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Shuangge Wen

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Cover Page Footnote

Shuangge Wen, Professor of Law, Center for Jurisprudence Research, School of Law, Jilin University, P.R. China; Member of the Institute of International Shipping and Trade Law, Swansea University, U.K.; Shuanggewen@jlu.edu.cn; S.Wen@swansea.ac.uk. We want to thank the Catholic University Law Review referees and editors for their constructive comments and suggestions. We are also greatly indebted to Professor Lidong Cai, Professor Iris Chiu, Professor Andrew Tettenborn and Gary Wilson for providing us with valuable comments on the drafts of this paper. The research is kindly supported by PRC Ministry of Justice: National Rule of Law and Legal Theory Research Program (19SFB2039, Legislative Designs of Global Supply Chain Governance), Department of Education of Jilin Province 135 Social Science Program (JJKH20180273SK, Company Law Transplantation amid Economic Globalization), and Jilin University 2019 Global Innovation Team Program (2019GJTD04, Transformations of Global Business Law Systems).
Jingchen Zhao, Professor of Law, Nottingham Law School, Nottingham Trent University, U.K., Jingchen.Zhao@ntu.ac.uk

THE BUMPY ROAD OF HOME STATES' REGULATION OF GLOBALIZED BUSINESSES—LEGAL AND INSTITUTIONAL DISRUPTIONS TO SUPPLY CHAIN DISCLOSURE UNDER THE MODERN SLAVERY ACT

Shuangge Wen† & Jingchen Zhao††

† Professor of Law, Center for Jurisprudence Research, School of Law, Jilin University, P.R. China; Member of the Institute of International Shipping and Trade Law, Swansea University, U.K.; Shuanggewen@jlu.edu.cn; S.Wen@swansea.ac.uk. We want to thank the Catholic University Law Review referees and editors for their constructive comments and suggestions. We are also greatly indebted to Professor Lidong Cai, Professor Iris Chiu, Professor Andrew Tettenborn and Gary Wilson for providing us with valuable comments on the drafts of this paper. The research is kindly supported by PRC Ministry of Justice: National Rule of Law and Legal Theory Research Program (19SFB2039, Legislative Designs of Global Supply Chain Governance), Department of Education of Jilin Province 135 Social Science Program (JJKH20180273SK, Company Law Transplantation amid Economic Globalization), and Jilin University 2019 Global Innovation Team Program (2019GJTD04, Transformations of Global Business Law Systems).

†† Professor of Law, Nottingham Law School, Nottingham Trent University, U.K., Jingchen.Zhao@ntu.ac.uk

I. INTRODUCTION

"Home from home"—in point of regulation, this idiomatic expression is becoming an increasing reality for focal companies and their subordinates in multinational groups.[1] Facing novel sustainability challenges posed by labor and environmental exploitation in the globalized business context, and with the power of multinational enterprises (MNE) greatly outpacing the growth of the international regulatory frameworks that control them,[2] it is no longer unusual for a home state to fill governance gaps and hold a focal company responsible for activities in its supply chains beyond its national borders.[3]

To take business and human rights as an example, in line with the current international regulatory framework and an overall expectation on home states as

1. In this article, the term "holding company" is used to denote a company created to buy and own the shares of other companies, which it then controls in a group context. The term is often used interchangeably with the concept of "parent company." The term "focal company" refers to a business entity that governs the supply chain and has bargaining power over its business partners. The latter may well include holding companies.

2. International law only recognizes individuals and states as possible perpetrators of certain human rights abuses, and does not accept private business defendants. Uta Kohl, *Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute*, 63(3) INT'L & COMP. L. Q. 665, 670 (2014).

3. John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/8/5, at 7 (Apr. 7, 2008). "Governance gaps" associated with the expansion of globalized businesses are defined as "[the gap] between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences." *Id.* at 3. *See also* Glen Whelan, Jeremy Moon & Marc Orlitzky, *Human Rights, Transnational Corporations and Embedded Liberalism: What Chance Consensus?* 87 J. BUS. ETHICS 367, 368 (2009) (discussing the rise of transnational corporations and their growing importance in global governance).

key performers/duty-bearers in human rights protection, two approaches currently form the polar extremes of a home state's regulatory taxonomy, reflecting the ostensibly irreconcilable impasse between human rights advocacy groups and businesses.[4] At one end of the spectrum is a hard law regime imposing substantive duties on corporations, with the 2003 United Nations (U.N.) Norms being a typical instance of this.[5] Towards the other end lies the much softer U.N. "Protect, Respect and Remedy" framework, which defined the nature of businesses' responsibility to respect human rights as a social norm "over and above compliance to laws and regulations,"[6] different from the 2003 "hard" duty recommendation.[7] Despite the fact that the 2003 U.N. Norms suffered a dismal outcome in practice,[8] this espousal of progressively hard laws to ensure that businesses uphold human rights has received a good deal of sympathy in a number of jurisdictions. For instance, English law recently held that holding companies could owe some duty of care to sustainability victims harmed by their overseas subsidiaries, with the possibility of extending this wide accountability to related institutions in global supply chains.[9] Meanwhile, there is also an assortment of international and national governance initiatives that embody the essence of the soft "Protect, Respect and Remedy" framework. One prominent example is the latest version of Section 54 of the U.K. Modern Slavery Act (MSA), a supply chain disclosure requirement that "merely

4. John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* xvi–xvii, 68, 76 (2013).

5. Economic and Social Council, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 1, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). The U.N. Norms stipulate that transnational firms and other business enterprises have corresponding legal duties within their spheres of activity and influence, compliance be monitored by a rigid enforcement mechanism, and victims be provided with effective remedies. *Id.* 15–18.

6. United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, at 13, HR/Pub/11/04.

7. Economic and Social Council, *supra* note 5, 1.

8. *See* John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 821 (2007) (discussing the business community's fierce opposition to the Norms). The U.N. Commission on Human Rights eventually declared that, although there were "useful elements and ideas," the document was ultimately a "draft proposal [with] no legal standing." *Id.*

9. Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528, [6], [136]–[37]; *Infra* notes 58–76.

provide[s] statutory endorsement to existing voluntary CSR [Corporate Social Responsibility] initiatives and reporting, with no penalty for non-compliance."[10] Practice has thus far brought to life a wide usage of both regulatory approaches, intensifying a need to examine their doctrinal and pragmatic compatibilities. This is the analysis to which this Paper turns.

This Paper aims to utilize the corporate disclosure requirement enshrined in Section 54 of the U.K. MSA[11] as an example of latest home states' soft corporate responsibility law-making efforts to foster business self-regulation, and to explore its interactions with other progressively hard law means with extraterritorial impacts. While Section 54 of the MSA has thus far been under intensive scholarly spotlight, the existing literature has concentrated on the intrinsic doctrinal and conceptual features of this latest regulatory approach,[12] with its fits to the external regulatory and institutional environment explored far less to date. Building upon and complementing existing research on social disclosure regulation, this Paper intends to fill the current literature void by investigating the regulatory interactions between Section 54 and recent common law developments on companies' duty of care and extraterritorial jurisdiction, the institutional compatibility of Section 54 to the broad supply chain environment that it operates in, and the resulting impacts on the enforcement of Section 54.

This consideration of the legal and institutional disruptions in the application of Section 54 of MSA is also one aspect of a much broader reappraisal of the regulatory paradigm of booming global outsourcing and transnational business activities.[13] Although globalization has, in the eyes of some, made the

10. Genevieve LeBaron & Andreas Rühmkorf, *The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act*, SOCIO-ECONOMIC REV. 1, 3 (2017).

11. Modern Slavery Act 2015, c. 30, § 54 (U.K.).

12. *See generally* Rae Lindsay, Anna Kirkpatrick & Jo En Low, *Hardly Soft Law: The Modern Slavery Act 2015 and the Trend Towards Mandatory Corporate Reporting on Human Rights*, 18(1) BUS. L. INT'L 29 (2017) (discussing the effectiveness of MSA's substantive requirements, such as mandatory reporting); *see also* Shuangge Wen, *The Cogs and Wheels of Reflexive Law: Business Disclosure Under the Modern Slavery Act*, 43(3) J. L. & SOC'Y 327, 330 (2016) (evaluating "the intrinsic worth" and the "doctrinal and potential functional limits" of § 54 of the MSA).

13. A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 REV. INT'L STUD. 133, 145 (2001).

Westphalian sovereignty belief somewhat archaic,[14] it would not be right to simply assume that globalization erodes the frontiers of national sovereignty. As presented by the United Nations Conference on Trade and Development (UNCTAD), diverse societies are still reasonably expected to have diverse interests and different capacities to discharge international law obligations.[15] In the absence of a widely adopted international legal framework, national and regional regulation plays a particularly important role in responding to "the peaks and troughs in the international regulatory landscape,"[16] with the field of business and human rights being a typical instance. Up to the present, states remain the primary duty bearers of human rights. Both horizontal (actions between private actors) and vertical (states' violations of private actors' rights) applications of international human rights law still depend heavily on the contextualization of domestic laws and regulations.[17] Discussions of Section 54 of the MSA and its interactions with other extraterritorial regulatory initiatives and institutional factors, additional to its significance in securing fundamental human rights in transnational business practice, thus also touch on the wider ramifications of supply chain management in the contemporary world, and even on the broad sustainability agenda underpinning all societies and economies.[18]

In the meantime, delineating the detailed regulatory fabric of corporate responsibilities in relation to human rights within such a broad ambit, loosely

14. See *id.* at 145 ("[globalization] is affecting a shift in authority structures, recasting state and corporate authority and control").

15. United Nations Conference on Trade and Development (UNCTAD), *The Social Responsibility of Transnational Corporations*, iii (1999).

16. Ryan J. Turner, *Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier*, 17 MELB. J. INT'L L. 188, 203 (2016).

17. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44(4) VA. J. INT'L L. 931, 935 (2004); U.N. Economic and Social Council, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with regard to Human Rights*, 12 (Feb. 15, 2005).

