Note

My Brother's Keeper: A Framework for a Legal Obligation to Respect Human Rights in Global Supply Chains

*Dylan Hays**

Abstract

Recent decades of globalization have brought enormous prosperity but also boundless potential for human rights abuses. With the fragmentation of supply chains into different stages, dispersed around the globe, consumers and businesses often have little idea of the social costs embedded in the products they purchase and produce. As of 2018, tens of millions of forced laborers, including children, toil day after day to harvest many of the raw materials used in seemingly innocuous products like chocolate and cell phones. Although the United Nations and other intergovernmental and nongovernmental organizations have acknowledged the extent of the problem, member nations have implemented few practical solutions. The contemporary approach against modern slavery tends toward mandatory disclosures aimed at weaponizing consumer choice. Only recently have a limited number of nations toyed with the idea of imposing affirmative obligations on businesses to maintain responsible sourcing practices.

This Note compares current approaches to imposing accountability on businesses maintaining complex global supply chains. It then argues that man-

* J.D. 2020, The George Washington University Law School; B.S., Economics, 2016, The Wharton School, University of Pennsylvania. I would like to thank *The George Washington Law Review* staff and Professor Katie Bukrinsky for their diligent review and guidance. Thank you to my parents, Bill and Carla, for their constant encouragement and to Charlie and Molly for keeping me entertained between drafts of this Note. Most of all, thank you to Jessica Tucker, for her unwavering love and support and for carrying our first child through our final year of law school.

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dated disclosures fall far short of being an effective approach for addressing a problem as serious as modern slavery. Instead, this Note advocates affirmative duties of due diligence and corrective action, modeled after some of the most novel solutions in France and the United States.

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Introduction

You might be complicit in human rights abuses around the globe without even knowing it. If you have ever eaten a Kit Kat, Butterfinger, Baby Ruth, or one of the many other chocolate products produced by Nestlé S.A., there is a decent chance the cocoa in your candy was the product of child labor.[1] The problems of child labor, forced labor, and human trafficking pervade the cocoa plantations of West Africa, which is responsible for 70% of the world's cocoa production.[2] Those human rights violations led former child slaves from Côte d'Ivoire to bring a lawsuit against Nestlé S.A. and its subsidiaries in 2005.[3] The plaintiffs in that suit were kidnapped as children and forced to work 14-hour days without pay, often witnessing beatings and torture of other child slaves who attempted to escape.[4] More recently, in 2016, Nestlé disclosed that its suppliers in the Thai seafood industry had procured fish for its Fancy Feast cat food brand through forced labor.[5]

Nestlé is not alone in its disregard for human rights abuses—even Patagonia, a founding member of the Fair Labor Association, uncovered exploitative practices in its Taiwanese textile suppliers.[6] In fact, the U.S. Department of Labor estimates that 148 goods in 76 countries are the product of forced or child labor, ranging from bananas to fireworks to footwear.[7] Children in India mine mica for use in makeup products, while children in the Democratic Republic of the Congo ("DRC") mine cobalt used to make rechargeable lithium-ion batteries

1 *See Child Labor and Slavery in the Chocolate Industry*, Food Empowerment Project, https://foodispower.org/human-labor-slavery/slavery-chocolate/ [https://perma.cc/W6D3-M8D2]; Brian O'Keefe, *Bitter Sweets: A Special On-the-Ground Report from West Africa*, Fortune (Mar. 1, 2016, 6:30 AM), http://fortune.com/big-chocolate-child-labor/ [https://perma.cc/SQ9X-FBGU].

2 *See Child Labor and Slavery in the Chocolate Industry*, *supra* note 1.

3 *See* Doe v. Nestlé (*Nestlé II*), 906 F.3d 1120 (9th Cir. 2018) (remanded to allow plaintiffs to amend complaint to comply with new legal developments).

4 *Id.* at 1122.

5 *See* Annie Kelly, *Nestlé Admits Slavery in Thailand While Fighting Child Labour Lawsuit in Ivory Coast*, Guardian (Feb. 1, 2016, 12:00 AM), https://www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand-fighting-child-labour-lawsuit-ivory-coast [https://perma.cc/MJR2-86BG].

6 *See* Gillian B. White, *All Your Clothes Are Made with Exploited Labor*, Atlantic (June 3, 2015), https://www.theatlantic.com/business/archive/2015/06/patagonia-labor-clothing-factory-exploitation/394658/ [https://perma.cc/63Z9-JWNP].

7 U.S. Dep't of Labor, 2018 List of Goods Produced by Child Labor or Forced Labor 11–14, 16 (2018).

for laptops, cell phones, and electric cars.[8] In 2016, the International Labor Organization estimated that there were over 151 million child laborers and, of those, over 72 million were involved in hazardous work.[9] Furthermore, the U.S. Department of Labor estimated that nearly 25 million people around the globe were victims of forced labor.[10] The U.S. imports an estimated $144 billion worth of at-risk goods, i.e., those that might have been the product of human rights abuses.[11]

Current attempts to address these human rights violations fall short. In 2011, the Office of the United Nations High Commissioner for Human Rights published its Guiding Principles on Business and Human Rights.[12] The Guiding Principles set out a framework of human rights obligations for both states and businesses.[13] They are not, however, binding international law.[14]

Existing legislative solutions are scattered and ineffective. In the United States, the Federal Acquisition Regulation ("FAR") Anti-Trafficking Provision and Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1502 (the Conflict Minerals Rule), are limited in scope, and as such fail to capture most relevant business.[15] At the state level, California is the only U.S. state to enact its own law to hold corporations accountable via the California Transparency in Supply Chains Act ("TSCA"); however, the law's disclosure regime is underwhelming at best.[16]

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8 *Id.* at 20 (noting that other products tainted by exploitation include coffee, sugar, sushi, toys, and leather).

9 8.7 ALLIANCE, 2017 GLOBAL ESTIMATES OF MODERN SLAVERY AND CHILD LABOUR 2 (2017). The Global Estimates report divides modern slavery into two parts: forced marriage and forced labor. *Id.* at 9.

10 *Id.* at 5.

11 *G20 Countries*, GLOB. SLAVERY INDEX, https://www.globalslaveryindex.org/2018/findings/importing-risk/g20-countries/ [https://perma.cc/Q4X9-DDEY].

12 *See* OFFICE OF THE HIGH COMM'R, UNITED NATIONS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011) [hereinafter U.N., GUIDING PRINCIPLES].

13 *See id.*

14 *See id.* at 1.

15 Federal Acquisition Regulation, 48 C.F.R. § 52.222-50 (2018) (applying only to federal contractors providing over $500,000 in goods to the federal government); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 2213 (2010) (codified at 15 U.S.C. § 78m(p) (2018)) (applying only to public companies whose products contain columbite-tantalite (coltan), cassiterite, gold, wolframite, their derivatives (i.e., tantalum, tin, and tungsten), or any other mineral and its derivatives determined to be financing conflict mined in the DRC or adjoining countries).

16 *See* California Transparency in Supply Chains Act of 2010, ch. 556, 2010 Cal. Stat. 2641 (codified at CAL. CIV. CODE § 1714.43).

