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The U.S. Statecraft of Corporate Human Rights Obligations

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I. INTRODUCTION

Statecraft may be defined as "the use of instruments at the disposal of central political authorities to serve foreign policy purposes."[1] That definition, though, may admit of a narrower and a broader understanding. The narrower and perhaps more cynical notion imagines statecraft as the management of a power struggle for the sake of self-preservation. Even the Oxford Dictionary of Politics and International Relations conceives statecraft as fundamentally about "managing relations between states to the advantage of one's own country."[2] With roots extending at least as far back as Machiavelli's The Prince with its infamous preoccupation with preserving power in the face of internal and external enemies,[3] this may be the most common contemporary sense of the term.[4] But a broader understanding of statecraft has arisen in modern scholarship, and perhaps in experience. Charles Anderson notes in his 1977 book *Statecraft*, that the word is an old north European term for "the science of government" and in connection with the modern state essentially consists of "impos[ing] direction and form on the course of human affairs."[5] According to Jochen Prantl and Evelyn Goh, the term may be better understood as "the skill of securing the

1. Michael Mastanduno, *Economic statecraft*, in Smith, Hadfield, and Dunne, eds., FOREIGN POLICY (Oxford University Press 2012) at 204.

2. *See* Colin Tabot, *The Science of Government: Setting out the Seven Elements of Statecraft*, GLOBAL GOV'T. FORUM (Sept. 1, 2023), https://www.globalgovernmentforum.com/the-science-of-government-setting-out-the-seven-elements-of-statecraft/.

3. NICOLO MACHIAVELLI, THE PRINCE (Ernest Rhys, ed., W. K. Marriot trans., E.P. Dutton 4th prtg. 1916) (1532).

4. Tabot, *supra* note 2.

5. CHARLES W. ANDERSON, STATECRAFT p.vii. (1977).

survival and prosperity of a sovereign state."[6] By this way of thinking, "the successful or unsuccessful conduct of statecraft may settle the fate of our way of life."[7] In this vein, Alasdair Roberts in his 2019 book "Strategies for Governing" conceives statecraft to encompass all aspects of the "creation, maintenance, and adaptation of the state and political order, both internal and external."[8] Similarly, Colin Talbot observes, "The term 'statecraft' can therefore be used as an all-embracing one for the study of states and governments and how to successfully build, run and adapt them, internally and externally."[9]

Whether statecraft is framed as the preservation of self-interest in a threatening world, or the promotion of a particular conception of a well-ordered society, international economic statecraft entails the use of legal and commercial tools, rather than military engagement, to achieve foreign policy objectives. States direct businesses in their overseas conduct towards public goals, and businesses become instruments of statecraft. Through law, states create incentives that direct the behavior of transnationally-engaged enterprises toward state interests.[10] Companies in turn adopt compliance programs to ensure their business conduct accords with these state-imposed objectives.

Presently, multinational companies thus must deal with two principal compliance concerns that are not industry-specific: corruption, particularly bribery; and sanctions and export controls.[11] But as this article will explain, those U.S. companies doing business with EU companies will soon need to add a third: human rights. The European Union is poised to require all member states to adopt legislation requiring companies to implement a set of corporate measures first laid out in the United Nations Guiding Principles on Business and Human Rights (UNGPs).[12] The UNGPs call on companies to adopt programs that are akin to the compliance programs they already have in place for

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6. Jochen Prantl & Evelyn Goh*, Rethinking Strategy and Statecraft for the Twenty-First Century of Complexity: a Case for Strategic Diplomacy*, 98 INTERNATIONAL AFFAIRS 443, 433 (2022).

7. Morton A. Kaplan, *An Introduction to the Strategy of Statecraft*, 4 WORLD POLITICS 548, 548 (1952).

8. ALASDAIR ROBERTS, STRATEGIES FOR GOVERNING (2019).

9. Tabot, *supra* note 2.

10. *See* David A. Baldwin, *What is Economic Statecraft?*, BUSH SCH. OF GOV'T AND PUB. SERVICE (https://bush.tamu.edu/economic-statecraft/what-is-economic-statecraft/.

11. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq; International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701 et seq.

12. Special Representative of the U.N. Secretary-General*, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* A/HRC/17/31, p. iv, (June 16, 2011) https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

corruption and sanctions, though different in important ways. Whether supply chain human rights risks threaten the very existence of a sovereign state is perhaps debatable. But to the extent that statecraft is about promoting a conception of a well-ordered society, whether and how a state imposes human rights obligations on transnational companies belongs in the conversation.

