims to bring civil claims against persons who were involved in slavery (whether because this person committed one of the offenses against the claimant or because the claimant financially benefited from it).[121] The Modern Slavery Bill was discussed at the Legislative Council on June 5th, 2018,[122] but no consensus has been reached yet.[123]

Australia also adopted a modern slavery bill in November 2018.[124] As of January 1, 2019, all companies operating in Australia with an annual revenue of at least 100 million Australian dollars will be expected to participate in mandatory reporting on modern slavery risk.[125] This reporting duty should apply to 3000 businesses in Australia.[126] Companies will have to issue a

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[120] *See* Samantha Woods, *Human Trafficking and Slavery: Updates from Hong Kong*, CSRASIA (Aug. 1, 2018), http://www.csr-asia.com/44-csr/newsletter/895-human-trafficking-and-slavery-updates-from-hong-kong [https://perma.cc/QC75-YQDB]; Hong Kong's Modern Slavery Bill and Action Plan to Combat Human Trafficking – An Update, Mekong Club (June 23, 2018), https://themekongclub.org/2018/06/23/hong-kong-modern-slavery-bill-and-action-plan-an-update/ [https://perma.cc/R9D9-8KYP].

[121] *See* JUSTICE CENTRE HONG KONG, SUBMISSION TO THE PANEL ON SECURITY OF THE LEGISLATIVE COUNCIL (2018), https://www.legco.gov.hk/yr1718/english/panels/se/papers/se20180605cb2-1515-1-e.pdf [https://perma.cc/7SMW-XHL6].

[122] *See id.*

[123] *See* Antony Crockett, *Hong Kong: Modern Slavery Law Proposed at Leigislative Council, With Requirements for Companies to Publish Statements on Human Trafficking*, BUS. & HUM. RTS. RESOURCE CENTRE (Jan. 29, 2018), https://www.business-humanrights.org/en/hong-kong-modern-slavery-law-proposed-at-legislative-council-with-requirements-for-companies-to-publish-statements-on-human-trafficking [https://perma.cc/G69C-NV7Z]; HERBERT SMITH FREEHILLS, MODERN SLAVERY LAW PROPOSED FOR HONG KONG (2018), https://www.herbertsmithfreehills.com/latest-thinking/modern-slavery-law-proposed-for-hong-kong [https://perma.cc/8CUZ-AB8G].

[124] *Modern Slavery Bill 2018* (Austl.), *available at* https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6148.

[125] *Id.,* Section 5(1)(a).

[126] *See* Sen. Linda Reynolds, *Australia: Modern Slavery Bill Passes House of Representatives*, BUS. & HUM. RTS. RESOURCE CENTRE (Sept. 22, 2018), https://www.

report annually that has been signed by the company director, explaining the organization of the company and detailing the due diligence policies undertaken by the company to assess and manage the risk of modern slavery.[127] However, no penalty will be imposed on companies in case of non-compliance.[128] The law thus mainly relies on companies' attachment to their public image to ensure their compliance. At this stage, the law does not provide for any possibility for public authorities to impose civil fines on non-compliant companies. The bill only contemplates the possibility of discussing the inclusion of civil penalties in a review of the bill that should take place three years after the bill's entry into force.[129]

In addition to this national bill, the New South Wales' Parliament has also passed a modern slavery bill in June 2018.[130] Under this act, companies with a least one employee working in New South Wales and with a total annual turnover of at least 50 million Australian dollars will have to publish every year a modern slavery statement on the internal policies of the company to assess and manage risks of slavery in their supply chains.[131] If companies fail to comply, they could face up to a 1.1 million Australian dollar fine.[132] The

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business-humanrights.org/en/australia-modern-slavery-bill-passes-house-of-representatives [https://perma.cc/JX9Z-3RAE].

[127] *See* Jacqui Wootton et al., *Establishing an Australian Modern Slavery Act and Its Impact on Australian Business*, HERBERT SMITH FREEHILLS (Dec. 22, 2017), https://www.herbertsmithfreehills.com/latest-thinking/establishing-an-australian-modern-slavery-act-and-its-impact-on-australian-business [https://perma.cc/5Q8G-J932].

