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Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts

Marcia Narine
University of Miami School of Law, mweldon@law.miami.edu

DISCLOSING DISCLOSURE'S DEFECTS: ADDRESSING CORPORATE IRRESPONSIBILITY FOR HUMAN RIGHTS IMPACTS

Marcia Narine*

ABSTRACT

Although many people believe that the role of business is to maximize shareholder value, corporate executives and board members can no longer ignore their companies' human rights impacts on other stakeholders. Over the past four years, the role and responsibility of non-state actors such as multinationals has come under increased scrutiny. In 2011, the United Nations Human Rights Council unanimously endorsed the "UN Guiding Principles on Business and Human Rights," which outline the State duty to protect human rights, the corporate responsibility to respect human rights, and both the State and corporations' duties to provide remedies to parties. The Guiding Principles do not bind corporations, but dozens of countries, including the United States, are now working on National Action Plans to comply with their own duties, which include drafting regulations and incentives for companies. In 2014, the UN Human Rights Council passed a resolution to begin the process of developing a binding treaty on business and human rights. Separately, in an effort to address information asymmetries, lawmakers in the United States, Canada, Europe, and California have passed human rights disclosure legislation. Finally, dozens of stock exchanges have imposed either mandatory or voluntary non-financial disclosure requirements, in sync with the UN Principles.

Despite various forms of disclosure mandates, these efforts do not work. The conflict lies within the flawed premise that, armed with specific information addressing human rights, consumers and investors will either reward "ethical" corporate behavior, or punish firms with poor human rights records. However, evidence shows that disclosures generally fail to change behavior because: (1) there are too many of them; (2) stakeholders suffer from disclosure overload; and (3) not enough consumers or investors penalize companies by boycotting

products or divesting. In this Article, I examine corporate social contract theory, normative business ethics, and the failure of stakeholders to utilize disclosures to punish those firms that breach the social contract. I propose that both stakeholders and companies view corporate actions through an ethical lens, and offer an eight-factor test to provide guidance using current disclosures or stakeholder-specific inquiries. I conclude that disclosure for the sake of transparency, without more, will not lead to meaningful change regarding human rights impacts.

I. INTRODUCTION

> "Mandated disclosure" may be the most common and least successful regulatory technique in American law. It aspires to help people making unfamiliar and complex decisions while dealing with specialists by requiring the latter (disclosers) to give the former (disclosees) information so that disclosees choose sensibly and disclosers do not abuse their position . . . . [M]andated disclosure is a Lorelei, luring lawmakers onto the rocks of regulatory failure.[1]

Retail giant Wal-Mart has allegedly sold shrimp produced by Thai slaves.[2] Soccer's governing corporation, FIFA, has purportedly turned a blind eye to the use of slave labor in the Qatar World Cup

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* Marcia Narine is an Assistant Professor of Law at St. Thomas University School of Law. She has also served as an executive in the supply chain industry, a member of the SEC Disclosure Reform Working Group of the U.S. Chamber of Commerce, and co-authored an amicus brief on the Dodd-Frank conflict minerals legislation. I would like to thank Deans Alfred Garcia and Cecilia Dykas for the research grant to complete this Article, and Anna Donovan, Anthony Ewing, Cecilia Martin, Valentina Okaru-Bisant, Keith Rizzardi, Jeff Schwartz, Amy Sepinwall, and Siegfried Wiessner for their comments. I am also grateful to the participants at the Zicklin Center for Normative Business Ethics Workshop at the Wharton School of Business for their insight. I would like to thank Matthew Carcano, Astrid Lopez, Islam Dashoush, Evan Phoenix, Courtney Segota, and Lauren Bengochea for their research assistance. I particularly appreciate the contributions of Maria Catala and Erica Behm. All errors are my own.

1. OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 3–4 (2014).

2. Aimee Picchi, *Shrimp Sold at Walmart, Costco Tied to Slave Labour*, CBS NEWS (June 11, 2014), http://www.cbsnews.com/news/shrimp-sold-at-walmart-costco-tied-to-slave-labor/; Kate Hodal, Chris Kelly, & Felicity Lawrence, *Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US, UK*, THE GUARDIAN (June 10, 2014), http://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour.

venue.[3] Both are well-known and highly profitable enterprises, and suffered reputational—but not financial—setbacks following the disclosure of this information.[4]

Many believe that the role of business is to maximize shareholder value.[5] This "shareholder view" holds that management has a moral and legal obligation to serve the interests of the shareholders, and to run the company solely for their benefit.[6] Although it is popular in academia, and among some in business circles, the shareholder-centric view no longer carries the day in an increasingly globally interdependent world. Executives and board members can no longer focus solely on their bottom line. Firms, and especially transnational corporations ("TNCs"), simply cannot ignore their obligations to consider social and human rights impacts on other stakeholders. These stakeholders include civil society organizations,[7]

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3. *See, e.g.*, Ian Black, Owen Gibson, & Robert Booth, *Qatar Promises to Reform Labour Laws After Outcry Over 'World Cup Slaves'*, THE GUARDIAN (May 14, 2014), http://www.theguardian.com/world/2014/may/14/qatar-reform-labout-laws-outcry-world-cup-slaves; Ian Traynor, *Fifa Says There Is Little It Can Do About Labour Conditions in Qatar*, THE GUARDIAN (Feb. 13, 2014), http://www.theguardian.com/world/2014/feb/13/fifa-labour-conditions-qatar-world-cup; Kevin Maguire, *Qatar Accused of Working 1,200 People to Death*, MIRROR (Mar. 30, 2014), http://www.mirror.co.uk/news/world-news/2022-world-cup-qatar-accused-3303458.

4. Suzanne Vranica, Tripp Mickle, & Joshua Robinson, *FIFA Corruption Scandal Pressures Soccer Governing Body's Sponsors*, WALL ST. J. (May 29, 2015), http://www.wsj.com/articles/scandal-in-world-soccer-pressures-sponsors-1432861411 (acknowledging that although FIFA sponsors expressed concern after U.S. prosecutors released an indictment detailing broad corruption charges, none, as of May 29, 2015, pulled out of their deals; however, "last year, Sony decided not to renew its FIFA sponsorship, an eight-year deal valued at over $300 million, partly because of the controversy around 2018 and 2022 World Cup events").

5. *See* Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17.

6. *See* E. Merrick Dodd, Jr., *For Whom Are Our Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1145–63 (1932) (discussing a range of views on the shareholder-stakeholder debate); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423–25 (1993); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1735–58 (2006); Leo E. Strine, Jr., *Our Continuing Struggle With the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 135–172 (2012).

7. *See* Civil Society Organizations, WORLD BANK (Nov. 6, 2013), http://go.worldbank.org/KK5KGT24X0 (defining a civil society organization as including NGOs, faith-based organizations, indigenous peoples, labor unions, foundations, and other interested parties).

nongovernmental [8] and intergovernmental organizations, [9] socially responsible investors ("SRIs"), [10] activists, consumers, and labor organizations.[11] Likewise, stakeholders should not, and cannot, ignore their duty to hold firms accountable for these impacts. Too often, however, corporations escape with impunity—both legally and in the marketplace—because stakeholders fail to take action against them. Some argue that stakeholders lack sufficient information or power to do so.[12] I argue instead that the information stakeholders obtain through various disclosures may be irrelevant, poorly understood, and/or underutilized. Nonetheless, legislators use disclosure to avoid the more politically difficult task of regulating multinational corporations, either at home or abroad, for their human rights abuses.

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8. Non-governmental Organizations, UNITED NATIONS RULE OF LAW, http://unrol.org/article.aspx?article_id=23 (last visited Feb. 24, 2015) (explaining that a nongovernmental organizations is a "not-for-profit group principally independent from government, which [are] organized on a local, national or international level to address issues in support of the public good . . . [which] perform a variety of services and humanitarian functions, bring public concerns to governments, monitor policy and programme implementation, and encourage participation of civil society stakeholders at the community level").

9. One such intergovernmental organization is the Organisation for Economic Co-Operation and Development ("OECD"). The OECD has thirty-four member countries, including the United States, and works to promote policies to improve the economic and social well-being of people around the world, including citizens of nonmember states. About the OECD, THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, http://www.oecd.org/about/ (last visited July 30, 2015). The United Nations, with its 193 member states, is also an intergovernmental organization. UN at a Glance, UN, http://www.un.org/en/aboutun/index.shtml (last visited Feb. 27, 2015).

10. Sustainable and Responsible Investment (SRI) Basics, U.S. SIF, http://www.ussif.org/sribasics (last visited Feb. 24, 2015) (explaining that socially responsible investors consider environmental, social, and governance factors ("ESG") when making investment decisions so that they can have long-term financial and societal impact).

11. *See* R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation*, *in* ETHICAL THEORY & BUS. 38, 39 (Tom L. Beauchamp & Norman E. Bowie eds., 2001) (discussing the types of stakeholders and how corporations should engage with them).

12. *See generally* Shelley Marshall & Kate MacDonald, *What Is Corporate Accountability*, CORPORATE ACCOUNTABILITY RESEARCH, http://corporateaccountabilityresearch.net/files/2011/09/What-is-corporate-accountability.pdf (noting that "multi-stakeholder processes do however tend to confront a range of practical challenges associated with both weak capacity among key stakeholder groups to engage effectively, and in some cases, difficulties in mediating conflicting priorities of affected stakeholders").

Human rights are universal and inalienable. As described by the United Nations, these rights include—among other things—the right to adequate housing; economic, social, and cultural rights; the right to food; educational rights; freedom of association and assembly; and certain rights for indigenous peoples. [13] Traditionally, the obligation to protect these rights has belonged to the State.[14] But in 2011, the forty-seven members of the United Nations Human Rights Council unanimously endorsed the nonbinding "UN Guiding Principles on Business and Human Rights" ("UNGPs" or "Ruggie Principles"), which outline: (1) the State's duty to protect human rights; (2) the corporate responsibility to respect human rights; and (3) both the State and corporations' duty to provide judicial and non-judicial remedies to aggrieved parties.[15] The UN has clearly indicated that the UNGPs do not impose any additional legal obligations under international law.[16]

More significantly, lawmakers in the United States, Canada, Europe, and the state of California have either introduced or passed disclosure legislation designed to inform investors and consumers about corporate human rights impacts, including, but not limited to: the 2010 California Transparency in Supply Chains Act,[17] Dodd-

13. *See* List of Human Rights Issues, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/Pages/ListOfIssues.aspx (last visited Mar. 2, 2015).

14. The United States and 166 other countries have ratified the International Covenant on Civil and Political Rights ("ICCPR"), which, among other things, requires state parties to enact legislation, protective measures, and remedies for the guaranteed rights to life and human dignity; freedom from slavery; equality before the law; freedom of speech, assembly, and association; freedom of religion; protections in criminal proceedings and the right to a fair trial; and minority rights. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/21/2200 (Dec. 16, 1966).

15. *See* John G. Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf [hereinafter Guiding Principles].

16. *See* Concluding Observations on the Sixth Periodic Report of Germany, Human Rights Comm., 106th Sess., Oct. 15–Nov. 2, 2012, U.N. Doc. CCPR/C/DEU/CO/6 (Nov. 12, 2012).

17. California Transparency in Supply Chains Act of 2010, Cal. Civ. Code § 1714.43 (West 2012).

Frank Section 1502 (the conflict minerals rule),[18] a 2013 European Commission directive requiring disclosure of certain environmental social and governance factors by 2017, [19] the 2014 EU [20] and Canadian[21] proposals related to corporate responsibility for mineral extraction in conflict zones, and a June 2014 bill by U.S. Congressional Representative Carolyn Maloney regarding human trafficking in supply chains.[22] In addition, dozens of individual stock exchanges around the world have imposed either mandatory or voluntary non-financial disclosure requirements.[23]

In June 2014, the United Nations Human Rights Council passed a resolution to begin the process of developing a binding treaty on business and human rights, in part because no international law governs corporate responsibility in this arena. [24] This treaty is unlikely to pass. Therefore, disclosure rules and, by extension, the marketplace, may be the only mechanisms to hold transnational corporations accountable.

Although there are few international legal obligations related to human rights for TNCs, corporations still have a role to play in addressing human rights impacts. I argue that, like governments, firms have entered into a "social contract" with stakeholders that goes beyond the legal right to operate, and that allows companies to

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18. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (West 2010).

19. European Commission, *Disclosure of Non-Financial and Diversity Information by Large Companies and Groups—Frequently Asked Questions* (Apr. 5, 2014), http://europa.eu/rapid/press-release_MEMO-14-301_en.htm.

20. European Commission, 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 (May 3, 2014), http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152227.pdf.

21. House of Commons of Canada, Bill C-486 (Can.) (Proposed Mar. 26, 2013), http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6258270.

22. Business Supply Chain Transparency on Trafficking and Slavery Act of 2014, H.R. 4842, 113th Cong. (2014), https://beta.congress.gov/bill/113th-congress/house-bill/4842/text.

23. *See* Marcia Narine, *Living in a Material World—From Naming and Shaming to Knowing and Showing: Will New Disclosures Regimes Finally Drive Corporate Accountability for Human Rights?*, *in* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE (forthcoming 2015) (manuscript at 7).

24. *Resolution on Binding Human Rights Standards Passes in Human Rights Council*, GLOBAL POLICY FORUM (June 27, 2014), https://www.globalpolicy.org/global-taxes/52651-treaty-alliance-press-release-on-resolution-on-binding-human-rights-standards.html.

co-exist and, ideally, thrive in society. More specifically, firms enter into social contracts when they commit to certain ethical principles, either through codes of conduct, corporate social responsibility programs,[25] or through voluntary industry or multi-stakeholder initiatives. At a more basic level, firms enter these "contracts" through what UN Special Representative John Ruggie calls the "social license to operate."[26] I will discuss this social contract, and the

25. There is no one established definition for CSR. *See, e.g.*, Henri Servaes & Ane Tamayo, *The Impact of Corporate Social Responsibility on Firm Value: The Role of Customer Awareness*, 59 MGMT. SCI. 1045, 1045–56 (2013), http://faculty.london.edu/hservaes/ms2013.pdf (citing various definitions but adopting the World Business Council for Sustainable Development's 2004 definition). Another appropriate definition is "a business organization's configuration of principles of social responsibility, processes of social responsiveness, and policies, programs, and observable outcomes as they relate to the firm's social relationships." Noam Noked, *Investing in Corporate Social Responsibility to Enhance Customer Value*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FINANCIAL REGULATION (Feb. 28, 2011, 9:31 AM), http://blogs.law.harvard.edu/corpgov/2011/02/28/investing-in-corporate-social-responsibility-to-enhance-customer-value/ (citing D.J. Wood, *Corporate Social Performance Revisited*, 16 ACAD. MGMT. REV. 693 (1991)). The Danish government, which mandates ESG reporting, defined CSR for purposes of inclusion in reporting as "considerations for human rights, societal, environmental and climate conditions as well as combatting corruption in . . . business strategy and corporate activities." Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting: Evidence from Four Countries* 7 (Harv. Bus. Sch., Working Paper No. 11-100, 2014), http://www.hbs.edu/faculty/Publication%20Files/11-100_7f383b79-8dad-462d-90df-324e298acb49.pdf. The United States government has explained, "[r]esponsible business conduct is intended to include a broad range of areas in which corporate conduct impacts society. It is well understood that responsible business conduct (RBC), sometimes referred to as corporate social responsibility or CSR, entails conduct consistent with applicable laws and internationally recognised standards. Based on the idea that you can do well while doing no harm, RBC is a broad concept that focuses on two aspects of the business-society relationship: 1) the positive contribution businesses can make to economic, environmental, and social progress with a view to achieving sustainable development, and 2) avoiding adverse impacts and addressing them when they do occur." U.S. State Dep't, *USG National Action Plan on Responsible Business* (Feb. 12, 2015) http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct.

26. *See* John G. Ruggie, UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 54, Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf [hereinafter Ruggie Report]. Author and Executive Director of the

role of corporate accountability for human rights, in more detail in Part II.

This Article examines the monitoring and enforcement of these corporate social contracts, particularly related to human rights impacts. I characterize a breach of the social contract as the firm's failure to adhere to the letter or the spirit of the contractual terms to which it voluntarily agrees. I argue that key stakeholders, such as consumers and investors, either (1) choose not to enforce or (2) fail in their efforts to enforce breaches of these social contracts. Stakeholders learn about these breaches through the various disclosures that States[27] require, or that companies disseminate through industry or intergovernmental initiatives.

The majority of the proposals and disclosure regimes that I discuss in this Article include either no penalties, or only minimal procedural penalties.[28] Disclosure theory rests on what I believe to be the well-intentioned, but faulty, premise perpetuated by legislators that, armed with certain information, consumers and investors will pressure corporations to change their behavior. Many of the proposals employ "name and shame" tactics to prey on corporate fears of reputational damage. NGOs have used "name and shame" campaigns against governments in the past,[29] and now governments are using them against corporations. These laws and campaigns depend on consumers and investors to compel firms to change their business

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Institute for Human Rights and Business John Morrison prefers the term "social license," and argues that legal and political licenses are dependent upon the social license and that it goes beyond a concept of corporate social responsibility. JOHN MORRISON, THE SOCIAL LICENSE: HOW TO KEEP YOUR ORGANIZATION LEGITIMATE (2014).

27. Unless otherwise specified, "States" refers to nation states.

28. Mark Dearn, *Without Corporate Accountability, "Good Governance" Falls: An Enforceable, Stakeholder Approach*, THE WORLD WE WANT (Feb. 28, 2013), https://www.worldwewant2015.org/node/314175 (acknowledging that "the series of attempts to create frameworks to encourage responsible business behavior include the 2012 Guiding Principles on Business and Human Rights, the UN Global Compact, and the OECD Guidelines for Multinational Enterprises. These exist alongside increasingly popular, voluntary 'corporate social responsibility' programs created by individual companies. However, all of these frameworks are beset by the same problem: they prescribe only voluntary adherence to principles. As Human Rights Watch argues, voluntary approaches may serve to entrench a paradigm of unenforceable commitments, ultimately to the detriment of human rights.").

29. *See* Emile M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 698 (2008).

practices. Unfortunately, they do not adequately consider how stakeholders evaluate and use the information that companies disclose, either voluntarily or under force of law. Recent data will highlight that it may be unwise to make such assumptions about stakeholder reactions.

Research discussed later in this Article reveals that, although disclosures are ubiquitous, they have varying degrees of utility.[30]

If implemented correctly by legislators and those required to disclose, disclosures have the potential to eventually lead to changes in consumer and investor demand, and at some point to shifts in corporate behavior. In the human rights context, however, disclosures are not as effective as they could be because they are not widely disseminated or known, and because not enough stakeholders who do read disclosures take advantage of their knowledge to press for corporate reform. Some stakeholders may choose to exit the relationship with the firm rather than give voice to their concerns. Others may be apathetic. Still others may assume that someone else will fight for change, thus leading to a collective action problem where individuals may choose to take a "free ride" off the activism or work of others, especially if it is too costly or inconvenient for them to act themselves.