18. *E.g.*, P. Beske & S. Seuring, *Putting Sustainability into Supply Chain Management*, 19(3) SUPPLY CHAIN MGMT.: AN INT'L J. 322, 322 (2014); Galit A Sarfaty, *Shining Light on Global Supply Chains*, 56 (2) HARV. INT'L L. J. 419, 419 (2015); Steve John New, *Modern Slavery and the Supply Chain: the Limits of Corporate Social Responsibility*, U. OF OXFORD SAID BUS. SCH. 1 (Aug. 2015), http://eureka.sbs.ox.ac.uk/5847/1/REVISED_MSSCaproofed1format.pdf.

defined as a corporation's sphere of influence,[19] is, to say the least, a difficult job for a home state. Despite their mutual ambition of eradicating human rights abuses in MNEs operations, even a cursory look at the above-mentioned soft and hard regulatory initiatives reveals huge variations in their jurisprudence and institutional designs, reflecting a variety of distinct ideological and national-contextual underpinnings; it also shows deep divisions surrounding the interests and preferences of stakeholders impacting and affected by relevant rule-making.[20] A large number of non-governmental organizations (NGOs), skeptical of the merits of laissez-faire capitalism, expressed limited confidence in the effectiveness of soft CSR initiatives in improving corporate performance.[21] Considerable doubt has since been thrown upon soft human rights initiatives, including those developed by MNEs, with the most critical voices even describing these business giants as modern day "leviathans."[22]

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19. John Ruggie (Special Representative of the Secretary-General) *Clarifying the Concepts of "Sphere of Influence" and "Complicity", Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 8, Human Rights Council, U.N. Doc. A/HRC/8/16 (May 15, 2008) (The U.N. Global Compact asked the corporate participants to embrace, support, and enact within their sphere of influence principles relevant to human rights protection and promotion. A company's sphere of influence may be interpreted as a set of concentric circles mapping out stakeholders in a company's value chain, with company workplace at the core, moving outwards to supply chains, the market place, the community and the government).

20. *See, e.g.*, LeBaron & Rühmkorf, *supra* note 10 (comparing the lawmaking process of the U.K. MSA with the Bribery Act, and concluding that the weak force of Section 54 of the MSA was largely due to industry actors' less direct but successful opposition to public regulation, which was done by way of supporting statutory endorsement to existing voluntary CSR initiatives and reporting).

21. *See* Amnesty International, *Submission to the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, (July 2008) https://www.amnesty.org/download/Documents/40000/ior800032010eng.pdf. (Amnesty International expressly gave support to extraterritorial hard law measures, believing they "can be developed to address [the] lacuna [of business and human rights.]") Much scholarly ink has also been spilled in the legal community, voicing similar concerns and suggesting the development of legally binding instruments regarding human rights violations. *See, e.g.*, Aurora Voiculescu, *Human Rights and the New Corporate Accountability: Learning from Recent Developments in Corporate Criminal Liability*, 87(S2) J. BUS. ETHICS 419, 422 (2009); Justine Nolan & Luke Taylor, *Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?*, 87(S2) J. BUS. ETHICS 433, 436 (2009).

22. Alfred D. Chandler, Jr. & Bruce Mazlish, LEVIATHANS: MULTINATIONAL CORPORATIONS AND THE NEW GLOBAL 2 (CUP, 2005).

Despite substantial suspicion from NGOs, soft corporate responsibilities to "respect" human rights manage to obtain considerable support from influential members of the business community, including the International Chamber of Commerce, the International Organization of Employers, and the Business and Industry Advisory Committee to the OECD.[23] At the time of this writing, the business community, scholars and NGOs have been far from speaking with one voice regarding the most suitable regulatory method to tackle business and human rights at the home state level. This division has led to a simultaneous adoption of various regulatory means with extraterritorial reach.[24] Resulting disparities in the levels of stringency of these different regulatory instruments further lead to reciprocal disturbance in their concurrent application, providing compelling reasons for thinking again about the issue of regulatory interaction and compatibilities.

This Paper is therefore also set against the backdrop of an ongoing movement towards regulating MNEs by virtue of home state regulation, to see how transnational norms with the aim of promoting corporate accountability are being shaped and interacting with domestic legislative frameworks. The argument will suggest that although recent U.K. extraterritorial regulation developments constitute a significant step forward in improving sustainability and human rights protection in global supply chains, in terms of both extending "hard law" protection to victims and strengthening corporate social responsibility efforts, they lack coherence in both logic and institutional design. Contradictions in their doctrinal underpinnings and disparities in their levels of stringency lead to reciprocal disruptions in application.

To further clarify, it is not our aim to refute these regulatory endeavors to tackle business and human rights challenges, with whose fundamental premises and ideals we fully agree. Rather, we intend to bring to light the doctrinal, contextual and practical difficulties faced by current home-state lawmaking endeavors, particularly in the form of supply chain disclosure regulation, in the hope of generating further insights into the complex but important issue of imposing human rights responsibilities on MNEs. We thus hope to build a bridge between law and other disciplines involved in the study of supply chain

23. Whelan et al., *supra* note 3, at 377.
24. *Id.* at 376.

management, from which a valuable mutual discourse could ensue. This will not only be of interest to policymakers, industry actors and anti-slavery activists who "have heralded this wave of legislation as a game-changer,"[25] but also responds to mounting awareness and concerns among consumers, investors and other stakeholders.

The Paper is structured as follows: Upon conclusion of this introductory Part I, Part II identifies the major approaches adopted by home states in responding to the regulatory challenges created by global outsourcing and MNEs' activities. The U.K. is utilized as a primary example, with Section 54 of the MSA embodying CSR ideals and recent case law imposing a hard law duty of care upon holding corporations occupying the polar extremes of its extraterritorial regulatory taxonomy on business and human rights. Part III discusses in detail the interactions between these regulatory means in the course of their implementation, as well as their likely disruptive effects on the enforcement of Section 54. Part IV further highlights institutional impediments to the effective implementation of Section 54, implicating its restricted practical effects in increasing corporate transparency and eliminating modern slavery offences in global chains. The discussions in Parts III and IV are supported by data-based evidence presented in Part V. Part VI puts forward some suggestions for future regulatory reform.

II. Regulatory Challenges brought about by Global Outsourcing

A. Global Outsourcing and Resulting Discrepancies between the Corporate and Legal Worlds

Global outsourcing—the practice of sub-contracting business to third parties in other countries[26]—has become a contemporary source of institutional innovation and operational transformation, rather than a mere means of price arbitrage.[27] Typical players involve integrated MNEs in the form of group

25. LeBaron & Rühmkorf, *supra* note 10, at 2.

26. Sarfaty, *supra* note 18, at 425.

27. *2016 Global Outsourcing Survey: Outsourcing Accelerates Forward*, DELOITTE CONSULTING LLP (June 2016), https://www2.deloitte.com/content/dam/Deloitte/fi/Documents/technology/2016%20GOS%20Exec%20Summary_Nordic.pdf.

companies and transnational contractual network enterprises. While their global outsourcing activities significantly promote economic development and are seen as a trigger for the next industrial revolution,[28] their power and control arrangements that defy territorial boundaries also pose novel challenges to existing frameworks of company law, which are predominantly state-based.

Under conventional company law, the above-mentioned two ways by which MNEs manipulate capital boundaries reduce or eliminate the potential legal liabilities of the holding company or the focal company, which is legally isolated from other production units within the corporate group/network, owing to the domestic nature of corporate laws and the separate legal personality orthodoxy.[29] The difficulty of distributing legal responsibility on a corporate group basis, and the jurisdictional concern of the holding (or focal) company often being situated in a different jurisdiction from that in which the harm occurs, lead to accountability failures by these entities.[30] The burgeoning of outsourcing activities under the separate legal personality principle — the fundamental cornerstone of corporate law in almost every jurisdiction — while perhaps not intending to, thus practically serves the purpose of expanding MNE immunity from legal liability, concealing "the reality of economic integration of interdependence."[31] At the very least, integral corporate operations through external contractual relations with other companies, or through subsidiaries in modern supply chains, lead to transaction cost reductions as well as unjustifiable limits upon business entities' legal responsibility. Templeman LJ remarked:

> English company law possesses some curious features, which may generate curious results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent

28. Alan S. Blinders, *Offshoring: The Next Industrial Revolution?*, FOREIGN AFF. (Mar./Apr. 2006), https://www.foreignaffairs.com/articles/2006-03-01/offshoring-next-industrial-revolution.

29. Salomon v. Salomon & Co. Ltd. [1897] AC 21; Adams v. Cape Indus. PLC [1990] Ch. 433 [535]. *See also* Prest v. Petrodel Res. Ltd. [2013] UKSC 34, [36]–[37] (showing the reluctance of English courts to acknowledge "piercing the corporate veil" as a general doctrine of law).

30. Hugh Collins, *Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration*, 53(6) MOD. L. REV. 731, 734 (1990).

31. *Id.* at 742.

> company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.[32]

B. Economic Integration Complications in Supply Chains

Viewed from an economic perspective, the variety of business integration forms further adds to the difficulty of imposing legal liability on transnational corporate players. Conventional English law used to recognize ownership and resulting control as major forms of bonding between economically integrated organizations, on the basis of which they may be regarded as one group rather than separate individual entities for responsibility purposes.[33] In the context of global supply chains, patterns of group company integration often exceed connections based upon ownership and follow-on control. A typical pattern of integration is dynamically hierarchical, with a focal company surrounded by a number of satellites at various levels of trade, comprising both upstream suppliers and downstream distributors.[34] In practice, this pattern of outsourcing activities has been constantly expanding, "ranging from product design to assembly, from research and development to marketing, distribution and after-sales service."[35] As this pattern of core and periphery, which often ignores national boundaries, gradually stabilizes through the practice of repetitive contracting, a steady authority relation will be formed under the mantle of a MNE and its smaller overseas business partners.[36] Such authority relations in supply chains are no longer necessarily tied to the same forms of ownership which are found in group companies. As remarked by Collins, they may arise "wherever the economic dependence of one party upon the other effectively

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32. Re Southard & Co. Ltd. [1979] 1 WLR 1198, 1208 (Templeman LJ).