In Europe, the United Kingdom and France are attempting to tackle exploitation in supply chains with their own laws. The U.K. Modern Slavery Act of 2015 ("MSA") followed the example of the California Act by enacting similar, but slightly more expansive, disclosure requirements.[17] France, on the other hand, went beyond disclosures when it imposed an affirmative duty on French corporations to monitor their supply chains and take corrective action when needed.[18] The French law includes a private right of action.[19] The law, however, has been in effect for less than a year, so the results remain to be seen. Consequently, in the current legal landscape, most U.S. corporations face few, if any, real obligations to ensure their supply chains are free of forced and child labor.

Congress should enact legislation modeled on the FAR Anti-Trafficking Provision and French Corporate Duty of Vigilance to impose an affirmative duty of due diligence and corrective action on corporations with suppliers around the world. Part I of this Note will provide background on the spread of global supply chains, the resulting race to the bottom in developing countries seeking foreign direct investment, and the international recognition of a need for a framework for responsible sourcing practices. Part II will examine a liability regime that exists under tort law extended through the Alien Tort Statute in the United States.[20] Part III will compare various disclosure requirements aimed at enforcing human rights obligations through the power of consumer choice, including the California TSCA,[21] the United Kingdom's MSA,[22] and the conflict minerals provision of the Dodd-Frank Act.[23] Finally, Part IV will set out a legislative solution for the United States, imposing an affirmative duty of due diligence and corrective action narrowly tailored to the most at-risk products and industries. By narrowly tailoring the obligation of corporations, the solution will carefully balance competing interests of incentivizing

17 *See* Modern Slavery Act 2015, c. 30 (UK).

18 *See* Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des socie'te's me'res et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 Relating to the Duty of Vigilance of the Parent Companies and the Companies Giving Orders], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 27, 2017 [hereinafter French Duty of Vigilance Law].

19 *Id.*

20 28 U.S.C. § 1350 (2018).

21 *See* 2010 Cal. Stat. 2641.

22 *See* 2015 c. 30 (UK).

23 *See* Pub. L. No. 111-203, § 1502, 124 Stat. 2213 (2010) (codified at 15 U.S.C. § 78m(p) (2018)).

responsible sourcing practices without being so cumbersome that businesses completely withdraw from all activities in developing countries.

I. Background

Slavery and child labor have long been outlawed in the United States.[24] Despite this, multinational corporations, many of them U.S.-based, find ways to skirt the labor protections guaranteed to the American workforce. International trade and globalization have expanded the economic benefits of comparative advantage to a massive scale, allowing manufacturers and service providers to cut costs and prices through strategic outsourcing.[25]

Unfortunately, while economic forces may transcend borders, domestic labor laws do not extend past the jurisdictional bounds of each sovereign nation.[26] The result has been a race to the bottom driven by multinational corporations seeking cheap investments in developing nations with access to raw materials and, more importantly, cheap labor.[27] Predictably, a significant portion of that cheap labor comes in the form of forced and child labor, often involving the use of human trafficking to move human capital to where it is cheapest.[28] Although the international community has begun to recognize a need for action,[29] little has been done to implement strong, effective regulations on corporate behavior.

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24 U.S. Const. amend. XIII; 29 U.S.C. § 212 (2018).

25 *See* Moana S. Simas et al., *The "Bad Labor" Footprint: Quantifying the Social Impacts of Globalization*, 6 Sustainability 7514, 7516 (2014) ("Less developed economies are net exporters of labor embodied in products and high-income countries are net importers."); Masahisa Fujita & Jacques-François Thisse, *Globalization and the Evolution of the Supply Chain: Who Gains and Who Loses?*, 47 Int'l Econ. Rev. 811, 811 (2006) ("[S]patial fragmentation of production aims at taking advantage of differences in technologies, factor endowments, or factor prices across places.").

26 *See* Jernej Letnar Cernic, *Moving Towards Protecting Human Rights in Global Business Supply Chains*, 36 B.U. Int'l L.J. 101, 107 (2018) ("The domestic law of most states does not provide that corporations have an extra-territorial obligation to engage in any degree of diligence to ensure that their suppliers comply with certain minimum standards.").

27 *See* Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 Wis. Int'l L.J. 131, 139–40 (2008) ("One of the main motivations for expansion abroad by multinationals is to 'obtain higher profits and stronger position and market access in global markets.' Therefore, the movement to less developed nations has improved their profits through cheap labor obtained in nations with weak or non-existent laws and policies protecting workers.") (quoting Geoff Riley, *Foreign Direct Investment in Africa*, Tutor2u, https://www.tutor2u.net/economics/reference/foreign-direct-investment-in-africa [https://perma.cc/BR9T-MBFL]).

28 *See G20 Countries*, *supra* note 11; 8.7 Alliance, *supra* note 9, at 2.

29 *See* U.N., Guiding Principles, *supra* note 12.

A. *A Brief History of Globalization and Its Effects*

Trade has existed for centuries, reaching back to when humans first realized they could barter for goods with one another. Examples of international trade can be found as early as the first century BCE with the expansion of the Silk Road.[30] Through technological advances in shipping and communication, international trade has expanded to every corner of the globe.[31]

The 1980s especially saw an explosion of trade, owing to the opening of new markets, the improved affordability of the personal computer as a planning tool, and the invention of new information technologies allowing instantaneous communication between managers on opposite sides of the globe.[32] This global expansion has fragmentated the production process into different stages, which can be easily separated into the categories of low-skill, labor-intensive processes like resource extraction and manufacturing, and high-skill strategic managerial processes performed from the comfort of a company's headquarters.[33] This division has had both positive and negative effects.[34]

"[B]ad labor conditions" like child labor and forced labor have been "associated with the production of internationally traded goods."[35] As globalization expands, the poorer, less developed economies end up being net exporters of labor.[36] This is especially true because a family's decision regarding child labor can be understood as a cost-benefit analysis for poor households, for whom the "short-term benefits from income generated by the children exceed the benefits of

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30 *Silk Road*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/Silk-Road-trade-route [https://perma.cc/S4PE-JJFJ].

31 Fujita & Thisse, *supra* note 25, at 813 ("[T]he development of new information and communication technologies is another major force that should be accounted for in order to better understand the evolution of the geography of modern economies.").

32 *See* Adam Robinson, *The Evolution and History of Supply Chain Management*, CERASIS, https://cerasis.com/history-of-supply-chain-management/ [https://perma.cc/Q8NC-9R75] ("The emergence of personal computers in the early 1980s provided tremendously better computer access to planners and a new graphical environment for planning. This spawned a flood of new technology . . . which enabled huge improvements in logistics planning . . . .").

33 *See* Fujita & Thisse, *supra* note 25, at 811–12 (describing the "spatial fragmentation of production aims"); Simas et al., *supra* note 25, at 7515 ("The rapid increase in the volume of international trade and the spread of manufacturing stages across the globe has dispersed environmental, social, and economic impacts.").