[128] *Modern Slavery Bill 2018* (Austl.), Section 25(2)(a) *available at* https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6148 [https://perma.cc/5YSY-AKKW].

[129] *Modern Slavery Bill 2018* sch of amends. made by the Senate 3, para. 24 (Austl.), *available at* https://parlinfo.aph.gov.au/parlInfo/download/legislation/sched/r6148_sched_3400899c-2869-4c92-978734675ab9c82b/upload_pdf/Modern%20Slavery%20Bill%202018.pdf;fileType=application%2Fpdf [https://perma.cc/T98L-WMLN].

[130] *Id.*

[131] *Modern Slavery Bill 2018* sch. of amends. made by the Senate 3, para. 24 (Austl.), https://parlinfo.aph.gov.au/parlInfo/download/legislation/sched/r6148_sched_3400899c-2869-4c92-978734675ab9c82b/upload_pdf/Modern%20Slavery%20Bill%202018.pdf;fileType=application%2Fpdf [https://perma.cc/B5MP-MR9U].

[132] This is equivalent to $10,000 Australian penalty units as defined under Section 22(2) of the New South Wales Modern Slavery Bill. *See Modern Slavery Bill 2018* (NSW) (Austl.),

bill also established a state-level independent Anti-Slavery Commissioner to raise public awareness and provide advice to companies[133] regarding compliance with the bill. This regional bill is more ambitious than the national regulation. Indeed, the fact that sanctions are provided in this bill should be praised. As noted in the interim report of the British experts in charge of proposing ideas of reforms to the Modern Slavery Act, the possibility of penalties will encourage companies to foster their compliance measures.[134]

B. Civil Law Countries

Several initiatives have also been adopted in the last years in Europe to create due diligence duties for companies to foster transparency and reporting of companies' social and human rights-related commitments.

1. The Netherlands

In May 2019, the Dutch Senate adopted a bill concerning a due diligence duty to prevent the delivery of goods and services produced through child labor.[135] The law should enter into force on January 1, 2020.[136]

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https://www.parliament.nsw.gov.au/bill/files/3488/First%20Print.pdf [https://perma.cc/Y2SY-D2K2].

[133] *See Modern Slavery Update: First Australian Modern Slavery Legislation Passes in NWS*, HERBERT SMITH FREEHILLS, https://www.herbertsmithfreehills.com/latest-thinking/modern-slavery-update-first-australian-modern-slavery-legislation-passes-in-nsw [https://perma.cc/R38M-52NZ].

[134] Field et al., *supra* note 117.

[135] Wet Zorgplicht Kinderarbeid (Child Labour Due Diligence Law). *See* European Coalition for Corporate Justice, *The Netherlands Takes a Historic Step by Adopting Child Labor Due Diligence Law* (May 14, 2019), http://corporatejustice.org/news/15081-the-netherlands-takes-a-historic-step-by-adopting-child-labour-due-diligence-law [https://perma.cc/5AYK-VGZN]. For more information on the reform, *see Frequently Asked Questions About the New Dutch Child Labour Due Diligence Law* MVOPLATFORM, https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/ [https://perma.cc/9Z48-3Z9T].

[136] *Bill Adopted by Dutch Parliament Introducing a Duty of Care to Prevent Child Labour*, STIBBE (May 22, 2017), https://www.stibbe.com/en/news/2017/may/bill-adopted-by-dutch-parliament-introducing-a-duty-of-care-to-prevent-child-labour [https://perma.cc/3FCT-67PG].