Accordingly, as legislators consider incentives or laws intended to change corporate behavior in the human rights context, they should analyze critically the relative ineffectiveness of the disclosures that already exist. This will be particularly relevant for those drafting laws enforcing compliance with the requirement of developing National Action Plans under the UNGPs. Instead of relying on ineffective disclosures, legislators should enact laws with specific and effective penalties, whether civil or criminal, that address human rights impacts.[31]

Part II of this Article briefly explains corporate social contract theory, the role of normative business ethics, and the current balance of human rights obligations between States and multinational corporations. Part III highlights the types of current and proposed transparency and disclosure regimes that States enact, or that firms impose on themselves, in my view, to avoid more onerous human rights legislation that may not pass. In Part IV, I discuss the

30. Dearn, supra note 28.

31. Specific solutions are beyond the scope of this paper, which will focus on the flaws in the current disclosure regime.

effectiveness of disclosures and their effect on consumer behavior. After a review of data, I argue that, because consumers do not use disclosures in the manner intended by the drafters—to make informed decisions—legislators should not rely solely, or even primarily, on "name and shame" disclosures for human rights legislation. In Part V, I examine the impact of socially responsible investors and other shareholders on firm behavior. Although I believe that disclosures are generally ineffective, I recommend here that more socially responsible investors adopt the ethical parameters of the Norwegian Pension Fund. The Pension Fund uses both teleological and deontological frameworks to make investment and divestment decisions. I also propose an eight-factor test depending on the investors' priorities. Part VI briefly concludes.

II. THE CORPORATE SOCIAL CONTRACT, NORMATIVE BUSINESS ETHICS, AND THE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS

In order to determine how to hold companies accountable, we must first briefly explore what motivates them to act and to change. First, I will discuss corporate social contract theory and normative business ethics as tools to analyze corporate motivations. Then, I will briefly discuss international efforts to establish corporate accountability for human rights.

Corporations are juridical persons that lack the "conscience" that otherwise constrains the conduct of their "natural" counterparts.[32] Without knowing what and who "motivates" them to

32. In the United States, corporations enjoy many of the privileges of "people." For example, they have First Amendment rights related to political spending and the ability to make religious choices. *See* Citizens United v. FEC, 558 U.S. 310, 406 (2010) (Stevens, J., concurring in part and dissenting in part) (treating corporations as persons for the purpose of the First Amendment under campaign finance laws); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (ruling that Affordable Care Act regulations requiring employers to provide employees with access to free contraception violated the rights of closely held corporations under the Religious Freedom Restoration Act); Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412 (2013); John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 657 (2012); *see also* Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217 (2010) (discussing the impact of *Citizens United* in the campaign finance constellation); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. WOMEN'S L.J. 35 (2015) (discussing the impact of *Hobby Lobby* in a corporation's ability to make religious choices). Corporations may also

act, any legislation, disclosure regime, or incentive program will be ineffective. Accordingly, lawmakers must ask abstract questions.[33] Can corporations actually feel "shame?" If so, how much "shame" or reputational damage must firms experience before they change their behavior? Legislators and activists, assuming that the corporations can feel shame, have focused on the "name and shame" laws and disclosure rules, with the assumption that a business' desire to preserve its reputation will cause it to act more ethically, even in the absence of more stringent legislation.[34] If corporations cannot feel shame, however, then "name and shame" tactics will be ineffective, as will disclosures based on that premise. Further, are investors and consumers doing enough to hold firms accountable, and if not, why not? I argue that the use of disclosures for accountability in the human rights context has thus far failed to achieve the stated goals.

This Article is premised on the belief that corporations are not separate moral agents. In the same way that I adopt a stakeholder view of the firm, I also adopt a view that the firm acts through its managers, and does not act as a separate moral person.[35]

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face criminal liability in the United States, but due to jurisdictional protections, it is difficult to sue corporations in U.S. federal courts for human rights abuses. *See* Marcia Narine, *Whistleblowers and Rogues: An Urgent Call for an Affirmative Defense to Corporate Criminal Liability*, 62 CATH. U. L. REV. 41 (2012); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1660–61 (2013) (holding that federal courts may not recognize a cause of action under the Alien Tort Statute (ATS) for violations of the law of nations occurring within the territory of a foreign sovereign).

33. I will not answer these questions in this Article. I merely pose them for consideration.

34. *See, e.g.*, Roya Ghafele & Angus Mercer, *'Not Starting in Sixth Gear': An Assessment of the U.N. Global Compact's Use of Soft Law as a Global Governance Structure for Corporate Social Responsibility*, 17 U.C. DAVIS J. INT'L L. & POL'Y 41, 51 (2010) (asserting that naming and shaming is a highly effective strategy, and the voluntary instrument known as the Extractive Industries Transparency Initiative (EITI) is an excellent example of its success in practice).

35. For more on the debate about corporate moral agency, *see* Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207 (1979) (arguing that a corporation's hierarchy of decision-making and their rules for determining whether a decision is in the interest of the corporation, as opposed to the interest of the individual making the decision, makes a corporation a moral agent); John R. Danley, *Corporate Moral Agency: The Case for Anthropological Bigotry*, *in* ETHICAL ISSUES IN PROFESSIONAL LIFE 269–74 (Joan C. Callahan ed., 1988) (disagreeing that corporations have individual moral agency); Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, 2 BUS. & PROF. ETHICS J. 1 (1983). For more on the theory of corporate personhood and the thesis that the U.S. Supreme Court has granted

These managers may come and go, and may have differing views on the role of the corporation in society. If the corporation does not act on its own, then the "corporation" cannot feel shame. Instead, the corporation's officers and directors, depending on the corporate culture, make decisions that will enhance or detract from the corporation's value in light of the appropriate incentives or penalties. These people are often shielded from liability, to a large extent, due to various legal protections that make individual prosecution difficult, thereby leading to potentially high-risk decision-making. If this is the case, how can legislators best influence those who control the firm?

To answer this question, it is important to understand the social contract theory, which may underlie legislators' current reliance on "name and shame" laws and disclosure rules. Although I believe that corporations have a social contract with society, it is not adequately enforced. Accordingly, legislation based on a premise of enforcement by citizens will fail.

A. The Social Contract[36]

Many are familiar with the concept of the social contract between the government and the governed, as outlined by philosophers Hobbes,[37] Locke,[38] and Rousseau.[39] Businesses also enter into social contracts with the States in which they operate, as well as with the stakeholders around them. Thomas Donaldson and Thomas Dunfee argue that macrosocial contracts are normative, hypothetical contracts among economic participants that establish the "moral

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constitutional rights to further the interests of the people in the corporation, and not the corporation itself, *see* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629 (2011).

36. Although other theories such as distributive justice could apply in the human rights context, this Article will not address them and will focus solely on social contract theory. For more, *see* JOHN RAWLS, *Distributive Justice*, *in* PHILOSOPHY, POLITICS, AND SOCIETY (Peter Laslett & W.G. Runcimann eds., 1967). A number of people question why corporations would enter such contracts at all. *See* Edward J. Conry, *A Critique of Social Contracts for Business*, 5 BUS. ETHICS Q. 187 (1995); Paul F. Hodapp, *Can There Be a Social Contract With Business?*, 9 J. BUS. ETHICS 127 (1990).

37. THOMAS HOBBES, LEVIATHAN (C.B. Macpherson ed., Penguin Classics 1985) (1651).

38. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (Ian Shapiro ed., Yale Univ. Press 2003) (1689).

39. JEAN-JACQUES ROUSSEAU, THE BASIC POLITICAL WRITINGS (Donald A. Cress ed. & trans., Hackett Publishing 1987) (1778).

boundaries for any social contracting."[40] "Moral free space" allows for the possibility that some cultural and economic norms will differ from others, but all must adhere to the traditional human rights values.[41] Paul Neiman categorizes groups of corporate social contracts.[42] In one group, Paul Neiman places those philosophers or ethicists who apply political philosopher Thomas Hobbes' theory of the state of nature to justify why firms sign on to sustainability plans and comply with national laws.[43] Others apply John Rawls' principles of justice to international businesses, arguing that multinationals have a limited duty of assistance toward those in developing economies.[44] Some question why businesses would enter into social contracts at all.[45]

As previously discussed, there is no specific international law or "hard law" that obligates firms to respect or protect human rights. In 1948, the UN issued the Universal Declaration of Human Rights[46] in response to the atrocities of World War II. The thirty articles of the Declaration make it clear that every human being deserves equal respect. Some argue that the Declaration was the basis of a tacit social contract between business and the State, under which the State would protect human rights, and business would generate wealth.[47]

If firms and the State have entered into contracts through the Declaration, I believe that firms have contracted with stakeholders by taking advantage of "soft law." Soft laws are neither legally binding "nor completely void of any legal significance," but can transition into

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40. *See* T. Donaldson & T.W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contract Theory*, 19(2) ACAD. MGMT. REV. 252 (1994); M. Douglas, *Integrative Social Contracts Theory: Hype Over Hypernorms*, 26(2) J. BUS. ETHICS 101 (2000); T. DONALDSON & T.W. DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS (1999); T. DONALDSON, P. WERHANE, & J. VAN ZANDT, ETHICAL ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH (8th ed. 2007).

41. *Id.*

42. Paul Neiman, *A Social Contract for International Business Ethics*, 114 J. BUS. ETHICS 75 (2013).

43. *Id.* (citing E. Palmer, *Multinational Corporations and the Social Contract*, 31(3) J. BUS. ETHICS 245 (2001)).

44. *See, e.g.*, Nien-hê Hsieh, *The Obligations of Transnational Corporations: Rawlsian Justice and the Duty of Assistance*, 14 BUS. ETHICS Q. 643 (2004).

45. *See* Conry, *supra* note 36; Hodapp, *supra* note 36.

46. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

47. Wesley Cragg, *Human Rights and Business Ethics: Fashioning a New Social Contract*, 27 J. BUS. ETHICS 205 (2000).

customary international law. [48] Masahiko Iwamura provides a particularly relevant description for this Article's purposes:

> "Soft law" refers to norms that are not formal laws provided by the state. State enforcement of these norms is not guaranteed, yet people are somehow bound by them in socio-economic society. These norms vary in their form; some are provided by the state (e.g., regulatory guidelines by ministries etc.), some by businesses or the markets themselves (e.g., self-regulation by industry associations or general standards of business ethics and etiquette etc.), and some are established by the international community (e.g., model laws, resolutions or guidelines of international organizations etc.). Contemporary business laws contain many elusively defined soft laws which play an important role, and which have a significant impact on business activities.[49]

The United Nations has long promoted a theory of a social contract between business and society, explaining:

> [T]he intellectual foundation for most evolving views of corporate social responsibility lies largely with the notion of a "social contract" between a corporation and its host society . . . . This social contract incorporates a firm's contractual legal obligations but extends beyond them to include additional expectations or responsibilities that are not (currently) mandatory. The contents of a corporation's social contract can evolve more rapidly than its legal charter, reflecting a society's changing social and cultural mores. When governed parties, such as corporations, are slow to comply with new societal values, those norms may then be formulated into legally-binding mandates. [50]

The United States Department of Labor ("DOL") has integrated the concept of a corporate social contract into the context

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48. *See* MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW, 30, 52–53 (4th ed. 2003).

49. *Soft Law and the State-Market Relationship—Forming a Base for Education and Research of Private Ordering*, THE UNIVERSITY OF TOKYO GLOBAL COE, http://www.u-tokyo.ac.jp/coe/english/list/category4/base12/summary.html (last visited Aug. 2, 2015).

50. United Nations Conference on Trade and Development, Geneva, Switz., Oct. 1999, *The Social Responsibility of Transnational Corporations*, 5, U.N. Doc. A/CONF (Oct. 1999).

of the employer/employee relationship. In a 1999 report for the DOL Office of the Secretary, MIT Professor Thomas Kochan studied three companies and their relationship with their employees.[51] He defined the social contract as:

> [T]he mutual expectations and obligations that employees, employers, and society at large has for work and employment relationships . . . [which arise] from a constellation of factors, including one's career aspirations, occupational norms, education and professional training, macro economic trends and performance, and societal value regarding democracy, freedom of expression and association, equity and fairness, etc.[52]

The private sector has also recognized the concept of a corporate social contract. In 2005, Ian Davis, the managing director of global consulting firm McKinsey & Company, called the "social contract" the "biggest contract"; he decried traditional corporate social responsibility as too "defensive," and Milton Friedman's "the business of business is business" shareholder maximization model as too myopic.[53] As Davis pointed out:

> [M]ore than two centuries ago, Rousseau's social contract helped to seed the idea among political leaders that they must serve the public good, lest their own legitimacy be threatened. The CEOs of today's big corporations should take the opportunity to restate and reinforce their own social contracts in order to help secure, for the long term, the invested billions of their shareholders.[54]

While Smith differentiates between the social contract and corporate social responsibility ("CSR"), Georg Kell, the executive director of the UN Global Compact, and John Ruggie, author of the UNGPs, explicitly link the two, observing, "CSR can be understood as the conditions under which society grants private corporations the

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51. Thomas Kochan, *Rebuilding the Social Contract at Work: Lessons from the Leading Cases*, 51 (Inst. for Work & Emp't Research, Task Force Working Paper No. WP09, 1999).

52. Thomas A. Kochan, *Reconstructing America's Social Contract in Employment: The Role of Policy, Institutions, and Practices*, 75 CHI.-KENT. L. REV. 137, 138 (1999).

53. Ian Davis, *The Biggest Contract: By Building Social Issues Into Strategy, Big Business Can Recast the Debate About Its Role*, THE ECONOMIST (May 26, 2005), http://www.economist.com/node/4008642.

54. *Id.*

right to pursue the maximization of profits. This social contract between a corporation and its host society implies legal requirements or can be understood to include implicit assumptions and expectations."[55]

Firms benefit from the lack of mandatory legal obligations by issuing corporate social responsibility reports, or by participating in the types of voluntary initiatives discussed below.[56] Some firms also take advantage of the lack of State enforcement for various human rights violations, particularly when firms are complicit with, but not directly responsible for, abuses.[57] Furthermore, as I will argue later, key stakeholders, such as consumers and investors, generally fail to enforce breaches of these social contracts, either because they do not care, or because they do not have the right information to judge the firms. In many instances, they do not have the legal recourse to take action. Thus, stakeholders fail to threaten either the legitimacy of the social contract between the TNC and society, or the legitimacy of the TNC itself. This allows some firms to do the minimum necessary to operate in their home or host state.

B. Normative Business Ethics

Given the lack of enforcement of corporate social contracts, the field of normative business ethics, which views the world through ethical frameworks, can provide guidance for firms, regulators, and other stakeholders to judge corporate actions. A lengthy discussion of the different schools of thought is beyond the scope of this Article, although these principles form the basis of the ethical framework for investors that I propose in Part IV.

Briefly, some ethicists subscribe to the teleological schools of thought, such as utilitarianism, and focus on the importance of consequences.[58] Applying this to the business context, a decision

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55. GEORG KELL & JOHN G. RUGGIE, GLOBAL MARKETS AND SOCIAL LEGITIMACY: THE CASE OF THE 'GLOBAL COMPACT" (Oct. 16, 2015), http://www.yorku.ca/drache/talks/pdf/apd_ruggiekellfin.pdf.

56. *See* Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12(1) INT'L J. MGMT. REV. 85, 101–02 (2010).

57. I discuss the concept of complicity in more detail in the text accompanying notes 71–77.

58. Major proponents of utilitarianism include Jeremy Bentham and John Stuart Mill. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Clarendon Press 1879).

concerning business conduct is ethical only if that decision produces the greatest good for the greatest number of individuals.[59] This theory logically leads to a cost-benefit analysis, and could allow for a self-serving definition of "the greatest good" or "the greatest number of individuals." The TNC can determine what is "right" by looking at the consequences. Cynically, this can also allow the TNC to take whatever means are necessary to achieve those ends, including being complicit in controversial behavior to achieve the "greatest good." For example, firms often operate in countries with minimal safety standards or civil liberties, because it is cheaper to operate there, and therefore conceivably "better" for the cost-conscious shareholder. Often, these firms provide the locale's major source of income and pay depressed wages, capitalizing on the fact that the labor laws are unenforced or under-enforced. If the company employs a large number of people, provides cheap goods for consumers, and satisfies shareholders, this may justify the act of joining the "race to the bottom."[60]

Others subscribe to a Kantian point of view, the deontological theory that companies should do the right thing. [61] Value considerations do not come into play because the firm has a duty to do what is inherently right, not to achieve any certain goal or to avoid any consequences. Firms that tout the maxim to "do the right thing because it's the right thing to do" utilize a Kantian perspective

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59. *See The Report From the Graver Committee*, GOVERNMENT OF NORWAY (Nov. 11, 2003), https://www.regjeringen.no/en/dokumenter/Report-on-ethical-guidelines/id420232/ (discussing both theories in the context of Norway's Pension Fund and explaining that "[m]ost people would support a requirement prohibiting complicity in actions that may result in the loss of human lives unless there are strong reasons for such complicity and unless the decision is made on justifiable grounds. The recent debate on the reasons for supporting or opposing the war against Iraq is an illustration of this."). Norway's Fund will be discussed in greater detail in Part IV.

60. For a discussion of governmental responses to address international labor issues related to the race to the bottom or "social dumping," *see* Michael J. Trebilcock, *Trade Policy and Labour Standards: Objectives, Instruments, and Institutions* at 10–11 (Univ. of Toronto, Law and Econ. Research Paper No. 02-01, 2002), http://ssrn.com/abstract=307219.

61. JAMES BRUSSEAU, THE BUSINESS ETHICS WORKSHOP, v. 1.0 682 (2012), http://2012books.lardbucket.org/pdfs/business-ethics.pdf (arguing against theories of corporate social responsibility—including deontological ethics—for, *inter alia*, the following reasons: (1) corporations cannot have ethical responsibilities; (2) corporate executives are only duty-bound to pursue profits; (3) corporations are ill-equipped to directly serve the public good; and (4) social issues should be managed by government, not corporations).

(although of course, they may act differently in practice). From a deontological perspective, some actions would be unethical under any circumstances.

An Aristotelian approach focuses on "virtues" and membership in a larger community.[62] This approach explains the multi-stakeholder initiatives and public-private partnerships that provide hybrid, privatized forms of governance. Three key multi-stakeholder initiatives relevant to human rights include the Voluntary Principles on Security and Human Rights,[63] outlining guidelines for private security forces; the Extractive Industries Transparency Initiative,[64] providing standards for transparency in the extraction of natural resources; and the Kimberley Process,[65] relating to conflict diamonds. All are, in my view, examples of nonbinding, but highly influential, social contracts.[66]

As I will discuss throughout the Article, although I believe that there is a social contract between business and society, it is poorly enforced by stakeholders, at least as it relates to human rights. Before addressing the reasons why, I turn now to the other alternatives for imposing corporate accountability for human rights.

