

# Building the U.S. Model for Corporate Accountability: A Foreign Corrupt Practices Act for Human Rights

Policy Brief  
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## Introduction

U.S. human rights accountability regimes have failed to keep up with the multinational nature of corporations' increasingly globalized operations and supply chains. As a result, there are U.S. corporations and corporations that trade on U.S. stock exchanges that exploit workers and communities within their supply chains around the world, outside the reach of U.S. government enforcement. In contrast, U.S. anti-bribery laws, such as the Foreign Corrupt Practices Act (FCPA), have been effective at curbing bribery and corruption in U.S. business operations around the globe. Given its success, the FCPA offers a strong model for legislation that can be used to hold corporations accountable for human rights and environmental abuses no matter where they occur. Establishing robust corporate accountability frameworks for human rights and environmental abuses is not a simple task. However, recent legislation and legislative proposals around the world, including the European Corporate Sustainability and Due Diligence Directive (CSDDD), have demonstrated the necessity and feasibility of acting now.

This brief presents how the FCPA model can be adapted into a framework under which U.S. corporations can be held accountable for human rights abuses throughout their global supply chains. We begin by surveying existing mechanisms for holding corporations accountable for human rights abuses under U.S. law and highlight where they fall short. Next, we outline how the FCPA works and why it is effective at holding corporations accountable globally. We argue that U.S. legislation that ensures ethical corporate behavior globally also advances U.S. interests and that such legislation is supported by a larger movement toward mandating human rights and environmental due diligence (HREDD) across supply chains. Finally, we present what an FCPA modeled human rights law would look like and how it would work to ensure human rights conscious U.S. supply chains.

## Existing Mechanisms for Accountability

There are few U.S. laws that have the potential to hold corporations accountable for the human rights violations. Human rights litigators have been utilizing statutes meant for specific circumstances, and courts have conservatively interpreted legislation to exclude extraterritorial accountability. We thus find ourselves in a situation where corporations can be held accountable for financial misdeeds while their human rights abuses are allowed to continue with impunity. Our country's interest in ending unethical behavior of domestic corporations and corporations that operate in the U.S. should be etched in stone, not waiting to be dug out of our dense jurisprudence.

## The Alien Tort Statute: A Limited Application

The Alien Tort Statute (ATS) permits non-U.S. citizens to bring a claim in federal court for torts “committed in violation of the law of nations or a treaty of the United States.”<sup>1</sup> Since the 1980s, it has been used by many victims of grave human rights abuses, such as torture, extrajudicial killing, sexual violence, and war crimes.<sup>2</sup> However, the Supreme Court has continuously narrowed its potential application, especially on cases involving corporate entities.

The first major blow to the ATS occurred in 2004, when the Court held that the only actions the statute recognizes are those that may have been committed in violation of a U.S. treaty, with few exceptions.<sup>3</sup> The second came in 2013, when the Court stated that a corporation may only be liable under the ATS for activities that “touch and concern” the United States—a test that precludes actions based on a “mere corporate presence,” but is otherwise left undefined.<sup>4</sup>

A third setback occurred in 2018, when the Court ruled that foreign companies cannot be sued under the ATS, even if the foreign corporation does business or has a significant presence in the United States.<sup>5</sup> The Supreme Court did not address whether domestic corporations may be held liable under the statute, and the issue has been contentious among the lower courts since the 2018 decision.<sup>6</sup> While this issue was resolved in the 2021 *Nestle v. Doe* decision, the Court also ruled in that case that corporate decisions made in the U.S. to knowingly purchase from suppliers engaging in violations of international law amount to “general corporate activity,” and therefore are insufficient to raise an ATS claim.<sup>7</sup> The decision in the *Nestle* case nearly eliminated any potential for extraterritorial ATS cases.

While the original intent behind the enactment of the ATS is uncertain,<sup>8</sup> the statute was not drafted to be responsive to the need to hold corporations accountable. As a result of the growing restrictions around the statute, advocates are working hard to ensure its continued use for extraterritorial corporate human rights violation cases. In May 2022, the Alien Tort Statute

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<sup>1</sup> Alien Tort Statute, 28 U.S.C. § 1350 (reading, in its entirety, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

<sup>2</sup> *The Alien Tort Statute*, CTR. FOR JUST. & ACCOUNTABILITY, available at: <https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute> (last visited Jan. 27, 2020).

<sup>3</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–30 (2004) (defining the “law of nations”); Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893 (2016). The exceptions permit federal courts to allow a claim recognized under “customary international law,” laws which may be poorly defined and perhaps are better understood as widely recognized or emerging norms and standards.

<sup>4</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

<sup>5</sup> *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

<sup>6</sup> See Zach Zhen He Tan, *Assessing the Impact of Jesner v. Arab Bank*, LAWFARE (Dec. 20, 2018), available at: <https://www.lawfareblog.com/assessing-impact-jesner-v-arab-bank>.

<sup>7</sup> *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1933–36 (2021).

<sup>8</sup> William Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMP. L. REV. 221, 222 (1996).

Clarification Act was introduced in the Senate to amend the ATS to explicitly allow for extraterritorial application.<sup>9</sup> However the bill has yet to move forward in the legislative process.