Article 6 of the bill requires companies that deliver goods or services in the Netherlands to provide "a statement to regulatory authorities declaring that they have carried out due diligence related to child labor in their full supply chains."[137] However, the scope of the law is quite unclear, as the bill does not state how far companies have to report on the situation in their supply chains.[138]

The regulatory authority to receive the due diligence statements has not been defined yet.[139] The Dutch Consumer Market Authority will most likely assume this role.[140] The due diligence declaration would only have to be issued once, and it would then have long-term validity.[141] This system of one-time declarations can be problematic. Indeed, a company's situation and its organization are not static. Therefore, a company can change trade partners, create new subsidiaries, or contract with new suppliers, depending on its commercial strategies. Therefore, due diligence is an ongoing process that should be regularly updated and checked upon. This contemplated system in the Netherlands is different from the United Kingdom. In fact, the Modern Slavery Act requires annual statements that have to be published on the website of the company issuing them.[142]

Under the bill, the regulatory authorities cannot undertake active enforcement of its rules. Indeed, they can only take action when a complaint is presented on the basis of concrete evidence that the company's products

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[137] *Id.*; *see* Cees Van Dam, *Statutory Human Rights Due Diligence Duties in the Netherlands* 4 (2016), https://www.rsm.nl/fileadmin/Images_NEW/Sites/Chair_IBHR/Publications/Van_Dam_-_Statutory_HRDD_duties_in_NL.pdf [https://perma.cc/FF9F-EX3X].

[138] For example, the Bill does not indicate whether Dutch companies should also have to report on the working conditions in the factories of their co-contractors' suppliers.

[139] *See Frequently Asked Questions About the New Dutch Child Labour Due Diligence Law*, MVOPLATFORM, https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/ [https://perma.cc/458D-9VVL].

[140] *Id.*

[141] *Id.*

[142] *See* Modern Slavery Act, *supra* note 98, at §54(7).

were made by resorting to child labor.[143] Under Article 3 of the bill, any natural or legal person whose interests have been affected by the action or inaction of the company to comply with its due diligence duty, will be able to file a complaint.

The right to file a complaint encompassed in the law constitutes an encouraging sign that could substantially contribute to the enforcement of the corporate commitment relating to the ban of child labor. The government of the Netherlands now has to specify a few elements in the form of General Administrative Orders to ensure that the law will have a significant impact in practice and will be duly enforced.[144]

2. France

In March 2017, the French Parliament introduced a first-of-its-kind bill in Europe,[145] requiring French corporations to adopt and enforce a due diligence plan in order to identify and prevent potential human rights, labor, or environmental breaches that might be caused by their activities or those of their suppliers.[146] The idea behind this new French law is that companies must publish annually a due diligence plan that identifies risks inherent to their activities and those of their subsidiaries and suppliers, and prevent these risks from materializing.

The reform of French law has taken a long time to emerge, as it is the result of a four-year-long process that involved considerable efforts from civil society organizations.[147] The due diligence duty of corporations is threefold,

[143] MvoPlatform, *supra* note 131.
[144] *See* European Coalition for Corporate Justice, *supra* note 135.
[145] Loi 2017-399 du relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of on the due diligence duties of parent and subcontracting companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.0.] [OFFICAL GAZETTE OF FRANCE] (2017).
[146] CODE DE COMMERCE [C. COM.][COMMERCIAL CODE] art. 224-102-4 (Fr.).
[147] The details provided by the Frenc h Sherpa NGO which has participated in the promotion of the bill. *See Due Diligence Act,* SHERPA, https://www.asso-sherpa.org/nos-actions/proposition-de-loi-devoir-de-vigilance [https://perma.cc/EP24-WZ42].

as provided in Article L225-102-4 of the French Commercial Code:[148] (i) companies need to elaborate a plan which identifies the risks related to business activities and provides measures to prevent serious violations of fundamental rights;[149] (ii) the plan then must be published and disclosed; and (iii) the plan must be enforced and effectively implemented.

Due diligence duties are not imposed on all French companies' activities. Indeed, French companies need to have an established commercial relationship with their subsidiaries or subcontractors to exercise a due diligence duty.[150] An established commercial relationship is defined under French law as a "stable, significant and regular commercial relationship,"[151] taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last.[152] However, the exact criteria to determine what constitutes an established commercial relationship remains ill-defined and depends on the appreciation of the courts.[153] In any case, from this definition, it appears that companies will not

[148] CODE DE COMMERCE [C. COM.][COMMERCIAL CODE] art. 225-102-4 (Fr.).