Of these three forms of imposing compliance costs on companies to achieve foreign policy objectives, in the U.S. one of these things is not like the others. The U.S. has plainly and deliberately assumed a global leadership role, for better or for worse, in driving international anti-corruption and sanctions enforcement; the U.S. has adopted exacting statutes and regulations and built highly-resourced enforcement mechanisms.[13] However, on the principle that companies should have mandatory human rights obligations, and to that end the UNGPs should be codified, the U.S. is something of a laggard. As Section II below will explain, the U.S. arguably dabbles with an assortment of statutes that variously touch on corporate human rights obligations, but these do not begin to compare to the comprehensiveness of the UNGPs. Rather, the epicenter of corporate human rights enforcement is clearly western Europe. Two of Europe's biggest economies—France[14] and Germany[15]—have both codified the UNGPs, and an EU-level mandate is now in the works.[16] While Europe's leading economic powers, and shortly the EU itself, have incorporated the UNGPs into their economic statecraft arsenal, the U.S. has chosen not to do so. As Part III will show, the U.S. has attempted and now attempts to address corporate human rights issues through a patchwork of statutes that collectively does not approximate the UNGPs' breadth and depth.

Nonetheless, at least some U.S. companies will soon find themselves within the ambit of these human rights requirements. Despite the United States' disinclination to codify the UNGPs, many U.S. companies will nevertheless find themselves under binding legal obligations to operationalize them. This will happen not through statute, but

13. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq; International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701 et seq.

14. Loi 2017-399 [French Duty of Vigilance Law] relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 27 Mar. 2017 (Fr.).

15. Handelsgesetzbuch [HGB] [Commercial Code] § 13d, Lieferkettensorgfaltspflichtengesetz [The Act on Corporate Due Diligence Obligations in Supply Chains] Jan 1, 2023 (Ger.).

16. EU Mandatory Human Rights Due Diligence Directive: Recommendations to the European Commission Note by the Office of the U.N. High Commissioner for Human Rights https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ohchr-recommendations-to-ec-on-mhrdd.pdf (July 2, 2021).

through contract. Once the EU Directive takes effect and member states adopt implementing legislation, European companies will be required to respect human rights throughout their partners and supply chains. European companies entering into contracts with U.S. companies will then demand that those U.S. companies adopt appropriate human rights due diligence measures.

Should U.S. companies fail to comply, they will find themselves in court, defending a European counterparty's claim for breach of contract. The emergent enforcement mechanism for overseas corporate human rights violations is thus not public enforcement, but private: aggrieved parties filing civil claims, and in so doing advancing public goals. Private enforcement, in turn, is a quintessentially U.S. form of statecraft. As Section IV will show, the U.S. long relied on this strategy for advancing public goals, embedding private rights of action in a wide array of federal statutes and making U.S. courts readily available for utilization.[17]

This essay describes the contours of this emerging manifestation of U.S. economic statecraft: the reliance on private enforcement to promote corporate human rights obligations. Part III briefly describes the U.S.' somewhat haphazard attempts to date to impose corporate human rights obligations through statutes.[18] Part IV then introduces the UN Guiding Principles on Human Rights and Business, and shows these are becoming codified in Western Europe.[19] Finally, Part V describes that distinctly U.S. manifestation of statecraft known as private enforcement: advancing public policy goals through empowering private litigants to bring suits in court, and explores its implications for adoption of UNGPs in the U.S.[20]

II. US ECONOMIC STATECRAFT ON HUMAN RIGHTS

For decades, enforcement agencies and private litigators have used federal statutes to address at least a subset of human rights issues arising in transnational supply chains. In some cases, Congress wrote the statutes for this purpose; in others the statutes had to be adapted. In practice, it hasn't mattered – either way, these statutes have collectively been hampered by a number of constraints. It would seem the

17. *See supra,* Part V. *See also* Luke Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483 (2022); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S., 10 (2010).

18. *See supra*, Part III.

19. *See supra*, Part IV.

20. *See supra*, Part V.

prospect of US companies having a legal obligation to adopt comprehensive human rights measures in their overseas operations does not now lie in statute.