33. *Compare* DHN Food Distrib. Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852; Antonio Gramsci Shipping Corp. & Others v. Stepanovs [2011] EWHC 333; Atlas Mar. v. Avalon Mar. (No.1) [1991] 1 Lloyd's Rep. 563, *with* Adams v. Cape Indus. PLC [1990] Ch. 433; VTB Capital PLC v. Nutritek Int'l Corp. & Others [2013] UKSC 5; Prest v. Petrodel Res. Ltd. [2013] UKSC 34 (placing *DHN* and similar judicial opinions on shaky ground).

34. Raja Kali & Javier Reyes, *The Architecture of Globalization: A Network Approach to International Economic Integration*, 38(4) J. INT'L BUS. STUD. 595, 595 (2007).

35. Gene. M. Grossman & Elhanan Helpman, *Outsourcing in a Global Economy*, 72 R. ECON. STUD. 135, 135 (2005).

36. Collins, *supra* note 30, at 743.

requires compliance with the dominant party's wishes."[37] A major MNE may acquire sufficient leverage over a supplier in an emerging economy to be in a position to determine its business behavior in practice. Its massive purchasing power, huge market share and the relatively competitive labor and product prices it can offer[38] often bolster this authority. From the perspective of institutional economics, these group organizations built upon contracts and authority are often stable, potentially even reaching the bonding status of quasi-firms in business reality, with individual units comprising distinct legal identities in law.[39] However, from the legal perspective, it is difficult to treat such a group of business organizations as one unit, or hold a focal company liable for the conduct of its satellite companies, despite their close ties in business practice. Not least owing to this reason, the liability regime within a corporate group led by a focal corporation is regarded as "one of the great unsolved problems of modern company law."[40]

C. Home State Regulatory Developments in Response to Global Outsourcing

While conventional laws that construct "an atomistic conception of social relations"[41] and delimit one's legal responsibilities in relation to one's own acts and omissions struggle to encompass the complex patterns of economic integration in the global ambit, novel attempts are increasingly being

37. *Id.* at 734. *Cf.* Dani Rodrik, *How Far Will International Economic Integration Go?*, 14(1) J. ECON. PERSP. 177, 179 (2000) (arguing that implicit contracts which are often embedded in domestic social networks are scarce in international contexts).

38. WORLD TRADE ORGANIZATION, ANNUAL REPORT 1998: CHAPTER FOUR GLOBALIZATION AND TRADE 36 (1998). Compared to the labor and material costs in domestic markets, the labor and product prices in emerging economies are much more modest. There is also evidence that various patterns of economic integration occur to take advantage of possible savings in this regard. According to the World Trade Organization in 1998, the production of a particular American car generated only 37% of the production value in the United States, with the rest generated in various foreign countries, including Japan, Germany, Taiwan, the U.K., Ireland and Barbados. *Id.* This percentage is likely to be even lower in the future. *See also* Collins, *supra* note 30, at 733.

39. Robert G. Eccles, *The Quasifirm in the Construction Industry*, 2 J. ECON. BEHAV. & ORG. 335, 335 (1981); Collins, *supra* note 30, at 734. This organizational form also to a large extent resembles the "inside contracting system" described by Williamson. *See* OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 96 (1975).

40. Clive M. Schmitthoff, *Banco Ambrosiano and Modern Company Law*, J. BUS. L. 361, 363 (1982).

41. Collins, *supra* note 30, at 731.

implemented in response to the challenges created by global outsourcing.[42] These so-called neo-evolutionary paths presuppose that conventional territorially-based law is static and ill-equipped for regulating rapidly changing and increasingly complex social spheres,[43] collectively calling for further differentiation of law into specialized areas of social ordering. The artificiality of an entity's domicile as a basis for regulation is increasingly recognized, and the reach of national legislation, particularly of home states in relation to their own business entities with operations in foreign jurisdictions, has been extending on the basis of business rather than territorial connections.[44]

However, these home state regulatory initiatives are not necessarily integrated. Taking the theme of business and human rights in the UK as an example, there are discrepancies between mandatory corporate accountability to protect human rights and voluntary corporate responsibility to respect human rights, on the basis of which different regulatory means have evolved. For instance, Section 54 of the U.K. MSA, which requires commercial organizations to disclose in their annual slavery statement, indicating whether they have made efforts to ensure that slavery and human trafficking are not taking place in their global supply chains, and if so, requiring a statement of the detailed steps taken,[45] could be seen as part of a pioneering attempt to advocate businesses' soft responsibility to respect human rights, as proposed by the U.N. Guiding Principles on Business and Human Rights.[46] Its general aim is to invite multiple stakeholders in global supply chains to assume a regulatory role, setting standards and action protocols for human rights protection in their own corporations' global supply chains.[47] Towards this end, general norms are set in order to steer primary actors but simultaneously leave them with a substantial zone of freedom to engage in self-regulation; this is evidenced by Section 54 leaving substantive discretion to corporate actors to determine their own

42. *Id.* *See* Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239, 239–40 (1983) (discussing new evolutionary theories about law).

43. Teubner, *id.*, at 274.

44. Turner, *supra* note 16, at 192.

45. Modern Slavery Act 2015, c. 30, § 54(4).

46. United Nations Human Rights Office of the High Commissioner, *supra* note 6, at 13.

47. Dara O'Rourke, *Multi-Stakeholder Regulation: Privatizing or Socializing Global Labour Standards?*, 34(5) WORLD DEV. 899, 900 (2006).

business undertakings, including the extent and ways in which they control modern slavery in the course of their operations.[48]

On the other hand, hard-law duties are inclining in the other direction, towards imposing substantive liabilities upon a holding/focal company where necessary, so as to "leave the realm of voluntary corporate responsibility for the one of pure accountability."[49] For instance, a number of recent case judgments in the U.K. hold that a holding company might be held directly responsible if shown to be itself at fault for sustainability or human rights violations committed by a subsidiary, without affecting the company law cornerstone of separate legal personality.[50] In the context of global supply chains, this arguably makes it possible to hold a focal firm liable for overseas activities of a subsidiary, or another member of the same multinational group of companies which is in the downstream of a supply chain.

As will be discussed below, while these two distinct regulatory approaches have a mutual aim of enhancing human rights protection in their home corporations' global ambit of influence, they lack logical and implementational coherence to "defeat the power of capital to organize itself in ways which reduce or eliminate liabilities arising from productive activities."[51] This calls for a more systematic treatment of the limits of legal responsibility by reference to the boundaries of capital units.

III. REGULATORY INTERACTION AND DISRUPTIONS TO SUPPLY CHAIN DISCLOSURE

The latest legal developments in supply chain transparency and benchmarking initiatives, represented by Section 54 of the U.K. MSA, offer a novel solution to the capital boundary problem. Section 54 captures the idea of integral economic control which binds a group of companies together, without rendering the concept of legal entity useless. One primary legislative aim of this type of

48. Michael C. Dorf, *The Domain of Reflexive Law*, 103(2) COLUM. L. REV. 384, 384 (2003); Wen, *supra* note 12, at 347–49.

49. Ramona Elisabeta Cirlig, *Business and Human Rights: From Soft Law to Hard Law?*, 6(2) JURID. TRIB. 228, 228 (2016).

50. The most notable is Chandler v. Cape PLC [2012] EWCA (Civ) 525, [78]–[79]. *See also infra* notes 58–76 and relevant texts.

51. Collins, *supra* note 30, at 738.

supply chain disclosure laws, as identified by Galit Sarfaty, is to "deploy . . . multinational companies to regulate themselves and indirectly regulate other firms in their supply chain."[52] On October 4, 2017, the U.K. Government released Updated Guidance on the corporate reporting obligation in the MSA, which is fully demonstrative of the '*best practice*' approach represented by Section 54, *i.e.*, encouraging rather than obligating companies to produce more detailed and practical MSA statements.[53]

Laudable legislative intent notwithstanding, it appears that the construction of Section 54 is based upon two premises, which are both, to a large extent, assumptions. First, as noted in Justice Brandeis' famous line "Sunshine is the best of disinfectants,"[54] lawmakers believe that it will be more difficult for commercial organizations to deny their own guilt or overlook their own idleness if they openly disclose their affairs and place them under market and public scrutiny, thereby obliquely facilitating the enhancement of human rights protection at the institutional level.[55] Second, there is also an inherent belief that businesses would be incentivized to disclose their efforts to combat modern slavery, as this information would demonstrate their proactive efforts to eradicate this social ill and thereby generate more reputation-related benefits.[56]

Leaving aside the first assumption, which is outside the scope of this Paper, it is possible to take issue with the second assumption. When information about combating modern slavery in a group context might lead to civil claims for reparation, or even claims on criminal grounds, it is hard to imagine that any business would accept this risk and make a full disclosure. Taking into

52. Sarfaty, *supra* note 18, at 435.

53. Wen, *supra* note 12, at 349.

54. Louis D. Brandeis, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914, reprinted by Martino Fine Books, 2009).

55. As in the words of Arnold Schwarzenegger, the former California State Governor, when promoting the California Transparency in Supply Chain Act: "This will increase transparency, allow consumers to get more information and make more choices and motivate businesses to ensure humane practices. . . . Of course this is not a silver bullet, by any means, but what it does is, it really makes government and businesses work together." *Governor Highlights Legislation to Combat Human Trafficking* (Oct. 18, 2010), https://www.gov.ca.gov/news.php?id=16215.

56. *See, e.g.*, *House of Commons Committee Debate First Sitting: The Modern Slavery Bill*, (July 21, 2014) (statement of Andrew Wallis, CEO of Unseen U.K.) ("Fundamentally, [the requirement of slavery disclosure statement] should be viewed not as red tape but as a measure to protect British business.").

consideration recent common law developments on corporations' tort liability in the context of group companies, such risks may well turn into reality. In respect of tortious liability, English courts have recognized that the modern degree of economic integration merits the adoption of a more flexible approach to territorial jurisdiction and even group responsibility, using a pattern of authority and domination to overcome the capital boundary problem.[57] As will be examined below, this separation from the conventional requirement of direct ownership opens up the possibility of charging liabilities not only in parent-subsidiary relations but also between companies without direct share ownership links, which are often observed in supply chain contexts.