### Trafficking Victims Protection Reauthorization Act

The Trafficking Victims Protection Reauthorization Act (TVPRA), enacted in 2000, allows survivors and the families of victims of human trafficking and forced labor to seek a civil remedy against perpetrators and those who financially benefit from the trafficking.<sup>10</sup> The TVPRA provides an opportunity for holding corporations accountable as it does not require perpetrators to have directly participated in the human trafficking or forced labor, but rather caused or contributed to the violation.<sup>11</sup> The reauthorization of the TVPRA in 2008 expressly allowed for extraterritorial jurisdiction, making it an even more promising tool for corporate accountability.<sup>12</sup> However, a D.C. district court's decision in *Doe v. Apple* in 2021, which was affirmed by an appeals court in 2024, claimed that the TVPRA's civil remedy would not apply extraterritorially.<sup>13</sup> Advocates have argued that this interpretation is inconsistent with the Supreme Court's reading of the TVPRA.<sup>14</sup>

### The Tariff Act of 1930

Section 307 of the Tariff Act of 1930 prohibits the import of goods made using forced labor from entering U.S. markets.<sup>15</sup> Anyone can report evidence of forced labor in the supply chain of an import to Customs and Border Protection (CBP), the enforcing agency.<sup>16</sup> After an investigation, if CBP determines that information "reasonably but not conclusively" indicates a good produced with forced labour "is being, or is likely to be, imported" into the United States, CBP may issue a Withhold and Release Order (WRO).<sup>17</sup> Shipments of goods subject to a WRO are detained by port officials, after which the importer has three months to either demonstrate admissibility (i.e., submit evidence showing the merchandise was not produced using forced labor) or remove the goods from the United States.<sup>18</sup> Where CBP finds probable cause that the merchandise was produced using

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<sup>9</sup> Alien Tort Statute Clarification Act, S.4155, 117<sup>th</sup> Congress, §3, (2021-2022).

<sup>10</sup>Trafficking Victims Protection Reauthorization Act, 18 U.S. Code § 1595(a).

<sup>11</sup> Lindsey Roberson & Johanna Lee, *The Road to Recovery After Nestle: Exploring the TVPA As a Promising Tool for Corporate Accountability*, 6 HRLR ONLINE 1, 22 (2021), available at:

[https://hrlr.law.columbia.edu/files/2021/11/11\\_9-Nestle-HRLR-Online.pdf](https://hrlr.law.columbia.edu/files/2021/11/11_9-Nestle-HRLR-Online.pdf); Trafficking Victims Protection Reauthorization Act, 18 U.S. Code § 1595(a).

<sup>12</sup> Lindsey Roberson & Johanna Lee, *supra* note 11 at 22; TVPRA, § 1595(a).

<sup>13</sup> William S. Dodge, *Does the TVPRA Apply Extraterritorially? Thoughts on the U.S. Chamber of Commerce Amicus Brief in Doe v. Apple*, TRANSNAT'L LITIGATION BLOG, (Oct. 20, 2022), available at: <https://tlblog.org/does-the-tvpra-apply-extraterritorially/>

<sup>14</sup> *Does the TVPRA Apply Extraterritorially?*, *supra* note 13.

<sup>15</sup>The Tariff Act of 1930, 19 U.S.C. §1307.

<sup>16</sup> U.S. CUSTOMS & BORDER PROT., *Forced Labor*, available at: [https://www.cbp.gov/trade/forced-labor#:~:text=CBP%20regulations%20state%20that%20any,CBP%20\(19%20CFR%2012.42\)](https://www.cbp.gov/trade/forced-labor#:~:text=CBP%20regulations%20state%20that%20any,CBP%20(19%20CFR%2012.42)). (last visited May 30, 2024).

<sup>17</sup> Findings of Commissioner of CBP, 19 C.F.R. § 12.42.

<sup>18</sup> CONG. RSCH. OFFICE, *Section 307 and Imports Produced by Forced Labor*, IN FOCUS, 1 (Jul. 26, 2022), available at: [https://crsreports.congress.gov/product/pdf/IF/IF11360#:~:text=Section%20307%20of%20the%20Tariff,\(CBP\)%](https://crsreports.congress.gov/product/pdf/IF/IF11360#:~:text=Section%20307%20of%20the%20Tariff,(CBP)%)

forced labour, the agency may also issue a formal Finding.<sup>19</sup> Shipments subject to Findings cannot be re-exported and instead are seized unless the importer establishes by “satisfactory evidence” that the merchandise is not tainted by forced labour.<sup>20</sup>

Building on the Tariff Act, in December 2021 the Uyghur Forced Labor Prevention Act (UFLPA) passed into law.<sup>21</sup> The UFLPA creates a rebuttable presumption that goods mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China, or produced by certain entities, are made using forced labor and are therefore prohibited from entering the United States under Section 307 of the Tariff Act.<sup>22</sup>

## Global Magnitsky Sanctions

The Global Magnitsky sanctions regime is another corporate accountability tool.<sup>23</sup> Individuals or entities can be listed under the Global Magnitsky sanctions program for involvement in human rights abuses or corruption.<sup>24</sup> NGOs can submit a recommendation to the Office of Foreign Assets Control (OFAC) to sanction a particular individual or entity.<sup>25</sup> Listed individuals and entities face asset freezes and entry bans to the U.S.<sup>26</sup> Sanctions regimes can serve as a deterrent to anyone doing business with sanctioned individuals and entities as doing so may subject them to significant penalties.<sup>27</sup> The threat of Global Magnitsky sanctions can incentivize corporations to be more cautious about human rights abuses or corruption in their supply chains.