34 Simas et al., *supra* note 25, at 7515 (seeking to quantify the positive and negative effects of "bad labor").

35 *Id.*

36 *Id.*

sending the children to be educated."[37] The results are startling: labor conditions in developing countries are four times worse than labor conditions in developed countries that can afford to import goods.[38] Some scholars even go so far as to speculate that corporations might not even invest in developing nations if labor standards were consistent across borders.[39] As it stands today, tens of millions of people are victims of forced labor, child labor, and human trafficking,[40] responsible for producing billions of dollars of goods imported to the United States alone.[41]

B. The International Response to Human Rights Abuses in Global Supply Chains

To be sure, the international community has not entirely ignored the staggering problem of human rights violations in global, multinational supply chains. In 2011, the Office of the United Nations High Commissioner for Human Rights published its Guiding Principles on Business and Human Rights.[42] It groups its principles into three broad categories: (1) the State duty to protect human rights, (2) the corporate responsibility to protect human rights, and (3) access to remedy.[43] Each category is further divided into "foundational principles" and "operational principles."[44] Of particular note is the second guiding principle, which specifies that "[s]tates should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."[45] The commentary immediately following that principle recognizes the territorial limitations of individual States,[46] but encourages States to set standards for the activities of their domestic business enterprises abroad.[47]

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37 *Id.* at 7516.

38 *Id.* at 7530.

39 *See* Nagle, *supra* note 27, at 137, 140 ("Human trafficking benefits from one of the crucial engines of globalization—the supply and demand of transportable commodities, as well as from the transfer of capital, the opening of borders, and trade deregulation.").

40 8.7 ALLIANCE, *supra* note 9, at 2 (estimating over 151 million child laborers, 72 million involved in hazardous work, and 25 million victims of forced labor).

41 *G20 Countries*, *supra* note 11.

42 *See* U.N., GUIDING PRINCIPLES, *supra* note 12.

43 *Id.* at iii.

44 *Id.*

45 *Id.* at 3.

46 *Id.* at 3–4 ("At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.").

47 *Id.* at 4 ("There are strong policy reasons for home States to set out clearly the expecta-

The Guiding Principles also set standards for the behavior of businesses.[48] At the broadest level, Principle Eleven mandates that business enterprises not only avoid infringing on human rights themselves, but also address any human rights abuses that can be traced to their activities.[49] The Guiding Principles further specify that appropriate measures for addressing abuses include "prevention, mitigation and, where appropriate, remediation."[50] Principle Thirteen provides perhaps the strongest support for extraterritorial responsibility. It states:

> The responsibility to respect human rights requires that business enterprises:
>
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
>
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, *even if they have not contributed to those impacts*.[51]

This means that human rights violations include not only *committing* human rights abuses, but also entering into a business relationship with a *supplier* that commits such abuses—whether the supplier's actions are independent of the head corporation or not. Of course, it remains an open question just how far that transferred responsibility stretches. For instance, should a business making cell phones be responsible for the actions of "artisanal" mine managers in the DRC, even though that step of the production process is several steps removed from the business itself? When faced with large corporations, flush with the resources necessary for operating such a complex supply chain, however, it seems clear the answer must be yes: such a corporation should be responsible for human rights compliance throughout its entire supply chain.

tion that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses.").

48 *Id.* at 13–26.

49 *Id.* at 13 ("Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.").

50 *Id.*

51 *Id.* at 14 (emphasis added).

The Guiding Principles, however, are only soft law, creating no binding legal obligations on members of the United Nations.[52] It is left to individual states to implement the policies necessary for enacting the framework set out by the Office of the High Commissioner for Human Rights. But without clear, strong laws, the forced labor and abuse persists. The remainder of this Note constitutes a comparative analysis of three legal approaches to address this failing: tort liability, disclosure requirements and consumer choice theory, and affirmative duties to monitor. From that analysis, this Note will propose a legislative solution for the United States consistent with the Guiding Principles and limitations of the U.S. Constitution.

II. Tort Liability Under the Alien Tort Statute

A. *The Rise and Fall of the Alien Tort Statute*

The Alien Tort Statute, as part of the Judiciary Act of 1789, is one of the oldest statutes in the United States.[53] It provided the district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[54] The statute lay effectively dormant until 1980, when it became the basis for the landmark decision in *Filártiga v. Peña-Irala*.[55] In *Filártiga*, the Second Circuit held that the Alien Tort Statute provided federal courts with jurisdiction over violations of customary international law, or "the law of nations" as stated in the Alien Tort Statute itself.[56] The particular norm that had been allegedly violated in *Filártiga* was the prohibition on torture, but the case opened the doors to the idea that a foreign national could file a lawsuit in a U.S. federal court based on international law.[57] Twenty-four years later, in *Sosa v. Alvarez-Machain*,[58] the Supreme Court clarified the role of the Alien Tort Statute, stating that the statute was purely juris-

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52 *Id.* at 1 ("Nothing in these Guiding Principles should be read as creating new international law obligations . . . .").

53 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712–13 (2004); David D. Christensen, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After* Sosa v. Alvarez-Machain, 62 Wash. & Lee L. Rev. 1219, 1225 (2005) (providing a brief history of the Alien Tort Statute).

54 28 U.S.C. § 1350 (2012).

55 630 F.2d 876 (2d Cir. 1980).

56 *Id.* at 878.

57 *See* Christensen, *supra* note 53, at 1226 ("Even more significant than elevating the role of the individual in international law, the *Filártiga* decision opened the gates for foreign nationals to pursue human rights claims in U.S. courts.").

58 542 U.S. 692 (2004).

dictional and did not create a cause of action.[59] Nonetheless, the Court did find that common law could provide a cause of action for certain violations of international law.[60] In the years after the *Filártiga* and *Sosa* decisions, Alien Tort Statute claims evolved to be brought not only against individuals but also against corporations.[61]

There was significant pushback against the use of the Alien Tort Statute in the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*[62] In *Kiobel*, foreign nationals sued foreign corporations for conduct that took place in a foreign state (often referred to as "foreign-cubed" cases).[63] The Court held that the "presumption against extraterritoriality" limits the application of the Alien Tort Statute in U.S. courts.[64] In order for a case to proceed, that presumption must be overcome by claims that "touch and concern the territory of the United States . . . with sufficient force . . . ."[65] Furthermore, Chief Justice Roberts, writing for the majority, explicitly stated that corporate presence in the United States does not by itself overcome the presumption.[66] In 2018, the Supreme Court again weighed in on Alien Tort Statute litigation against foreign corporations in *Jesner v. Arab Bank, PLC*,[67] and delivered a resounding blow by declaring categorically "that foreign corporations may not be defendants in suits brought under the ATS."[68] As a result, victims of human trafficking and forced labor have no recourse in U.S. courts for labor abuses by

59 *Id.* at 724 ("[T]he ATS is a jurisdictional statute creating no new causes of action . . . .").

60 *Id.* ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

61 Gwynne L. Skinner, *Beyond* Kiobel*: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-*Kiobel*) World*, 46 COLUM. HUM. RTS. L. REV 158, 160 (2014) (finding at least 200 Alien Tort Statute cases had been filed against transnational business since the 1990s, primarily on the grounds of vicarious liability).