C. The United Nations Approach to Corporate Accountability

In this section, I will outline several UN mechanisms for addressing corporate human rights impacts and their degrees of success. These initiatives include the International Covenant on Civil and Political Rights ("ICCPR"), a proposed 2014 UN Treaty, and the UN Guiding Principles on Business and Human Rights.

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62. *See* Robert C. Solomon, *Corporate Roles, Personal Virtues: An Aristotelian Approach to Business Ethics in Ethical Issues in Business*, 2 BUS. ETHICS Q. 317, 319 (1992).

63. *Voluntary Principles on Security and Human Rights*, VOLUNTARY PRINCIPLES, http://www.voluntaryprinciples.org (last visited Mar. 4, 2015).

64. *What Is the EITI?*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, https://eiti.org (last visited Aug. 2, 2015).

65. THE KIMBERLEY PROCESS, http://www.kimberleyprocess.com (last visited Mar. 4, 2015).

66. *See* Scott Jerbi, *Assessing the Roles of Multistakeholder Initiatives in Advancing the Business and Human Rights Agenda*, 94 INT'L REV. RED CROSS 1027 (2012).

1. The ICCPR

The United States and 166 other countries have ratified the ICCPR, which, among other things, requires State parties to enact legislation, protective measures, and remedies for the guaranteed rights to life and human dignity; freedom from slavery; equality before the law; freedom of speech, assembly, and association; freedom of religion; protections in criminal proceedings and the right to a fair trial; and minority rights.[67] The ICCPR does not bind corporations, but it requires States to protect citizens from violations by the State, as well as by other citizens, including corporations.[68]

At times, though, contrary to the ICCPR, the State and the TNC work together to infringe upon human rights, making it difficult, if not impossible, for injured parties to seek redress in their home state. The United Nations has specific guidelines regarding corporate accountability for complicity. This Article adopts the UN Global Compact definition of complicity: "[a]n act or omission (failure to act) by a company, or individual representing a company, that 'helps' (facilitates, legitimizes, assists, encourages, etc.) another, in some way, to carry out a human rights abuse, and the knowledge by the company that its act or omission could provide such help."[69] Citing the Guiding Principles, the UN Global Compact, discussed in more detail in Part III.A, makes clear that firms have an obligation to respect human rights and conduct appropriate due diligence, even if the legal definition of criminal complicity may not apply.[70]

The UN Global Compact outlines three categories of complicity.[71] Companies are "directly complicit" when they provide

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67. International Covenant on Civil and Political Rights, *supra* note 14.

68. John G. Ruggie, *State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations' Core Human Rights Treaties*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (June 1, 2007), http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-ICCPR-Jun-2007.pdf; *Civil and Political Rights: The Human Rights Committee*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf (last visited Oct. 14, 2015).

69. *The Ten Principles of the UN Global Compact: Principle Two: Human Rights*, UN GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2 (last visited Mar. 4, 2015).

70. *Id.*

71. *Id.*

goods or services that they know will be used to carry out abuse.[72] Companies are guilty of "beneficial complicity" when they do not take any specific actions to carry out abuse but nonetheless benefit from it.[73] Finally, a company that remains silent in the face of "systematic or continuous human rights abuse" is "silently complicit," even though the company may not face legal liability.[74] In 2008, before developing the United Nations Guiding Principles on Business and Human Rights, UN Special Representative John Ruggie acknowledged that,

> [M]ere presence where an abuse occurs, or deriving from the abuse itself, is unlikely to result in legal liability for complicity . . . . From a company perspective, legal liability does not represent the only concern or risk, and companies need guidance that considers more than what law currently can provide—but which the analysis of social norms, or a company's social license to operate, would encompass.[75]

The UNGPs are Ruggie's attempt to provide this guidance.

Many, however, believe that the UNGPs and these unenforceable complicity guidelines are not enough. They argue that it is time to change the current state of affairs in which there are no

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72. *See* Vranica, Mickle, & Robinson, *supra* note 4 (highlighting that although FIFA sponsor Johnson & Johnson was so concerned about the corruption allegations that it tried to insert a "morals" clause into its contract for the 2014 World Cup—language that essentially would let the company pull out of a sponsorship arrangement if FIFA's reputation were badly damaged—FIFA refused to sign the contract with the morals clause, and Johnson & Johnson nonetheless continued to sponsor FIFA, though it decided not to renew its contract after the 2014 World Cup).

73. *Id.*

74. *Id.* Recently, Daewoo Int'l Corp., a South Korean company, has been subject to pressure to stop purchasing cotton from Uzbekistan, which allows the use of forced and child labor. Daewoo defended its involvement by claiming that, although forced labor may be used in the growing and harvesting of cotton, no forced labor is used in the company's processing plants in the country. *See* Jeyup S. Kwaak, *Posco Unit Admits Using Cotton From Forced and Child Labor*, WALL ST. J. (Aug. 13, 2014), http://www.wsj.com/articles/daewoo-faces-criticism-for-use-of-uzbekistan-cotton-made-with-forced-labor-1407918539.

75. *See* Letter from John G. Ruggie, UN Secretary-General's Special Representative for Business and Human Rights, to Carlos Lopez, Legal Officer of International Commission of Jurists in Geneva, Switz. (Sept. 12, 2008), http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-comments-ICJ-complicity-report-12-Sep-2008.pdf.

treaties or international laws specifically requiring corporations to protect, or even respect, human rights.[76]

As discussed previously, the 1999 UN statement about corporate social contracts leaves open the possibility that corporations that are slow to adapt to changing societal norms may face legally binding mandates. For these and other reasons, a renewed effort for a binding treaty to hold corporations accountable is currently underway.[77] As discussed below, though, an international treaty is not likely to pass in the near future. Thus, stakeholders will have to address their grievances through either a patchwork of under-enforced local laws, or whatever level of voluntary commitments TNCs choose to make.

2. The Proposed UN Treaty

At the 24th Session of the Human Rights Council in September 2013, Ecuador introduced a proposal calling for the creation of an open-ended working group to research and elaborate on an international, legally binding treaty governing the actions of multinational corporations with regard to human rights abuses.[78] The Resolution aims to develop a treaty that will provide a valid enforcement mechanism, providing for greater predictability and

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76. *See* Jena Martin, *"The End of the Beginning": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda From a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871 (2012) (noting additionally that (1) it is difficult to hold TNCs accountable in host countries with weak governance systems; (2) international human rights law focuses exclusively on state actors; (3) jurisdictional issues often bar relief in transnational litigation; (4) transnational corporations often have complex structures and subsidiaries that can hide their role in wrongdoing; and (5) corporations will claim to be "bystanders" and merely witnesses but not participants to the human rights abuses perpetrated by the state of the community around them).

77. African Group, Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru, and Ecuador, *Statement on Behalf of a Group of Countries at the 24rd Session of the Human Rights Council* (Sept. 2013), http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf.

78. *Id.*; *see also In Controversial Landmark Resolution, Human Rights Council Takes First Step Toward Treaty on Transnational Corporations' Human Rights Obligations*, INTERNATIONAL JUSTICE RESOURCE CENTER (July 15, 2014), http://www.ijrcenter.org/2014/07/15/in-controversial-landmark-resolution-human-rights-council-takes-first-step-toward-treaty-on-transnational-corporations-human-rights-obligations.

uniform legal standards for all transnational corporations.[79] A group of more than 600 organizations quickly joined to form the Treaty Movement in support of the proposed legislation;[80] however, many well-known organizations have argued against a binding treaty.[81] After significant debate, in June 2014, the UN voted to adopt Ecuador's resolution (co-drafted by South Africa) by a narrow margin,[82] with twenty countries voting for the resolution, fourteen countries voting against, and thirteen countries abstaining.[83] The

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79. Notes of the Workshop and Public Debate at Notre Dame Law School, Business and Human Rights Resource Centre, *Does the World Need a Treaty on Business and Human Rights? Weighing the Pros and Cons* (May 14, 2014), http://business-humanrights.org/sites/default/files/media/documents/note_event_does_the_world_need_a_treaty_on_business_and_human_rights__21-5-14.pdf.

80. *Global Movement for a Binding Treaty*, TREATY ALLIANCE, www.treatymovement.com (last visited Mar. 5, 2015).

81. Among the organizations protesting the proposed treaty are the International Chamber of Commerce. *See ICC Disappointed by Ecuador Initiative Adoption*, INTERNATIONAL CHAMBER OF COMMERCE (June 30, 2014), http://iccwbo.org/News/Articles/2014/ICC-disappointed-by-Ecuador-Initiative-adoption/). For International Organization of Employers, *see Consensus on Business and Human Rights Is Broken with the Adoption of the Ecuador Initiative*, INTERNATIONAL ORGANIZATION OF EMPLOYERS (June 26, 2014), http://www.ioe-emp.org/index.php?id=1238 (finding the adoption of the resolution to be a setback as it "has broken the unanimous consensus on business and human rights" established by the Guiding Principles); *Letter From Human Rights Watch to the UN Human Rights Council Re: Business and Human Rights*, HUMAN RIGHTS WATCH (June 10, 2014), http://www.hrw.org/news/2014/06/10/letter-un-human-rights-council-re-business-and-human-rights (calling for an investigation designed to identify specific protections that need to be put into place at a later date rather than beginning to negotiate a legally binding treaty immediately).

82. *See* Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, U.N. Doc. A/HRC/26/L.22/Rev. 1 (June 24, 2014) [hereinafter *Elaboration of an International Legally Binding Instrument*]; *see also Latest Developments on Business and Human Rights at the UN Human Rights Council*, INSTITUTE FOR HUMAN RIGHTS & BUSINESS, http://www.ihrb.org/pdf/2014-06-UN-HRC.pdf (last visited Oct. 8, 2015) (summarizing the resolution introduced by Ecuador at the 26th Session in June 2014).

83. *Latest Developments on Business and Human Rights at the UN Human Rights Council*, *supra* note 82. The countries voting for the resolution were Algeria, Benin, Burkina Faso, China, Congo, Cote d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, and Vietnam. The countries voting against the resolution were Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, the United Kingdom, and the United States of America. The countries abstaining from the

passed resolution established an intergovernmental working group designed to develop a binding treaty that requires States to bear the primary responsibility for protecting against human rights abuses, including those by TNCs operating in their jurisdictions.[84]

Notably, the proposal targets only TNCs, and would not affect the operations of local companies, which employ the vast majority of people in the affected countries.[85] As an example, in the context of the Bangladesh Rana Plaza collapse, the proposed treaty would affect transnational corporations doing business with the factories housed in the collapsed building, but not the local factory owners.[86]

The vote was a source of controversy, with some governments opposed to the proposal stating that they would not cooperate with the new working group created by this resolution.[87] Those who supported Ecuador's resolution argued that it was designed to address the "dangerous 'governance gap' between the powerful globalising [sic] forces, and the often weak capacity of societies to cope with the problems and damage these forces can create."[88] Additionally, proponents claimed that the current system of non-binding legislation enacted by the Ruggie Principles had not achieved consensus over implementation, and as such, had not had the intended effect on business policies and practices.[89] Many, including Ruggie, viewed these as part of a wider program of changing the normative framework in which to then build further change.

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vote were Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and the United Arab Emirates.

84. *Elaboration of an International Legally Binding Instrument*, *supra* note 82.

85. Arvind Ganesan, *Dispatches: A Treaty to End Corporate Abuses?*, HUMAN RIGHTS WATCH (Jul. 1, 2014), http://www.hrw.org/news/2014/07/01/dispatches-treaty-end-corporate-abuses. Indeed, in the opening remarks of the 2014 UN Forum on Business and Human Rights, the Chair, Mo Ibrahim, pointed out that most people in the world do not work for TNCs and thus more small and medium sized enterprises should have been present and represented at the forum. Mo Ibrahim, Chairperson of the 3rd Forum, Welcome Remarks at the Forum on Business & Human Rights 2014 (Dec. 2, 2014), http://webtv.un.org/watch/welcome-remarks-forum-on-business-and-human-rights-2014/3932050755001.

86. Ganesan, *supra* note 85.

87. *Latest Developments on Business and Human Rights at the UN Human Rights Council*, *supra* note 82.

88. Notes of the Workshop and Public Debate at Notre Dame Law School, *supra* note 79.

89. *Id.*

In contrast, those opposed to Ecuador's proposal claimed that the resolution would create discord, and would undermine the progress being made on the implementation of the UNGPs.[90] Ruggie himself stated that the proposal was overly broad, as it was intended to create a binding legal document to govern all business conduct in relation to any human rights abuse.[91] Despite the overly broad nature of the subject matter governed by the resolution, many opponents were unsatisfied with the narrow reach it proposed.[92]

The opponents of Ecuador's resolution favored, instead, a contrasting proposal from Norway, backed by twenty-two countries, which was adopted the next day.[93] This resolution sought to extend the mandate of the existing UN Working Group on Business and Human Rights for an additional three years, in order to promote domestic remedies, address corporate involvement in finding a solution, and investigate the strengths and weaknesses of a legally binding instrument regulating corporate actions.[94]

In his closing remarks at the Third UN Forum on Business and Human Rights, Ruggie urged States to continue implementing the UNGPs through "a smart mix of [voluntary and involuntary] measures."[95] He spoke hopefully about the progress that had been

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90. Stephen Townley, Member of the Delegation of the United States of America: Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights (June 26, 2014), https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/ ("The focus will turn to the new instrument, and companies, states, and others are unlikely to invest significant time and money in implementing the Guiding Principles if they see divisive discussions here in Geneva.").

91. John G. Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty*, INSTITUTE FOR HUMAN RIGHTS AND BUSINESS (Jul. 8, 2014), http://www.ihrb.org/commentary/board/past-as-prologue.html.

92. *In Controversial Landmark Resolution*, *supra* note 78 (noting that Human Rights Watch stated that "the UN's decision is too narrow since it only focuses on transnational corporations and will not address national or other businesses that should also be required to respect human rights").

93. U.N. Doc. A/HRC/26/L.1 (June 23, 2014).

94. Irene Pietropaoli, *High Tide in Lake Geneva: Business and Human Rights Events at the 26th Session of the UN Human Rights Council*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE (June 27, 2014), http://business-humanrights.org/sites/default/files/media/high_tide_in_lake_geneva.pdf.

95. John G. Ruggie, Former UN Special Representative for Business & Human Rights, Closing Plenary Remarks at the Third United Nations Forum on

made in the three years since the adoption of the Guiding Principles, stating that they "are becoming embedded in the regulatory ecosystem for business and human rights . . . expand[ing] from the international to the national and local spheres."[96] Finally, Ruggie specified three key characteristics that he believes to be necessary to any attempt to create binding legislation: (1) the treaty must account for diversity in cultural and economic systems of the home countries for transnational corporations; (2) the treaty should encompass all businesses, not only transnational corporations; and (3) the treaty should, instead of creating a broad, abstract prohibition against all abuses, be targeted to address those gaps that the Guiding Principles are unable to address.[97]

It may be no coincidence that the States that tended to vote in favor of Ecuador's proposal had largely failed to implement the Guiding Principles by June 2014.[98] Cynics might suggest that these States may support the treaty as an attempt to distract the world from the Guiding Principles and slow the progress that Ruggie has achieved. The UNGPs and other voluntary mechanisms, which I consider social contracts, are discussed in more detail below.

3. The UN Guiding Principles on Business and Human Rights[99]

The fate of the proposed treaty is uncertain, but many do not hold much hope for its passage.[100] Accordingly, while not abandoning the debate, many stakeholders have focused more on the UNGPs, which, as discussed earlier, have three pillars—the State duty to

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Business & Human Rights (Dec. 3, 2014), http://business-humanrights.org/sites/default/files/documents/ruggie-un-forum-dec-2014.pdf.

96. *Id.*

97. *Id.*

98. John G. Ruggie, *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*, INSTITUTE FOR HUMAN RIGHTS AND BUSINESS (Sept. 4, 2014), http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.

99. *See* Marcia Narine, *Whistleblowers and Rogues: An Urgent Call for an Affirmative Defense to Corporate Criminal Liability*, 62 CATH. U. L. REV. 41 (2012) (discussing the history of attempts to implement binding legislation on companies and the precursors to the Guiding Principles).

100. *In Controversial Landmark Resolution*, supra note 78 (highlighting that Guiding Principles author John Ruggie fears that advocates and opponents of a business and human rights treaty may be "on a collision course.").

protect human rights, the corporate duty to respect human rights, and the joint duty to provide access to remedies for grievances.[101]

The UNGPs do not bind businesses, but instead discuss specific human rights due diligence processes and obligations, and a number of firms have modeled their human rights policies on them.[102] In sum, the UNGPs require firms to commit to a policy of respecting human rights. Firms must conduct due diligence to identify, prevent, and mitigate their human rights impact, and must report on those efforts to affected stakeholders.[103] Firms must also implement appropriate remediation procedures to address adverse human rights impacts that they cause.[104] The thirty-one UNGPs recommend that business enterprises, regardless of size, conduct due diligence throughout their supply chains, looking for actual and potential human rights impacts; integrate and act upon the findings; track responses; and then publicly communicate how the firm has addressed the impacts.[105] They also recommend that companies mitigate risks and provide remedies for the impacts they cause, or those to which they contribute.[106] UNGP 12 explains that the theory

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101. *Id.* (noting that John Ruggie stressed that a treaty on corporate human rights liability could take years to emerge, and that "business and human rights is not so discrete an issue-area as to lend itself to a single set of detailed treaty obligations").

102. *See* Michael Kourbas, *Adidas Creates Human Rights Complaint Process*, TRIPLE PUNDIT (Nov. 6, 2014), http://www.triplepundit.com/2014/11/adidas-announces-human-rights-complaint-process; *Microsoft on the Issues: Commemorating International Human Rights Day*, MICROSOFT CORPORATE BLOGS (Dec. 10, 2014), http://blogs.microsoft.com/on-the-issues/2014/12/10/commemorating-international-human-rights-day; *Corporate Citizenship*, MICROSOFT, http://www.microsoft.com/about/corporatecitizenship/en-us/working-responsibly/principled-business-practices/human-rights (last visited Mar. 5, 2015); *see also Evidence of Corporate Disclosure Relevant to the U.N. Guiding Principles on Business and Human Rights*, SHIFT (June 2014), http://www.shiftproject.org/publication/evidence-corporate-disclosure-relevant-un-guiding-principles-business-and-human-rights-0 (discussing a 2014 study on how forty-three companies have integrated the UNGPs into their operations and disclosures).