A. Potential Tort Liability for Focal Companies in Global Supply Chains

Distinguishing territory from jurisdiction is not completely new under English law. As evidenced in the trajectory of tort liability for focal companies, it began with *Lubbe and Others v. Cape PLC*,[58] and reached maturity in *Chandler v. Cape*.[59] The claimant, Mr. Chandler, was employed by Cape Building Products Ltd, a subsidiary of the defendant company Cape PLC (hereinafter Cape). The claimant, who worked in a factory with open sides, which emitted dust, contracted asbestosis fifty years later.[60] Both the High Court and the Court of Appeal supported Mr. Chandler's claim that there was a duty of care on the part of Cape to the employees of the subsidiary company to advise on, or to ensure, a safe system of work for them, on the basis of an assumption of responsibility derived from the *Caparo* judgment.[61] Given (1) that the business of the holding

57. *See* Collins, *supra* note 30, at 734.

58. Lubbe & Others v. Cape PLC [2000] 1 WLR 1545. On the other hand, the general principles that determine whether A owes a duty of care to C in respect of the harmful activities of B can be traced back as far as the House of Lords' decision in Dorset Yacht Co. Ltd. v. Home Office [1970] AC 1004. Vedanta Res. PLC & Another v. Lungowe [2019] UKSC 20, at [46]–[56] (Lord Briggs).

59. Chandler v. Cape PLC [2012] EWCA (Civ) 525.

60. *Id.* at [1], [3].

61. *Id.* at 32, [72]–[81]; *see also* Caparo Indus. PLC v. Dickman [1990] 2 AC 605, 617–8 (Lord Bridge) (stating the three ingredients for determining whether a situation gives rise to a duty of care include that the damage should be foreseeable, that there should exist a relationship of proximity between the party owing the duty and the party to whom it is owed, and that the situation should be one in which the court considers it fair, just and reasonable to impose a duty of a given scope upon the one party for the benefit of the other).

company and subsidiary are in all relevant aspects the same; (2) the state of Cape's knowledge about the subsidiary's work; (3) Cape's superior knowledge of the nature and management of asbestos risks, and; (4) that Cape knew, or ought to have foreseen, that the subsidiary or its employees would rely on it using its superior knowledge for the employees' protection,[62] it was held that the claimant had established a sufficient degree of proximity to the defendant company for it to be fair, just and reasonable to impose a duty of care on Cape to protect the claimant from harm from asbestos in the atmosphere.[63] In particular, the Court of Appeal emphasized that it was not necessary to show that the holding company was in the habit of intervening in the health and safety policies of the subsidiary; evidence showing "that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues" would suffice for the purpose of (4).[64]

Although *Chandler* is often seen as "a source of inspiration" for the imposition of a duty of care on the focal company of a multinational for the health and safety of employees and others affected by the acts and omissions of an overseas subsidiary,[65] it is worth pointing out that the imposition of such a duty of care does not involve "a novel and controversial extension of the boundaries of the tort of negligence, beyond any established category."[66] Instead, this has been

62. *See Chandler* [2012] EWCA (Civ) 525, at [75] (finding the test was satisfied on the basis that throughout the claimant's employment period Cape had employed a group medical advisor and a scientific officer in seeking ways of suppressing asbestos dust, and many aspects of the subsidiary's production process had been discussed and authorized by the defendant's board).

63. *Id.* at [80] (Arden LJ).

64. *Id.*

65. Ugljesa Grusic, *Responsibilities in Groups of Companies and the Future of International Human Rights and Environmental Litigation*, 74(1) CAMBRIDGE L. J. 30, 32–33 (2015).

66. Vedanta Res. PLC & Another v. Lungowe [2019] UKSC 20, [46] (Lord Briggs). The court stated

> the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence. Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of land owned by the subsidiary, but it does not impose any duty upon the parent to do so, whether owed to the subsidiary or, a fortiori, to anyone else. Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary.

Id. at [49]. The court also noted

realized by the courts' elastic interpretation of proximity in business relations. As Arden LJ stated, "the development of the law of negligence has to be incremental."[67] The conceptual elasticity of "proximity" has already been explicitly acknowledged on several occasions in English law. As Lord Oliver pointed out in *Caparo*: "'Proximity' … embraces not a definable concept but merely a description of circumstances in which, pragmatically, the courts conclude that a duty of care exists."[68] In *Chandler*, the Court of Appeal explicitly rejected the defendant's argument that "the duty of care can only exist if the parent company has absolute control of the subsidiary,"[69] implying the enlarged scope of the duty and the far-reaching potential of the *Caparo* test.[70] The possibility of a wider scope for the imposition of the duty of care within a multinational group of companies, within which "there is no limit to the models of management and control,"[71] was further reaffirmed by Tomlinson LJ in *David Thompson v. The Renwick Group PLC*,[72] where he stipulated that "[i]t is clear that Arden LJ intended this formulation to be descriptive of circumstances in which a duty might be imposed rather than exhaustive of the circumstances in which a duty may be imposed."[73]

> [t]here is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-a-vis persons affected by those activities…. The legal principles are the same as would apply in relation to the question whether any third party (such as a consultant giving advice to the subsidiary) was subject to a duty of care in tort owed to a claimant dealing with the subsidiary.

Id. at [50] (quoting AAA v. Unilever PLC [2018] EWCA (Civ) 1532, [36] (Sales LJ) (appeal taken from Eng. & Wales).

67. Chandler v. Cape PLC [2012] EWCA (Civ) 525, [63] (Arden LJ) (appeal taken from Eng. & Wales).

68. Caparo Indus. PLC v. Dickman [1990] 2 AC 605 (HL) 633 (Lord Oliver of Aylmerton) (appeal taken from Eng. & Wales).

69. *Chandler* [2012] EWCA (Civ) 525, at [66].

70. *See id.* at [67], [70] ("[i]t is simply not possible to say in all cases what is or is not a normal incident of that relationship…. The question is simply whether what the … company did amounted to taking on a direct duty [of care.]").

71. Vedanta Res. PLC & Another v. Lungowe [2019] UKSC 20, [51] (Lord Briggs SCJ) (appeal taken from Eng. & Wales).

72. Thomson v. Renwick Grp. PLC [2014] EWCA (Civ) 635, [33] (Tomlinson LJ). The claimant's claim was only rejected in this case on the grounds that the holding company did not carry on any business at all apart from holding shares in other companies, and that there was no evidence that the holding company either did have or should have had any knowledge of the risk superior to that which the subsidiaries could be expected to have. *Id.* at [38].

73. *Id.* at [33].

The legitimate provenance of finding a focal company liable in tort for its subsidiaries, who may well be its suppliers in a global supply chain, is further extended by the *Vedanta* judgment.[74] In a judgment that was subsequently affirmed by the Supreme Court, the Court of Appeal stipulated in this case that a U.K. holding company's duty of care may, in certain circumstances, extend not only to employees of a subsidiary but also to third parties affected by a subsidiary's operations, including subsidiaries that are not wholly owned.[75] Although it remains to be seen how these claims will be determined on their merits, the fact that there had never been a reported case in this regard clearly did not make such a claim unarguable.[76]

B. Regulatory Interactions between Tortious Liabilities of the Focal Company and Supply Chain Disclosure

While the liability arising from common law negligence has only been successfully applied thus far to holding companies in relation to their subsidiaries' health and safety offenses, this is significant enough to cause disruption in the enforcement of Section 54, given that group companies are a common pattern in global outsourcing. The *Caparo* ascription of responsibility application would also likely have significant implications for supply chain management, which often involve similarly subtle arrangements of agency and collateral contracts. In particular, the three-part *Caparo* test of foreseeability, proximity and reasonableness, which is used in affirming the assumption of responsibility, could equally apply to supply chain relationships, particularly in big MNEs which have power and "a practice of intervening in the trading operations"[77] of their trading partners within supply chains.[78] Section 54 of the MSA suggests that a qualifying corporation should disclose information on "the

74. *Vedanta* [2019] UKSC 20, at [52]–[62].

75. Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528 [83] (Simon LJ) (appeal taken from Eng. & Wales).

76. *See id*. at [88] ("If it were otherwise the law would never change.").

77. Chandler v. Cape PLC [2012] EWCA (Civ) 525 [80] (Arden LJ) (appeal taken from Eng. & Wales).

78. *See* Vedanta [2019] UKSC 20, at [49] (provided that between these trading partners there exists direct or indirect ownership by one company of all or a majority of the shares of another company).

organization's structure, its business and its supply chains"[79] and "the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk."[80] This disclosure conveniently would constitute direct evidence for potential claimants against the focal company in proving foreseeability and proximity, given that the suppliers, under repetitive contracts with and the authority of the focal company, will also likely rely upon the focal company deploying its superior knowledge or expertise in avoiding modern slavery.[81]

The evidential significance of sustainability reports published by corporations, including reports involving modern slavery information, in establishing proximity and reasonableness was clearly stipulated by Lord Bingham in *Lubbe*.[82] As mentioned, the main issue of determining the liability of a parent company involves the control that it exercises over and the advice it gives to its subsidiary company. Much of the evidence presented to any such inquiry would, in the ordinary way, "be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence."[83] Considering the four factors that the Court of Appeal explicated in *Chandler*, one would expect that the last three of the required elements, including the parent's superior knowledge of the risk, are all likely to be satisfied if the parent corporation provides details about "the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk" as required by Section 54 of the MSA.[84]

Practice has already seen real reparation claims following corporations' modern slavery disclosures. A recent class action suit was filed by a consumer against the U.S. retailing giant Costco and several of its suppliers, claiming that the presence of forced labor in its seafood supply chain is contradictory to the

79. U.K. Modern Slavery Act 2015, c. 30, § 54(5).
80. *Id.* § 54(5)(d).
81. *See supra* notes 33–40 (discussing the authority of a focal firm in supply chain contexts).
82. Lubbe & Others v. Cape PLC, [2000] 1 WLR 1545 [20].
83. *Id.*
84. U.K. Modern Slavery Act 2015, c. 30, § 54(5).