The first is the rise of judicial doctrines that have limited the application of these statutes to overseas conduct. As Pamela Bookman has observed, courts have used the doctrines of personal jurisdiction, forum non conveniens, abstention comity, and the presumption against territoriality to avoid adjudicating transnational disputes.[21] The latter has proven perhaps the most vexing. The most salient example of a federal statute that once held promise as a mechanism for deterring overseas corporate human rights misconduct, but has been hampered by recent judicial trends, is the Alien Tort Statute. Enacted in 1789, the ATS gives federal district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[22] The statute laid dormant until 1980, when the U.S. Court of Appeals for the Second Circuit issued the decision of *Filartiga v. Pena-Irala*, holding that foreign nationals who are victims of international human rights violations may bring a civil suit in federal court for overseas violations, provided the court had personal jurisdiction over the defendant.[23] This holding gave the statute a rebirth, and for the next three decades the ATS became the principle vehicle for litigating transnational human rights issues in the United States. Then in the 2013 case of *Kiobel v. Royal Dutch Petroleum Co*., the U.S. Supreme Court invoked the presumption against extraterritoriality – which holds that statutes should not apply to conduct occurring beyond the territory of the United States absent clear evidence of Congressional intent – to preclude "foreign cubed" cases in which a foreign plaintiff sues a foreign defendant for conduct occurring in a foreign nation.[24] In the 2018 Supreme Court case of *Jesner v. Arab Bank*,[25] PLC categorically prohibited the suing of foreign corporations under the ATS. The evisceration of the ATS would continue in 2021, with the U.S. Supreme Court's case of *Nestle USA, Inc. v. Doe* further restricting the application of the ATS, holding that "allegations of general corporate activity" are insufficient to overcome the presumption against extraterritoriality when the harmful conduct occurred overseas.[26] As a result, ATS cases now must be limited to claims against

21. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1099-1100 (2015).

22. 28 U.S.C. § 1350.

23. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

24. *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108, 124-25 (2013).

25. 138 S. Ct. 1386, 1407 (2018).

26. 141 S. Ct. 1931, 1937 (2021).

U.S. corporations for harm occurring in the U.S.[27] As a tool for deterring overseas corporate human rights violations, the ATS is largely out of commission.

The presumption against extraterritoriality likewise jeopardizes two additional statutes that might otherwise prove effective in deterring overseas corporate human rights abuses. The Trafficking Victims Protection Act, enacted in 2000 and reauthorized multiple times, created criminal and civil causes of action for both labor and sex trafficking.[28] Whether the private cause of action applies to extraterritorial violations is unclear based on the statutory language[29] and lower courts are divided on the question.[30] Given the current composition of U.S. Supreme Court and recent jurisprudential trends, its days would seem numbered. Similarly, a reauthorization of the TVPA would bring another statute to bear on forced labor. The Racketeer Influenced and Corrupt Organizations Act (RICO) was passed in 1970 as a tool for prosecuting organized crime. The statute prohibits committing multiple "acts of racketeering activity" within a ten-year period in relation to an "enterprise."[31] While the original list of racketeering activities included dozens of acts related to corruption and crimes against the person, human rights violations were not among them. Then in 2003, the Trafficking Victims Protection Reauthorization Act added human trafficking, to include both labor and sex trafficking.[32] This would have appeared to be a least one substantial step forward. However, in the 2016 case of *RJR Nabisco, Inc. v. European Community*,[33] the U.S. Supreme Court required the plaintiff to prove domestic injury. RICO thus represents the confluence of two critical limitations: the presumption against extraterritoriality, and the narrow focus on trafficking.

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27. William S. Dodge*, The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), https://perma.cc/9BDF-XCWS ("Nestlé . . . mark[s] the end of the Filartiga line of ATS cases against individual defendants whose relevant conduct occurs outside the United States.").

28. Trafficking Victims Protection Act, 22 U.S.C. § 7101.

29. Sara Sun Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, 50 CASE W. RSRV. J. INT'L L. 17, 39 (2018).

30*. See* Matthew H. Higgins, *Closed Loophole, Open Ports: Section 307 of the Tariff Act and the Ongoing Importation of Goods Made Using Forced Labor*, 75 STAN. L. REV. 917, 933–35 (2023) (summarizing cases).

31. 18 U.S.C. § 1961(4)-(5) (defining "enterprise" and "pattern of racketeering activity"); *id*. § 1962(a).

32. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 5(b), 117 Stat. 2875, 2879 (2003) (codified at 18 U.S.C. § 1961).

33. 136 S. Ct. 2090, 2111 (2016).