103. *See* Guiding Principles, *supra* note 15, ¶ 17.

104. *Id.* ¶ 18.

105. *Id.* ¶¶ 17–21. For a detailed discussion of the development of the UNGPs, as well as some criticisms, *see* Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 69 (2012).

106. *See* Backer, *supra* note 105 (summarizing UNGP 22).

of corporate responsibility respecting human rights stems from the principles of the Universal Declaration of Human Rights;[107] the International Conventions on Economic, Social and Cultural Rights, and Civil and Political Rights;[108] and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.[109] A number of the principles are similar to what firms have already committed to through their corporate social responsibility programs or other voluntary industry or multi-stakeholder initiatives, which will be discussed in Part III of this Article.

To comply with the first pillar, the States must develop National Action Plans ("NAPs") as part of their responsibility to implement and disseminate the UNGPs. These NAPs are the mechanism for States to "recognize the normative validity of the Guiding Principles."[110] As of the time of this writing, only a few countries—Denmark,[111] Finland,[112] Italy,[113] the Netherlands,[114] the

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107. Guiding Principles, *supra* note 15, ¶ 12. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

108. International Covenant on Civil and Political Rights, *supra* note 14.

109. *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm (last visited Mar. 5, 2015).

110. Damiano de Felice & Andreas Graf, *The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment With Respect to the UN Guiding Principles on Business and Human Rights*, 7 J. HUM. RTS. PRAC. 40, 43–44 (2015) (noting "significant gaps between commitment and compliance" for human rights initiatives by states and recommending that NAPs be drafted using the following criteria: "(1) be based on a comprehensive baseline study/gap analysis; (2) include all relevant state agencies; (3) allow effective multi-stakeholder participation; and (4) envisage continuity, in particular through monitoring of implementation," and in terms of content, "NAPs should: (5) express firm commitment to implement the UN documents; (6) conform as much as possible to the structure and substance of the UN Guiding Principles; (7) offer unambiguous commitments and (8) envisage capacity-building").

111. THE DANISH GOVERNMENT, DANISH NATIONAL ACTION PLAN—IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (Mar. 2014), http://ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf (citing the Rana Plaza disaster and noting that firms needed to add social responsibility to their business plans and consumers needed to consider social responsibility when making purchasing decisions).

112. MINISTRY OF EMPLOYMENT & THE ECONOMY OF COMPETITIVENESS, NATIONAL ACTION PLAN FOR THE IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2014), http://www.tem.fi/files/41214/TEMjul_46_2014_web_EN_21102014.pdf (indicating that "key aims for the

UK,[115] and Spain[116]—had completed NAPs, while almost twenty, including the United States, had announced plans to begin the consultation and drafting process.[117] It is no surprise that the countries that have completed their plans come from the EU, given the EU's prioritization of business and human rights issues.[118]

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action plan are the legislative report, definition of the due diligence obligation, and the application of social criteria in procurement.").

113. *The Foundations of the Italian Action Plan on the United Nations "Guiding Principles on Business and Human Rights,"* BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, http://business-humanrights.org/sites/default/files/media/documents/foundations-ungps-nap-italy.pdf (focusing on the first and third pillars, the State duty and the joint duty to provide access to remedy, and discussing use of foreign direct investment and export credits to facilitate improvements in human rights).

114. MINISTRY OF FOREIGN AFFAIRS, NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS (2014), http://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf (discussing the sustainable procurement policy implemented in 2013; the need for domestic and international policy coherence; incorporating the UNGPs and OECD Guidelines for Multinational Enterprises into trade and investment agreements; clarifying the meaning of due diligence, including for the government itself in its own practices; promoting greater company awareness of the UNGPs; and examining existing and proposed transparency and reporting requirements).

115. HM GOVERNMENT, GOOD BUSINESS, IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2013), http://business-humanrights.org/sites/default/files/media/documents/foundations-ungps-nap-italy.pdf (observing that the "Government supports the approach set out in the UNGPs, and is determined to help companies implement it. This should be at the heart of a company's core operations; it is not the same as philanthropy or social investment. The responsibility of businesses to respect human rights exists independently of States' abilities and/or willingness to fulfil their own human rights obligations.").

116. GOBIERNO DE ESPAÑA, PLAN DE EMPRESA Y DERECHOS HUMANOS (2014), http://business-humanrights.org/sites/default/files/documents/pnedh-borrador-julio-2014.pdf.

117. Christopher Smart, *Announcement of Opportunity to Provide Input into the U.S. National Action Plan on Responsible Business Conduct*, WHITEHOUSE.GOV (Nov. 20, 2014), http://www.whitehouse.gov/blog/2014/11/20/announcement-opportunity-provide-input-us-national-action-plan-responsible-business; *USG National Action Plan on Responsible Business Conduct*, HUMANRIGHTS.GOV (Feb. 12, 2015), http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/.

118. COUNCIL OF THE EUROPEAN UNION, EU STRATEGIC FRAMEWORK AND ACTION PLAN ON HUMAN RIGHTS AND DEMOCRACY 3, (2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (stating that the "EU will encourage and contribute to implementation of the UN Guiding Principles on Business and Human Rights").

The key question, then, is how the governments in their National Action Plans will compel or incentivize companies to prioritize human rights. Assuming that firms have established social contracts with the State and with stakeholders, how will stakeholders know that the firm has violated the contract? Which stakeholders enforce these contracts and how, particularly when firms are complicit in human rights abuses perpetrated by States?

Many lawmakers, reluctant to pass strict national or international human rights laws, have assumed that disclosure can play a critical role, and that the marketplace will legislate. This, I believe, is a mistake. Unless there are significant legal or market-based penalties (and there are none so far), States will abrogate their duties to protect human rights from abuses perpetrated by non-state actors. I discuss some of these disclosures in Part III below.

III. THE ERA OF DISCLOSURE

In 1913, future Supreme Court Justice Louis Brandeis coined one of his most famous sayings: "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants . . . ."[119] Writing about the money trusts of the early twentieth century, Brandeis argued for disclosure of bankers' commissions or profits when they issued securities. But he also warned that the disclosure should be "real," "obligatory," and to the actual investor, because filing with a regulator, or allowing investors to waive the disclosures, would be ineffective.[120]

One hundred years later, legislators and regulators around the world are grappling with the same issues of disclosure and transparency. Notably, when the UN first attempted to gather information about the rate of progress related to the UNGPs in 2013, only twenty-six of the 193 member States responded.[121] At that time, sixteen States "encouraged" businesses to report on human rights. Ten of the sixteen mandated these reports, five made them voluntary, and one had a hybrid of mandatory and voluntary requirements.[122] A

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119. *Justice Louis D. Brandeis*, BRANDEIS UNIVERSITY, http://www.brandeis.edu/legacyfund/bio.html (last visited Aug. 4, 2015).

120. *Id.*

121. Human Rights Council, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/23/32/Add.2 (Apr. 16, 2013).

122. *Id.* ¶ 9.

new initiative by the Business and Human Rights Resource Centre, announced in February 2015, will monitor both companies' and countries' progress on reducing negative human rights impacts.[123] Interestingly, a higher percentage of companies (fifty-two percent) than countries (forty percent) responded to the initial disclosure inquiries.

The following section will examine the issue of disclosure more closely.[124]

A. Voluntary Disclosure Initiatives

By now, consumers are used to the term "corporate social responsibility," and expect most large TNCs, and even smaller firms, to have some commitment, if not a full-fledged program, devoted to it. Some of the corporate social responsibility initiatives discussed below also constitute social contracts.

A number of binding and non-binding regimes have been inspired largely, but not solely, by the Guiding Principles. For example, many firms produce corporate social responsibility reports[125] using the Global Reporting Initiative ("GRI") sustainability framework to report on environmental, social, and governance factors. GRI, a non-profit which partners with the UN Global Compact and the Organisation for Economic Co-operation and Development ("OECD"), cites to the Ruggie Principles. GRI requires companies to examine their operational governance, human rights, labor, environmental factors, fair operating practices, consumer issues, community involvement, and development.[126] As of 2013, more than 4,000 organizations had released a GRI report or a GRI-

123. *See Launch: Corporate & Government Action on Human Rights Revealed*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, http://business-humanrights.org/en/launch-corporate-government-action-on-human-rights-revealed (last visited Mar. 5, 2015).

124. *Id.*

125. Some firms call their reports "sustainability reports," which are often synonymous with corporate social responsibility, ESG ("environmental, social and governance"), or non-financial reports. *See* Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting: Evidence from Four Countries* 2 (Harv. Bus. Sch., Working Paper No. 11-100, 2014), http://www.hbs.edu/faculty/Publication%20Files/11-100_7f383b79-8dad-462d-90df-324e298acb49.pdf.

126. *What Is GRI?*, GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx (last visited Mar. 4, 2015).

referenced report.[127] Nonetheless, GRI acknowledges that fewer than ten percent of the world's 45,000 publicly-traded companies publicly disclose information about environmental, social, and governance factors.[128] In 2013, GRI introduced the G4 version of its framework, which requires the consideration of "materiality" (as defined in securities law) in reporting for the first time in GRI reports.[129]

The OECD Guidelines for Multinational Enterprises (the "Guidelines") are voluntary, government-backed principles for responsible business conduct in labor, environment, information disclosure, bribery, consumer interests, technology, competition, and taxation, for participants operating in or from adhering countries.[130] The Guidelines require risk-based due diligence within the supply chain.[131] In 2011, the OECD amended the Guidelines to adopt the UNGPs, and added a human rights section.[132]

The UN Global Compact, another voluntary disclosure regime, originated in January 1999, when UN Secretary-General Kofi Annan asked business leaders to "initiate a global compact of shared values and principles, which will give a human face to the global

127. ERNST & YOUNG & THE BOSTON COLLEGE CENTER FOR CORPORATE CITIZENSHIP, VALUE OF SUSTAINABILITY REPORTING 18 (2014), http://ey.com/Publication/vwLUAssets/EY_-_Value_of_sustainability_reporting/$FILE/EY-Value-of-Sustainability-Reporting.pdf.

128. GLOBAL REPORTING INITIATIVE, ANNUAL ACTIVITY REVIEW 2012/13 FROM INFORMATION TO TRANSFORMATION: THE NEXT STEP IN SUSTAINABILITY REPORTING 26, https://www.globalreporting.org/resourcelibrary/GRI-Activity-Report-2012-13.pdf.

129. *G4 Development Process*, GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/standards/g4/g4-developments/Pages/default.aspx (last visited Mar. 5, 2015). Under the current public company reporting regime in the United States, information is "material" if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of the information made available." TSC Indus. v. Northway Inc., 426 U.S. 438, 449 (1976).

130. *See About the OECD Guidelines for Multinational Enterprises*, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, http://mneguidelines.oecd.org/about/ (last visited Feb. 1, 2015). The OECD has thirty-four member countries, including the United States, and works to promote policies to improve the economic and social well being of people around the world, including citizens of nonmember States. *Id.*

131. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011 EDITION (2011), http://www.oecd.org/corporate/mne/48004323.pdf.

132. *Id.*

market."[133] The Global Compact asks companies to commit to ten principles related to human rights, labor, the environment, and anti-corruption.[134] As of June 2014, the Global Compact had 8,000 business participants from 145 countries around the world.[135] Compact members must issue an annual Communication on Progress, disclosing how they have implemented the principles and their support for other UN development goals.[136] Despite the disclosure, many NGOs accuse Global Compact companies of "bluewashing" to appear as though they had the UN's imprimatur for their CSR programs.[137] Moreover, although critics complain that there are no independent monitoring requirements,[138] hundreds of members are expelled each year for failing to complete their reports.[139]

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133. Press Release, Secretary-General, *Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos*, U.N. Doc. SG/SM/6881 (Feb. 1, 1999), http://www.un.org/press/en/1999/19990201.sgsm6881.html (last visited Mar. 4, 2015).

134. *See* UN Secretary-General, *Rep. of the Secretary-General on the Work of the Organization*, ¶ 46, U.N. Doc. A/61/1 (Aug. 16, 2006); *see also Overview of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, http://unglobalcompact.org/AboutTheGC/index.html (last visited Feb. 12, 2015).

135. UNITED NATIONS GLOBAL COMPACT, *UN Global Compact Participants*, http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html (last visited Feb. 12, 2015).

136. *UN Global Compact Expels 285 Companies in First Half of 2014*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/news/1151-07-14-2014 (last visited Aug. 11, 2014).

137. *See* Daniel Berliner & Aseem Prakash, *From Norms to Programs: The United Nations Global Compact and Global Governance*, REGULATION & GOVERNANCE (2012), http://faculty.washington.edu/aseem/gc.pdf (noting that "[v]oluntary programs which do not impose real obligations on firms or do not back them with sufficient monitoring—bluewashing or astroturfs—have a greater chance of failure"). For the origins of the term "bluewashing," see Kenny Bruno & Joshua Karliner, *Tangled Up in Blue, Corporate Partnerships at the United Nations*, CORPWATCH.ORG (Sept. 1, 2000), http://s3.amazonaws.com/corpwatch.org/downloads/tangled.pdf.

138. *See* Berliner & Prakash, *supra* note 137, at 36 (observing that the Compact represents "excessive compromise" and requires only "beyond marginal compliance").

139. *UN Global Compact Expels 657 Companies in 2014*, UNITED NATIONS GLOBAL COMPACT (Jan. 14, 2015), https://www.unglobalcompact.org/news/1621-01-14-2015. Georg Kell, Executive Director of the UN Global Compact, has stated that only fifteen percent of the Global 1000 participating in the program are likely "sincere" or "serious" about sustainability. Stephen J. Dubner, *Is Good Corporate Citizenship Also Good for the Bottom Line?*, FREAKONOMICS (Apr. 19, 2012),

B. Legally Required Disclosure in the United States

TNCs based in the United States must comply (when applicable) with at least four legally required disclosures related to human rights: Dodd-Frank § 1502 (conflict minerals) [140]; the California Transparency in Supply Chains Act[141]; a number of rules that apply to federal contractors, discussed in the footnote below[142]; and the Burma Responsible Investment Reporting Requirements.[143]

1. Conflict Minerals: Dodd-Frank § 1502

Under Dodd-Frank § 1502, known as the conflict-minerals provision, all companies, regardless of size, that file reports with the Securities and Exchange Commission ("SEC") under Sections 13(a) or 15(d) of the Exchange Act[144] must conduct due diligence and report the origin of minerals in their products from the Democratic Republic of Congo or adjoining countries.[145] The law's drafters wanted to

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http://www.freakonomics.com/2012/04/19/is-good-corporate-citizenship-also-good-for-the-bottom-line/.

140. Dodd-Frank Wall Street Reform And Consumer Protection Act, 12 U.S.C. § 5301 (2010).

141. California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (2012).

142. The Federal Acquisition Regulations requires prospective contractors and subcontractors to certify that they are not engaging in a variety of human trafficking activities in supplying end products, and it requires changes in contractual clauses and compliance programs as well as cooperation with audits and investigations. *See* Exec. Order No. 13627, 77 Fed. Reg. 60029 (Sept. 25, 2012) *in effect* March 2, 2015, https://whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe.
Executive Order 13126 has prohibited the use of products made with the use of forced or child labor since 1999. Exec. Order 1999 No. 13126, "Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor" (June 12, 1999), http://www.gpo.gov/fdsys/pkg/FR-1999-06-16/pdf/99-15491.pdf. The Defense Department already requires some assessment of measures to preempt or prevent human rights issues for security contractors. *See* DFAR 252.225-7039.

143. *Fact Sheet: Burma Responsible Investment Reporting Requirements*, HUMANRIGHTS.GOV (June 19, 2013), http://www.humanrights.gov/fact-sheet-burma-responsible-investment-reporting-requirements.html [hereinafter Burma Fact Sheet].

144. *See* Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(a), 78o-6(a) (2012).

145. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502(e)(1). The term "adjoining country" is defined as a country that shares an internationally recognized border with the DRC, which presently includes Angola,

ensure that TNCs do not source tin, tantalum, tungsten, or gold ("3TG") from mines controlled by rebels who commit rape and torture, use child soldiers, and exploit child labor—activities which, among others, have led to a human rights crisis affecting millions of Congolese.[146] The minerals are exceedingly common in everyday use—cell phones, computers, surgical implants, cameras, diapers, wind turbines, coatings for food cans, solders, catalysts, stabilizers, light bulbs, aerospace components, machine tools, electronic conductors, jewelry, medical equipment, and anti-lock brakes all have the potential to contain "conflict minerals."[147]

Congo has been called the "rape capital of the world," and many public campaigns have used that rhetoric to convince consumers and investors to scrutinize companies that NGOs believe have not adequately cleaned up their supply chains.[148] The law does not prohibit the use of conflict minerals, but instead requires certain companies to: obtain an independent private sector third-party audit of its report of the facilities used to process the conflict minerals; conduct a reasonable country of origin inquiry; and describe the steps the company used to mitigate the risk, in order to improve its due diligence process.[149] A portion of the law requiring companies to disclose whether their products are "DRC-conflict free" was ruled unconstitutional by a federal appeals court on August 18, 2015, on

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Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia. *See id.*

146. For a detailed description of the history of the Congo and the Congolese wars, *see* JASON K. STEARNS, DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA (reprint ed., Public Affairs 2011).

147. *See* Conflict Minerals, Exchange Act Release No. 34-67716, at 39, 77 Fed. Reg. 56,274, 56,365 (Sept. 12, 2012) (to be codified at 17 C.F.R. 240, 249(b)), http://www.sec.gov/rules/final/2012/34-67716.pdf; Supplier Responsibility, APPLE, http://www.apple.com/supplierresponsibility/pdf/Apple_SR_2012_Progress_Report.pdf (last visited Mar. 5, 2015); Brief of Experts on the Democratic Republic of the Congo as Amici Curiae Supporting Petitioners Nat'l Ass'n of Mfrs., et al., v. S.E.C., No. 13-5252 (Jan 23, 2013).

148. *See, e.g.*, *UN Official Calls DR Congo 'Rape Capital of the World'*, BBC (Apr. 28, 2010), http://news.bbc.co.uk/2/hi/africa/8650112.stm (quoting Margot Wallström, Special Representative of the Secretary-General on Sexual Violence in Conflict). For an example of a publicity campaign, *see* John Prendergast, *Can You Hear Congo Now? Cell Phones, Conflict Minerals, and the Worst Sexual Violence in the World*, ENOUGHPROJECT (Apr. 1, 2009), http://www.enoughproject.org/publications/can-you-hear-congo-now-cell-phones-conflict-minerals-and-worst-sexual-violence-world.

149. 15 U.S.C. § 78m(p).