[149] The law lists five of the measures that could be taken by companies : i) a mapping that identifies, analyses and ranks risks; ii) procedures assessing the situation of certain subsidiaries, subcontractors or suppliers; iii) actions to prevent and mitigate risks and serious harms; iv) an alert mechanism; and v) a monitoring scheme to follow-up on the plan's implementation and efficiency of measures. *See* Loi 2017-399 du relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of on the due diligence duties of parent and subcontracting companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.0.] [OFFICAL GAZETTE OF FRANCE] (2017).

[150] CODE DE COMMERCE [C. COM.][COMMERCIAL CODE] art. 225-102-4 para 1.2. (Fr.).

[151] *See* Cour de cassation [Cass.][supreme court for judicial matters] com., Sept. 15, 2009, Bull. civ. IV, No. 08-19.200 (Fr.). French law refers to the term of "relation commerciale établie".

[152] *See* CODE DE COMMERCE [C. COM.][COMMERCIAL CODE] art. 442-6-I-5 (Fr.); *See also* Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., Dec. 18, 2007, Bull. civ. II, No. 06-10390 (Fr.); *see also* Sandra Cossart et al., *The French Law on Duty of Care : A Historic Step Towards Making Globalisation Work for All*, 2 BUS. HUM. RTS. J. 317, 320 (2017).

[153] Cour de cassation [Cass.][supreme court for judicial matters] com., Sept. 15, 2009, Bull. civ. IV, No. 08-19.200 (Fr.) (holding that successive contracts between parties could be held to characterise an established commercial relation).

need to exercise any due diligence towards the contractors of their subcontractors, even though they are indirectly part of their supply chain.

If they fail to comply with their due diligence duties, French companies can be held liable in tort following Articles 1240 and 1241 of the French Civil Code.[154] Therefore, if these companies fail to to implement their corporate social responsibility plans effectively, they can be condemned by civil courts to the payment of damages.

As for most other initiatives imposing a duty to report on companies, the French legislature expects that French companies will take action in order to protect their reputation and their public image.[155] Therefore, following Article L. 225-102-5 of the Commercial Code, courts can order the publication, broadcast, or display of their decisions, at the expense of the company.[156] Considering how much companies fear bad publicity, such a measure could have been generalized as a systematic measure by the legislator instead of leaving it to the discretion of the judges.[157]

The French reform represents a major milestone to improve corporate compliance with human rights. Indeed, France has introduced in this way a due diligence duty on companies to prepare a vigilance plan to identify and prevent serious human rights violations committed by their subsidiaries and their subcontractors. Once the risks posed to human rights are identified, companies are required to implement and report annually on a

[154] *See* CODE DE COMMERCE [C. COM.][COMMERCIAL CODE] art. L225-102-5 (Fr.).(expressly makes reference to Articles 1240 and 1241 of the French Civil Code, which are two of the main extra-contractual liability provisions in French law).
[155] Suzanne Carval, *La Responsabilité Civile Dans sa Fonction de peine Privée 31,* (LGDJ, 1995).
[156] *See* CODE DE COMMERCE [C. COM.][COMMERCIAL CODE] art. L225-102-5 para. 4 (Fr.) (providing in its original French version : « La juridiction peut ordonner la publication, la diffusion ou l'affichage de sa decision ou d'un extrait de celle-ci, selon les modalités qu'elle précise. Les frais sont supportés par la personne condamnée.")
[157] Anne Danis-Fâtome & Geneviève Viney, *La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordres,* Recueil Dalloz 1610, 1618 (2017).

"vigilance plan" aiming to mitigate risks.[158] In case of non-compliance, interested parties can enforce non-compliance with the law through the courts.[159] This intervention of courts on corporate social responsibility issues is key to secure compliance by companies.[160] French law has thus set a good example which could be followed by other countries. The enforceability of the new French reform, as well as its impact in practice, remain to be seen in the years to come.

3. Switzerland

Switzerland is also considering a reform of its laws to impose a due diligence duty on its transnational corporations.[161] This development stemmed from a coalition of 85 civil society organizations which launched the "Responsible Business: Protecting Human Rights and the Environment" initiative.[162] A popular initiative offers Swiss people the possibility to revise

[158] See Article L225-102-4 (I) para. 3 of the French Commercial Code, which provides in its original French version, "Le plan comporte les mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement (…)".