62 569 U.S. 108 (2013).

63 Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's* Filártiga, 89 NOTRE DAME L. REV. 1695, 1703 (2014) (tracing the coining of the term "foreign-cubed" to *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010)).

64 *Kiobel*, 569 U.S. at 117.

65 *Id.* at 125 (Kennedy, J., concurring).

66 *Id.* at 125 (majority opinion) ("Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.") However, Chief Justice Roberts also acknowledged the possibility that Congress could provide for jurisdiction on such grounds through its legislative power. *See id.* ("If Congress were to determine otherwise, a statute more specific than the ATS would be required.").

67 138 S. Ct. 1386 (2018).

68 *Id.* at 1390.

foreign subsidiaries of multinational corporations or foreign companies that are merely contracting parties with a U.S. corporation.

B. *Implications of* Kiobel *and* Jesner

The immediate fallout of *Kiobel* and *Jesner* is readily apparent in *Doe v. Nestlé, S.A.* (*Nestlé II*),[69] which was recently remanded by the Ninth Circuit to allow the plaintiffs to amend their complaint, acknowledging a change in law under *Jesner*.[70] In *Nestlé I*, the plaintiffs brought suit against several corporations and their subsidiaries, some of which were foreign corporations while others were domestic.[71] After the Supreme Court's decision in *Jesner*, the Ninth Circuit in *Nestlé II* held that the foreign defendants would have to be removed from the lawsuit, leaving only the domestic defendants.[72] This allowed Nestlé, a Swiss company, to avoid being brought into U.S. court for labor abuses.[73] There is now little doubt that a foreign supplier of a U.S. multinational corporation would be immune from liability under the Alien Tort Statute.

Nestlé's U.S. subsidiary, Nestlé North America, was still subject to U.S. federal jurisdiction,[74] but because that subsidiary was not directly involved in the alleged conduct, it could only be charged under an aiding and abetting theory.[75] The *Nestlé II* court considered that theory of liability only because the alleged conduct included payments of personal spending money to suppliers, which the court viewed as "more akin to 'kickbacks'" than "ordinary business conduct."[76] In the absence of improper practices like kickbacks, it seems highly unlikely that liability could be imposed on a U.S. corporation contracting unknowingly with a human rights violator. It would seem nearly impossible to charge that same corporation with liability for the actions of a supplier perhaps four or five steps down the supply chain, with whom they have no direct relationship.

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69 906 F.3d 1120 (9th Cir. 2018).

70 *Id.* at 1126 ("As we observed in *Nestlé I*, '[i]t is common practice to allow plaintiffs to amend their pleadings to accommodate changes in the law . . . .'" (quoting *Doe v. Nestlé USA, Inc.* (*Nestlé I*), 766 F.3d 1013, 1028 (9th Cir. 2014))).

71 *Id.* at 1122 (the defendants in the suit were Nestlé, S.A. and its subsidiaries in the United States and the Ivory Coast, Cargill Cocoa, a U.S. corporation, and its West African subsidiary, and Archer Daniels Midland, another U.S. corporation).

72 *Id.* at 1126–27.

73 *See id.* at 1127.

74 *See id.*; *Doe v. Nestlé, S.A.*, 929 F.3d 623 (9th Cir. 2018) (amending *Nestlé II* to hold that plaintiffs have standing to pursue claims against domestic defendants).

75 *Nestlé II*, 906 F.3d at 1125–26.

76 *Id.* at 1126.

III. Disclosure Requirements

A number of governments have made efforts at national and local levels to curb human rights abuses in the supply chain through required disclosures. Recent examples come from California, the United Kingdom, and the U.S. federal government. This Part will examine some of the common threads between these laws as well as their shortcomings as tools of affecting real change.

A. *Current Disclosure Frameworks*

1. *The Dodd-Frank Conflict Minerals Rule*

Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act shortly after the financial crisis of 2008, aiming to institute oversight for financial markets and prevent another such crisis.[77] Yet, almost hidden within the bill, under "Miscellaneous Provisions," Section 1502, titled "Conflict Minerals," advances a moral agenda against human rights abuses.[78] In Section 1502, Congress recognizes the violations of human rights occurring in the DRC and seeks to remedy those violations by amending the Securities Exchange Act of 1934.[79] The amendment directs the U.S. Securities and Exchange Commission ("SEC") to promulgate rules requiring any publicly traded company selling products that use specified minerals[80] from the DRC to describe their due diligence measures and provide a list to the SEC of any products that are not "conflict free."[81] The rule specifically applies to a corporate actor if "conflict minerals are necessary to the functionality or production of a product [it] manufacture[s]."[82] The Conflict Minerals Rule represents a significant departure from the typical securities regulations, focusing on social welfare rather than corporate profit.[83]

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77 *See* Jeff Schwartz, *The Conflict Minerals Experiment*, 6 Harv. Bus. L. Rev. 129, 130 (2016).

78 *See id.*

79 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 2213 (2010) (codified at 15 U.S.C. § 78m note (2018)) ("It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence . . . particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting [the following provision].").

80 *Id.* § 1502(b) (defining conflict mineral to mean "columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives" and allowing the Secretary of State to determine other minerals financing conflict in the DRC to be added to the list).

81 *Id.*

82 *Id.*

83 Verna Krishnamurthy, *SEC Rules and Human Rights: Specialized Disclosure for Corpo-*

In practice, the Conflict Minerals Rule has seen limited success, and has been the source of much controversy.[84] Critics have pointed out several shortcomings of the law. First, the results of the initial year of disclosures under the law were meager—most companies simply disclosed that they could not trace the source of their minerals and primarily conducted their search through a simple supplier survey.[85] Second, companies exploited gaps in SEC rules through a reasonable interpretation of the language that they were only required to report data on mineral processing facilities when they could *precisely identify* those facilities linked to their products.[86] As a result, companies could avoid disclosing critical information about those facilities.[87] Third, even with the disclosures, it is too difficult for consumers to discern from the reports which companies are bad actors and which are simply caught up in a highly complex web of suppliers and producers without necessarily being wrongdoers themselves.[88] Finally, the delegation of responsibility for human rights to the SEC is an inexplicable departure from the SEC's area of expertise, which has historically been limited to securities disclosures, typically covering finances and financial prospects exclusively, rather than social policy concerns.[89] An empirical analysis of the rule's effect is discouraging. While the SEC predicted that approximately 6,000 companies would file disclosures, less than 1,400 actually did so.[90] Altogether, the results of the first round of disclosures provided consumers with little hard evidence upon which to make a decision—no company could be clearly labeled a rule

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rate Accountability, 36 U. Pa. J. Int'l L. 821, 824 (2015) ("The SEC rule on conflict minerals . . . is not like other typical reporting requirements because it does not directly serve the main corporate interest of profit maximization . . . .").

84 *See* Schwartz, *supra* note 77.