First Amendment constitutional grounds.[150] This effectively gutted the "name and shame" portion of the law. The law remains intact until the decision becomes final, however.[151] Firms face liability for making false or misleading statements under Section 18 of the Exchange Act because these reports are filed with the SEC.[152] Although early reports estimated that the law would affect over 6,000 firms[153] as of the deadline for 2014, in the first year, only 1,315 companies had filed reports.[154] For the 2015 filings reflecting the 2014 season, slightly fewer companies filed reports, but early indications reveal that they are somewhat more detailed than the filings for 2013.[155]

I, along with others, have criticized the law for oversimplifying the deadly crisis in Congo, and reducing it to easily-digestible sound bites about rebels, rape, and cell phones.[156] While

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150. Nat'l Ass'n of Mfrs. v. S.E.C., No. 13-5252, 2015 WL 5089667 (D.C. Cir. Aug. 18, 2015).

151. *See, e.g.*, Keith F. Higgins, Director, SEC Division of Corporation Finance, Public Statement, Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule (Apr. 29, 2014), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994.

152. *Id.*

153. *See* KPMG, CONFLICT MINERALS AND BEYOND: PART TWO: A MORE TRANSPARENT SUPPLY CHAIN 1 (2012), http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/conflict-minerals/Documents/conflict-minerals-beyond-part-two.pdf. Companies that are not affected either meet the exemptions or do not come under the law's requirements. However, because the law did not allow for a *de minimis* exception for some of the metals, many companies are affected.

154. EY CENTER FOR BOARD MATTERS, LET'S TALK: GOVERNANCE: FIRST YEAR CONFLICT MINERAL REPORTING REVEALS INSIGHTS AND SURPRISES 2 (2014), http://www.ey.com/Publication/vwLUAssets/EY-lets-talk-governance-june-2014/$FILE/EY-lets-talk-governance-june-2014.pdf. Many filers claimed that they could not adequately trace their supply chains in part because their suppliers did not respond to survey requests. *See, e.g.*, *Conflict Minerals Report (Form SD)*, APPLE INC. (May 29, 2014), http://investor.apple.com/secfiling.cfm?filingid=1193125-14-217311&cik= (asserting continuing efforts to push suppliers to provide information).

155. Cydney Posner, *This Year's Conflict Minerals Findings Show Some Improvement, According To Early Review*, PUBCO @ COOLEY (June 20, 2015), http://cooleypubco.com/2015/06/20/this-years-conflict-minerals-filings-shows-some-improvement-according-to-early-review.

156. *See* 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 REGENT U. L. REV. 351 (2013); Brief of *Amicus Curiae* Experts on the Democratic Republic of the Congo in

some have labeled the disclosure law a success, others have claimed that it has done little to stem the violence in Congo and has in fact hurt exports in other countries.[157] Scholar Jeff Schwartz remains hopeful that, with amendments, the law can be effective, but, based on his empirical study of the first set of filings, observed:

> Naming and shaming requires that activist consumers and shareholders be able to distinguish between good actors and bad, so that they can take action against the latter. But the information in the reports does not provide sufficient information to get such campaigns off the ground. The filings lack the type of specifics that could inspire investors to reallocate their money or consumers to reassess their purchasing habits. Almost every company fell into the category of having a reason to believe they were sourcing from a country in the Congo region, but being unable to tell whether their minerals were really from there, or despite being from there, were actually conflict free. Disclosures such as these provide paltry basis for change.[158]

Given that the proponents of the legislation had hoped that naming and shaming through transparency would lead investors and consumers to take action against noncompliant companies,[159] this law does not appear, at present, to have had the desired effect. The law, which may serve as a model for others, is a poor example of the use of disclosure legislation. Although some large companies, such as Apple

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Support of Petitioners, Nat'l Ass'n of Mfrs. v. S.E.C. (D.C. Cir. 2014), No. 13-5252; Séverine Autesserre, *Dangerous Tales: Dominant Narratives on the Congo and Their Unintended Consequences*, 111 AFRICAN TALES 202, 212–13 (2012).

157. *Compare* Fidel Bafilemba, et al., *The Impact of Dodd-Frank and Conflict Minerals Reforms on Eastern Congo's Conflict*, THE ENOUGH PROJECT (June 10, 2014), http://www.enoughproject.org/reports/impact-dodd-frank-and-conflict-minerals-reforms-eastern-congo%E2%80%99s-war (claiming that the law has made mining many minerals less economically viable for armed groups), *with* Sarah von Billerbeck, *Is the News about Congo's Conflict Minerals Good?*, WASH. POST (June 18, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/06/18/is-the-news-about-congos-conflict-minerals-good (arguing armed groups have simply found ways around the law).

158. Jeff Schwartz, *The Conflict Minerals Experiment*, 6 HARV. BUS. L. REV. (forthcoming 2015) (manuscript at 32).

159. David Sullivan, *A Step Forward on Conflict Minerals via Financial Reform*, THE ENOUGH PROJECT (May 20, 2010), http://www.enoughproject.org/blogs/step-forward-conflict-minerals-financial-reform.

and Intel, have made commendable strides in tracing minerals,[160] for most companies, it is expensive and onerous, and has done nothing to stop sexual and gender-based violence and mass killings.

2. California Transparency in Supply Chains Act

In 2010, the California legislature passed the California Transparency in Supply Chains Act ("CTSCA" or the "Act"), designed to end the practices of human trafficking and forced labor.[161] The law does not prohibit the sale of goods produced through the use of forced labor, but rather attempts to change company practices through public disclosures, designed to promote socially conscious consumer purchasing decisions. [162] The CTSCA requires retailers and manufacturers earning over $100 million in worldwide receipts, and doing business in the State of California (as defined by California tax rules), to disclose efforts to ensure their supply chains are free from slavery and human trafficking. [163] These disclosures must be presented in an easily-identified and prominent link on their website. [164] Approximately 3,200 companies are subject to these disclosure regulations.[165]

The CTSCA requires corporations to include the following information in their disclosures: verification of supply chains to evaluate risks of human trafficking; audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery; certification from direct suppliers that materials in the product comply with anti-slavery and anti-trafficking laws;

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160. Daisuke Wakabayashi, *Apple Claims Progress on Conflict Minerals*, WALL ST. J. (Feb. 11, 2015), http://blogs.wsj.com/digits/2015/02/11/apple-claims-progress-on-conflict-minerals/ (detailing Apple's progress in eliminating conflict mining from its supply chain); Lynnley Browning, *Where Apple Gets the Tantalum for Your iPhone*, NEWSWEEK (Feb. 4, 2015), http://www.newsweek.com/2015/02/13/where-apple-gets-tantalum-your-iphone-304351.html (describing how Apple went beyond the legal minimum reporting requirements); Hayes Brown, *Intel Announces First 'Conflict-Free' Microprocessor*, THINK PROGRESS (Jan. 7, 2014), http://thinkprogress.org/security/2014/01/07/3126271/intel-announces-launch-conflict-free-microprocessors/.

161. CAL. CIV. CODE § 1714.43 (West 2012).

162. Alexandra Prokopets, Note, *Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010*, 37 HASTINGS INT'L & COMP. L. REV. 351, 354–55 (2014).

163. CAL. CIV. CODE § 1714.43(a)(1) (West 2014).

164. *Id.* at § 1714.43(b).

165. John Pickles & Shengjun Zhu, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT 3 (Capturing the Gains, Working Paper No. 2013/15, 2013).

maintenance of internal standards and policies for employees or contractors who fail to meet company standards; and training on trafficking and slavery for employees and management. [166] Specifically, companies must outline their "efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale."[167]

Early disclosures indicated that the CTSCA may have limited success in promoting changes in corporate behavior, although some stakeholders are tracking them.[168] The Act initially had two main problems. First, it did not specify any uniform standards for disclosure. [169] Critics contended that the information may be presented in a manner that is unintelligible to the average consumer, does not impact their daily lives, and is often misleading. [170] Companies' disclosures vary widely in the usefulness and specificity of the information disclosed. Many companies have complied, posting statements detailing the efforts they are making to investigate and end the use of human trafficking within their supply chains. [171] Others, however, have complied with the Act by disclosing their intent not to take any action to end the abuse within their organization.[172] These disclosures are in full compliance with the

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166. CAL. CIV. CODE § 1714.43(c) (2014).

167. CAL. CIV. CODE § 1714.43(a)(1) (2014).

168. *See SB 657 Disclosure Search*, KNOW THE CHAIN, https://www.knowthechain.org/sb657-search/ (last visited Oct. 9, 2015); Terry Fitzpatrick, *Slavery in Your Shopping Cart? New Website Helps You Know!*, FREE THE SLAVES BLOG (Oct. 21, 2013), http://freetheslaves.net/slavery-in-your-shopping-cart-new-website-helps-you-know/.

169. Prokopets, *supra* note 162, at 363.

170. Sophia Eckert, Note, *The Business Transparency on Trafficking and Slavery Act: Fighting Forced Labor in Complex Global Supply Chains*, 12 J. INT'L BUS. & L. 383, 399–400 (2013).

171. *See, e.g.*, *Supplier Responsibility*, APPLE INC., http://www.apple.com/supplier-responsibility/ (last visited May 25, 2014) (including a full progress report and detailed information about suppliers' requirements and workers' rights); *California Transparency in Supply Chains Act*, BAYER CORPORATION, http://www.bayerus.com/disclosure.aspx (last visited May 25, 2014) (detailing two initiatives implemented to improve supply chain standards and corporate sustainability as well as various other actions).

172. *10 Firms Decline to Take Action on Trafficking Risks Under California Transparency in Supply Chains Act*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, http://business-humanrights.org/en/10-firms-decline-to-take-action-on-trafficking-risks-under-california-transparency-in-supply-chains-act (last visited Aug. 5, 2015) (identifying the following ten firms as declining to take any affirmative steps: Caterpillar, Commercial Metals, Danaher Corp., Hyundai

standards set out in the CTSCA and are therefore legally acceptable, but in my view, still constitute a violation of the social contract between the corporation and society.

Second, the Act fails to incorporate an effective enforcement mechanism. The only method of enforcing the provision is through an injunctive action brought by the Attorney General, although a putative class action was filed in August 2015, based in part on a corporation's representations on its website.[173] Perhaps in response to these criticisms, the Attorney General, Kamala D. Harris, published a resource guide for compliance with model disclosure language in 2015,[174] and in April 2015, began sending letters to companies, asking them to prove compliance or explain why they believe that they are not subject to the law.[175] As of the time of this writing, research has not revealed whether any government enforcement actions have resulted from the April 2015 letters. Further, as I will discuss in Part IV, these disclosures may not have the effect on either consumers or companies that the state legislature intended.

Motor America, IDEX Corp., Johnson Matthey, Krispy Kreme Doughnuts, Manufactured Packaging Products, Overhill Farms, and Valero Energy).

173. CAL. CIV. CODE § 1714.43(d) (2014). Monica Sud, a California woman, filed suit against Costco Wholesale Corp. (also named as defendants are CP Food Products Inc., the U.S. distributor of the prawns, and Charoen Pokphand Foods PCL, the company's Thailand-based parent company) for its purchase and sale of Thailand's farmed prawns. Her complaint alleges the prawns are caught by forced, unpaid labor. Citing the CTSCA and state laws that bar companies from making false claims as to illegal conduct in their supply chain, the lawsuit seeks an injunction barring Costco from selling products that have been produced with slave labor and requiring it to disclose any such products. In July, the U.S. State Department's annual report (examining human trafficking in 188 countries) expressed concern about Thailand's fishing industry. *See* Erik Larson, *Costco Sued Over Claims Shrimp Harvested With Slave Labor*, BLOOMBERG (Aug. 19, 2015), http://www.bloomberg.com/news/articles/2015-08-19/costco-sued-over-claims-shrimp-is-harvested-with-slave-labor; Complaint, Sud v. Costco Wholesale Corp., No. 3:15-cv-03783 (N.D. Cal. Aug. 19, 2015).

174. CAL. DEP'T OF JUSTICE, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT, A RESOURCE GUIDE (2015), https://s3.amazonaws.com/knowthechain/resources/resource-guide.pdf.

175. *Attorney General Issues Guide for Complying With Transparency in Supply Chains Act*, CALCHAMBER ADVOCACY, http://calchamber.com/governmentrelations/businessissues/pages/california-transparency-in-supply-chains-act.aspx (last visited Aug. 4, 2015).

3. The Responsible Investment in Burma Act

Under federal law, companies with over $500,000 in new investments in Burma must now provide an overview of operations and disclose their policies, due diligence, and mitigation measures related to human rights, labor, anti-corruption, financial transparency, the acquisition of property, arrangement with security providers, and the environment.[176] The law does not require firms to establish policies to prevent human rights abuses; rather, it only requires companies to disclose the information[177] so that CSOs are empowered "to take an active role in work[ing] with companies to promote investments that will enhance broad-based development and reinforce political and economic reform."[178] The Burma law cites the UNGPs as well as the OECD Guidelines. As of July 2015, a handful of companies have reported compliance with the regulations.[179]

C. The EU Approach to Human Rights Disclosures

1. Conflict Minerals

The European Union, which performed an impact analysis on conflict minerals,[180] began addressing conflict minerals disclosure differently than the United States, prompting harsh critique from

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176. U.S. DEP'T. OF STATE, RESPONSIBLE INVESTMENT REPORTING REQUIREMENTS, http://www.humanrights.gov/wp-content/uploads/2013/05/responsible-investment-reporting-requirements-final.pdf (last visited Aug. 5, 2014). The company must submit a report within 180 days of reaching the $500,000 investment threshold; after the initial report, the company must file an annual report every year on July 1.

177. Amy K. Lehr, *Burma (Myanmar) Sanctions Eased, But Companies Required to Report on Responsible Business Practices*, FOLEY HOAG LLP (July 11, 2012), http://www.csrandthelaw.com/2012/07/11/burma-myanmar-sanctions-eased-but-companies-required-to-report-on-responsible-business-practices/.

178. Burma Fact Sheet, *supra* note 143.

179. Among the reporting companies are: Hercules Offshore, Inc., Aberdeen Asset Management Inc., Western Union, Capital Group Companies, Coca-Cola, Four Rivers, Clipper Holdings, Inc., TPG Holdings, Gap Inc., and Tillman Global Holdings, LLC. *See Doing Business in Burma, Reporting Requirements*, EMBASSY OF THE U.S. RANGOON BURMA, http://burma.usembassy.gov/reporting-requirements.html (last visited Aug. 5, 2015).

180. *Frequently Asked Questions—Responsible Sourcing of Minerals Originating Conflict-Affected and High-Risk Areas: Towards an Integrated EU Approach*, EUROPEAN COMMISSION (Mar. 5, 2014), http://europa.eu/rapid/press-release_MEMO-14-157_en.htm.

NGOs.[181] The initial proposed EU regulation cited the UNGPs and established a voluntary process through which importers of 3TG into the EU self-certify that they do not contribute to financing in "conflict-affected" or "high risk areas."[182] Unlike Dodd-Frank, both the initial and the new European Parliament proposals cover all of the conflict areas of the world, specifically areas "in a state of armed conflict, with presence of widespread violence, collapse of civil infrastructure, fragile post-conflict areas as well as areas of weak or non-existent governance and security, such as failed states, characterized by widespread and systematic violations of human rights, as established under international law."[183]

On February 19, 2014, the European Parliament's development committee voted in favor of an EU regulation that required companies using and trading minerals, and all upstream and downstream companies, to adhere to a legally binding obligation to undertake supply chain due diligence in identifying and mitigating the risk of conflict financing and human rights abuse.[184] Among other things, the report acknowledged that, "in order to increase efficiency and achieve equity in the field of CSR, a move away from the current 'à la carte' system, in which companies choose codes and standards according to their own preferences, towards common industry-wide standards is of primary importance."[185] NGOs strongly welcomed the European Parliament's call for regulation that enforces existing

181. *See Proposed EU Regulation on Conflict Minerals: Commentaries & Media Coverage*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, http://business-humanrights.org/en/conflict-peace/conflict-minerals/proposed-eu-regulation-on-conflict-minerals-commentaries-media-coverage, (last visited Mar. 6, 2015); Ian Weekes, *Conflict Minerals: New EU Rules Simpler Alternative to US Regulation*, THE GUARDIAN (Mar. 26, 2014), http://www.theguardian.com/sustainable-business/blog/eu-regulations-conflict-minerals-trade.

182. *Proposal for a Regulation of the European Parliament and of the Council*, EUROPEAN COMMISSION (Mar. 5, 2014), http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152227.pdf.

183. Union system for self-certification of importers of certain minerals originating in conflict-affected and high-risk areas ***I, Eur. Parl. Doc. P8_TA-PROV(2015)0204 (2015).

184. Mayer Brown LLP, *Proposed European Law Against Conflict Minerals*, LEXOLOGY.COM (July 2, 2015), https://www.lexology.com/library/detail.aspx?g=c1e00c92-83e7-4738-b642-db7f324ec3e5.

185. Judith Sargentini, *Report on Promoting Development Through Responsible Business Practices, Including the Role of Extractive Industries in Developing Countries*, EURO. PARL. COMM. ON DEV., Doc. No. A7-0132/2014, at 5 (Feb. 19, 2014), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0132+0+DOC+PDF+V0//EN.

international standards and makes supply chain checks compulsory for companies operating in Europe.[186] However, this proposal was initially rejected.[187]

Taking note of various stakeholder consultations and the U.S. Dodd-Frank law, the EU first limited the scope of the disclosures to importers, and chose a voluntary mechanism to avoid any regional boycotts that hurt locals and did not stop armed conflict.[188] Those importers, out of the roughly 400 affected, who chose to certify had to conduct due diligence in accordance with the OECD Guidance[189] and report their findings to the EU. The EU would then publish a list of "responsible smelters and refiners" so that the public would hold importers and smelters accountable for conducting appropriate due diligence. The proposed initial regulation also offered incentives, such as assistance with procurement contracts.[190] However, some NGOs raised concerns that dozens of minerals in over seventeen countries around the world may fuel conflict, that targeting importers would leave a large loophole, and that the proposal contradicted the spirit of the UNGPs.[191]

Supporters of mandatory disclosure argue that, because the EU is the world's largest trading bloc and a major importer of products containing natural resources, "anything short of a mandatory and binding obligation on businesses would mean that the Commission had failed to do enough to prevent Europe from acting as a 'conflict mineral-trading hub.'"[192]

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186. *Id.*

187. Alexandria Bennett, *Too Weak to Work? EU's Conflict Minerals Regulation*, SOURCEINTELLIGENCE.COM (May 8, 2015), http://www.sourceintelligence.com/eu-conflict-minerals-will-it-work/.

188. *Proposal for a Regulation of the European Parliament and of the Council*, *supra* note 182.

189. OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS: SECOND EDITION (2013), http://dx.doi.org/10.1787/9789264185050-en.

190. *Proposal for a Regulation of the European Parliament and of the Council*, *supra* note 182.