The extraterritorial application problem would then be solved, to some extent, by what we now call the Tariff Act.[34] Originally enacted in 1930 as the Smoot-Hawley Tariff Act, this statute is today stigmatized as among the most damaging trade policies in history. The Act sought to ameliorate the Great Depression but is generally regarded as worsening it by imposing "some of the highest rates of tariff duties in the history of the United States."[35] However, among its restrictions was one that may have been prescient: Section 307 created a bar on the importation of "all goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor…"[36] The historical record contains no evidence that Section 307 was animated by human rights concerns; rather, its purpose was to "protect domestic producers, production, and workers from the unfair competition which would result from the importation of foreign products produced by forced labor."[37] However, to address concerns that such severe restrictions would deny Americans the use of goods they could not domestically produce, Congress adopted the consumptive demand exception, permitting the importation of goods made by forced labor if they are produced "in such quantities in the United States as to meet the consumptive demands of the United States."[38] The exception would swallow the rule, as the consumptive demand exception turned out severely limit the enforcement of this forced labor prohibition – a great many goods likely to have been produced with forced labor were nevertheless imported to the U.S. Then, in 2015, Congress adopted an omnibus trade law called the Trade Facilitation and Trade Enforcement Act which, in the name of creating a "fair and competitive trade environment," created new tools to address the importation of counterfeit goods, enforce antidumping laws.[39] Most importantly, it eliminated the consumptive demand exception.[40] With this, issuance of WROs has increased steadily and will likely continue to do so. This dynamic is further accelerated by the Uyghur Forced Labor Prevention Act of 2021, which created a rebuttable presumption that any good produced

34. 19 U.S.C. 4 - TARIFF ACT OF 1930 ("Smoot Hawley Tariff Act").

35. Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 586–87 (2007) (quoting RALPH H. FOLSOM ET AL., *Principles Of International Business Transactions, Trade, And Economic Relations* 229 (2005)).

36. 19 U.S.C. § 1307.

37. Higgins, *supra* note 139 at 937, (quoting *McKinney v. U.S. Dep't of Treasury*, 799 F.2d 1544, 1552 (Fed. Cir. 1986) (emphasis omitted)).

38. *See* 19 U.S.C. § 1307 (2010) (amended 2016).

39. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 910(a)(1), 130 Stat. 239 (2015) (codified at 19 U.S.C. § 1307).

40. *Id.*

in the Xinjiang region of China was produced with convict labor, forced labor, or indentured labor.[41]

The Tariff Act, as amended in 2015 and 2021, thus is buttressed against the presumption against extraterritorial application in ways that previous statutes were not. But even so, an amended Tariff Act from a problem that likewise inheres in the TVPA and RICO: these statutes only apply to forced labor and human trafficking. Among the full panoply of human rights recognized in the International Bill of Human Rights and, as the below will show, integrated into the UNGPs, the Tariff Act, TVPA, and RICO only protect one of them.

And as the below juxtaposition with the UNGPs will illustrate, these statutes do not require or even recommend what may be the most fundamental feature of a legal framework that effectively deters overseas corporate human rights abuses. Neither the ATS, nor the TVPA, nor RICO, nor the Tariff Act requires a set of preventative measures, akin to a corporate compliance program but different in key respects, that companies adopt to internalize the costs of deterring misconduct. Companies are of course free to adopt internal measures to ensure they do not violate any of these laws, but the laws themselves neither require these measures nor provide formal legal incentives to do so.[42]

Enter the UN Guiding Principles on Business and Human Rights.

III. THE UN GUIDING PRINCIPLES: A PROGRESSION FROM SOFT TO HARD LAW

The UNGPs are the uncontested definitive standard for corporate best practices in human rights. While the compliance field

41. Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 3(a-b), 135 Stat. 1525, 1529 (2021) (codified at 22 U.S.C. § 6901 note (Prohibition on Importation of Goods Made Through Forced Labor in the Xinjiang Uyghur Autonomous Region)).