statements made under the provisions of the Supply Chain Transparency Act.[85] A similar class action suit was also brought against Nestlé.[86] Under such circumstances, the realization of the legislative intent of supply chain disclosure regulation is likely to be disrupted, and corporations' incentives to disclose comprehensive and extensive information would be reduced; when a detailed disclosure of supply chain management and control of modern slavery might potentially lead to direct liability in supply chains, it is predictable that focal companies subject to Section 54 will be tempted to make a tick-the-box disclosure only, or even simply deny any action on or knowledge of modern slavery in their supply chains. In both cases they will have fulfilled their statutory duty of disclosure as a commercial organization, and will be regarded as having properly disclosed under Section 54 by simply stating that they have taken no relevant action during the financial year.[87] Given the additional risk of reputational damage, commercial organizations and people who are "the directing mind and will" of these companies[88] will, at the very least, be cautious about what to disclose when the information might be used as evidence, thereby putting themselves at future risk. As stated by New, "Forced labor is an issue of such legal gravity that continued, knowing engagement could constitute direct complicity in criminal behavior, a much more serious situation for the firm than 'mere' reputational damage."[89] One may thus see potentially perverse incentives for corporations "not to regulate their supply chains . . . for fear of generating the factum for a cause of action in tort," although as a matter of policy

85. *See* Sarah K. Rathke et al., *Litigation Fallout from All This Supply Chain Transparency Legislation (or, These Things Have Teeth!) (or, The Cycle of Misfortune)*, NAT'L L. REV. (Aug. 26, 2015), https://www.natlawreview.com/article/litigation-fallout-all-supply-chain-transparency-legislation-or-these-things-have (noting that the class action suit, Sud v. Costco Wholesale Corp., No. 15-cv-03783-JSW, 2016 U.S. Dist. LEXIS 5524 (N.D. Cal. Jan. 15, 2016), "may be the first lawsuit of its kind, [but] it certainly won't be the last.").

86. Barber v. Nestlé USA, Inc., 154 F. Supp. 3d 954 (C.D. Cal. 2015). Neither *Sud* nor *Barber* made substantive headway as both claims were dismissed by the trial courts. *Sud*, 2016 U.S. Dist. LEXIS 5524, *re-filing dismissed*, 229 F. Supp. 3d 1075 (N.D. Cal. 2017), *aff'd*, 731 Fed. App'x 719 (9th Cir. 2018); *Barber* 154 S. Supp. 3d 954, aff'd, 730 Fed. App'x 464 (9th Cir. 2018).

87. U.K. Modern Slavery Act 2015, c. 30, § 54(4)(b).

88. Tesco Supermarkets Ltd. v. Nattrass [1972] AC 153, 171 (appeal taken from Eng. & Wales) (establishing a theory of corporate liability in which certain people, such as directors and superior officers, represent companies' directing mind and will).

89. New, *supra* note 18, at 4.

the law does not intend to encourage such willful passiveness among corporations.[90]

C. Developments on Cross-Border Corporate Sustainability and the Evidential Implications of Supply Chain Disclosure

1. The Evidential Value of Corporate Disclosure Documents

A number of recent case judgments,[91] in particular *Vedanta Resources PLC and Another v. Lungowe*[92] and *Okpabi v. Royal Dutch Shell PLC*,[93] further consolidate the significant evidential effect of public documents on cross-border corporate sustainability. These cases currently concern the establishment of jurisdiction only: overseas claimants, as third parties allegedly harmed by a subsidiary's local operations, are trying to establish the English courts' jurisdiction to try claims against parent companies and their overseas subsidiaries.[94] However, these jurisdiction claims merit an examination of the substance of the case, and thereby require consideration of whether there was some plausible case between the overseas claimants and the holding company,[95] involving a purportedly simple question of law that *Chandler* was trying to solve: whether an English parent company owes a duty of care to those affected by a subsidiary's overseas operations.[96]

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90. Turner, *supra* note 16, at 197.

91. *See, e.g.*, AAA & Others v. Unilever PLC & Anor [2018] EWCA (Civ) 1532. Regardless of the High Court Judge Elisabeth Laing J's decision that there was a sufficient degree of proximity and although there was inadequate foreseeability or reasonableness to establish viable claims against Unilever, the Court of Appeal unanimously agreed that the appeal should be dismissed by reason of the proximity point in relation to Unilever, and it is pointless to consider issues of foreseeability and reasonableness in terms of the imposition of a duty of care. The Court of Appeal found insufficient detail in the record regarding the English company's guidance and advice to the subsidiary to establish proximity. *Id.* at [15].

92. Vedanta Res. PLC v. Lungowe [2019] UKSC 20 (Lord Briggs, unanimous decision) (appeal taken from Eng. & Wales).

93. Okpabi v. Royal Dutch Shell PLC [2018] EWCA (Civ) 191 (Eng. & Wales).

94. *Vedanta* [2019] UKSC 20, at [3]–[4]; *Okpabi* [2018] EWCA (Civ) 191, [196].

95. *See, e.g.*, Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528, [63] (Simon LJ) ("In general, a real issue between the relevant parties is to be equated with a properly arguable case or serious question to be tried . . . The more doubtful the point of law, the more cautious the court should be, since the question of law goes to the existence of the jurisdiction.").

96. Chandler v. Cape PLC [2012] EWCA (Civ) 525; Caparo Indus. PLC v. Dickman [1990] 2 AC 605 (HL) 609 (Lord Oliver of Aylmerton) (appeal taken from Eng. & Wales). Such a duty of care may arise where the parent company: (a) has taken direct responsibility for devising a

In both *Vedanta* and *Okpabi* the claimants relied on the sustainability reports disclosed by the defendants, implicating the potential evidential effects of the modern slavery reports required by Section 54 in establishing the human rights liabilities of parent corporations.[97] For instance, in *Vedanta* the report issued by the Vedanta company, entitled "Embedding Sustainability," contained information about the board of Vedanta exercising oversight of all Vedanta's subsidiaries, and referred to problems with discharges into water as an example.[98] There were also highlights in Vedanta's public statements regarding its commitment to address environmental risks and technical shortcomings in the subsidiary's mining infrastructure.[99] These are the kind of standardized statements that one often finds in corporate reports on sustainability issues — for instance, the statement that "we have a governance framework to ensure that surface and ground water do not get contaminated by our operations."[100] However, they were relied upon by the plaintiff and the courts, in support of a well arguable case that the parent company Vedanta had either taken direct responsibility or had controlled the operations which had given rise to the claim.[101] As stipulated by Lord Briggs, with whom other Supreme Court judges agreed, there does not exist a general principle that a parent could never incur a duty of care in respect of the activities of a particular subsidiary merely

material health and safety policy; or (b) controls the operations which give rise to the claim. In these cases the Court of Appeal used the three-part formulation (foreseeability, proximity, and reasonableness) set out by the House of Lords in *Caparo*, to see whether a properly arguable claim that a duty of care was owed in the particular case could be established. *Id.*

97. *Vedanta* [2019] UKSC 20, at [8]; *Okpabi* [2018] EWCA (Civ) 191, at [43].

98. *Vedanta* [2019] UKSC 20, at [58]; *Vedanta* [2017] EWCA (Civ) 1528, at [84].

99. *Vedanta* [2019] UKSC 20, at [55].

100. *Vedanta* [2017] EWCA (Civ) 1528, at [84].

101. *See Vedanta* [2019] UKSC 20, at [61] (Lord Briggs). The Court stated

> I regard the published materials in which Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those standards by training, monitoring and enforcement, as sufficient on their own to show that it is well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrable at trial, after full disclosure of the relevant internal documents of Vedanta and KCM and of communications passing between them.

See also id. at [84]–[90] (Simon LJ).

by laying down group-wide policies and guidelines, and expecting the management of each subsidiary to comply with them.[102]

Likewise, in *Okpabi* the claimants relied on the contents of several Sustainability Reports published by the defendant company, highlighting the commitment of the parent company to control and direct the subsidiary's environmental performance.[103] Although the Court of Appeal rejected the claimants' argument by a 2–1 majority, the evidential value of public reports issued by the defendant company was explicitly acknowledged by all appellate judges.[104] Simon LJ, who was among the majority, emphasized that he "would accept that statements made in the … Sustainability Report were particularly relevant to the existence of the duty of care relied on by the claimants."[105] Likewise, Sir Geoffrey Vos opined that the regulatory text (that puts forward disclosure standards) means that such statements "are more likely to be true, and so should be accorded greater evidential weight."[106]

Furthermore, as evidenced in *Okpabi*, it still remains debatable as to the extent to which the disclosed information would be deemed specific enough to establish proximity between the entities, and the evidential value of corporate disclosure, including modern slavery reports, in establishing the focal company's duty of care might turn out to be even more significant.[107] For instance, based on exactly the same facts on which Simon LJ and Sir Geoffrey Vos rejected the appeal, Sales LJ adopted a more contextual approach when

102. *See Vedanta* [2019] UKSC 20, at [52]–[53] (Lord Briggs) (giving two examples in which the parent would be held liable in respect of the activities of one of its subsidiaries by laying down group-wide policies and expecting the subsidiaries to comply: if the unsafe system of work had formed part of a group-wide policy publicized by the parent, which had been applied by subsidiaries around the world; or if the parent claims in published materials to exercise a sufficient degree of supervision and control of its subsidiaries, but it does not in fact do so.).

103. Okpabi v. Royal Dutch Shell PLC [2018] EWCA (Civ) 191, [153], [163].

104. *Id.* at [163].

105. *Id.* at [67] (Simon LJ).