191. *See, e.g.*, *EC's Conflict Minerals Proposal Must Not Be Limited to Four Minerals*, CENTER FOR RESEARCH ON MULTINATIONAL CORPORATIONS (Feb. 5, 2015), http://somo.nl/news-en/ec2019s-conflict-minerals-proposal-must-not-be-limited-to-four-minerals.

192. *Commission Should Heed Parliament's Call for Strong EU Regulation on Conflict Resources, Campaigners Say*, GLOBALWITNESS.ORG (Feb. 27 2014), https://www.globalwitness.org/archive/eu-commission-should-heed-parliaments-call-strong-eu-regulation-conflict-resources/.

In May 2015, Parliament rejected the voluntary disclosure scheme, and required that the legislation be mandatory, and that it apply to importers of manufactured products containing tin, tungsten, tantalum, and gold from conflict areas, as well as to importers of raw products.[193] The proposed certification procedure will follow the previous proposal in using OECD certification guidelines.[194] Member states will review, and must eventually approve, the proposals, and then the Parliament, the Council, and the Commission will engage in negotiations regarding these proposals.[195]

The U.S. and the EU have developed well-intentioned, but likely counterproductive, regulations concerning conflict minerals. The U.S. law, Dodd-Frank, goes too far and too deep in the supply chain, without any evidence that it will help the intended beneficiaries of the law, the Congolese. The law is too narrow in geographic scope and in the scope of minerals covered. Further, the law may cause some manufacturers to boycott certain countries in order to avoid the burden of disclosure.[196] The EU proposal, like Dodd-Frank, forces legislators to accomplish the impossible task of defining a "conflict" zone. Moreover, the EU law is costly, because it will require hundreds of thousands of European companies to gather data, make inquiries, and review and analyze the responses of suppliers. Most importantly, there is no evidence that the type of disclosures required by Dodd-Frank and the EU proposal are effective in changing companies' behavior and protecting human rights.

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193. Dynda Thomas, *Conflict Minerals—Light at the End of the Tunnel?*, AFR. L. BUS. (July 14, 2015), http://www.africanlawbusiness.com/news/5682-conflict-minerals-light-at-the-end-of-the-tunnel.

194. Proposed European Law Against Conflict Minerals, LEXOLOGY.COM (July 2, 2015), https://www.lexology.com/library/detail.aspx?g=c1e00c92-83e7-4738-b642-db7f324ec3e5 (stating that the guidelines require that companies: first, establish strong company management systems; second, identify and assess risk in the supply chain; third, design and implement a strategy to respond to identified risks; fourth, carry out independent third-party audits of the supply chain due diligence at identified points in the supply chain; and fifth, report on supply chain due diligence).

195. *Id.*

196. *See* Narine, *supra* note 156, at 351–401; Brief of Experts on the Democratic Republic of the Congo as Amici Curiae Supporting Petitioners, Nat'l Ass'n of Mfrs., et al., v. S.E.C., No. 13-5252 (Jan 23, 2013).

2. EU Non-Financial Disclosure Rules

On April 15, 2014, the EU Parliament adopted a non-financial disclosure directive that is expected to affect 6,000 companies with 500 or more employees beginning in 2017.[197] The directive[198] requires affected companies to disclose policies, risks, and outcomes related to environmental matters, social and employee-related issues, human rights, anti-corruption and bribery issues, and board diversity.[199] Companies may report based upon a number of frameworks, including the UN Global Compact, the UNGPs, the OECD Guidelines, their home countries' sustainability requirements,[200] or ISO 26000.[201] Enforcement takes a "comply or explain" approach. Those who choose not to report will be required to explain why they did not do so.[202] As discussed elsewhere in this Article, a disclosure requirement with no significant penalties that depends on investors and consumers to read, comprehend, and act will not likely have the meaningful impact that drafters intend. While transparency is important and can be useful, human rights crises cannot be solved merely through a corporate disclosure report.

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197. Council Directive 2014/95, Art. 50(1), 2014 O.J. (L330) 1, 4-5 (EU).

198. An EU directive is a goal that the member States of the European Union must achieve through law that the member state chooses to enact to accomplish that goal by a certain date. An EU regulation is binding law on every EU state as soon as it is passed. National governments do not need to enact implementing legislation for it to take effect. *Regulations, Directives, and Other Acts*, EUROPEAN UNION, http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm (last visited Oct. 9, 2015).

199. *Non-Financial Reporting*, EUROPEAN COMMISSION (Sept. 10, 2015), http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm.

200. For a list of country-specific sustainability requirements as of 2013, *see* Narine, *supra* note 23.

201. *See* Int'l Org. for Standardization (ISO), *ISO 26000: Social Responsibility*, http://www.iso.org/iso/home/standards/management-standards/iso26000.htm (last visited Mar. 6, 2015) (discussing the standards and guidance on how businesses and organizations can operate responsibly). ISO is the world's largest voluntary organization for setting international standards by global consensus. *About ISO*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, http://www.iso.org/iso/home/about.htm (last visited Mar. 6, 2015).

202. *ISO 26000: Social Responsibility*, supra note 201; *The New EU Accounting Directive and (Non-) Financial Reporting Obligations*, MCGUIREWOODS LLP (Feb. 18, 2015), https://www.mcguirewoods.com/Client-Resources/Alerts/2015/2/New-EU-Accounting-Directive.aspx.

D. Other Proposed Sources of Obligations: Maloney Human Trafficking Bill[203]

On June 11, 2014, Congresswoman Carolyn Maloney introduced the Business Supply Chain Transparency on Trafficking and Slavery Act of 2014 in the United States House of Representatives.[204] This bill would impose mandatory disclosures to the SEC on every company with over $100 million in worldwide receipts, similarly to the CTSCA.[205] The disclosures must state the extent to which the company has: created and enforced policies to identify and eliminate the risks of human trafficking within the supply chain; implemented a policy preventing employees from engaging in commercial sex acts with a minor; made efforts to evaluate the risks of human trafficking within its supply chain; attempted to audit the members of the supply chain to ensure that working conditions and policies are in compliance with corporate anti-trafficking policies; trained employees and maintained internal accountability standards; and provided adequate remedies to any trafficking victims identified within the company's supply chain.[206] The Maloney bill does not require companies to enact policies to prevent the use of forced labor, but rather requires them to disclose what, if any, steps they are taking to avoid using forced labor, thereby purportedly empowering consumers to make responsible decisions.[207]

Like the CTSCA, the Maloney bill requires each company to post their disclosure statements on their websites, or to respond to consumer inquiries in writing within thirty days if the company does not have a website.[208] The Department of Labor will create a list of companies subject to the legislation and a summary of the disclosures received, both of which will be posted on the Department's website for easy consumer access.[209] The bill also requires the "Secretary of

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203. This bill should not be confused with the Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22 (2015), which passed both houses of Congress and was signed into law in May 2015.

204. H.R. 4842, 113th Cong. (2014).

205. *Maloney Targets Slavery, Human Trafficking, and Child Labor with Bipartisan Supply Chain Transparency Bill*, CONGRESSWOMAN CAROLYN B. MALONEY (June 12, 2014), http://maloney.house.gov/media-center/press-releases/maloney-targets-slavery-human-trafficking-and-child-labor-with.

206. H.R. 4842, 113th Cong. (2014).

207. *Maloney Targets Slavery, Human Trafficking, and Child Labor*, *supra* note 205.

208. H.R. 4842, 113th Cong. (2014).

209. *Id.*

Labor, in consultation with the Secretary of State and other appropriate Federal and international agencies, independent labor evaluators, and human rights groups, to develop an annual list of the top 100 companies complying with supply chain labor standards," to be posted on the Department of Labor's website.[210] Of course, for the law to be effective, consumers must seek out and use this information. The bill has received significant support from SRIs.[211]

This bill is modeled after a previous version, introduced in 2011.[212] The original Maloney bill contained many of the same provisions, and the language in the 2014 bill is nearly identical to the original in all provisions that remained consistent. The main difference between the two versions is the 2014 bill's requirement that disclosures be posted on the Department of Labor's website. The 2011 bill faced severe criticism from businesses, as well as from several state trade groups, such as the California Chamber of Commerce, which found the bill to be too punitive.[213] The 2014 bill will likely face similar barriers to passage.

IV. THE INEFFECTIVENESS OF DISCLOSURE REQUIREMENTS

Disclosure requirements are largely aimed at the marketplace of consumers and investors. Some consumers make conscious choices based upon their ethical beliefs and mobilize others to do the same, often by publicizing corporate wrongdoing. Indeed, this strategy was a catalyst to the divestment movement, which eventually contributed to the end of apartheid in South Africa.[214] In this Article, I explore

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210. *Maloney Targets Slavery, Human Trafficking, and Child Labor*, *supra* note 205; H.R. 4842, 113th Cong. (2014).

211. A coalition of 300 SRIs has formed to support the passage of this bill. *See* Julie Wokaty, *Investors Welcome Federal Bill Calling for Corporate Disclosures on Trafficking and Slavery Risks*, INTERFAITH CENTER ON CORPORATE RESPONSIBILITY BLOG (June 12, 2014), http://www.iccr.org/investors-welcome-federal-bill-calling-corporate-disclosures-trafficking-and-slavery-risks.

212. H.R. 2759, 112th Cong. (2011).

213. *See* Patrick Wall, *In Congress, a Bid to Make U.S. Firms Take Steps Against Modern-Day Slavery*, CHRISTIAN SCIENCE MONITOR (Aug. 5, 2011), http://csmonitor.com/USA/Politics/2011/0805/In-Congress-a-bid-to-make-US-firms-take-steps-against-modern-day-slavery.

214. *See A Struggle From the Ground Up: The Anti-Apartheid Movement in South Africa*, TAVAANA, https://tavaana.org/en/content/struggle-ground-anti-apartheid-movement-south-africa (last visited Sept. 28, 2015) (explaining that "the consumer boycott was a particularly effective tactic; by decimating profits, it

how most consumers, armed with all of these disclosures, respond to company disclosures. When enacting disclosure regulations, legislators assume that consumers will read and digest the disclosures, and then make decisions based upon those disclosures. However, the evidence does not always substantiate these assumptions. Instead, disclosures often confuse consumers rather than raising their consciousness. Even when consumers are informed and aware of companies' business practices, their purchase habits do not always align with their ethical ideals.

Accordingly, I propose that governments abandon disclosure requirements, because they rarely create informed consumers, and even when consumers are informed, they do not often act in response to these disclosures. Therefore, in order to further human rights, lawmakers should focus on regulations other than disclosure requirements.

A. The Confused Consumer

The first problem with the disclosure regime is that consumers do not always read or understand disclosures. [215] Professors Ben-Shahar and Schneider have focused on the easy trap into which legislators fall, in which legislators pass generally uncontroversial disclosure rules to aid consumers in their everyday decision-making processes related to health, mortgages, online internet purchases, terms of use, and privacy policies, to name a few.[216] The authors conclude that, while lawmakers use disclosure to meet regulatory goals, the average consumer is not educated enough to understand the disclosures, will not read the disclosures because there are too many, and may not know what to do with the information even if they do read and understand it.[217] To further this

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drove a wedge between business and government as white store owners put pressure on the government to change policy").

215. *See* Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43(1) J. LEGAL STUD. 1, 1 (2014); *see also* Florencia Marotta-Wurgler, *Even More Than You Wanted to Know About the Failures of Disclosure* 1 (N.Y Univ. Law and Econ. Working Papers, Paper No. 395, 2012) (observing that "[t]he theorist's hope is that disclosure regulation forces sellers to compete on the information disclosed and thus represents a superior alternative to measures that might distort markets or reduce choice. The realist's concern, however, is that disclosure does not work so well.").

216. Ben-Shahar & Schneider, *supra* note 1.

217. *Id.* at 42.

claim, the authors cite a study indicating that over forty million Americans are functionally illiterate, and that another fifty million are marginally literate.[218]

Professors Ben-Shahar and Schneider also conclude that the solution is not tweaking the implementation of disclosure requirements, but rather using tools besides disclosure for certain information.[219] Assuming that perfecting the implementation of disclosure requirements will result in more effective disclosures will only lead to more amendments to disclosure requirements,[220] because lawmakers who feel that consumers need to be informed will add more, not less, information—and this information is notoriously difficult to simplify.[221] Consumers may become numb even to simplified disclosures and are increasingly willing to buy cheap products manufactured in conditions that would not pass muster in their home countries. Consumers find it easy to rationalize choices that do not comport with the ideal of ethical sourcing, because they are separated from the harm. Instead of disclosure requirements, Ben-Shahar and Schneider recommend tougher regulation of companies when warranted.[222] I agree with this recommendation and contend that, if legislators really want to curb bad behavior, they should impose financial penalties, criminal sanctions, and debarment from government contracts. If the human rights situation in a host country is egregious enough, the U.S. government should ban companies from conducting business there through an embargo.

This argument for tougher regulation applies with particular force to the human rights context. The CTSCA, the proposed Maloney bill, and the Dodd-Frank conflict minerals legislation simply require due diligence and disclosure.[223] They do not, however, punish activity that harms the purported beneficiaries of these laws—the affected communities. Instead, governments expect the marketplace to punish the bad actors. As I discuss below, this does not happen with enough regularity to be an effective strategy.

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218. *Id.* at 8.

219. *See generally* Ben-Shahar & Schneider, *supra* note 1, at Part III (suggesting that the problems inherent in disclosure require a solution outside of the disclosure model).

220. *See id.* at 138–40 (suggesting that lawmakers routinely impose and extend disclosures out of the mistaken belief that more information leads to better decision-making).

221. *Id.* at 26–27.

222. *Id.* at 183.

223. *See supra* Part III.B, D.

B. The Conscious Consumer

Assuming for the sake of argument that consumers read, understand, and want to apply the data that has been disclosed to them, consumers can play an important role in motivating companies to be more socially and environmentally responsible.[224] Consumers are becoming more aware of ethical consumption through marketing and information campaigns.[225] The literature suggests that many consumers shop with their morals as well as with their wallets.[226] Studies have sought to establish concrete, empirical evidence about what motivates a consumer to support or boycott a company based on its CSR record.[227] A recent survey used to support the new UK Modern Slavery Act[228] (which is similar to the CTSCA) indicates that two-thirds of UK consumers would stop buying a product if they found out that slaves were involved in the manufacturing process, and that consumers would be willing to pay up to ten percent more

224. *See* Sergio W. Carvalho, et al., *Consumer Reactions to CSR: A Brazilian Perspective*, 91(2) J. BUS. ETHICS 291, 291 (2010) ("In fact, a recent McKinsey poll (2007) reveals that CEOs of companies that have signed the UN Global Compact expect consumers to have the greatest impact on the way companies manage societal expectations in the next 5 years.").

225. Oliver M. Freestone & Peter J. McGoldrick, *Motivations by the Ethical Consumer*, 79(4) J. BUS. ETHICS 445, 445 (2008).

226. *Id.*; *see also* Silvia Grappi, Simona Romani, & Richard P. Bagozzi, *Consumer Response to Corporate Irresponsible Behavior: Moral Emotions and Virtues*, 66 J. BUS. RESEARCH 1814, 1814 (2013); Rommel O. Salvador, Altaf Merchant, & Elizabeth A. Alexander, *Faith and Fair Trade: The Moderating Role of Contextual Religious Salience*, 121 J. BUS. ETHICS 353, 355 (2014) (explaining that a person's values are likely to play a role in shaping purchasing decisions); Adam Corner, *Morality Is Missing From Our Debate About Sustainable Behavior*, THE GUARDIAN (July 19, 2013), http://www.theguardian.com/sustainable-business/social-justice-behaviour-climate-change.

227. Freestone & McGoldrick, *supra* note 225, at 446. *See also* Thuriane Mahe, *Are Stated Preferences Confirmed by Purchasing Behaviors? The Case of Fair Trade-Certified Bananas in Switzerland*, 92 J. BUS. ETHICS 301, 311 (2010) (finding that Swedish persons would pay more for bananas certified Fair Trade). Some studies say consumers are willing to pay more for ethically labeled goods, while others suggest they are not. *But see* Verena Gruber, *How Techniques of Neutralization Legitimize Norm- and Attitude-Inconsistent Consumer Behavior*, 121 J. BUS. ETHICS 29, 42 (2014) (finding that people behaved inconsistently regarding their stated moral preference for sustainability when faced with higher prices).

228. Modern Slavery Act, 2015, c. 30 (U.K.), http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf.

for slave-free products.[229] The survey also found that seventy percent of luxury brand consumers and sixty percent of those who buy low- and mid-range products would be willing to pay more, or even switch brands, if they knew that exploited labor was involved in the supply chain.[230] The numbers are similar, but slightly lower, for those surveyed in the United States.[231] A study about the habits of American consumers found:

> [W]hen asked if they would be willing to pay more for their favourite products if this ensured they were produced without the use of modern slavery: 52% of American consumers said they would pay more to ensure products were produced without modern slavery; 27% were not sure; 21% said they would not pay more.[232]

This means that at least twenty percent, and possibly almost half, of informed consumers would not likely change their buying habits.

Surveys also indicate that consumers care about a wide variety of issues, from animal welfare to fair trade to labor standards, which can complicate an ethical consumer's decision-making process.[233] Moreover, not all consumers are the same; socially responsible consumers view corporate responsibility differently than traditional consumers do.[234] Therefore, because consumer impact may

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229. Kieran Guilbert, *UK Shoppers Would Switch Brands, Pay More to Avoid Use of Slaves—Poll—TRFN*, REUTERS UK, (Mar. 11, 2015), http://uk.reuters.com/article/2015/03/11/uk-slavery-poll-unitedkingdom-idUKKBN0M700O20150311.

230. *Id.*; *see also* WALK FREE FOUNDATION, SLAVERY ALERT: CONSUMER POLL, UNITED KINGDOM 2 (2015), http://d3mj66ag90b5fy.cloudfront.net/wp-content/uploads/2015/03/Consumer-Poll-UK.pdf.

231. WALK FREE FOUNDATION, SLAVERY ALERT: CONSUMER POLL, UNITED STATES 2 (2015), http://d3mj66ag90b5fy.cloudfront.net/wp-content/uploads/2015/03/Consumer-Poll-USA.pdf.

232. *Id.* at 6.