[159] See Article L225-102-4 (II) of the French Commercial Code, which provides in its original French version : "Lorsqu'une société mise en demeure de respecter les obligations prévues au I n'y satisfait pas dans un délai de trois mois à compter de la mise en demeure, la juridiction compétente peut, à la demande de toute personne justifiant d'un intérêt à agir, lui enjoindre, le cas échéant sous astreinte, de les respecter."

[160] For a discussion on the importance of the role of the judge to enforce the corporate duty of vigilance, s*ee* Isabelle Desbarats, *La RSE « à la française » : où en est-on?,* Droit Social, Dalloz 525, 525 (2018); Pauline Abadie, *Le juge et la responsabilité sociale de l'entreprise*, Recueil Dalloz 302 (2018).

[161] Official Website of the Initiative Committee. SWISS COALITION FOR CORPORATE JUSTICE, https://corporatejustice.ch/about-the-initiative/ [https://perma.cc/6XRD-9RKH] (last visited Mar. 22, 2019, 07:06 PM).

[162] Economiesuisse Torpille Un Dialogue Constructif Entre Multinationales Et Ong (Constructive Dialogue Between Multinations and NGOs), INITIATIVE MULTINATIONALES RESPONSABLES, https://initiative-multinationales.ch/communiques-de-presse/economiesuisse-torpille-un-dialogue-constructif-entre-multinationales-et-ong/ [https://perma.cc/69EN-74HC] (last visited Mar. 26, 2019, 01:44 PM).

the Constitution through the voting process.[163] If a constitutional initiative is adopted, the constitutional rule has to be implemented by legislation.[164]

The initiative launched by the civil society proposes Swiss people to add Article 101a to the Swiss Constitution relating to the responsibility of businesses.[165] The proposal states that companies that have their registered office, their central administration or their principal place of business in Switzerland must respect internationally recognized human rights and ensure that these rights are also respected by companies abroad which are under their control.[166] Therefore, the idea, which is similar to French law, is to require Swiss companies to engage in due diligence and risk assessment and to develop measures to prevent possible human rights violations and environmental damage.[167] If the initiative is adopted, companies would be required to carry out due diligence and to report on the measures taken to ensure compliance with fundamental rights.[168] If companies do not comply with their due diligence obligations, they might face civil liability.[169]

Yet, on June 14, 2018, the *Conseil National* (the lower house of the Swiss Parliament) adopted a counter-proposal to this initiative.[170] The counter-

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[163] *See* CONSTITUTION FÉDÉRALE [CST][CONSTITUTION] Apr. 18, 1999, art 138-142 (Switz.).
[164] *Id.*
[165] *See The Initiative Text with Explanations Factsheet*, SWISS COALITION FOR CORPORATE JUSTICE, https://corporatejustice.ch/wpcontent/uploads//2018/06/KVI_ Factsheet_5_E.pdf [https://perma.cc/KUV7-5JYQ].
[166] *Id.* at 1. See Art. 101a para. 2 of the Initiative.
[167] *See* Nicolas Bueno & Sophie Scheidt, *Die Sorgaltspflichten von Unternehmen im Hinblick auf die Einhaltung von Menschenrechten bei Ausladsaktivitäten*, EUR. CTR. FOR CON. AND HUM. RTS. October 2015; *See also* Christine Kaufmann, *Konzernverantwortungsinitiative: Grenzenlose Verantwortlichkeit?,* COALITION FOR COALITION FOR SWISS REV. OF BUS. & FIN. MKT. LAW 50, 50–51 (2016).
[168] *See The Initiative, supra* note 168. See Art. 101a para. 2 let.b of the Initiative.
[169] *Id.* See Art. 101a para. 2 let..c of the Initiative.
[170] *See* Contre-projet indirect à l'initiative populaire "Entreprises responsables - pour protéger l'être humain et l'environnement" (Indirect counter-project to the popular initiative "Responsible enterprises - to protect the human being and the environment), https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20170498 [https://perma.cc/M48Y-N48R] (last visited Aug. 12, 2018, 04:30 PM).