85 *Id.* at 132. In the three most recent rounds of disclosures, still nearly half of companies made either no source determination or were unable to trace their sources. *See* U.S. Gov't Accountability Off., GAO-19-607, Conflict Minerals: 2018 Company Reports on Mineral Sources Were Similar in Number and Content to Those Filed in the Prior 2 Years 10 (2019).

86 Schwartz, *supra* note 77, at 132–33 ("But many companies reasonably interpreted SEC language to require that they report such data only when they could precisely identify the processing facilities linked to their individual products . . . .").

87 *Id.* at 132.

88 *Id.*

89 *Id.* at 142 (noting that "[e]ven SEC Chairwoman Mary Jo White criticized the legislation for assigning to the SEC, an expert in financial regulation, the task of drafting rules aimed to shame companies into acting in conformity with a social goal").

90 *Id.* at 144.

violator and no company could definitively declare its products to be conflict free.[91]

2. *The California Transparency in Supply Chains Act of 2010 and State Consumer Protection Laws*

Required disclosures have also made an appearance at the state level. As Dodd-Frank was being passed by the federal legislature, the California legislature enacted the California TSCA.[92] The TSCA's goal was to provide consumers with the means to fight slavery and trafficking through consumer choice.[93] A consumer who knows a product was made with slave labor could choose not to buy the product, thereby decreasing demand. The company producing it would then be incentivized to responsibly manage their supply chains so as to not lose potential revenue.

The TSCA applies to all "retail sellers" and "manufacturers" with at least $100 million in revenue who do business in the state of California.[94] Those businesses must disclose any of their efforts to engage in due diligence and responsible sourcing practices by making a posting on their website, or, if the business does not have a website, providing a written disclosure to consumers who make a request for one.[95] Required disclosures include verification of risks in the supply chain, audits of supplier compliance with company standards, requirements that direct suppliers certify the materials used in the product are free of slavery and human trafficking, internal accountability standards and procedures for employees that fail to meet company standards, and training of employees and managers on how to mitigate the risk of slavery and human trafficking.[96] Under the TSCA, the exclusive remedy for a business that fails to comply with the disclosure requirements is a suit by the California Attorney General for injunctive relief to force disclosure of the required information.[97]

Unfortunately, the TSCA provides little prospect for effective change as it is currently written. First, the scope is too limited, applying only to retail sellers and manufacturers with sales in the state.[98]

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91 *Id.* at 159.

92 *See* ch. 556, 2010 Cal. Stat 2641 (codified at CAL. CIV. CODE § 1714.43).

93 *Id.* § 2(i) ("[C]onsumers are at a disadvantage in being able to force the eradication of slavery and trafficking by way of their purchasing decisions.").

94 *Id.* § 3(a)(1).

95 *Id.* § 3(b)–(c).

96 *Id.* § 3(c)(1)–(5).

97 *Id.* § 3(d).

98 *See id.* § 3(a)(1); Schwartz, *supra* note 77, at 142.

Although California is a large state and it can be presumed that most large companies do business there, the restricted application to retail sellers and manufacturers is an unnecessary limitation. The definition of "manufacturer" is itself limited to mean "a business entity with manufacturing as its *principal business activity code*, as reported on the entity's tax return."[99] The practical implication is that a large company whose activities include manufacturing but not as its principal business activity could be exempt from the law. Second, the TSCA's weak enforcement mechanism provides little incentive for companies to change their behavior. The sole consequence of nondisclosure is the threat of an injunction requiring the company to make the disclosure.[100] In the absence of criminal penalties or monetary fines, companies have little incentive to fulfill their obligations under the laws.[101]

Because the TSCA lacks a private right of action, some consumers have instead brought lawsuits against alleged violators of human rights under California's consumer protection laws.[102] In these cases, the plaintiffs claimed that the defendants failed to disclose information about slavery in their supply chains and sought forced disclosure of that information.[103] To date, however, all of these cases have been dismissed, for reasons such as the plaintiffs lack Article III standing.[104] To establish standing in federal courts, consumers needed to demonstrate some type of "injury-in-fact."[105] While some district courts applied a relaxed standard—allowing a claim that the plaintiff would not have purchased the product if they had known it was produced with slave labor to function as the supposed injury—more recent cases have tightened the standard, requiring that the specific product actually purchased by the consumer have a traceable link to the alleged labor violations.[106] Consequently, the prospect of consumer legal activism under consumer protection laws is virtually nonexistent, highlighting a large gap in enforcement that could have been filled through

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99 *See* California Transparency in Supply Chains Act of 2010 § 3(a)(2)(C) (emphasis added).

100 *See id.* § 3(d).

101 *See* Andrew G. Barna, *The Early Eight and the Future of Consumer Legal Activism to Fight Modern-Day Slavery in Corporate Supply Chains*, 59 WM. & MARY L. REV. 1449, 1463 (2018).

102 *See id.* at 1471–73 (plaintiffs brought lawsuits under California's Unfair Competition Law, Consumers Legal Remedies Act, and False Advertising Law).

103 *Id.* at 1472.

104 *Id.*

105 *Id.* at 1473 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

106 *See id.* at 1475–76 (citing Sud v. Costco Wholesale Corp., 229 F. Supp. 3d 1075, 1081–82 (N.D. Cal. 2017)).

a private right of action in the TSCA. Without such an enforcement mechanism, the TSCA's reliance on consumer demand is insufficient to curb forced labor.

3. *The United Kingdom's Modern Slavery Act*

In 2015 the United Kingdom enacted a law very similar to California's TSCA, mandating similar disclosures in the name of increasing transparency.[107] Part six of the MSA, titled "Transparency in Supply Chains," requires any commercial organization providing goods and services in the U.K. with worldwide revenue exceeding an amount determined by the Secretary of State to make an annual disclosure—referred to as a "slavery and human trafficking statement"—about the organization's attempts to fight slavery and human trafficking.[108] The statement can include information about the structure of the organization, its policies regarding slavery and human trafficking, its due diligence process, risk areas in its supply chain and any remedial actions taken, its effectiveness at keeping its supply chain free of slavery and human trafficking, and information about training on the topic provided to its employees.[109] Like the California TSCA, the organization must publish the statement on its website, under a link in a "prominent place" on the website's homepage, or if it does not have a website, provide a copy to any person who makes a written request.[110] Any organization that fails to make the required disclosures is subject only to a civil proceeding for an injunction by the Secretary of State to force disclosure.[111] Without civil fines or criminal penalties, the MSA, like the TSCA, fails to provide adequate incentive for companies to alter their sourcing practices.

4. *The Business Supply Chain Transparency on Trafficking and Slavery Act*

Back in the United States, U.S. Congresswoman Carolyn Maloney has proposed a national disclosure regime for public companies in three separate congressional terms, most recently in 2015.[112] Like the Dodd-Frank Conflict Minerals Rule, the Business Supply Chain

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107 Modern Slavery Act 2015, c. 30 (UK).

108 *Id.* § 54(1) ("A commercial organisation within subsection (2) must prepare a slavery and human trafficking statement for each financial year of the organisation.").

109 *Id.* § 54(5)(a)–(f).

110 *Id.* § 54(7)–(8).

111 *Id.* § 54(11).