## Limited Opportunities for Accountability

Litigators and advocates have identified other tools to seek corporate accountability as well. For example, in March 2022, Global Labor Justice (GLJ) filed suit against Bumble Bee Foods, a U.S.

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[20enforces%20the%20prohibition](#); See also HUM. TRAFFICKING LEGAL CTR., *Short Guide on Section 307 of the U.S. Tariff Act of 1930, 2*, available at: [https://htlegalcenter.org/wp-content/uploads/Short-Guide-to-Section-307-of-the-Tariff-Act\\_English.pdf](https://htlegalcenter.org/wp-content/uploads/Short-Guide-to-Section-307-of-the-Tariff-Act_English.pdf).

<sup>19</sup> 19 C.F.R. § 12.42.; See also U.S. CUSTOMS & BORDER PROT., *Forced Labor Frequently Asked Questions*, available at: <https://www.cbp.gov/trade/programs-administration/forced-labor/frequently-asked-questions> (last visited May 30, 2024).

<sup>20</sup> 19 C.F.R. § 12.42.; See also *Forced Labor Frequently Asked Questions*, *supra* note 19.

<sup>21</sup> U.S. CUSTOMS & BORDER PROT., *Uyghur Forced Labor Prevention Act*, available at: <https://www.cbp.gov/trade/forced-labor/UFLPA>.

<sup>22</sup> Office of Trade, *Fact Sheet: Uyghur Forced Labor Prevention Act*, U.S. CUSTOMS & BORDER PROT., available at: [https://www.cbp.gov/sites/default/files/assets/documents/2024-Feb/Forced\\_Labor\\_Guidance\\_UFLPA\\_Fact\\_Sheet\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2024-Feb/Forced_Labor_Guidance_UFLPA_Fact_Sheet_0.pdf).

<sup>23</sup> U.S. DEPARTMENT OF THE TREASURY, *Global Magnitsky Sanctions*, available at:

<https://ofac.treasury.gov/sanctions-programs-and-country-information/global-magnitsky-sanctions>.

<sup>24</sup> Global Magnitsky Human Rights Accountability Act, 22 U.S.C. §108; Exec. Order No. 13818, 31 C.F.R. § 583 (2017).

<sup>25</sup> 22 U.S.C. § 108(c)(2).

<sup>26</sup> Exec. Order No. 13818, 31 C.F.R. § 583, (2017).

<sup>27</sup> HUM. RTS. FIRST, *Report Assesses Impacts of Magnitsky Sanctions*, (Nov. 16, 2023), available at: <https://humanrightsfirst.org/library/report-assesses-impacts-of-magnitsky-sanctions/>.

canned tuna brand, under the District of Columbia Consumer Protection Procedures Act, alleging that Bumble Bee Foods claimed their supply chain was “fair and safe” despite significant evidence of labor abuses at sea in their fishing fleets.<sup>28</sup> Nearly a year later, Bumble Bee Foods settled the case, agreeing to remove the claim from its website and other public advertising materials.<sup>29</sup>

While some tools exist under U.S. law to hold corporations accountable, they remain limited in application. Although the TVPRA explicitly allows for extraterritorial jurisdiction where the ATS does not, courts have interpreted both to exclude extraterritorial reach for civil remedy. The Tariff Act similarly only prevents imports of goods caught using forced labor from entering U.S. markets, allowing those goods to go elsewhere and profits from those imports to continue to enter the U.S.

However, opportunities to advance accountability for corporate human rights abuses can develop from existing accountability mechanisms. The Global Magnitsky sanctions regime demonstrates the interconnectedness of corruption and human rights related abuses. Corruption can indirectly prevent the realization of fundamental human rights, with bribes and corruption facilitating abuses such as torture, sexual assault, and kidnapping, among others.<sup>30</sup> As corruption and human rights abuses often happen in tandem, the same mechanisms could be used to address both types of abuses.

## The Foreign Corrupt Practices Act

In 1977, the United States determined that it had a vested interest in preventing companies from engaging in bribery or corruption abroad.<sup>31</sup> The legal reforms that resulted established the United States as a global leader in the fight to end corruption.<sup>32</sup> One of the most significant examples of legislation passed to place a guardrail around corporate conduct, the Foreign Corrupt Practices Act (FCPA) has the power to hold companies civilly and criminally liable for bribing foreign officials.<sup>33</sup> The law has two main provisions: the first prohibits the bribery of foreign officials for

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<sup>28</sup> Complaint, *GLJ-ILRF v. Bumble Bee Foods*, (D.C. Super. Ct. 2022), Case No: 1:22-cv-01220, available at: <https://globallaborjustice.org/wp-content/uploads/2022/03/GLJ-ILRF-v.-Bumble-Bee-Foods-LLC-Complaint-FILED.pdf>.