42. Notably, these same limitations appear in the one state statute of note in this space, the California Transparency in Supply Chains Act of 2012. The state statute requires retail sellers and manufacturers doing business in California with $100 million or more in annual worldwide gross receipts to "disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods." *See* S. B. 657, 2010 Leg., 2009-2010 Sess. (Cal. 2010). It thus requires these companies to post on their websites the extent to which they evaluate and address human trafficking and slavery risks in their supply chains, audit suppliers, require direct suppliers to certify that their products comply with any applicable laws in the countries where they operate, maintain internal standards of accountability, and provide training to employees and management. The exclusive remedy is an action for injunctive relief brought by the State Attorney General. *Id.* Again, there is no private right of action, no compensation to victims, no protection beyond human trafficking, and while the statute requires companies to disclose the extent of the measures they've adopted, a company disclosing that it has done absolutely nothing would itself satisfy that requirement.

generally is highly pluralistic, with standards promulgated by various governments, intergovernmental organizations and nongovernmental organizations, the business and human rights space is monolithic and the monolith is the UNGPs. This is so even though they have no binding force on states, let alone on businesses. Though endorsed by the UN Human Rights Council in 2011,[43] states do not have legal obligations to adopt the UNGPs and there exists no enforcement mechanism above the state level. In effect, the UNGPs are a recommendation to states, one which is gaining increased adoption in Europe but not yet elsewhere.

The UNGPs are divided into three sections, the first of which affirms the long-established principle that states have a duty to protect human rights and clarifies the state's duty in connection to business activity. Working from this starting point, the real work of the UNGPs begins in Section II, which describes a corporate responsibility to "respect" human rights.[44] The human rights include "at a minimum," the rights articulated in the International Bill of Human Rights – to include the Universal Declaration of Human Rights[45] and the two principle instruments codifying the Declaration: the International Covenant on Civil and Political Rights[46] and the International Covenant on Economic, Social and Cultural Rights[47] and the International Labor Organization's Declaration on Fundamental Principles and Rights at Work.[48] Collectively, these create a broad panoply of enforceable human rights, to include anti-discrimination, anti-trafficking, due process, privacy, freedom of expression and religion, right of assembly to include trade unions and the right of collective bargaining, fair wages, safe and healthy working conditions, reasonable hours, maternity leave, the abolition of child labor, and adequate living conditions.

This responsibility to respect includes both a preventative component and a remedial component. Preventatively, companies in the

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43. Special Representative of the Secretary-General, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* A/HRC/17/31, p. 1 (2011) available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

44. *Id. at Section II.*

45. *Id.* at 13-14.

46. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

47. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

48. ILO Declaration on Fundamental Principles and Rights at Work, Jun. 18, 1998, 37 I.L.M. 1233.

first instance should "avoid fringing on the human rights of others."[49] This means that in their own conduct, they should avoid causing or contributing to" adverse human rights impacts. However, the UNGPs ask companies to take responsibility not just for their own misconduct, but misconduct occurring among their partners and throughout their value chain. The UNGPs capture this concept by stating that companies should "seek to prevent or mitigate" adverse impacts that are "directly linked" to their operations, products, or services as a result of business relationships, even if it could not be said that the company otherwise contributed to those impacts.[50] To sum up, companies should never directly cause or contribute to human rights violations, and additionally, they should take reasonable efforts to prevent any such violations from occurring among their partners and within their supply chains.

Then there is the remedial component. Where the business has caused or contributed to the adverse impact, it has a duty to actively remediate. By extension, where the adverse impact is not one the company caused or contributed to, but rather, is only linked to its operations (occurring somewhere in its business relationships) the company is not responsible under the UNGPs for remediating.[51] Remediation means ensuring that "those affected" have access to "effective remedy." The remedy may take many forms, to include apologies, restitution, rehabilitation, financial or non-financial compensation, punitive sanctions, or injunctions.[52] Procedurally, access to an effective remedy requires a grievance mechanism, which can be state- or non-state based, can be judicial or non-judicial, and may even be provided by the business itself (which the UNGPs call "operational-level").[53]

To operationalize these preventative and remedial features, companies need to adopt three kinds of measures: 1) a policy commitment, a.k.a. a code of conduct; 2) due diligence conducted throughout its own operations, as well as the company's business relationships, both to prevent and to mitigate adverse impacts; and 3) appropriate remediation processes.[54]

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49. Special Representative of the Secretary-General, *supra* note 13, at 13.

50. *See United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* A/HRC/17/31, *supra* note 43, Section II.

51. *Id.* at 24-25.

52. *Id.* at 25-26.

53. *Id.* at 27-28.

54. *Id.* at 15-16.