112 *See* H.R. 3226, 114th Cong. (2015); H.R. 4842, 113th Cong. (2014); H.R. 2759, 112th Cong. (2011).

Transparency on Trafficking and Slavery Act would take effect as an amendment to the Securities Exchange Act of 1934, requiring annual disclosures to the SEC.[113] The Act would apply to public companies with annual worldwide revenues over $100 million.[114] Unlike the California TSCA and the U.K. MSA, the Act would not only require disclosure of efforts taken, but also risks identified *and* measures taken to eliminate those risks.[115] The enforcement mechanism underlying the Act would be the same as that underlying securities fraud—that is to say either the SEC or private investors could bring suit against a company for material misrepresentations or omissions in their disclosures, allowing for all the penalties normally available under an action for securities fraud.[116] However, private citizens who are only consumers of the company's product and not investors in the company's securities would have no cognizable injury for securities fraud and thus no standing to file suit.[117] Furthermore, due to its operation through the Securities Exchange Act of 1934, only public companies would be subject to the disclosure requirements.[118] This would exclude some massive private companies like Cargill (one of the defendants in *Nestlé II*) and Mars, Inc., many of whose products are derived from cocoa, a product rife with forced labor and human trafficking.[119] Finally, like the California TSCA and the U.K. MSA, even the Business Supply Chain Transparency on Trafficking and Slavery Act would rely on consumer choice, without additional incentives or punishment to bring companies to change their behavior.

B. *Consumer Choice as a Mechanism for Combatting Human Rights Abuses*

In addition to the above disclosure laws' limited scope and enforcement mechanisms, the greatest weakness of mandated disclosures as a means of fighting slavery and human trafficking in supply chains is the underlying mechanism: consumer choice. The rationale

113 *See* H.R. 3226 § 3.

114 *Id.* ("Covered issuer" in this case refers to an issuer of securities.).

115 *See* Barna, *supra* note 101, at 1467 (comparing H.R. 3226 § 3 with CAL. CIV. CODE § 1714.43(a)(1) and Modern Slavery Act 2015, c. 30, § 54(4)(a) (UK)).

116 *See, e.g.*, Securities Exchange Act of 1934 § 18, 15 U.S.C. § 78r (2018); Securities Act of 1933 §§ 8A, 11, 24, 15 U.S.C. §§ 77h-1, 77k, 77x (providing for civil and criminal liability for securities fraud); 17 C.F.R. § 240.10b-5 (2016).

117 *See, e.g.*, Securities Act of 1933 § 11 (stating eligibility requirements for plaintiffs).

118 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 2213 (2010) (codified at 15 U.S.C. § 78m(p)); 15 U.S.C. § 78a; H.R. 3226.

119 *America's Largest Private Companies*, FORBES, https://www.forbes.com/largest-private-companies/list/#tab:rank [https://perma.cc/NA76-S7JC].

for these types of laws as expressed in their text is to inform consumers about the risks present in marketed products in order to allow consumers to buy fewer products tainted with slavery and human trafficking and buy more responsibly sourced products.[120] This rationale is problematic for three reasons.

First, as seen with the Dodd-Frank Conflict Minerals Rule, it is not clear that consumers will alter their purchasing choices due to mandated disclosures about human rights abuse risks rather than more typical reasons for buying an alternative product, like price, quality, or brand loyalty.[121] Second, if consumers do base their purchasing decisions on sourcing practices, it is possible that boycotts of a product will cause a shift in foreign investment away from those poorest countries where bad labor practices are most common.[122] It is precisely these countries that need foreign investment to alleviate poverty. Third, and most importantly, it is counter to historical developments in human rights laws to give enforcement power to consumers rather than governments. Slavery in the United States was eradicated not by consumer choice, but by a constitutional amendment banning the practice altogether.[123] Likewise, labor laws were imposed on domestic businesses not as disclosure requirements, but as affirmative duties enforceable by law.[124] Labor standards have not typically been left to the whims of consumers, nor should they be here simply because the conduct occurs overseas.

Overall, mandated disclosures are a step in the right direction, but largely a symbolic gesture rather than practical solution. Eradication of slavery and human trafficking in supply chains will require more stringent responsibilities in the form of affirmative duties as discussed in the next Part.

IV. Affirmative Duties to Monitor

There have been a small number of attempts to impose an affirmative duty on corporations to perform supply chain due diligence and address any risks found. The two most important examples of this approach are the recent Anti-Trafficking Provisions in the Federal Ac-

120 *See* California Transparency in Supply Chains Act of 2010, ch. 556, 2010 Cal. Stat. 2641 (codified at Cal. Civ. Code § 1714.43); Modern Slavery Act 2015, c. 30 (UK); H.R. 3226.

121 *See* Schwartz, *supra* note 77.

122 *See id.* at 180–82.

123 U.S. Const. amend. XIII.

124 29 U.S.C. § 212 (2018).

quisition Regulations in the United States and the Corporate Duty of Vigilance law in France, discussed below.

A. *Current Affirmative Duties*

1. *The Federal Acquisition Regulations Anti-Trafficking Provision*

In 2015, the Federal Acquisition Regulatory Council promulgated an amendment to its rule governing federal contractors' use of coerced labor.[125] These new rules effectively implemented a policy announced by President Barack Obama through Executive Order 13,627 and aimed at eliminating coerced labor from the federal supply chain.[126] Under the Anti-Trafficking Provisions, all government contractors must guarantee the performance of certain responsibilities, regardless of the size of the contract.[127] These responsibilities include the following:

> (1) prohibiting government contractors, subcontractors, and their employees and agents from engaging in trafficking related activity and (2) requiring contractors and subcontractors to actively meet disclosure requirements and cooperate with enforcement actions designed to reduce coerced labor.[128]

Businesses with federal contracts worth more than half a million dollars have new responsibilities, including (1) development, maintenance, and disclosure of a detailed compliance plan, and (2) an annual certification that due diligence inquiries either showed no violations, or that the contractor has taken necessary steps to remedy the violations.[129] The penalties for noncompliance with the regulations include "loss of award fee, suspension of contract payments, removal of of-

125 Federal Acquisition Regulation, 48 C.F.R. § 52.222-50 (2018); *see also* Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4967, 4990 (Jan. 29, 2015).

126 Exec. Order No. 13,627, 3 C.F.R. § 309 (2012).

127 T. Markus Funk & Chelsea Curfman, *The Emerging Compliance 'Hot Topic' for 2016: Regulations Regarding Trafficked, Coerced Labor*, SUPPLY CHAIN BRAIN (Feb. 8, 2016), http://www.supplychainbrain.com/content/latest-content/single-article/article/the-emerging-compliance-hot-topic-for-2016-regulations-regarding-trafficked-coerced-labor/ [https://perma.cc/P45F-6QTH]; *see also* 48 C.F.R. § 52.222-50(b)–(c).