<sup>29</sup> *GLJ-ILRF v. Bumble Bee Foods*, No. 2022 CA 001235 B, (D.C. Super. Ct. 2023), available at: <https://link.edgепilot.com/s/fea0cf04/TOVsBOacXU2RWWB41KJs7g?u=https://efmdc.tylertech.cloud/ViewDocuments.aspx?FID=bd16058d-6103-4725-af7e-99c29a059166>.

<sup>30</sup> Andrew B. Spalding, *Corruption, Corporations, and the New Human Right*, 91 WASH. U. L. REV. 1365, 1408 (2014), available at: [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6100&context=law\\_lawreview](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6100&context=law_lawreview).

<sup>31</sup> U.S. DEPT. OF JUST., *Foreign Corrupt Practices Act*, available at: <https://www.justice.gov/criminal/criminal-fraud/foreign-corrupt-practices-act#:~:text=The%20Foreign%20Corrupt%20Practices%20Act,in%20obtaining%20or%20retaining%20business..>

<sup>32</sup> Abigail Bellows, *Regaining U.S. Global Leadership on Anticorruption*, CARNEGIE ENDOWMENT FOR INT’L PEACE, (July 1, 2020), available at: <https://carnegieendowment.org/research/2020/07/regaining-us-global-leadership-on-anticorruption?lang=en>.

<sup>33</sup> Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 et seq.; Abigail Bellows, *supra* note 32.

## **The FCPA: Main Elements**

### Anti-Bribery Provisions

The FCPA anti-bribery provisions prohibit:

1. Making or authorizing a payment or promise to pay money or anything of value;
2. To a foreign official, politician, political party official, or political candidate for office;
3. With corrupt intent;
4. For the purpose of influencing the person's official acts or decisions in violation of their lawful duty, securing an improper advantage, or inducing the person to use their influence to affect an official act or decision;
5. In order to assist in obtaining or retaining business.

### Accounting Provisions

The accounting provisions of the FCPA require business to take steps to ensure that finances are being used and recorded properly to avoid corruption or bribery. There are two primary accounting provisions: (1) the books and records provision, and (2) the internal controls provision.

The books and records provision requires corporations to, in reasonable detail, track and keep records of their transactions and the state of their assets. This provision is intended to ensure businesses do not mischaracterize payments sent for corruption purposes as legitimate payments in their accounting procedures.

The internal controls provision requires corporations to ensure that there are procedures in place to reasonably ensure that:

- Transactions made are authorized by management;
- Transactions are recorded in a way that ensures adequate information to prepare financial statements as well as to maintain accountability;
- Assets are accessed only based on authorizations from management; and
- The corporation regularly checks to ensure that recorded assets and transactions align with existing assets.

a business purpose, the second directs publicly traded companies to accurately account for all their assets and liabilities. To meet the requirements of the second provision, covered entities must keep accurate and reasonably detailed books and records and implement internal controls to ensure all transactions are properly authorized.<sup>34</sup>

One essential aspect of the FCPA framework is its global reach: the FCPA's bribery prohibition applies to domestic corporations and individuals, public foreign corporations that trade on U.S. exchanges, and other persons or entities acting from within the United States or its territories.<sup>35</sup> The FCPA also applies to actors throughout the corporate entity, including to a corporation's officers, directors, stockholders, agents, partners acting on behalf of the corporation, as well as parent and subsidiary companies.<sup>36</sup> The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have the sole powers of enforcement of the FCPA, and the law provides them with the jurisdiction necessary to prosecute and/or investigate both domestic and foreign corporations.<sup>37</sup> The law has been regarded as a successful vehicle to hold corporations around the world accountable for corrupt business practices.<sup>38</sup>

Following the enactment of the FCPA, American corporations were concerned that such strong anti-corruption regulations on American corporations compared to others around the world put them at a disadvantage.<sup>39</sup> However, the United States prioritized a policy of advocating for anti-corruption legislation worldwide, which has resulted in the globalization of anti-corruption and bribery efforts.<sup>40</sup> In 1997, the Organization for Economic Co-operation and Development (OECD)

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<sup>34</sup> See U.S. DEP'T OF JUSTICE & SEC. & EXCHANGE COMM'N, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 23–24 (2012), available at: <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [hereinafter FCPA RESOURCE GUIDE]; S. REP. NO. 95-114, at 11 (1977) (reasoning that “a U.S. company which “looks the other way” in order to be able to raise the defense that they were ignorant of bribes made by a foreign subsidiary, could be in violation of section 102 requiring companies to devise and maintain adequate accounting controls.”).

<sup>35</sup> 15 U.S.C. § 78dd-1(a).

<sup>36</sup> *Id.*

<sup>37</sup> FCPA RESOURCE GUIDE, *supra* note 34 at 4.