106. *Id.* at [188] (Sir Geoffrey Vos). These two judges only declined to allow the claim because they felt the disclosed corporate policies and documents were not specifically targeting the subsidiary company, and thus only showed that a parent company had taken steps to ensure that there were proper control mechanisms in place over all subsidiaries. Nevertheless, there might be an arguable case if relevant corporate policies and processes were more specific, demonstrating the parent's endeavors to exercise control over a particular subsidiary. *Id.*

107. *Id.* at [2]–[4].

considering the issue of proximity and was in favor of allowing an appeal:[108] " . . . on the facts of a particular case, the issuing of mandatory instructions combined with close monitoring, intervention and enforcement, may show that there has been a material assumption of responsibility."[109] In Sales LJ's opinion in *Okpabi*, the group-wide instructions issued by RDS provided a practical means for RDS to disseminate expertise and to control at least some aspects of the management of its operating companies, which helped the claimants to assert an arguable claim that RDS assumed a material degree of responsibility in relation to the management of the pipeline and facilities according to the criteria in *Chandler* and *Vedanta*.[110] In particular, the fact that the losses due to oil spillage in Nigeria were singled out in the Shell Sustainability Report 2014 was construed as strong evidence that the parent "had a particularly strong interest in ensuring that the management of the pipeline and facilities was conducted effectively and thus was proactive in assuming control of the operational decisions about how to manage the risk of oil and spillage from them."[111]

2. Extended Corporate Proximity from Ownership to Authority

In the *Vedanta* case, the subsidiary company, KCM, was not a 100% subsidiary of Vedanta.[112] However, based on the materials published by Vedanta, it was not difficult for the courts to find that Vedanta's ultimate control of KCM was "not to be regarded as any less than it would be if wholly owned."[113] The *Okpabi* judgment went even further, stipulating that the fact that the parent company did not directly hold shares in the subsidiary was irrelevant in establishing the duty of care of the parent company, since the parent could still exert practical control over the subsidiary.[114] These are explicit signs of English courts starting to depart from the conventional emphasis on

108. Chandler v. Cape PLC [2012] EWCA (Civ) 525, [31]–[32].
109. Okpabi v. Royal Dutch Shell PLC [2018] EWCA (Civ) 191, [172] (Sales LJ).
110. *Id.* at [171].
111. *Id.* at [162].
112. Vedanta Res. PLC & Another v. Lungowe [2019] UKSC 20, [2] (Lord Briggs) (appeal taken from Eng. & Wales).
113. *Id.* at [2].
114. *Okpabi* [2018] EWCA (Civ) 191, at [172] (Sales LJ).

ownership in groups towards authority when establishing proximity, and focusing more on whether the group is managed integrally along functional lines. For instance, the existence of global standards within a company group was considered by Sales LJ in *Okpabi* as capable of providing a mechanism for the projection of real practical executive control by the parent's CEO and key organs over the affairs of the subsidiary, if they wished to assume such control.[115] This is an additional warning sign to corporations operating using forms of authority bonding, which often occurs in supply chains. Predictably, the evidential value of public information disclosed by the company in establishing a holding company's duty of care largely remains a matter of detailed factual analysis, which will only make MNEs more careful in choosing and formulating their methods and the content of their disclosure, thereby largely thwarting the legislative purpose of Section 54.

This area of law is far from being consolidated, since the claimants in *Okpabi* are seeking to appeal to the Supreme Court, and the *Vedanta* case remains to be judged on its merits.[116] In the meantime, however, based on existing case judgments it seems that the more a company becomes involved in the control and publication of information about its overseas connected companies' operations, the more likely it is to be plunged into litigation and held liable for negligence by overseas subsidiaries and companies connected through supply contracts. Thus far, connections acknowledged by judicial authorities have been confined to those between parents and subsidiaries, but this type of parent-subsidiary connection often exists in supply chains, if it is possible to demonstrate the necessary degree of foreseeability, proximity and reasonableness.[117]

115. *Id.* at [161].

116. Chris Owen & Adam Bristow, *Okpabi v. Shell Appeal Highlights Important Points Regarding Parent Co. Liability*, ELEXICA (Feb. 28, 2018), http://www.elexica.com/en/legal-topics/dispute-resolution-commercial/260218-okpabi-v-shell.

117. *Okpabi* [2018] EWCA (Civ) 191, at [24] (Simon LJ). "It is clear that the three-part test set out in the Caparo case is not a forensic equation to which values may be attached that yield the answer to whether or not a duty is owed." *Id.*

3. The Enforcement Tension between the Extraterritorial Duty of Care and Supply Chain Disclosure

A significant tension is therefore evident in the trajectory of the latest case law developments: MNEs in general, and particularly under supply chain disclosure regulation, are encouraged to construct and implement measures to prevent their suppliers/subsidiaries from engaging in human rights abuses.[118] However, there also exists a risk that the imposition and enforcement of such measures could be construed as the focal companies' control of and/or acceptance of responsibility for the operations of that subsidiary/supplier.[119] Existing laws on the duty of care for parent corporations place significant emphasis on the nature of the working relationships between business entities, in which documentary evidence issued by the entities plays an important role. In this regard, *Vedanta* and *Okpabi* provided clear examples of how detailed sustainability disclosure can backfire; the evidence, in which sustainability reports played a key part, was considered to support the case that "there was a pattern of distribution of expertise and control in relation to the handling of the risk of oil spills in [Nigeria]."[120]

To make things even more complicated, the disputable status of the law increases the likelihood of similar future claims against MNEs, seeking to rely on documents issued by the corporations themselves which are available in the public domain. Hopes have been raised that claims originally brought against subsidiaries may be brought before the courts of their parent companies' home states and remedies may be sought in that jurisdiction.[121] Although judgments in the Court of Appeal in two recent cases denied access to courts in parent companies' home states for the victims of extraterritorial human rights violations,[122] the evidential value of public reports including sustainability

118. *Id.* at [71], [162].

119. Owen & Bristow, *supra* note 116.

120. *Okpabi* [2018] EWCA (Civ) 191, [165] (Sales LJ). Sales LJ also explained why judges tend to attach significance to public disclosure—it has evidently not been easy for claimants to find internal witnesses (from the defendant company) who were willing to act in a certain sense as whistleblowers. *Id.* at [168].

121. Owen & Bistrow, *supra* note 116.

122. *Okpabi* [2018] EWCA (Civ) 191; AAA & Others v. Unilever PLC & Anor [2018] EWCA (Civ) 1532 (appeal taken from EWHC (QB)).

information was widely appreciated.[123] It is likely that as long as the law is not completely clarified and the possibility of focal companies being dragged into lawsuits remains, MNEs will continue to be deterred from issuing detailed sustainability reports with details, since such hearings are costly in terms of both time and expenditure. Lord Neuberger warned in *VTB Capital PLC v. Nutritek International Corp.*[124] about the risk of vexatious litigations if a hearing is expensive and time-consuming.[125] Unfortunately, the expenditure of time, effort, and financial resources in recent jurisdiction disputes has been significant, to the extent that they became "wholly self-defeating."[126] For instance, in *Okpabi* the total length of the witness statements ran to over 2,000 pages of material, and the parties' 'skeleton arguments' ran to 259 pages.[127] In *Vedanta*, the Supreme Court further warned against the disproportionate way in which these jurisdiction issues have been litigated, measured by the statistics about the materials placed before the Court.[128] As summarized by Lord Briggs, "[t]he parties' two written cases (ignoring annexes) ran to 294 pages. The electronic bundles included 8,945 pages. No less than 142 authorities were deployed, spread over 13 bundles, in relation to an appeal which, on final analysis, involved only one difficult point of law."[129] The cost and effort burdens on MNEs will incentivize them to avoid this type of litigation, and information disclosed in public documents which might be used as evidence against them will therefore be brief and concise. Given that Section 54 of the MSA imposes no penalty for poor-quality disclosure, corporations that wish to avoid public disapproval are likely to disclose minimal or selective information in an indirect and non-confrontational manner, rather than straightforward opposition and failure to disclose.[130]

123. *Okpabi* 2018 EWCA (Civ) 191, at [62, 67, 153]; *AAA & Others* [2018] EWCA (Civ) 1532, at [40].

124. VTB Capital PLC v. Nutritek Int'l Corp. & Others [2013] UKSC 5, [82] (Lord Neuberger).

125. *Id.* ("hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues and long argument.").

126. *Okpabi* [2018] EWCA (Civ) 191, at [21] (Sales LJ).

127. *Id.* at [17].

128. *Vedanta* [2019] UKSC 20, at [6]–[14].

129. *Id.* at [10].

130. *See* LeBaron & Rühmkorf, *supra* note 10, at 8–10 (arguing that Section 54 of the U.K. MSA was a result of corporations' displacement efforts during the policy-making process).

IV. INSTITUTIONAL BARRIERS TO SUPPLY CHAIN DISCLOSURE

A. Structural and Compositional Intricacies of Supply Chains

As well as its incompatibilities with regulatory approaches to extraterritorial tortious liability, Section 54 of the MSA is also restrained in practice by institutional barriers, not least the structural and compositional complications of supply chains. Most of the supply chain and modern slavery literature concentrates on criminal behavior occurring in goods and services supply chains.[131] Likewise, Section 54 in its current form does not distinguish between product supply chains and labor supply chains.[132] However, the complex channels of labor supply—contract employment agencies, local gang-masters, and the fact that they often provide people to work for a company without being counted as direct employees—tend to get around supply chain governance and labor standards, taking advantage of legislative ambiguity in the terms "supplier" and "employee."[133] Under pressure to engage in responsible business practices, many companies spend vast sums of money on tracing the source of their products and making their product supply chains transparent.[134] However, the stark reality is that labor chains remain invisible for the most part. As shown by empirical evidence in the field, many businesses experience pragmatic difficulties in detecting modern slavery practices in their labor chains.[135] The high structural volatility of global value chains has already been shown to have a significant impact on the actual operating effects of corporate policies, in some circumstances even rendering them unfit for purpose.[136] In

131. Turner, *supra* note 16, at 205.

132. *See generally* Modern Slavery Act 2015, ch. 30, § 54 (UK).

133. New, *supra* note 18, at 4. For instance, the precise conceptual boundaries of forced labour may vary, the radical view being that all workers under a capitalism regime are wage slaves. Marxism is the typical example of this. *Id.* at 2.

134. Thomas Wailgum, *Supply Chain Spending on the Rise*, CIO (Jan. 3, 2008), https://www.cio.com/article/2437386/supply-chain-spending-on-the-rise.html.