233. Freestone & McGoldrick, *supra* note 225, at 446.

234. *See* Sergio W. Carvalho, et al., *supra* note 224, at 293 (explaining that consumer reactions are related to price fairness and feelings of personal satisfaction). *See also* Sun Ya Bae, *Understanding Ethical Consumers: Assessing the Moderating Effects of Price Sensitivity, Materialism, Impulse Buying Tendency, and Clothing Involvement* (2012) (unpublished M.S. thesis, Colorado State University) (on file with the Colorado State Library System), http://digitool.library.colostate.edu/exlibris/dtl/d3_1/apache_media/L2V4bGlicmlzL2R0bC9kM18xL2FwYWNoZV9tZWRpYS8xODY2NTY=.pdf (examining consumers' personal attitudes toward altruism, ethical concerns, and ethical obligation as predictors of attitudes toward social responsibility in the

be difficult to quantify precisely, some argue that many companies and academics alike may underestimate the influence that consumers could have on corporate social responsibility and fair trade policies.[235]

I, on the other hand, argue for the opposite view. Scholars tend to overstate the impact of consumer influence on corporate action. Although many consumers claim to care about social responsibility, their purchasing decisions do not always reflect that concern.[236] Sustainable products represent only a small part of overall demand; thus, consumers' positive stance towards ethical purchasing is not an adequate predictor of actual purchasing behavior.[237] Some studies suggest that sustainable principles are too abstract for the average consumer, and can be pushed aside in favor of lower prices and convenience.[238] Further, a consumer's age and lack of knowledge about sustainable products also contributes to a low demand for such products.[239] Additionally, even when consumers are presented with information in the form of corporate social responsibility reports, many do not know what to do with this information. Indeed, one recent study showed that CSR websites did little to change people's perceptions, because many of the CSR sites failed to nurture trust,

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apparel and textiles industry and noting that "consumers' price sensitivity may depend on the types of products (i.e., functional or hedonic) or consumption situations (i.e., purchasing products alone or with others). Also, price-sensitive consumers are careful and smart shoppers who maximize total utility and make purchase decisions that fulfill the goal").

235. *See* Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 HOUS. J. INT'L L. 255, 320 (2013) ("The impact of the consumer on corporate behavior cannot be underestimated.").

236. *See* Gruber, *supra* note 227, at 39 (explaining that the gap between consumers saying one thing but doing another can be reconciled through "neutralization techniques [that] are intended to transform norm-contradicting into norm-conforming behavior"); *see also* Narine, *supra* note 156, at 351; *but see* WALK FREE FOUNDATION, *supra* note 230 (noting that over fifty percent of the U.S. consumers surveyed said they had stopped buying from a brand that did not meet their ethical expectations).

237. Gruber, *supra* note 227, at 30.

238. *Id.*; *see also* Sergio W. Carvalho, et al., *supra* note 224, 293–94 (explaining that consumer "perception of price fairness" can influence purchasing decisions); Gwang-Suk Kim, et al., *A Cross-National Investigation on How Ethical Consumers Build Loyalty Toward Fair Trade Brands*, 96 J. BUS. ETHICS 589 (2010) (investigating how "ethical consumption values . . . Fair Trade product beliefs . . . and Fair Trade corporate evaluation . . . determine Fair Trade brand loyalty").

239. Gruber, *supra* note 227, at 35–39.

and did not adequately convey the message that the company has a "greater stake in society than to make an extra dollar."[240] Consumers are generally skeptical about whether companies practice ethically responsible behavior; many consumers view a company's CSR as merely a tool to boost its image.[241]

More importantly, disclosure regulations assume that, because consumers say they care about ethical sourcing, they act that way in practice. However, researchers discovered that, while consumers generally denounce unacceptable labor practices, product desirability outweighs ethical considerations at the time of purchase.[242] The authors of *The Myth of the Ethical Consumer* correctly point out that typical surveys on consumer demand for fair trade or ethically-sourced coffee, chocolate, and other products rely on self-reporting, in which respondents often overstate what they do or plan to do.[243] Their research found that respondents' words and actions were inconsistent; that most consumers do not care enough about CSR to pay a higher price; and that most people will not sacrifice product function for ethics.[244] Other studies show that, although consumers are less likely to ask for ethical information initially, if they receive disclosures, they are more likely to use them.[245] However, due to the "CSR halo effect," consumers often make assumptions about a company's CSR performance that are unwarranted given the data presented.[246] Due to the halo effect,

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240. *CSR Websites 'Do Little' to Change Consumer Perception*, ENVIRONMENTAL LEADER (Mar. 13, 2014), http://www.environmentalleader.com/2014/03/13/csr-websites-do-little-to-change-consumer-perception/.

241. Xinming Deng, *Understanding Consumer's Responses to Enterprise's Ethical Behaviors: An Investigation in China*, 107 J. BUS. ETHICS 159, 162 (2012).

242. Neeru Paharia et al., *Sweatshop Labor Is Wrong Unless the Shoes Are Cute: Cognition Can Both Help and Hurt Moral Motivated Reasoning*, 121 ORG. BEHAV. & HUM. DECISION PROCESSES 81 (2013) [hereinafter Paharia et al., *Sweatshop Labor Is Wrong*]; *see also* Neeru Paharia, *The Psychology of Sweatshop Labor*, HUFFINGTON POST (July 10, 2013), http://www.huffingtonpost.com/neeru-paharia/the-psychology-of-sweatsh_b_3574717.html [hereinafter Paharia, *The Psychology of Sweatshop Labor*] (explaining reasons why product desirability outweighs ethical considerations).

243. Timothy Devinney et al., *Values vs. Value: New Research Revealing a Disparity Between What Shoppers Say and What They Do Debunks the Myth of the Ethical Consumer*, STRATEGY+BUSINESS (Feb. 22, 2011), http://www.strategy-business.com/article/11103.

244. *Id.*

245. Paharia et al., *Sweatshop Labor Is Wrong*, *supra* note 242.

246. N. Craig Smith et al., *Consumer Perceptions of Corporate Social Responsibility: The CSR Halo Effect* (Fontainebleau: INSEAD, Paper No. 12,

consumers often believe that a company that treats employees well, for example, is also a good steward of the environment.

Another flaw with the disclosure regime is that name and shame disclosures depend on consumers spreading the message about a company's poor practices. Consumer word of mouth is a highly effective means of sending messages on a sweeping scale, especially in an age of social media.[247] However, at least one critic of media frenzy boycotting has asserted that "campaigning is about more than just Twitter storms, change needs long-term commitment from people." [248] Nonetheless, the disclosure devotees rely on the assumption that the negative publicity stemming from such public scrutiny cannot leave a company completely unscathed,[249] and that enough of it piled together, over time, could motivate companies to strengthen their social responsibility policies.[250]

There is no doubt that boycotts can be a powerful motivator for firms to change behavior, and the proponents of disclosure count on consumers to take this action. But while boycotts can be successful, most boycotts fail to have any noticeable impact on companies, even though the negative media coverage that boycotts generate often makes it harder for a company to control the messages it sends out to the public and its consumers.[251] In order for boycotts to succeed, there must be widespread support[252] and consumers must be

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2010) (suggesting that consumers make inferences about company CSR performance based on limited information, contingent on a number of factors).

247. *See* Grappi, *supra* note 226; *see also Ethical Consumer List of Consumer Boycotts*, ETHICAL CONSUMER (Oct. 17, 2014), http://ethicalconsumer.org/boycotts/boycottslist.aspx (providing a current list of consumer boycotts); Tansy Hoskins, *Can Consumer Boycotts Change the World?*, THE GUARDIAN (Aug. 13, 2013), http://www.theguardian.com/sustainable-business/consumer-boycott-change-world (explaining how #dumpstoli, a Twitter campaign, instigated the circulation of photographs depicting people pouring Stoli into gutters outside New York bars, thus invoking an almost instant response from Stolichnaya and a widespread discussion on the effectiveness of such boycotts).

248. Hoskins, *supra* note 247.

249. *Id.* For consumer boycotting to implement change, a well-chosen target is the most important factor. Unlike governments, which are more difficult to influence, companies make "softer targets" because of their "increasing use of social media and consumer engagement." For example, the "#dumpstoli message for businesses is that no brand is safe if they are viewed as being hypocritical." *Id.*

250. *See id.*

251. Daniel Diermeier, *Why Do Company Boycotts Work?*, HBR BLOG (Aug 6, 2012), http://blogs.hbr.org/2012/08/when-do-company-boycotts-work.

252. *Id.*

passionate about the issue. But consumers are fickle,[253] which further undermines the "name and shame" premise.

Moreover, even when consumers have vocalized their passion, it has not always translated to impacts on the bottom line. For example, the CEO of Chick-Fil-A's vocal opposition to gay marriage triggered a consumer boycott that opened up a platform for further political and social goals, although it did little to hurt the company's profits; in fact, proponents of the CEO's anti-gay views developed a consumer campaign to counteract the boycott.[254] In 2009, a consumer activist group boycotted Whole Foods after its CEO criticized Obama's healthcare plan.[255] Conservatives and Tea Party supporters responded by leading a campaign supporting Whole Foods.[256] That fiscal year Whole Foods posted $1.83 billion in sales, up from $1.79 billion the year before.[257]

On the other hand, research has shown that companies that implement sustainable strategy throughout their supply chain see an increase in financial gain, while those who do not usually experience a decrease.[258] But there is scant evidence of a causal correlation. Furthermore, research has not revealed consistent evidence, or anything other than anecdotes, of consumer complaints or threats of boycott leading to significant policy changes by some of the TNCs most often accused of human rights abuses.

Accordingly, I conclude that the evidence is inconsistent, at best, about the effect of disclosures on consumer behavior. The evidence is clear, however, about the lack of consumer enforcement of the social contract through boycott or other sustained action. If legislators expect consumers to act using the information from disclosures, the evidence to date shows that such an assumption is

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253. *See id.* For example, a boycott against Proctor and Gamble because their moon-shaped logo was rumored to symbolize devil worship fell flat, likely because consumers were not invested in the issue.

254. *Id.*

255. Eric Etheridge, *Whole Foods Fight*, N.Y. TIMES (Aug, 17, 2009), http://opinionator.blogs.nytimes.com/2009/08/17/whole-foods-fight/?_r=0.

256. *Nationwide Tea Party Leaders Announce Tea Party Buycott to Support Whole Foods This Tuesday*, REUTERS, (Aug. 28, 2009), http://www.reuters.com/article/2009/08/28/idUS176016+28-Aug-2009+BW20090828.

257. Brian Gaar, *Whole Foods Ends Toughest Year With Another Profit*, STATESMAN (Nov. 4, 2009), http://www.statesman.com/news/business/whole-foods-ends-toughest-year-with-another-profit/nRQ8z/.

258. *CSR Websites 'Do Little' to Change Consumer Perception*, *supra* note 240.

misplaced. Unfortunately, investors are not much better at enforcing the social contract based upon disclosure.

V. THE INTELLIGENT INVESTOR

While consumers may have limited power or desire to affect corporate decision-making, investors—particularly pension funds and other institutional investors—may wield more clout. There are some benefits to disclosure in terms of company performance. A recent study of mandatory environmental, social, and governance ("ESG") reporting in four countries found that firms improve the reliability of their disclosures and tend to change other internal management practices, such as reducing emissions and improving labor practices.[259] Competitors and others often disclose ESG information too, even when they are not directly affected by mandatory regulations. [260] Further, researchers have concluded that such reporting enhances, rather than detracts from, the financial value of the firms, because investors value transparency.[261] All of this is good for stakeholders, particularly investors. Critically, however, researchers have not determined whether disclosure regulations have increased stakeholder demand for information or regulation.[262]

Legislators assume that sophisticated investors take advantage of disclosures to ascertain which stocks to buy and sell. But even SEC Chair Mary Jo White has publicly and repeatedly questioned the effectiveness of these disclosures on the investor class, particularly those related to human rights. In a statement about the Dodd-Frank conflict minerals rule, she asserted that "seeking to improve safety in mines for workers or to end horrible human rights atrocities in the Democratic Republic of the Congo are compelling objectives, which, as a citizen, I wholeheartedly share . . . [b]ut, as the Chair of the SEC, I must question, as a policy matter, using the federal securities laws and the SEC's powers of mandatory disclosure to accomplish these goals."[263] She has also stated that she believes

259. *See, e.g.*, ERNST & YOUNG & THE BOSTON COLLEGE CENTER FOR CORPORATE CITIZENSHIP, *supra* note 127.

260. Ioannou & Serafeim, *supra* note 25.

261. *Id.* at 21.

262. *Id.* at 22.

263. Mary Jo White, Chairwoman, SEC Speech at the Nat'l Ass'n of Corporate Dirs. Leadership Conference in National Harbor, Md.: The Path Forward on Disclosure (Oct. 15, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539878806#.VFrAzYt4pB8.

that investors suffer from "disclosure overload."[264] This substantiates my earlier assertion that consumers either ignore or do not know what to do with the disclosures they see.

A. U.S. Shareholder Proposals on Human Rights

Socially responsible investors in the United States generally attempt to effectuate change through shareholder proposals. SEC Rule 14a-8 allows shareholders with $2,000 in market value, or one percent, of a company's outstanding stock for at least one year, to submit a proposal to be included in the company's proxy for vote at the annual meeting. [265] Pension funds and socially responsible investors file over half of shareholder proposals. [266] The highly influential 2013 Institutional Shareholder Services proxy guidelines advise clients to consider voting their proxies on environmental, social, and governance matters on a case-by-case basis, depending on a number of factors. Those factors include the scope of the request; the degree to which existing relevant policies and practices have been disclosed; whether the firms existing policies comport with internationally recognized standards; how the company and its facilities are monitored; whether the company participates in fair labor organizations or other internationally recognized initiatives; whether the organization conducts business in high risks areas; recent and significant fines, litigation or controversies related to human rights involving the company or its suppliers; and whether the company deviates from industry standards.[267]

In 2014, fifteen human rights-related shareholder proposals were put forth in proxies for publicly traded firms.[268] Many of them cited the UNGPs in an effort to convince companies to report on how they were assessing human rights risks and impacts, and/or to ask for

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264. *Id.*

265. *See* SEC Staff Legal Bulletin No. 14 (CF) (July 13, 2001), http://www.sec.gov/interps/legal/cfslb14.htm.

266. Heidi Welsh & Michael Passoff, *Proxy Preview 2012*, AS YOU SOW 6 (2012), https://www.missioninvestors.org/system/files/tools/proxypreview-2012-helping-shareholders-vote-their-values-heidi-welsh-and-michael-passoff-as-you-sow-and-sustainable-investments-institute.pdf.

267. *See generally* INSTITUTIONAL SHAREHOLDER SERVICES, 2013 U.S. PROXY VOTING SUMMARY GUIDELINES 65 (2013), http://www.issgovernance.com/files/2013ISSUSSummaryGuidelines1312013.pdf.

268. EY CENTER FOR BOARD MATTERS, LET'S TALK: GOVERNANCE 3 (Feb. 2014), http://www.ey.com/Publication/vwLUAssets/EY-An-early-look-at-proxy-season-2014/$FILE/EY-An-early-look-at-proxy-season-2014.pdf.

audited sustainability reports from third-party suppliers regarding labor practices.[269] The likelihood of success, however, is low. In the 2013 proxy season, human rights issues constituted eight percent of the ESG proposals filed, compared with thirty-three percent for political spending (the largest category), and none passed.[270] Perhaps so few passed because, according to one study, only fifteen percent of shareholders report reading a whole prospectus—notwithstanding, or perhaps because of, all of the required disclosure data.[271]

B. Divestment

Some large socially responsible investors ("SRIs") choose to make public statements when they divest, though these divestment statements rarely have the kind of global impact sufficient to change industry behavior. However, the Norwegian Government Pension Fund (the "Fund"), with over $828 billion under management, is the largest sovereign wealth fund in the world, and provides a model for

269. *Id. See generally* UN WORKING GROUP ON BUS. & HUMAN RIGHTS, STATEMENT CONCERNING SHAREHOLDER RESOLUTIONS REQUIRING COMPANIES TO PERFORM HUMAN RIGHTS DUE DILIGENCE (May 13, 2013), http://business-humanrights.org/sites/default/files/media/documents/13_05_13_wg_statement_shareholder_resolutions_and_hr_due_diligence.pdf. Caterpillar objected to the shareholder proposal, arguing that it was duplicative of material that it already planned to disclose in its proxy and filed a no-action letter with the SEC. The SEC indicated that it would not take action on the matter if the proposal was excluded from the proxy. *See* Caterpillar Inc., SEC No-Action Letter [Incoming Letter Jan. 30, 2013] (Mar. 25, 2013), http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/afscme032513-14a8.pdf. Halliburton and McDonald's urged their shareholders to vote against the proposal in their 2013 proxy statements. *See* HALLIBURTON, 2013 Proxy Statement 70–72 (2013), http://ir.halliburton.com/phoenix.zhtml?c=67605&p=irol-reportsAnnual (follow "ANNUAL REPORT AND PROXY," "2013 PROXY STATEMENT," hyperlink); *see also* MCDONALD'S CORP. 2013 PROXY STATEMENT 48–52 (2013), http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202013/2013%20McDonalds%20Proxy%20Statement%20-%20LQ.pdf; *ProxyMonitor ScoreCard 2014*, PROXY MONITOR, http://www.proxymonitor.org/ScoreCard2014.aspx (last visited Nov. 5, 2014).

270. MARCY MURNINGHAN, REDEFINING MATERIALITY II: WHY IT MATTERS, WHO'S INVOLVED, AND WHAT IT MEANS FOR CORPORATE LEADERS AND BOARD 7 (2013), http://accountability.org/images/content/6/8/686/aa_materiality_report_aug2013%20final.pdf.

271. *See* Ben-Shahar & Schneider, *supra* note 1, at 68 ("only 15 percent of shareholders report reading the whole prospectus (a report we doubt because they are hideously hard)").

other institutional investors.[272] The Fund was originally established to avoid fluctuations from oil sector activity by investing abroad, but it also has a mandate to restrict investment of parts of the Fund in companies that adversely impact the environment.[273] More important for the purposes of this Article, according to its ethical guidelines, the Norwegian pension fund cannot invest in companies that produce tobacco or that directly or indirectly contribute to killing, torture, deprivation of freedom, or other violations of human rights in conflict situations or wars. [274] These prohibitions stemmed from recommendations from a 2002 government appointed committee.[275] The resulting "Graver Report" examined a number of ethical principles, and specifically considered the "main normative characteristics that are consistent over time . . . [and distinguished] between the obligation to influence, to avoid complicity and to exercise retribution or punish."[276]

In 2004, the Norwegian Council on Ethics (the Council) was established to independently evaluate whether the Fund's investments were in line with the Guidelines.[277] The quote below exemplifies the Fund's philosophy:

> One group of ethical theories asserts that we should primarily be concerned with the consequences of the choices we make. These theories are in other words forward-looking, focusing on the consequences of an action. The choice that is ethically correct influences the world in the best possible way, i.e. has the most

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272. *Norway Government Pension Fund Global Excludes Three Companies for Ethical Reasons*, THE NORDIC PAGE NORWAY (Jan. 30, 2014), http://tnp.no/norway/economy/4279-norway-government-pension-fund-global-excludes-three-companies-for-ethical-reasons.