<sup>38</sup> NAT'L WHISTLEBLOWER CTR., *Foreign Corrupt Practices Act: How the Whistleblower Rewards provisions Have Worked* (Aug. 2018), available at: <https://www.whistleblowers.org/wp-content/uploads/2018/12/nwc-fcpa-report.pdf> (“Whistleblowers are crucial to” the FCPA, a law that has had “profound influence. . . beyond U.S. borders.”). For a discussion on what merits success in the FCPA's legacy, see Mike Koehler, Symposium, *Has the FCPA Been Successful in Achieving Its Objectives?*, 2019 U. Ill. L. Rev. 1267 (2019).; Compare Steven R. Peikin, Co-Director, Enforcement Division, SEC, Speech: Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017), available at: <https://www.sec.gov/news/speech/speech-peikin-2017-11-09> (stating that dedicated FCPA enforcement techniques have “enhanced domestic and international partnerships in the fight against corruption”).

<sup>39</sup> Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO STATE L. J. 930, 975 (2012), available at: <https://fcpa.stanford.edu/academic-articles/20120101-the-story-of-the-fcpa.pdf>.

<sup>40</sup> Frank C. Razzano & Travis P. Nelson, *The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance*, 42 THE INT'L LAWYER 1259, 1259-60 (2008), available at: <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1224&context=til>.



developed The Anti-Bribery Convention which has been signed by 44 countries.<sup>41</sup> There are also anti-corruption treaties which have been enacted by the Inter-American Commission, the European Union, African Union, and the United Nations, which require signatory States to enact legislation to combat bribery and corruption.<sup>42</sup>

When enacting the FCPA, lawmakers were hopeful that “the criminalization of foreign corporate bribery [would] to a significant extent act as a self-enforcing, preventative mechanism.”<sup>43</sup> In the years since the passage of the FCPA, that hope has been realized. In response to the enactment of the FCPA, companies have created robust internal mechanisms to prevent bribery involving their own officials and partners.<sup>44</sup>

Many businesses recognize the value of the FCPA to their bottom line. The prohibition of bribery in the FCPA offers companies a government-backed excuse to refuse to pay bribes, which helps even out the global playing field, especially as more countries implement their own anti-corruption laws.<sup>45</sup> The law also affords assurances that, for example, business operations are not delayed at the whim of individuals expecting bribes, that hidden corrupt practices do not evolve into other fraudulent activity, or that contracts are not built on illegal premises, resulting in their lack of enforceability.<sup>46</sup> Overall, companies find it to be a competitive advantage and an improvement to the “business environment.”<sup>47</sup>

## A Vested Interest in Ethical Corporate Behavior

The United States government has a vested interest in American corporations acting ethically overseas. American corporations that are globally recognizable serve as ambassadors of the United States. The goods and services of these businesses and the ways in which they are produced or provided shape how people around the world view the United States and its institutions, and as

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<sup>41</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 Dec. 1997, OECD, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0293>.

<sup>42</sup> Frank C. Razzano & Travis P. Nelson, *supra* note 40.

<sup>43</sup> S. REP. NO. 95-114, at 10 (1977).

<sup>44</sup> Mike Koehler, *Has the FCPA been Successful in Achieving its Objectives?*, *supra* note 38, at 1301.

<sup>45</sup> See NICK BECKETT ET AL., *CMS Guide to Anti-Bribery and Corruption Laws* (2018), available at: <https://cms.law/en/int/publication/cms-guide-to-anti-bribery-and-corruption-laws>; See also Max de Haldevang & Heather Timmons, *One of the US's Greatest Gifts to the Global Economy is Under Threat from Trump*, QUARTZ (Mar. 13, 2017), available at: <https://qz.com/927217/one-of-the-worlds-best-weapons-against-bribery-and-corruption-is-under-threat-from-trump>.

<sup>46</sup> Matteson Ellis, *Can FCPA Compliance Be Good for Business? What the Experts Say. . .*, FCPAMÉRICAS (Sept. 12, 2012), available at: <http://fcpamericas.com/english/anti-corruption-compliance/can-fcpa-compliance-be-good-for-business-what-the-experts-say>; Conniel Malek, *Six Reasons Why Corporations Like (and Want) the Foreign Corrupt Practices Act Even If They Won't Admit It*, BUS. & HUMAN RTS. RESOURCE CTR., available at: <https://www.business-humanrights.org/en/six-reasons-why-corporations-like-and-want-the-foreign-corrupt-practices-act-even-if-they-wont-admit-it> (last visited Feb. 6, 2020).

<sup>47</sup> *Why Anti-Bribery Laws Help Global Business*, CHRISTIAN SCI. MONITOR (Jan. 24, 2017), available at: <https://www.csmonitor.com/Commentary/the-monitors-view/2017/0124/Why-anti-bribery-laws-help-global-business> (citing a 2015 survey of more than 800 companies).

such, should reflect American culture and values. International perception of American corporations plays an important role in shaping a host of government interests tied to trade, including export and import privileges and sanctions, access to government contracts, and publicity generally. It is thus essential that the United States ensures American corporations' actions are aligned with American values if it wishes to project a unified message.