135. Andrew Crane & Genevieve LeBaron, *Why Businesses Fail to Detect Modern Slavery*, THE CONVERSATION, Sept. 11, 2017, http://theconversation.com/why-businesses-fail-to-detect-modern-slavery-at-work-82344. In Crane and LeBaron's research into modern slavery, a senior executive of a major British hotel chain admitted bitterly that "I can tell you the farm where the steak on your plate came from. Probably even the name of the cow. But we have no idea where the workers came from that work in our kitchens." *Id.*

136. Sarfaty, *supra* note 18, at 435.

the meantime, multi-tier supply chains, and the complex systems of transnational managerial control through which they operate, were ignored in the legislative drafting of Section 54, deliberately or otherwise. If one takes a close look at the wording of Section 54 of the MSA, the term 'supply chain' is not clearly defined for the purpose of this provision, with the consequence that the scope of the suppliers covered by corporate policies and actions is not at all clear.[137]

In this regard, a comparable provision—Section 1714.43(a)(1) of the Californian Civil Code—avoids confusion by clearly targeting a "direct supply chain for tangible goods offered for sale."[138] Some argue that Section 54's omission of the adjective "direct" implicates the U.K. legislators' intention to accommodate a broader reach than the Californian peer.[139] Indeed, practice has thus far supported the need to expand legislative reach; modern slavery problems frequently occur upstream at the less visible sub-supplier levels, rather than at the focal company or among the first-tier suppliers with whom a focal firm has direct contractual relationships.[140] However, this is only scholarly speculation rather than an authoritative interpretation. The enforceability of Section 54, at least at present, is significantly undermined by these conceptual and scope ambiguities. As commented by O'Neill, proclamations about combating crimes including modern slavery without establishing or identifying institutions where corresponding claims for rights or redress may be lodged are, at best, "a premature rhetoric of rights (that) may have political point and impact . . . (and) at worst a rhetoric of rights (that) can inflate expectations while masking a lack of claimable entitlements."[141]

B. Limits of the Focal Company in Sustainable Chain Management

Behind the supply chain governance initiatives and the growing body of research suggesting that focal companies should expand their sustainability

137. New, *supra* note 18, at 2–4.

138. Turner, *supra* note 16, at 194.

139. *Id.* at 195.

140. J.L. Glover, D. Champion, K.J. Daniels & A.J.D. Dainty, *An Institutional Theory Perspective on Sustainable Practices across the Dairy Supply Chain*, 152 INT'L J. PROD. ECON. 102, 102–11 (2014) (highlighting various infrastructural challenges to sustainable supply chain management).

141. ONORA O'NEILL, TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING 133 (1996).

strategies to the sub-suppliers' level[142] lies another implicit assumption, which is that focal companies are able to affect or even manage their sub-suppliers' practices.[143] From the perspective of buying firms, this "chain liability"[144] effect demands that their sustainability management strategies penetrate as far as second-tier suppliers and even beyond. This assumption should not be taken for granted, as the complexity of supply chains also affects the capacity and quality of sustainable supply chain management by the focal company. To begin with, the lack of contractual relationships between a buying firm and its second-tier suppliers, coupled with asymmetric information on the exact number or identity of its sub-suppliers,[145] often render the focal company's practice of implementing sustainability strategies at sub-supplier levels difficult. Focal companies are usually located in developed economies, whereas sub-suppliers are in emerging economies. The multi-dimensional geographical, regulatory and cultural distances between a focal company and its sub-suppliers, combined with limited resource availability at the first-tier supplier's level, which often serve as agent of the focal company, further compound the challenge of achieving sustainable goals in supply chains.[146] Up to the present, managing sub-suppliers in the context of sustainability and human rights protection is still the exception rather than the norm,[147] and the extent of supply chain management also varies significantly, affected by power asymmetries as well as

142. *E.g.*, Miriam Wilhelm, Constantin Blome, Ellen Wieck & Cheng Yong Xiao, *Implementing Sustainability in Multi-Tier Supply Chains: Strategies and Contingencies in Managing Sub-Suppliers*,182 INT'L J. PROD. ECON. 196, 197 (2016); Thomas Choi & Tom Linton, *Don't Let Your Supply Chain Control Your Business*, HARV. BUS. REV. 112 (2011).

143. *See, e.g.*, 541 Parl. Deb. HC (6th ser.) (2012) col. 172 (U.K.) (Fiona Mactaggart, MP) (commenting on the disclosure obligation that "in enabling public information to be provided . . . [it] aims to use the power of the purchaser to prevent slavery and exploitation"); *see also* Carlos Mena, Andrew Humphries & Thomas Y. Choi, *Toward a Theory of Multi-Tier Supply Chain Management*, 49(2) J. SUPPLY CHAIN MGMT. 58, 59 (2013).

144. R van Tulder, J van Wijk & A Kolk, *From Chain Liability to Chain Responsibility*, 85(2) J. BUS. ETHICS 399, 409 (2009).

145. Wilhelm et al., *supra* note 142, at 196; Thomas Y. Choi, Kevin J. Dooley & Manus Runtusanatham, *Supply Networks and Complex Adaptive Systems: Control versus Emergence*, 19(3) J. OPS. MGMT. 351, 358 (2001).

146. Miriam Wilhelm, Constantin Blome, Vikram Bhakoo, & Antony Paulraj, *Sustainability in Multi-tier Supply Chains: Understanding the Double Agency Role of the First-tier Supplier,* 41 J. OPS. MGMT. 42, 53 (2016).

147. Wilhelm et al., *supra* note 142, at 196.

dependencies between supply chain members for critical resources or components.[148]

Second, the strategies that focal companies use to manage sub-suppliers also differ significantly, ranging from delegating authority to tier 1 suppliers where there is no direct connection between the buying firm and the tier 2 supplier,[149] to working with third parties in extending sustainability to sub-suppliers,[150] and to forming "closed triads" in which buying firms directly manage sub-suppliers.[151] The holistic implementation of practices beyond the boundaries of a buying firm is thus characterized by wide diversities in the focal company's power, the industry in which the supply chain resides, the number and location of production facilities, infrastructural characteristics in transportation and telecommunications, the extent of public scrutiny, and the extent of dependency and distance between supply chain members, which will need to be taken into account in future law-making.[152]

C. Impacts of the General Socio-Economic Environment

Other than the institutional complications of supply chains discussed above, the social complexities and dangers that might be involved in disclosing modern slavery in the global context may also deter efficient and full disclosure. Modern slavery, particularly in the form of human trafficking and forced labor, is a process rather than an isolated event, often involving the participation of criminal gangs who may use threats and various means of violence to prevent their crimes from being disclosed.[153] Just as acutely noted by Quirk, "[modern slavery] does not denote a uniform condition, but covers a spectrum of practices, involving varying degrees of consent, coercion, treatment, and autonomy."[154] Rather than seeing modern slavery as an exogenous problem that companies

148. *Id.* at 196–97; Crane & LeBaron, *supra* note 135.

149. Mena et al., *supra* note 143, at 60; Wilhelm et al., *supra* note 142, at 196.

150. Wilhelm et al., *supra* note 142, at 197.

151. *Id.* at 196.

152. *See, e.g., id.* (discussing examples of firms that have implemented such an approach); Elcio M. Tachizawa & Chee Yew Wong, *Towards a Theory of Multi-Tier Sustainable Supply Chains: A Systematic Literature Review* 19(5) SUPPLY CHAIN MGMT. 643, 657 (2014).

153. New, *supra* note 18, at 5.

154. Joel Quirk, *The Anti-Slavery Project: Linking the Historical and Contemporary*, 28 HUM. RTS. Q. 565, 576 (2006).

have to address, it should be seen as an endemic feature of socio-economic systems that are sometimes partly constituted by the companies themselves.[155] Imposing disclosure obligations on companies without tackling the socio-economic contexts in which modern slavery develops will not help much in fully eradicating the social ill.

V. DATA-BASED EVIDENCE

Given the multi-faceted elements that interact with and disrupt the implementation of statutory disclosure requirements, it is unlikely that Section 54 of the MSA will have a substantial effect in incentivizing focal companies to make detailed and accurate disclosure about their anti-slavery performance in supply chains. This has been proved by empirical evidence. Up to March 23, 2020, of the 19,712 U.K. companies exceeding the £36 million annual turnover threshold,[156] just about half —10,517 companies—submitted reports to the Modern Slavery Registry, and only 23% of the submitted reports met all the minimum requirements set out in the MSA.[157] If these disappointing figures can to a certain extent be excused by the fact that it is not mandatory to disclose on the Registry's website, a closer look at the contents of MSA reports is just as unsatisfactory. The Business and Human Rights Resource Centre (BHRRC) assessed the first year's MSA Reports released by FTSE 100 companies, and concluded that "[while] there is a welcome cluster of leading companies taking robust action … the majority show a lacklustre response to the [MSA] at best."[158] In other research targeting reports submitted by companies operating in sectors that are widely recognized as a heightened risk, almost two thirds did not make reference to the specific risks of slavery and human trafficking in relevant supply

155. *Id.* at 577 (describing modern slavery as effectively a "multi-faceted continuum.") *See also* New, *supra* note 18, at 8.

156. *FAME*, BUREAU VAN DIJK, http://www.bvdinfo.com/en-gb/our-products/company-information/national-products/fame (last visited Mar. 24, 2020).

157. *Modern Slavery Registry*, BUS. & HUM. RTS. RESOURCE CTR., https://www.modernslaveryregistry.org/ (last updated on Mar. 23, 2020).

158. *First Year of FTSE 100 Reports under the UK Modern Slavery Act: Towards Elimination?*, BUS. & HUM. RTS. RESOURCE CTR. (last visited Mar. 24, 2020, 9:59 AM), https://www.business-humanrights.org/en/first-year-of-ftse-100-reports-under-the-uk-modern-slavery-act-towards-elimination.

chains or specific sectors.[159] Without correct identification of the risks, it will be difficult for firms to take effective action to address those risks. Many statements are not even compliant with the basic requirements of the legislation, with the majority failing to address the six topic areas listed in Section 54 in any detail.[160] Indeed, viewed in the global context, firms tend to allege that they are against modern slavery and forbid their suppliers from engaging in it. In many cases, firms assert that their prohibition must be cascaded down the chain of production, going beyond the first tier of supplying firms. However, this kind of assertion tends to be restricted to the policy level—few companies thus far have disclosed their or their suppliers' previous involvement in modern slavery, even if passive or unrecognized.[161] Company policies also tend to be highly uniform and relatively abstract, revealing little information about their actual performance. This has been described by Coombs and Halladay as a "pseudo-panopticon."[162] The conventional corporate policy and monitoring regime has thus far proved only to provide room for manipulation and game-playing[163] in responding to less challenging environmental issues in supply chains, not to mention dealing with the much more severe problem of modern slavery.