273. Simon Chesterman, *The Turn to Ethics: Disinvestment From Multinational Corporations for Human Rights Violations—The Case of Norway's Sovereign Wealth Fund*, 23 AM. U. INT'L L. REV. 577, 583 (2008).

274. *Guidelines for Observation and Exclusion from the Government Pension Fund's Global*, GOVERNMENT OF NORWAY (Apr. 9, 2014), https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/responsible-investments/guidelines-for-observation-and-exclusion/id594254/.

275. *The Graver Committee and Ethical Guidelines*, GOVERNMENT OF NORWAY (May, 31, 2013), https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/responsible-investments/The-Graver-Committee---documents/the-graver-committee-and-ethical-guideli/id434926/.

276. *The Report from the Graver Committee*, *supra* note 59.

277. *The Council on Ethics*, GOVERNMENT OF NORWAY (June 26, 2013), https://www.regjeringen.no/en/topics/the-economy/the-government-pension-fund/responsible-investments/the-council-on-ethics-for-the-government/id447010/.

> favourable consequences . . . . Another group of ethical theories focuses on avoiding breaching obligations by avoiding doing evil and fulfilling obligations by doing good. Whether the results are good or evil, and whether the cost of doing good is high, are in principle of no significance. This is often known as deontological ethics.
>
> In relation to the Petroleum Fund, these two approaches will primarily influence choice in that deontological ethics will dictate that certain investments must be avoided under any circumstances, while teleological ethics will lead to the avoidance of investments that have less favourable consequences and the promotion of investments that have more favourable consequences . . . . The issue of investments that should be avoided may be assessed on the basis of both deontological and teleological ethics.[278]

Using this framework, an independent council makes recommendations to the Minister of Finance regarding which companies to divest from, and which to exclude from investment in the first place.[279] From 2011–14, the Fund divested from 114 companies due to environmental and climate change concerns.[280] It has also divested because of human rights concerns. In 2006, the Fund divested its $400 million position (over fourteen million shares in the United States and Mexico operations) in Wal-Mart.[281] In fact, Wal-Mart constitutes two of the three companies excluded from

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278. *The Report From the Graver Committee*, *supra* note 59.

279. *Company Exclusions*, GOVERNMENT OF NORWAY (Apr. 9, 2014), http://regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/companies-excluded-from-the-investment-u.html?id=447122.

280. *Id.*; *see also Work on Responsible Investment Strengthened*, Norges Bank (Feb. 5, 2015) (quoting the CEO of Norges Bank Investment Management as stating that the Fund had divested from 114 companies so far).

281. *See* Gwladys Fouche & Joachim Dagenborg, *Norway's $800 Bln Fund Should Lose Independent Ethics Panel-Report*, REUTERS (Nov. 11, 2013), http://www.reuters.com/article/2013/11/11/norway-sovereignwealthfund-ethics-idUSL5N0IT23S20131111; Lisa Shapiro, *Walmart Blacklisted by Major Pension Fund Over Poor Labor Practices*, HUFFINGTON POST (Jan. 5, 2012), http://www.huffingtonpost.com/2012/01/05/walmart-blacklist-abp-pension-fund_n_1186384.html; Andrew Ang, *The Norwegian Government Pension Fund: The Divestiture of Wal-Mart Stores Inc.*, COLUMBIA CASEWORKS, https://www8.gsb.columbia.edu/caseworks/node/256 (last visited Oct. 22, 2015).

investments by the Fund due to a "series of systematic" human rights violations.[282] Pension funds in Sweden and the Netherlands followed the Fund's lead after determining that Wal-Mart had not done enough to change its labor practices.[283] In a similar decision, the city of Portland, Oregon began the process of divesting itself of all interest in Wal-Mart in 2014.[284] City Commissioner Steve Novick cited the company's labor, wage, and hour practices, as well as a recent bribery scandal,[285] as significant factors in the decision.[286]

Colleges and universities represent another powerful group of investors. A number of NGOs and student groups have attempted to leverage the buying power of these institutions to spur companies to do more regarding conflict minerals.[287] However, this has achieved limited success.[288]

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282. *Company Exclusions*, *supra* note 279.

283. Clare O'Connor, *How Angry Walmart Workers Helped Convince Foreign Investors to Dump Shares*, FORBES (Oct. 7, 2013), http://www.forbes.com/sites/clareoconnor/2013/10/07/how-angry-walmart-workers-helped-convince-foreign-investors-to-dump-shares/.

284. Elizabeth A. Harris, *Portland, Ore., Sheds Its Walmart Bonds*, N.Y. TIMES (May 16, 2014), http://www.nytimes.com/2014/05/17/business/portland-ore-will-no-longer-invest-in-walmart.html?_r=0.

285. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES (Apr. 21, 2012), http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all; Sam Gustin, *How Big a Deal Is Walmart's Mexico Bribery Scandal?*, TIME (Apr. 23, 2012), http://business.time.com/2012/04/23/how-big-a-deal-is-wal-marts-mexico-bribery-scandal/.

286. Harris, *supra* note 284. On February 17, 2015, Wal-Mart announced a significant wage increase for workers as well as changes to its health insurance programs. Steven Greenhouse, *Workers and Critics Greet Walmart Pay Raise But Say Much Remains to Be Done*, THE GUARDIAN (Feb. 23, 2015), http://theguardian.com/business/2015/feb/23/workers-activists-walmart-pay-raise. It remains to be seen whether those funds that have divested will reinvest based upon these changes.

287. *Conflict-Free Campus Initiative*, RAISE HOPE FOR CONGO, http://raisehopeforcongo.org/content/conflict-free-campus-initiative (last visited Mar. 6, 2014).

288. Michael Posner, Co-Director of the NYU Stern Center for Bus. & Human Rights, Universities Not Making Enough Progress to Protect Human Rights In Supply Chain, Spending or Investments, Speech at U. Mich. (Oct. 10, 2014), *in* NYU Stern Center for Bus. & Human Rights, Oct. 10 2014, http://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/business-human-rights/activities/universities-not-making-enough-progress-protect-human-rights-supply-chain-spending-or.

In early 2015, a group of sixty European investors with over $4 trillion in assets under management called on companies to uphold labor rights, and they endorsed the UNGP Reporting Framework for firms to assess their human rights impacts.[289] In the call to action, the investors stated that "meaningful disclosure of human rights performance can play a significant role in reducing a company's human rights risks . . . contributing to a company's competitive advantage, and strengthening its long-term financial stability."[290] Notably, the investors used the term "meaningful disclosures." It is too early to tell whether this call to action will have a substantial and sustained impact on corporate behavior.

C. An Ethical Framework for Divestment

Norway and the other governments that have made ethical purchasing and divestment decisions can influence others to do the same. I recommend the following guidelines to facilitate that decision-making process, based upon disclosures or other information that the investor has obtained about a company. Although I generally do not believe that disclosures are enough, stakeholders can consider these inquiries even with the incomplete disclosures that exist today. The guidelines that I recommend represent a way to work within the disclosure framework that exists to make it as effective as possible. More importantly, stakeholders can ask their own questions of companies to ascertain the information that is most relevant to their decision-making process. These proposed guidelines are particularly pertinent when a firm is contemplating taking new action, or entering a market in an area with known human rights issues.

Because I believe that many companies may speak like Kantians in their CSR materials but act like utilitarians in practice, we need a set of questions that provides the flexibility to address each type of firm under a variety of circumstances. The following questions

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289. *See UN Guiding Principles Reporting Framework Investor Statement*, UN GUIDING PRINCIPLES REPORTING FRAMEWORK (July 31, 2015), http://www.ungpreporting.org/early-adopters/investor-statement; *$4 Trillion Investor Coalition Backs New Human Rights Reporting Tool*, BOSTON COMMON ASSET MANAGEMENT (Feb. 25, 2015), http://www.bostoncommonasset.com/news/UNGP.php.

290. *$4T Investor Group Backs UN Human Rights Initiative*, ASSET INTERNATIONAL-CHIEF INVESTMENT OFFICER (Feb. 25, 2015), http://ai-cio.com/channel/NEWSMAKERS/$4T_Investor_Group_Backs_UN_Human_Rights_Initiative.html.

have been adapted from Laczniak and Murphy,[291] and are as appropriate for human rights as they are for ethical marketing. Investors (and possibly conscious consumers) can make more critical assessments of disclosures, and/or make more reasoned choices about the firms they support after considering these baseline questions.

1) Does the contemplated action violate the law? (The legal test)

This is the simplest and most straightforward factor. Regardless of whether the home or host country enforces laws affecting human rights, firms are expected to comply with the law.[292] Furthermore, for those firms that must comply with the requisite disclosures, failure to comply could lead to legal issues or, more importantly, to calls for additional, stricter legislation. This guideline reiterates what the UN indicated about business and social contracts in 1999.[293] Investors who fail in shareholder proposals can, and should, lobby legislators to enact regulations with more teeth if the disclosure regime does not provide a direct benefit to those affected by human rights issues. Investors should also focus on firm compliance with the law, not home or host country enforcement of the law. Most importantly, they should consider whether firms comply with both the spirit and the letter of the law.

2) Is the action contrary to widely accepted moral obligations? (The duties test)

Firms and stakeholders may have differing views of their "duties" and moral obligations. These could include Kantian duties, "duties" or "responsibilities" under the UNGPs, and/or obligations under various industry or other voluntary initiatives. Although I think this factor is helpful, it should be further refined, and must take into account the concept of "moral free space" discussed in Part

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291. *See* N. Craig Smith, *Social Marketing and Social Contracts: Applying Integrative Social Contracts Theory to Ethical Issues in Social Marketing* (London Business School Centre for Marketing Working Paper No. 00-702 Oct. 2000), http://facultyresearch.london.edu/docs/00-702.pdf. The article cites the seminal piece by Laczniak and Murphy. *See* GENE R. LACZNIAK & PATRICK E. MURPHY, ETHICAL MARKETING DECISIONS: THE HIGHER ROAD (Allyn & Bacon 1993). Laczniak and Murphy also identify the issue of sufficient disclosure as an ethical issue.

292. *See* OECD, *supra* note 131.

293. *See* UN Conference on Trade & Development, *supra* note 50.

II, so that cultural norms that do not violate basic human rights are respected. However, TNCs cannot use respect for local customs as an excuse to violate baseline human rights. Some firms that tout their human rights credentials may attempt to argue that they are complying with cultural norms in order to excuse otherwise unacceptable behavior. For example, some firms may not follow standard safety precautions because they are not legally required to do so by the host country. This duties test also ensures compliance with the UNGP requirement that corporations respect human rights, regardless of local law.[294] This test requires a careful comparison between the words in a CSR or disclosure report and a firm's actions.

3) Does the proposed action violate any special obligations that stem from the type of organization? (The special obligations test)

Certain stakeholders could argue that companies that provide food, security, data, and medical services, for example, should have special obligations to the communities in which they operate. Others might argue that those in the extractive industry have heightened duties, because they often deal with oppressive regimes so that they can have access to timber, water, land, and other minerals, even if indigenous peoples also claim rights to those resources. It is possible that some TNCs should be held to a higher standard, but regardless of the level of special obligation, all firms should be able to answer questions about their complicity, using the UN definitions described in Part II. If disclosures do not require this information, then stakeholders should ask questions to obtain this information, and use the complicity guidelines to hold firms accountable.

4) Is the intent of the contemplated action harmful? (The motives test)

A number of the most egregious allegations against TNCs fall into this category. For example, residents of Papua, New Guinea sued Rio Tinto in 2000 under the Alien Tort Statute, alleging, among other things, that Rio Tinto was complicit in war crimes and crimes against humanity after the government quelled a violent uprising and fought a secessionist civil war—a war that was caused in part by the firm's alleged environmental crimes and racially discriminatory labor

294. Laczniak & Murphy, *supra* note 291; OECD, *supra* note 131, at 32.

practices.[295] The suit, brought on behalf of 10,000 people, claimed that the firm used its influence with the Papua New Guinea government to put down the rebellion, and that the armed forces eventually killed 15,000 citizens—almost ten percent of the population—through acts which included bombings and burning villages.[296] The suit also alleged that the government, acting for Rio Tinto, established a blockade of the island so that residents could not receive vital supplies.[297] According to the Ninth Circuit, "the complaint allege[d] purposeful conduct undertaken by Rio Tinto with the intent to assist in the commission of violence, injury, and death, to the degree necessary to keep its mines open."[298] After the *Kiobel* decision, which limited jurisdiction under the ATS, the Rio Tinto plaintiffs had no redress in U.S. courts.[299] Although this test will not apply to most TNCs, it certainly will apply to some, and stakeholders do not need firm disclosures to assess this factor. News reports and court filings will likely provide the relevant information.

5) Is it likely that any major harms to people or organizations will result from the contemplated action? (The consequences test)

This factor is perhaps the most subjective because of the differing definitions of "harmful." Some examples illustrate the potential conflict of interest between stakeholders. An NGO may believe that corporate sponsors of mega-events, such as the World Cup or the Olympics, have a responsibility to speak out against the host country's actions, or to boycott the events. In their view, failure to do so could cause harm to the host country's residents. Consumers and fans, on the other hand, may believe that the sponsor's involvement in buying commercials and plastering logos on stadiums is attenuated from the host country's human rights abuses, and that pulling out or boycotting would harm local communities and athletes. Similarly, a corporation may believe that it is protecting pregnant women by banning them from working around certain chemicals,

295. David Pallister, *Islanders Sue in US over Impact of Rio Tinto Mine*, THE GUARDIAN (Sept. 7, 2000), http://www.theguardian.com/world/2000/sep/08/davidpallister.riotinto.

296. *Id.*

297. *Id.*

298. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 767 (9th Cir. 2011), *vacated,* 133 S. Ct. 1995 (2013).

299. *Id.*

even though the host country's laws do not prohibit such employment. The workers, on the other hand, may prefer to take the risk so that they can earn money for their families. Is it more harmful for the firm to ban such employees, or to retain them? The consequences test also requires a value judgment as to the level of harm that is acceptable, because the question asks only about "major" harm. Likewise, the UNGPs specifically contemplate a weighing of consequences and harms by requiring firms to conduct due diligence in their supply chains for their human rights impacts.[300] Although it is highly subjective, some investors may find this consequences factor useful. Investors with a utilitarian mindset, for example, may find the test particularly satisfying. Ultimately, investors should make the decisions that best comport with their values. "Ethical" consumers may need to consider whether their attendance at an event, or their purchase of a sponsor's goods, makes them "complicit" in human rights abuses. Socially responsible investors have, in the past, passed submitted shareholder proposals in the United States, but perhaps they can play a bigger role if this factor resonates with their principles.

6) Is there a satisfactory alternative action that produces equal or greater benefits to the parties affected than the proposed action? (The utilitarian test)

This question would provide stakeholders with the opportunity to work with the firm to determine alternatives prior to harmful actions being taken, provided that the firm was actively engaged with the appropriate groups. Again, though, the word "satisfactory" can lead to difficulty. An NGO may expect a TNC to pull out of a country, or to go above and beyond what the host country's law requires, in order to meet the NGO's standards. On the other hand, some investors or even board members may argue that providing donations to appropriate charities, or staying in the country to push for legislative change, are better alternatives. Nonetheless, stakeholders can utilize this factor whether they rely on existing disclosures, or (preferably) they ask specific questions that can assist in their assessment of the firm.

300. *See* Guiding Principles, *supra* note 15, ¶ 17.

7) Does the contemplated action infringe upon human rights? (The rights test)

This test should be relatively easy to apply, given the amount of guidance that firms and stakeholders have from the sources, including disclosures, described above. Firms that are more involved with the State or with human rights offenders should have more of a positive duty to protect human rights, rather than a negative duty to simply do no harm.

8) Does the proposed action leave another person or group less well off? Is the person or group already a member of a relatively underprivileged class? (The justice test)

Like the duties test, this seemingly straightforward test could have differing answers, depending on one's perspective and priorities. In some instances, a project may provide jobs to a large segment of the community, but may also have significant environmental or human rights impacts, especially for indigenous peoples. Stakeholders assessing disclosures will again have to make a judgment call in line with their stated principles.

If current disclosures do not aid in these inquiries, stakeholders should ask the targeted questions that do. The problem, however, will be overcoming the collective action issues that currently disincentivize this sort of engagement. Although I propose this ethical framework in the section on investors, consumers and board members could adopt one or more parts of the test as well in evaluating disclosures and firm behavior overall. In fact, I would recommend that board members ask these questions in a balancing test that best fits their business needs and corporate culture before agreeing to sign on to any voluntary initiatives, making disclosures, or engaging in new business in an area with known human rights issues.

VI. CONCLUSION

Some consumers and investors will patronize and invest in firms regardless of their human rights records. In fact, for some customers and shareholders, a firm's refusal to allow unions or use of underage labor keeps costs down, and could provide a company with a competitive advantage. For them, operating in a weak or failed State is not a barrier, but a benefit, because of under-enforced or nonexistent laws. Others may have an interest in human rights impacts, but do not know how to make informed decisions based on

the numerous, confusing, and often incomplete disclosures they receive.

Adding or tweaking disclosures is not the answer. Assuming stakeholders even see or read the disclosures, one-size-fits-all disclosure regimes do not provide adequate information. Disclosures are either too much, too little, or not relevant to the kinds of decisions that stakeholders will make in the human rights context. It is also possible that the weakness of disclosure reflects on the social contract itself. Perhaps consumer and investor apathy suggest that ethical business practices are not an essential part of business' social contract. Market participants may not see themselves as defining or enforcing the social contract between business and society.

Regardless of the reason for the failure of disclosures, I argue that legislators should move away from disclosures, rather than trying to fix them; instead, they should enact human rights legislation that imposes meaningful penalties on companies that negatively impact human rights, such as financial fines, criminal prosecution when warranted, debarment from government contracts, and when appropriate, an embargo against the host country so that companies cannot do business with regimes with oppressive human rights records. Countries that insist on disclosure should also provide significant incentives, such as procurement preferences, for complying with the UNGPs and otherwise positively impacting human rights.[301] More importantly, if countries use disclosure, they must do more. Legislators must not only penalize failure to comply with the procedural hurdles of disclosure, but most also require disclosure of due diligence and human rights impacts; prohibit activities that negatively impact human rights; and punish firms for substantive violations. Finally, I propose an eight-factor test to provide guidance on using current disclosures or stakeholder-specific inquiries. The test, while not perfect, is a first step to a broader and more robust inquiry about corporate accountability that I will develop in a future Article. In the interim, the questions can provide a basic framework by which others can judge firms and, indeed, firms can judge themselves. Although it may not provide a remedy for breaches of the social contract, it may provide another way to ascertain whether the firm has lived up to its legal and non-legal obligations.

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301. I discuss this in detail in Narine, *supra* note 23.