Juxtaposed with the US statutes above, the UNGPs are clearly poised to succeed where those statutes have failed. They would require companies to protect the fully panoply of rights, not just human trafficking; they unequivocally apply to overseas operations; they require companies to ensure a mechanism for victims to seek redress and provide effective remediation; and most importantly, their essence is the requirement that companies adopt internal policies and procedures to both prevent and remediate such violations. The trick, then, is to convert these soft law principles into binding law.

This is precisely what is occurring in Europe. The last ten years have witnessed the incremental adoption of the UNGPs in statute. The precursor to this movement was the UK Modern Slavery Act of 2015, which requires organizations carrying on "a part of a business" in the UK and has minimum annual turnover to draft and publish on their website a slavery and human trafficking statement.[55] The statute supplies a list of "information that may be included," which includes organizational structure, policies, due diligence processes, a risk assessment, training measures, and performance indicators.[56] Moving beyond the U.S. statutes, the UKBA begins to codify the notion that companies must adopt internal policies and procedures. However, much like the Tariff Act and the amended RICO, the UKBA applies only to the discrete right of human trafficking and modern slavery.

The UNGPs became more fully codified in France through its Duty of Vigilance Law.[57] Adopted in 2017, the statute requires all companies with 5000 employees, including subsidiaries, on French territory, or 10,000 total if including all global subsidiaries, to adopt a vigilance plan. The plan must relate to "human rights and fundamental freedoms" and the "health and safety . . . of the environment," thus including all internationally recognized human rights and more.[58] To respect these rights, covered companies must identify and prevent risks resulting from their own activities, as well as to the activities of companies they control or with whom they have commercial relationships (when the risks are linked to the relationship). Mandatory measures include risk mapping, risk mitigation measures with regular

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

56. See *Transparency in supply chains: a practical guide*, GOV.UK, ¶¶ 5.1-5.2, https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide/transparency-in-supply-chains-a-practical-guide (last updated Dec. 13, 2021).

57. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [French Duty of Vigilance Law], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], (Mar. 27, 2017).

58. *Id.*

monitoring, and an alert mechanism.[59] Harmed individuals can sue companies in tort for harms that the vigilance plan would have prevented.[60] Following France's lead, in 2023 Germany adopted its Supply Chain Act[61] that arguably represents a further advancement in the codification of the UNGPs. It reduces the minimal number of employees to 1000 (effective in 2024) and adds a combination of public and private enforcement: its existing Federal Office for Economic Affairs can investigate and issue administrative penalties, and the statute creates a private right of action for trade unions or NGOs to represent aggrieved parties. Like the Duty of Vigilance Law, the German Supply Chain Act protects all recognized human rights as well as environmental rights and requires companies to adopt internal due diligence measures.[62]

Even though the German statute goes further than France, the EU may shortly require all 27 member states to go further yet. The proposal now under consideration at the EU would commit all member states to adopt legislation similar to the German model. States would be required to adopt legislation requiring companies to respect all rights in the international human rights conventions plus environmental protections, and to impose substantive requirements, including policies, due diligence measures, monitoring, a grievance mechanism, and prevention, mitigation, and remediation. The minimum size of the company subject to these laws will be even smaller: initially 500 employees and 150 million Euro turnover, and then two years later it would apply to companies in "high-impact sectors" with 250 employees and 40 million turnover.[63] More similar to the German law (and less so to the French), it will require states to utilize a combination of public enforcement and private rights of action for victims.[64]

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59. *Id.*

60. *See France's Duty of Vigilance Law,* BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/frances-duty-of-vigilance-law/, for guidance in English on requirements of the French law.

61. Lieferkettensorgfaltspflichtengesetz[LkSG] [The Act on Corporate Due Diligence Obligations in Supply Chains] Jan 1, 2023 (Ger.).

62. *See* Daniel H. Sharma & Franz Kaps, *German Supply Chain Act (Lieferkettensorgfaltspflichtengesetz) – New standard for human rights and environmental due diligence for global supply chains,* DLA PIPER, (Sep. 29, 2021) https://www.dlapiper.com/en-us/insights/publications/2021/09/german-supply-chain-act-lieferkettensorgfaltspflichtengesetz, for guidance in English on requirements of German law.

63. *Id.*

64. *See* European Commission Press Release IP/22/1145, Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value (Feb. 23, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145.

As a technique of statecraft, the EU is thus taking a two-tiered approach to imposing human rights obligations on transnational companies: first, it creates the obligations through statute; and second, it holds companies accountable to these obligations through a combination of private and public enforcement.