128 GERALD T. HATHAWAY & MATTHEW A. FONTANA, BUSINESS AND HUMAN RIGHTS 8 (2018) (citing T. Markus Funk et al., *The Day Government Contractor Compliance Changed: Federal Acquisition Regulations on Human Trafficking Released*, BLOOMBERG L. (Feb. 20, 2015, 7:19 PM), https://news.bloomberglaw.com/white-collar-and-criminal-law/the-day-government-contractor-compliance-changed-federal-acquisition-regulations-on-human-trafficking-released [https://perma.cc/LNG8-NZ26]).

129 *Id.* at 9.

fending employee or employees from the project, termination of the contract and debarment."[130] Individual employees found to have made false certifications can be imprisoned for five years and fined up to $250,000.[131]

Unfortunately, the Anti-Trafficking Provisions suffer from a lack of strong oversight and enforcement mechanisms. Some critics point out an overreliance on self-reporting, incentivizing contractors to turn a blind eye to misbehavior by their agents.[132] Prime contractors may also avoid liability by subcontracting responsibilities, buttressing their argument that they were unaware of violations due to their inability to monitor labor violations at all levels of their subcontractors' activities.[133] This is particularly troubling because a large part of trafficking activity occurs at the subcontractor level.[134] Ultimately, despite admirable aims, the Anti-Trafficking Provisions almost certainly fall short, in practice, due to easily exploitable loopholes. Nonetheless, they represent a step in the right direction.

2. *France's Duty of Corporate Vigilance*

France has also gone one step further and imposed affirmative duties to source responsibly through its Corporate Duty of Vigilance law, adopted in 2017.[135] This new law took effect through an amendment to the French Commercial Code, imposing a so-called "duty of vigilance" on specified businesses.[136] The law only went into effect after a challenge before the French Constitutional Council, on the grounds that it was too vague to impose a civil penalty (considered a criminal sanction in France), violated precepts of personal liability, and required the disclosure of information that could be considered trade secrets.[137] The Council agreed that the law was too vague for a penalty, but upheld the imposition of liability and disclosure requirements.[138]

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130 *Id.* at 10 (citing 48 C.F.R. § 52.222-50).

131 *Id.* (citing 18 U.S.C. § 1001 (2012)); Funk & Curfman, *supra* note 127.

132 *See* Sariana Garcia-Ocasio, *How Tolerant is Zero Tolerance? The Loopholes in Anti-Trafficking Federal Contract Regulations*, 44 PUB. CONT. L.J. 551, 563 (2015).

133 *Id.* at 564–65.

134 *Id.* at 565.

135 French Duty of Vigilance Law, *supra* note 18.

136 *See* HATHAWAY & FONTANA, *supra* note 128, at 17.

137 *See* Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317, 321–22 (2017) (citing Conseil constitutionnel [CC] [Constitutional Court] decision No. 2017-750DC, Mar. 23, 2017 (Fr.)).

138 *See* CC decision No. 2017-750DC, Mar. 23, 2017.

The French Duty of Corporate Vigilance applies to businesses headquartered in France with more than 5,000 employees worldwide—including at subsidiaries—as well as businesses with at least 10,000 employees regardless of where their headquarters are located.[139] It requires those businesses to "establish[ ] and effectively implement[ ] a vigilance plan."[140] Under the law, the plan must include (1) a risk map for identification, analysis, and prioritization of stakeholders in the business, (2) procedures for "regular evaluation" and "risk mapping" of the supply chain, (3) a list of actions to mitigate risks and prevent serious harms, (4) a mechanism to alert the business to the "existence or realization of risks" created in coordination with the proper trade union organizations, and (5) a monitoring device to evaluate the effectiveness of measures implemented through the plan.[141] Any business failing to comply with the law would allow any sufficiently affected party to claim relief "equivalent to an injunction and tortious damages in Anglo-American common law."[142] This affirmative duty, paired with reasonable enforcement, represents a significant step to curb labor abuses.

B. *Affirmative Duties as a Mechanism for Combatting Human Rights Abuses*

The unifying feature between the FAR Anti-Trafficking Provisions and the French Duty of Vigilance law is the creation of a legal obligation, not to simply disclose efforts to eradicate coerced labor, but to actively investigate the supply chain for violations and fix them. The true threat of penalty through judicial enforcement, rather than the effervescent threat of lost income due to consumer choice, provides the affected business with the incentive to eradicate modern slavery from their supply chains.[143] Such an affirmative duty more closely mirrors other developments in labor law as enforced by executive agencies and judicial precedent.[144] In this way, affirmative duties to monitor and resolve violations up the ante from a regime where

139 *See id.*; French Duty of Vigilance Law, *supra* note 18.

140 French Duty of Vigilance Law, *supra* note 18, at art. 1.

141 *Id.*

142 HATHAWAY & FONTANA, *supra* note 128, at 18.

143 *Compare* California Transparency in Supply Chains Act of 2010, ch. 556, 2010 Cal. Stat. 2641 (codified at CAL. CIV. CODE § 1714.43) (relying on consumer choice as its mechanism), *and* Modern Slavery Act 2015, c. 30 (UK) (same), *with* 48 C.F.R. § 52.222-50 (2018) (enforcing direct penalties against companies), *and* French Duty of Vigilance Law, *supra* note 18 (same).

144 *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. § 203 (2018) (enforcing penalties for violations of minimum labor standards); Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2018) (enforcing penalties for hazardous work conditions).

corporate social responsibility is voluntary to one where it is legally required.

V. Moving Toward a Corporate Duty of Due Diligence in the United States

In order to lead the fight to eradicate all forms of modern slavery from global supply chains, the United States should enact a new law imposing an affirmative duty of due diligence and remediation similar to the FAR Anti-Trafficking Provision and French Duty of Vigilance discussed above. By creating the legal obligation to source responsibly, Congress could essentially use global free enterprise as a mechanism to spread better labor standards across borders where it has no jurisdiction to prescribe labor laws. The broad elements of such a law are discussed below.

A. *The Duty of Due Diligence and Remediation*

Like the French Duty of Vigilance law, the proposed law would impose five broad categories of obligation: (1) *design* a system of compliance within the specifications of the relevant rulemaking agency, (2) *implement* the compliance system, (3) continuously *monitor* the compliance system for violations, (4) *remedy* any violations discovered, and (5) *report* any findings of risks, violations, and corrective actions to the rulemaking agency.[145] The reporting requirement is not only necessary for enforcement of the law, but is also a useful information-collection mechanism for federal agencies and departments to determine the level of risk for specific industries, products, and geographic regions. That information can then be pooled to allow businesses to tailor their compliance programs toward the riskiest parts of their supply chain.

The agency promulgating the specific rules and regulations should take note of both aspirational and practical considerations, using the U.N. Guiding Principles as a target, and the best corporate codes of conduct as an indication of what is feasible. The most critical aspect is the design of the compliance system itself. That design should be guided by Section II of the Guiding Principles.[146] In particular, the Guiding Principles recognize several factors as relevant in determining "[t]he means through which a business enterprise meets its respon-

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145 *Compare* the proposed law (imposing affirmative obligations to design and implement a regularly evaluated compliance system), *with* French Duty of Vigilance Law, *supra* note 18 (same).