The United States seeks to be a human rights leader by, in part, “promot[ing] fair play, the rule of law, and high standards for global commerce.”<sup>48</sup> In the 2024 National Action Plan on Responsible Business Conduct,<sup>49</sup> the United States pledged its commitment to human rights and environmental due diligence (HREDD) based on the UN Guiding Principles on Business and Human Rights. While the NAP defines what HREDD processes are expected of U.S. corporations, there are still currently no mechanisms to enforce any such directive in U.S. law.<sup>50</sup> Without mandating that American corporations and those trading on U.S. stock exchanges engage in HREDD, the United States' message on the importance of human rights is muffled by how the country allows its businesses and those operating within its jurisdiction to conduct themselves overseas.

There exists a vast infrastructure to support building and conducting business in the United States. Businesses operating in the United States both benefit from and rely on multiple national security exchanges, a robust intellectual property system, generous tax credits, and a dependable judicial system. Yet these domestic entities continue to disregard U.S. human rights and foreign policy goals. These companies hide behind U.S. courts to avoid accountability for human rights violations they committed abroad. U.S. business abroad plays a significant role in U.S. diplomatic efforts. However, U.S. companies' operations abroad can severely impact U.S. diplomatic efforts when companies behave in a way that is counter to U.S. values or in ways that would otherwise be illegal in the United States.

The United States cannot be a global leader for human rights without enacting mandatory measures preventing companies from exploiting individuals and communities throughout their supply chains around the world. The United States' failure to regulate U.S. corporate behavior abroad has given U.S. corporations and corporations that trade on U.S. stock exchanges license to export their human rights abuses to other countries, outside the reach of U.S. jurisdiction. As long as HREDD measures remain voluntary, corporations will not be incentivized to respect human rights.

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<sup>48</sup> OFF. COMM. & BUS. AFFAIRS, *U.S. National Action Plan on Responsible Business Conduct* (Apr. 23, 2019), available at: <https://www.state.gov/u-s-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises/u-s-national-action-plan-on-responsible-business-conduct>.

<sup>49</sup> U.S. DEP'T ST., *United States Government National Action Plan on Responsible Business Conduct*, 4 (2024), available at: <https://www.state.gov/wp-content/uploads/2024/03/2024-United-States-Government-National-Action-Plan-on-Responsible-Business-Conduct.pdf>, [hereinafter 2024 U.S. NAP].

<sup>50</sup> Rachel Chambers & David Birchall, *How European Human Rights Law Will Reshape U.S. Business*, 20 U.C. L. BUS. J. 3, 5-6 (2024), available at: [https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1253&context=hastings\\_business\\_law\\_journal](https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1253&context=hastings_business_law_journal).

## Mandatory Human Rights and Environmental Due Diligence

Although legislation to hold corporations accountable for human rights abuses remains elusive in the United States, the global movement to mandate human rights and environmental due diligence offers opportunities for change. This movement arises out of decades of voluntary business and human rights measures that corporations have failed to adequately implement. Multinational enterprises began developing corporate codes of conduct in the 1990s, intending to safeguard their “social sustainability” in the wake of human rights abuses associated with their business practices.<sup>51</sup> Multilateral frameworks for corporate social responsibility (CSR) followed, and eventually culminated in the United Nations Guiding Principles on Business and Human Rights (UNGPs).<sup>52</sup> The UNGPs recognize three fundamental pillars: first, “states have a *duty to protect* against human rights abuses by third parties;” second, “business enterprises have an independent *responsibility to respect* human rights;” and third, harmed individuals “should have *access to effective remedy*.”<sup>53</sup>

To effectively comply with the UNGPs, corporations need to conduct human rights and environmental due diligence (HREDD).<sup>54</sup> The goal of HREDD is to identify and respond to real and potential risks of violating internationally recognized human rights, including the right to a clean, healthy, and sustainable environment<sup>55</sup> faced by rights-holders throughout the company’s activities and supply chain.<sup>56</sup> The UNGPs state that due diligence should:

- Include ongoing assessments of actual and potential human rights impacts;
- Integrate and take action on the findings;
- Track the effectiveness of the company's responses; and

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<sup>51</sup> See John G. Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights*, 9–10 (Corporate Responsibility Initiative Working Paper No. 67, John F. Kennedy Sch. of Gov’t, Harvard University, 2017), available at:

[https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper\\_67\\_0.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_67_0.pdf) [hereinafter *Social Construction of UNGPs*]; see also Kenneth Winer, *Doing It Right — Overseas: Compliance programs Take on New Importance in a Global Economy*, ABA: BUS. L. TODAY (Nov.–Dec. 1999).

<sup>52</sup> John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. HR/PUB/11/04 (Mar. 21, 2011) [hereinafter *UNGPs*].

<sup>53</sup> *Social Construction of UNGPs*, *supra* note 51; See also *UNGPs*, *supra* note 52.

<sup>54</sup> INT’L ORG. OF EMPLOYERS, *IOE Paper on State Policy Responses on Human Rights Due Diligence*, 23 (May 2018), available at: [http://www.ioe-emp.org/fileadmin/ioe\\_documents/publications/Policy%20Areas/business\\_and\\_human\\_rights/EN/\\_20182505\\_C1031\\_IOE\\_paper\\_on\\_State\\_policy\\_responses\\_on\\_Human\\_Rights\\_Due\\_Diligence\\_-\\_FINAL.pdf](http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_20182505_C1031_IOE_paper_on_State_policy_responses_on_Human_Rights_Due_Diligence_-_FINAL.pdf); *UNGPs*, *supra* note 52.