Neither will occur in the U.S. anytime soon. The winds of UNGP codification may be moving swiftly across the European continent, but they are not crossing the Atlantic or forecasted to do so any time soon. Absent a statute, there will be no public enforcement of the full panoply of human rights, much less a corporate obligation to adopt due diligence. However, one piece of the European approach may lie on the U.S. horizon: private enforcement, a practice the U.S. knows well.

IV. PRIVATE ENFORCEMENT OF THE UNGPS

A long-standing and deeply-embedded feature of U.S. law has been the use of private rights of action to advance public policy goals. Rather than relying on public agencies alone to file civil or criminal suits seeking to advance these goals, U.S. law frequently grants private parties the legal right to file civil suits against those who may have contravened this policy and violated the statute.[65] Today, hundreds of federal statutes include private enforcement mechanisms, to include areas such as antitrust, securities regulation, environmental law, labor and employment, communications, civil rights, consumer protection, housing, public health, securities and banking, election, and national security.[66] In so doing, U.S. law pairs the more conventional tools of public enforcement with private lawsuits. Indeed, research has shown that where a statute utilizes both public and private enforcement to advance its policy goals, private enforcers bring upwards of 95% of all enforcement actions.[67]

These private rights of action serve the dual goals of separating the enforcement power from the periodic shifts of the political winds blowing through executive agencies and decreasing reliance on limited public resources.[68] So too do private suits empower those most directly

65. The decidedly uncomfortable origins of this practice is the Fugitive Slave Acts of 1793 and 1850. *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183, 186 (exploring how private attorney general regimes allow "Congress [to] vindicate important public policy goals by empowering private individuals to bring suit")

66. *See* Luke Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1492-93 (2022).

67. *Id.* at 1495.

68. *See* Norris, *supra* note 66 at 1496.

affected by a statute's violation, bringing their "expertise of experience"[69] to the enterprise of vindicating rights and developing case law. The enforcement agency's expertise is thus combined with the private litigants' felt experiences to create a more balanced and robust enforcement strategy. The Progressive Era political philosopher John Dewey captured the dynamic this way: "The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied."[70] Admittedly, private rights of action have become more politicized and controversial in recent years, and the concept is now tied in the public consciousness not with bedrock principles of regulation commanding bi-partisan support but with highly politicized causes that may gain political support only on a state basis.[71] But backing away from this more recent variant, private enforcement generally is used to advance national goals related to regulating business conduct and protecting individual rights.

This distinctively U.S. approach may be poised to become a principal, if not *the* principal, mechanism for enforcing human rights commitments on U.S. companies in their overseas operations. The U.S. appears not at all close to codifying the UNGPs and supporting that codification with public enforcement, as Germany has done with the UNGPs and the US has done with bribery or sanctions. But U.S. state and federal courts stand ready to allow European companies to hold U.S. companies accountable for their contractual obligations to adopt human rights due diligence.

Might we deem this a form of statecraft? A statecraft by omission? The decision not to impose comprehensive human rights obligations on US companies through statute may itself be an act of statecraft. If European companies do one day file suits against U.S. companies for breach of contract, the questions of statecraft will then revolve around the interpretation and enforcement of these contracts. The epicenter of U.S. statecraft on this issue may then become the courts. The question of statecraft will in turn become whether contracts should be the more legally dependable instruments of extraterritorial application of comprehensive corporate human rights commitments.

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69. *Id.* at 1513.

70. *See* Norris, *supra* not 66 at 1513 (citing John Dewey, *The Public and its Problems: An Essay in Political Inquiry* 46-54 (Melvin L. Rogers ed., Pa. State Univ. Press 2012) (1927)).

71. *See* Norris, *supra* note 66 at 1496-97 (documenting the use of private rights of action to advance more polarizing political goals on issues such as abortion, guns, and gender identity).

However, this form of private enforcement is different from the well-established U.S. practice in at least one key respect. Unlike anti-trust, anti-discrimination, securities laws, and a myriad of other forms of federal private enforcement mentioned above, the U.S. presently has no public policy of applying comprehensive human rights obligations to U.S. companies in their overseas operations. If anything, private enforcement of the UNGPs would in effect constitute the enforcement of the public policy of a foreign jurisdiction – the E.U. Perhaps the awkwardness of that arrangement, especially the perception that U.S. companies are being policed by foreign jurisdictions, will one day catalyze stronger national legislation.