146 U.N., Guiding Principles, *supra* note 12, at 13–26.

sibility to respect human rights" in its supply chain.[147] Specifically, those means should be proportional to the size of the enterprise, the severity of its human rights impact judged by "scale, scope and irremediable character," and whether the enterprise is acting on its own or as part of a larger corporate group.[148]

Existing corporate codes of conduct provide a solid foundation for what enterprises themselves believe is feasible when it comes to compliance systems. For example, Wal-Mart, in response to repeated criticisms regarding its sourcing practices, now requires suppliers to agree to its "Standards" code of conduct as part of the supply contract itself.[149] The code of conduct, in addition to requiring compliance with labor standards, provides Wal-Mart the right to inspect its suppliers through third-party audit teams.[150] After the initial audit, all audits are unannounced, and the auditor assigns a risk-level assessment, which is used to determine the timetable for conducting the next audit and whether or not the supplier should be punished through termination of current and future orders or even the entire business relationship.[151] Currently, these codes of conduct are self-imposed, self-regulated, voluntary, and not legally binding.[152] The proposed law would take these soft obligations and turn them into a binding due diligence standard for business enterprises.

B. Scope and Applicability

Ideally, the proposed law would apply to all companies with business operations in the United States whose supply chains extend outside the United States. This law would extend to all steps of the supply chain for maximum effect. In practice, running a compliance program may be prohibitively expensive for small- and medium-sized enterprises ("SMEs").[153] If SMEs were to be subject to these rules without any sort of cost offset, it could effectively prevent them from sourcing globally in an effort to avoid the costs of implementing the necessary compliance program. This would leave them on unequal

147 *Id.* at 15.

148 *Id.*

149 *See* Haley Revak, *Corporate Codes of Conduct: Binding Contract or Ideal Publicity?*, 63 HASTINGS L.J. 1645, 1652 (2011).

150 *Id.* at 1653 ("The audit consists of a factory tour, a minimum of twenty-five employee interviews, and review of factory documents.").

151 *Id.*

152 *Id.* at 1667.

153 *See generally* JOHN BACE ET AL., UNDERSTANDING THE COSTS OF COMPLIANCE (2006) (discussing the cost of regulatory compliance and acknowledging that such cost "is a burden that can drain the resources out of even the most robust and well-run business").

footing with larger firms, who already have a competitive advantage through economies of scale. The choice here is between two alternatives: (1) excluding SMEs below a certain level of income from the law altogether, or (2) subsidizing their expenses. The first option would lessen the impact of the new law but avoid adding to the national deficit. The second option would ensure maximum impact, but potentially require tax increases or an increase in the national deficit. Until the costs of complying with this new law are better understood, the first option appears to be preferable.

C. Enforcement Mechanisms

Two possible methods of enforcing the proposed law would be (1) administrative or criminal proceedings by an executive agency like the Federal Trade Commission or the Department of Justice or (2) a private right of action like the one provided under the Sherman Antitrust Act of 1890.[154] The following subparts explain why the former is an appropriate enforcement mechanism while the latter could be detrimental to the goals of the law.

1. Promulgation of Rules and Enforcement by the Federal Trade Commission

Although the law itself will lay out the broad principles and responsibilities, much of the implementation work will be left to a federal agency to prescribe and administer specific regulations and enforce them against violators. In this way, the law would be similar to the Sherman Antitrust Act, which left much of the specifics of antitrust framework to the courts and the Federal Trade Commission ("FTC").[155] Here too, the FTC would be the most appropriate administrative agency. The FTC's stated mission is "[p]rotecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity."[156] Furthermore, the FTC has been responsible for administering a number of other consumer protection laws.[157] Its expertise in economic and trade issues uniquely qualifies it to administer a legal framework requiring a

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154 Ch. 647, 26 Stat. 209 (codified at 15 U.S.C. § 1 (2018)).

155 *See id.*

156 *About the FTC*, Fed. Trade Comm'n, https://www.ftc.gov/about-ftc [https://perma.cc/ES26-SB94].

157 *See, e.g.*, Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2018); Telemarketing Sales Rule, 16 C.F.R. § 310 (2019); *see also* William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 Mich. L. Rev. 1019, 1030 (2012) (describing the FTC's first

delicate balance of countervailing economic forces. As such, it is a more appropriate agency to assume the role of regulator than the SEC, whose role is to ensure accuracy of financial disclosures.

Similar to its role under the Sherman Act, the FTC in this case will shape the law through its enforcement actions. Through its discretion to bring administrative proceedings against antitrust violators, the FTC shapes antitrust law by both curtailing violations and signaling to businesses what behavior is acceptable.[158] In the antitrust context, the courts provide limits on the FTC's power through the appeals process.[159] Under the proposed Duty of Due Diligence and Remediation, the FTC would act as the vanguard, pursuing action against business enterprises it perceives to be violators of their due diligence obligations. The federal courts would act as a check on the FTC's determinations of whether a firm's behavior was reasonable under the requirements of the law. By combining the institutional power of both the federal courts and the FTC, the responsibilities of corporations under the new law would likely evolve over time just as they have under U.S. antitrust law.

2. *A Private Right of Action for Labor Abuses*

In contrast to the Sherman Act, the proposed law would *not* provide for a private right of action. Although this option might appear attractive as a means of redress for consumers, it creates several problems. First, the addition of such liability would likely increase the cost of doing business to the point at which small- to medium-sized enterprises could no longer compete with larger enterprises, although the proposed carve-out for those enterprises should address this concern.[160] Second, even larger enterprises might decide to withdraw operations from foreign countries rather than cope with the costs of both an expansive compliance system and the cost of addressing class action lawsuits, which could ultimately reduce employment opportunities in those countries and harm the very individuals the law is intended to help. Third, even if a private right of action were pro-

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forays into consumer protection and its eventual express authority to do so as granted by Congress).

158 *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 395 (2003) (describing how the United States and other antitrust systems afford "considerable discretion" to enforcement agencies to determine how the legislature's "commands will be applied to specific behavior").

159 *See* Kovacic, *supra* note 157, at 1034 (describing the appeals process for FTC decisions).

160 *See* BACE ET AL., *supra* note 153, at 18 (recommending a "compliance bar" that would be set according to a company's risk profile).

vided, courts seem likely to curtail it as they have done in the antitrust context, where the risk of over-deterring business practices led courts to impose stronger demands on pleading and standing.[161] Ultimately, the exclusion of a private right of action should help the law balance the goal of eradicating modern slavery with the inevitable costs of doing business, therefore making the law more palatable to the legislature, the courts, and businesses.

Conclusion

Modern problems require modern solutions. With the advent of highly complex supply chains stretching across the globe, it is only reasonable to expect a higher degree of responsibility. The same technological advances in supply chain management and information technology used to grow global supply chains can be easily used to implement effective global compliance programs. The only remaining roadblock is a lack of proper incentive for businesses to do so. The legislation proposed by this Note, imposing an affirmative duty on businesses to conduct due diligence and take corrective action, would provide such an incentive. Perhaps, with such enforcement, the scourge of modern slavery could be eradicated once and for all.

161 *See* Kovacic, *supra* note 157, at 1041.