VI. SUGGESTIONS

Although the ascription of responsibility has thus far primarily focused on group companies and depends on the individual circumstances in each case, including the nature, scope and extent of the holding company's control, these legal developments still have significant implications for supply chain management, which often involve similarly subtle arrangements of agency and collateral contracts. From the home state regulatory perspective, this requires

159. CORE Coalition, *Risk Averse? Company Reporting on Raw Material and Sector-Specific Risks under the Transparency in Supply Chains Clause in the U.K. Modern Slavery Act 2015*, 4 (Sept. 2017) (providing examples of heightened risk sectors as "garment production; hotels and accommodation; construction; football clubs … and outsourcing companies").

160. *Id.* at 8.

161. Adam S. Chilton & Gail Sarfaty, *The Limitations of Supply Chain Disclosure Regimes, in Coase-Sandor Working Paper Series in Law & Economics*, No.766, 1, 20 (2016).

162. W. Timothy Coombs & Sherry J. Holladay, *The Pseudo-Panopticon: the Illusion Created by CSR-Related Transparency and the Internet*, 18(2) CORP. COMM.: AN INT'L J. 212, 213–17 (2013).

163. New, *supra* note 18, at 6; Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 787 (2014).

the acknowledgement of modern forms of corporate integration, so as to develop a coherent regulatory approach that defines the extent of the human rights responsibilities (accountability) of focal companies. In order to solve the regulatory and institutional tensions discussed above, the experiences of several other jurisdictions might be of referential value to the U.K., both in reconciling corporate disclosure and other regulatory initiatives, and in enhancing the extraterritorial reach of home states towards their companies' overseas supply chains, as explicated below.

To begin with, eradicating modern slavery not only requires the improvement of regulatory standards in relation to disclosure, wages, working conditions and collective bargaining rights in both home and host countries, but also demands the effective detection of modern slavery in the first place. Section 54 of the MSA does not dictate the content of corporate disclosures, instead merely providing guidance as to what information may be included in an organization's slavery and human trafficking statement,[164] which enables corporations to formulate their statements in ways beneficial to them. In this regard, the transparency required by the Californian Act seems to be more robust—each eligible retail seller or manufacturer must, at a minimum, disclose to what extent, if any, that he does each of the following: the verification of product supply chains to evaluate risks of slavery; conducting audits of suppliers to evaluate supplier compliance with corporate standards; requiring direct suppliers' certification of material compliance; maintaining internal accountability standards for employees or contractors, as well as procedures for those who fail to meet the standards; and the provision of training for employees and managers who have direct responsibility for supply chain management.[165] Of course, corporations can tick "no" to all the above questions, but then the disclosure statement will presumably become evidence in a name-and-shame exposure.

Complex patterns of economic integration in contemporary groups and supply chains also consist of more than one form of bond—for example, ownership, authority and contract— which the law needs to take into full account in order to develop principles accordingly. For instance, a repetitive pattern of contracting for essentially the same goods or services should suffice as evidence

164. U.K. Modern Slavery Act 2015, c. 30, § 54(5).

165. CAL. CIV. CODE § 1714.43(c) (2012).

of a significant degree of economic integration which may warrant a disclosure. Furthermore, this should not be limited to repetitive bilateral contracts, since multiple relations may operate in these massively integrated networks.[166] Further clarification is also necessary in terms of sufficient degrees of proximity and control in the *Caparo* test, so that disclosure regulation would well integrate with the hard law duty of care. In this regard, in France, disclosure of human rights protection activities has now become part of an integral framework of corporate duties that corporations must adhere to, rather than an isolated undertaking that corporations have the discretion to ignore.[167] An amendment to the French Commercial Code creates an obligation for companies to prevent and mitigate environmental, health and human rights harms resulting from their activities, including those carried out by their subsidiaries and supply chains.[168] This duty is composed of three elements (stages), including "elaboration, disclosure and the effective implementation of a 'vigilance plan,'"[169] which should include "due diligence measures to identify risks and to prevent serious violations of human rights … health and safety and the environment."[170] In a corporate group, the duty could be imposed on the holding company to monitor and ensure that the vigilance plan is complied with within the sphere of influence. Policies and measures to address extraterritorial challenges should appear in the vigilance plan in order to avoid unnecessary risks, including potential tort liability. Good corporate practice of more information gathering and sharing would therefore not necessarily affect the arm's length relationship between companies and their suppliers.

Given their increasingly important role in global governance, a regulatory environment incentivizing MNEs to engage in self-observance and the effective governance of human rights in their extraterritorial activities will also be necessary, until such time as (and even after) MNEs become directly legally

166. Collins, *supra* note 30, at 743.

167. Sandra Cossart, Jerome Chaplier & Tiphaine Beau De Lomenie, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317, 320, 323 (2017).

168. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L. 225-102-4 (Fr.); Mark B. Taylor, *Due Diligence: A Compliance Standard for Responsible European Companies*, 11 EUR. COMPANY L. 86, 86 (2014).

169. Cossart et al., *supra* note 167, at 320. *See also* C. COM art. L. 225-102-4(1) (Fr.).

170. C. COM. art. L. 225-102-4(1).

accountable for their human rights abuses. In this regard, the Illegal Logging Prohibition Act 2012 (ILP Act) in Australia provides a novel supplementary regulation mode. Instead of directly targeting wrongdoers who are engaged in illegal logging activities in a foreign jurisdiction and thereby risking accusations of the abuse of jurisdiction, the ILP Act provides "a mechanism for the prosecution of downstream activities ancillary to the illegal logging" (i.e., importation and processing).[171] By reducing the markets for unlawful goods and services, this kind of "downstream regulatory scheme in developed states can indirectly strengthen compliance with the law in developing states" without risking accusations of cultural invasion[172] and thereby reconciling relationships between home and host states in jointly tackling human rights abuses in global supply chains.

In addition to more effective punishments or sanctions to deter non-disclosure or poor-quality disclosure, the creation of incentivizing structures within the law would also help. For example, "public procurement guidelines based on corporate social responsibility standards"[173] could potentially form the basis of incentivizing governance methods.

VII. CONCLUDING REMARKS

The "non-territorial spaces and management systems"[174] of MNEs and the global regulatory gaps that spring from them have provided the impetus for intense academic and strategic attention, and a consequent range of regulatory attempts. In transnational supply chains, "business entities are able to capitalize on the labor practices of contractors and suppliers in foreign states with whom they have an arm's-length relationship."[175] The opacity of supply chains further makes it possible to straddle a thin line between lawful employment and slavery or forced labor.

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171. Turner, *supra* note 16, at 207. *See also Illegal Logging Prohibition Act 2012*, (Cth) ss 15, 17 (Austl.).

172. Turner, *supra* note 16, at 207.

173. *Id.* at 190. For instance, "the procurement practices and decisions of wholesalers and retailers could limit the ability of consumers to purchase [slavery-]tainted goods and services." *Id.* at 196.

174. John Gerard Ruggie, *Reconstituting the Global Public Domain—Issues, Actors, and Practices*, 10(4) EUR. J. INT'L RELATIONS 499, 503 (2004).

175. Turner, *supra* note 16, at 208.

As global governance initiatives to encourage due diligence and combat exploitation in multinational supply chains proliferate, home state regulation of the global supply chains of corporations and the outsourcing activities of other multinational business entities is increasingly gaining momentum. The U.K. has been a pioneer as regards global supply chain regulation and has made some commendable attempts—both in case law, which embodies a hard law duty of care owed by focal companies towards parties affected by their overseas subsidiaries, and in statutory requirements embedded in the MSA. However, after an examination of the interactions between these regulatory methods, particularly the legal and institutional factors hindering companies from making detailed and substantial disclosures under Section 54 of the MSA, we have identified an urgent need for a more fine-grained and coherent regulatory framework, which can effectively reflect the volatile regulatory, normative, and cultural environments that global supply chains encompass. Clear lines need to be drawn as regards a corporation's sphere of accountability in the globalized context. Furthermore, the statutory steering of CSR, particularly supply chain disclosure laws, should not be the major regulatory method to improve labor practices in transnational supply chains. It should be part of a comprehensive strategy, within a framework that is designed to both incentivize supply chain sustainability and penalize business entities with supply chains that involve illicit labor practices.[176] This will require coherent and compatible progression along several paths — extraterritorial jurisdiction, an extended duty of care for focal companies, and even downstream regulatory schemes, to name but a few.

While home state regulation has to a certain extent offset the regulatory gap in international law by way of forming an "expanding web of liability,"[177] the "geopolitical and geo-economic" tension implicated in regulating transnational business enterprises should not be overlooked.[178] To end this institutional scourge and encompass MNEs within coherent home state and extraterritorial

176. *Id.* at 209.

177. Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 GEO. WASH. INT'L L. REV. 841, 894 (2009).

178. Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, *Written Statement Submitted by Law Society of England and Wales*, 1st Sess, U.N. Doc A/HRC/WG. 16/1/NGO/6, at 6 (July 2015), https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx.

regulatory regimes requires movements both at and beyond the regulatory level. For example, the complexity of institutional environments necessitates adaptations to "some of the most prominent features of the current world polity and economy:" the structural and compositional complications of global chains, national competition for markets and foreign investment, state sovereignty, coherence between human rights law and corporate law, the highly contested legitimacy of extraterritorial jurisdiction—the list goes on.[179] Indeed, as commented by Ruggie, while our hearts drive our instinct to eradicate modern slavery in supply chains, we still need our heads to develop suitable strategies to "steer the heart through the very difficult global terrain on which we are travelling."[180]

179. Ruggie, *supra* note 4, at 170–71.
180. *Id.* at l.