<sup>55</sup> U.N.G.A. Res. 76/300 (Aug. 1, 2022).; See *Human Rights Due Diligence and the Environment (HRDD+E): A Guide for Business*, UNDP, 3, (Nov. 10, 2023) (“in light of the recognition of the right to a clean, healthy, and sustainable environment as a human right<sup>4</sup> 56 by the UN Member States in 2022, human rights due<sup>5</sup> 57 diligence should apply an environmental perspective”).

<sup>56</sup> INT’L ORG. OF EMPLOYERS, *supra*, note 54, at 6 (referencing *UNGPs*, *supra* note 52.)

- Plan to communicate how impacts are addressed.<sup>57</sup>

A variety of international organizations have been pushing to cement HREDD into legislation, operating on the idea that businesses are unlikely to prioritize respect for human rights and the environment in their supply chains over corporate profits without governments requiring them to do so.<sup>58</sup> These legislative measures require corporations to engage in HREDD in line with the UNGPs.<sup>59</sup> Mandatory HREDD laws have already been enacted in France and Germany<sup>60</sup> and, in a landmark vote in April 2024, the European Parliament voted to adopt the Corporate Sustainability Due Diligence Directive (CSDDD) which establishes a minimum mandatory HREDD requirement to be adopted in all EU countries.<sup>61</sup> The CSDDD would require certain corporations doing business in the EU to conduct human rights due diligence across their supply chains through “identifying and addressing potential and actual adverse human rights and environmental impacts.”<sup>62</sup> Failure to comply would result in sanctions by the relevant regulatory authority.<sup>63</sup> Victims of violations would also be empowered to sue for damages.<sup>64</sup>

While HREDD laws will look different in different jurisdictions, the European Coalition for Corporate Justice (ECCJ) has identified ten features of mandatory HREDD legislation that are essential to addressing the proper range of key issues.<sup>65</sup> These include protecting a wide range of human rights, clearly defining the entities covered by the law, finely illustrating the nature and reach of companies’ due diligence obligations, establishing liability for companies, and, finally, a way for victims to seek justice for human rights and environmental abuses.<sup>66</sup> Corporations have raised concerns that mandatory HREDD laws in different countries will place too many conflicting

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<sup>57</sup> Id.

<sup>58</sup> OHCHR, *UN Human Rights “Issues Paper” on legislative proposals for mandatory human rights due diligence by companies*, 8 (June 2020), available at:

[https://www.ohchr.org/sites/default/files/Documents/Issues/Business/MandatoryHR\\_Due\\_Diligence\\_Issues\\_Paper.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf); BUS. & HUM. RIGHTS RESOURCE CTR., *Mandatory Due Diligence*, available at: <https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/> (last visited May 30, 2024).

<sup>59</sup> See generally *Business & Human Rights in Law*, BUS. & HUM. RTS. L., <http://www.bhrinlaw.org>.

<sup>60</sup> EUR. COALITION FOR CORP. JUST, *French Corporate Duty of Vigilance Law (English Translation)*, available at: <https://respect.international/french-corporate-duty-of-vigilance-law-english-translation/>; Act on Corporate Due Diligence Obligations in Supply Chains of July 16 2021, BGBI I 2021, 2959 (Germany), official translation available at: [https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?\\_\\_blob=publicationFile&v=4](https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=4).

<sup>61</sup> EUROPEAN PARLIAMENT, *Corporate Sustainability Due Diligence*, Texts Adopted, (Apr. 24, 2024), available at: [https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html).

<sup>62</sup> EUROPEAN COMMISSION, *Corporate sustainability due diligence*, available at: [https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence\\_en](https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en) (last visited May 30, 2024).

<sup>63</sup> EUROPEAN COMMISSION, *Corporate sustainability due diligence*, *supra* note 62.

<sup>64</sup> Id.

<sup>65</sup> EUR. COALITION FOR CORP. JUST, *Key features of mandatory human rights due diligence legislation* (June 8, 2018), available at: <https://corporatejustice.org/publications/key-features-of-mandatory-human-rights-due-diligence-legislation/>.

<sup>66</sup> EUR. COALITION FOR CORP. JUST, *Key features of mandatory human rights due diligence legislation*, *supra* note 65.

obligations on them and result in an excess of paperwork.<sup>67</sup> A human rights law modeled on the FCPA could incorporate the features recognized as necessary in a mandatory HREDD law, while building off the existing FCPA system that companies are already required to comply with without conflicting with CSDDD obligations.

## The FCPA for Human Rights

The FCPA's tried-and-true method of tackling endemic corruption is an ideal springboard for requiring companies to implement HREDD. The FCPA focused on human rights would align with mandatory HREDD measures that already exist or are being formed in other countries,<sup>68</sup> giving the United States footing to help establish global norms and expectations.

### **The FCPA vs. FCPA for Human Rights: The Big Picture**

**The Foreign Corrupt Practices Act (FCPA)** is a two-part system that, on one hand, prohibits companies from bribing foreign officials in the course of business, and on the other, requires companies to keep detailed records of their financial transactions, and create a system of internal controls to ensure that such reporting is accurate.