proposal is less ambitious than the original initiative. Indeed, the counter-proposal only aims to target a restricted circle of companies, which, over two consecutive financial years, would meet two of the three following criteria: (i) the company has a balance sheet of 40 million Swiss Francs; (ii) the company has a turnover of 80 million Swiss Francs; and/or (iii) the company employs in average 500 full-time employees.[171] Moreover, even though the counter-proposal provides that companies shall have a due diligence duty, their civil liability is limited to offenses involving their subsidiaries and involving injuries to life, physical integrity, or property.[172]

The counter-proposal has been discussed at the *Conseil des Etats* (the higher-house of the Swiss Parliament).[173] In March 2019, the *Conseil des Etats* recommended that the initiative should be rejected.[174] The *Conseil National* now has to decide whether it wants to keep its counter-proposal. The Committee that has developed the original initiative has already informed that it will withdraw the initiative (therefore canceling the referendum) if the counter-proposal is adopted without any modification.[175] Otherwise, in the case where the counter-proposal was not adopted and a referendum came to be organized, the organization of the voting would not see the light of day before February 2020.[176] The Swiss people would then have to decide on the adoption of the initiative.

III. CONCLUSION

Over the last years, corporations have increasingly made commitments to protect human rights and social norms, notably to meet consumers' expectations and concerns regarding corporate social responsibility issues.

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[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *See* Contre-Projet (Against Project), INITIATIVE MULTINATIONALES RESPONSABLES, https://initiative-multinationales.ch/contre-projet/ [https://perma.cc/48GY-VBFL] (last visited Mar. 26, 2019, 02:02 PM).
[175] *Id.*
[176] *Id.*

To show their good faith and their commitment to corporate social responsibility, many companies have adopted corporate codes of conduct in which they commit to respect a certain amount of norms in their productions methods. However, the strength of these soft law agreements is not established yet, and the question of their applicability towards third-party beneficiaries—such as employees of the firm's or consumers wishing to enforce them—remains unresolved.

To foster compliance with certain social norms, several states have introduced reporting duties for companies. However, these reporting duties are quite limited, as they are either applied to a certain industry,[177] or they require reporting on measures concerning a certain type of wrongs only.[178] Such a specific focus on certain sectors or violations results in a fragmentation of human rights.[179]

The aim of these reporting duties is to bring companies to report and to bring public awareness to their activities. However, mechanisms to ensure compliance with the obligations reported have not been set up in parallel, which gives corporations too much flexibility. This approach might result in a whitewashing exercise, allowing companies to claim compliance with a certain number of norms without having to prove compliance or being subject to sanctions if found to be non-compliant.

Governments should thus adopt legislation to regulate corporate social responsibility initiatives and establish a proper framework to supervise them. Moreover, the civil society should exercise pressure on companies to require change from them and should be given the tools to enforce corporations' commitments. Companies' non-compliance with their

[177] For example, the Dodd-Frank Act relates to the mining industry in the Democratic Republic of Congo.

[178] The California Transparency in Supply Chains Act 2010 notably requires reporting on risks of slavery and trafficking in supply chains, the Dutch Child Labor Due Diligence Act relates to child labor action plans.

[179] OLGA MARTIN-ORTEGA, Due Diligence, Reporting and Transparency in Supply Chains – The United Kingdom Modern Slavery Act, in Angelica Bonfanti (ed.), BUS. & HUM. RTS IN EUR. 120 (Routledge, 2018).

codes of conduct represent misrepresentations that should lead to sanctions. If companies are left to decide the extent of their commitments, such a *laissez-faire* approach might result in abuses.

France has set an interesting example in introducing a due diligence duty for companies that should provide inspiration for other jurisdictions. In fact, due diligence is an efficient mechanism, as it plays a double role. It can first play a preventive role to compel corporations to take measures before any harm arises. Moreover, due diligence can allow victims to obtain reparation when due diligence requirements have not been respected by companies. Governments should thus adopt legislations to impose due diligence duties on companies that are enforceable before national courts and generate sanctions in case of non-compliance. Such a widespread approach would contribute to the fulfillment of the United Nations Guiding Principle on business and human rights.