**The FCPA for Human Rights** proposes a similar framework which, first, prohibits companies from violating certain human rights throughout their supply chains, and second, requires companies to institute a due diligence system to prevent any such violations from occurring, and make regular reports regarding their compliance and success. Thirdly, the FCPA for Human Rights would allow victims of violations access to a remedy through a private right of action.

Congruent with mandatory HREDD regimes, and mirroring the FPCA, the FCPA for Human Rights would extend due diligence and reporting obligations to the corporate supply chain, including suppliers all over the world. A company is in violation of the FCPA for Human Rights if violations they knew or should have known about are present in their supply chain anywhere in the world. The scope of the violations the FCPA for Human Rights would cover includes all recognized international human rights incorporated into U.S. law. The FCPA for Human Rights would not create any new legal rights but would instead hold corporations liable for violating the

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<sup>67</sup> INT'L ORG. OF EMPLOYERS, *Key developments in mandatory human rights due diligence and supply chain law*, 34 (2021), available at: <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=156042&token=ee1bad43bfa8dbf9756245780a572ff4877a86d5>.

<sup>68</sup> See EUR. COALITION FOR CORP. Just., *Evidence for Mandatory HRDD Legislation* (Nov. 2018), available at: [https://corporatejustice.org/policy-evidence-mhrdd-november-2018-final\\_1.pdf](https://corporatejustice.org/policy-evidence-mhrdd-november-2018-final_1.pdf) (discussing HRDD-related legislation in France, the UK, Netherlands, Italy, Switzerland, and other European bodies) [hereinafter Evidence for Mandatory HRDD Legislation].

rights already recognized by U.S. law.<sup>69</sup> Due diligence provisions in the FCPA for Human Rights would be based on OECD Guidelines and the UN Guiding Principles on Business and Human Rights.<sup>70</sup>

The accounting directives of the FCPA are loosely defined, giving companies leeway to customize their own compliance mechanisms; therefore, a broad directive for HREDD would fit similarly into this model. Under the FCPA, covered entities must create a system of internal accounting controls to ensure the accuracy of their books and records, and that all transactions and access to assets are properly authorized.<sup>71</sup> The FCPA for Human Rights' equivalent provision would require the same entities to instate an internal compliance system to verify that the corporation has not violated any included human rights in its course of business. Although there are no specific controls a company must employ to be in compliance with the FCPA, the DOJ has a series of topics it considers relevant in assessing whether, and to what extent, a company's compliance program was effective.<sup>72</sup> The FCPA for Human Rights' due diligence equivalent would be broken down into many of the same categories, including risk assessment; management of third-party relationships; preventative measures; timely, documented investigative responses; and continued monitoring of the program itself.<sup>73</sup> Like the FCPA, the scale of these systems under the FCPA for Human Rights would be proportionate to the company's size and means.

The ability and willingness of companies to comply with such demands under the FCPA signals that similar, additional reporting and recording provisions are well within their capacities. With the proliferation of guidelines and consultants available to the corporations who already meet this and other due diligence criteria, many companies have sufficient resources to build effective compliance systems.

In addition to replicating FCPA mechanisms, the FCPA for Human Rights would not conflict with the requirements of the CSDDD. The CSDDD model requires companies to follow a due diligence

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<sup>69</sup> The FCPA also created no new rights, but anti-bribery laws have sparked a discussion on a "right from corruption." See Matthew Murray & Andrew Spalding, *Freedom from Official Corruption as a Human Right*, BROOKINGS: GOVERNANCE STUD. (Jan. 2015), available at: [https://www.brookings.edu/wp-content/uploads/2016/06/Murray-and-Spalding\\_v06.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Murray-and-Spalding_v06.pdf).

<sup>70</sup> See 2024 U.S. NAP, *supra* note 49, at 7 ("The USG expects businesses to conduct HRDD throughout their value chains in line with internationally recognized standards set out in the UNGPs and the OECD Guidelines as well as in the International Labor Organization's (ILO's) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy ("MNE Declaration"). Businesses should treat these standards and principles as a floor rather than a ceiling for implementing responsible business practices while incorporating lessons learned and striving for continuous improvement.").

<sup>71</sup> 15 U.S.C. § 78m(a)-(b).

<sup>72</sup> U.S. DEP'T OF JUSTICE, CRIMINAL DIV., *Evaluation of Corporate Compliance Programs* (last updated Apr. 2019), available at: <https://www.justice.gov/criminal-fraud/page/file/937501/download>; See also Paul McGreal, *Implications of Extrajudicial Enforcement of the U.S. Foreign Corrupt Practices Act for Anti-Corruption Compliance and Ethics Programs*, 2019(4) UNIV. ILL. L. REV. 1151, 1167-68 (2019) (comparing how the DOJ's assessment criteria results in a measurement of "effectiveness," whereas many judicial standards only permit a binary decision for or against culpability).

<sup>73</sup> FCPA RESOURCE GUIDE, *supra* note 34, at 40.

process laid out in the law.<sup>74</sup> By contrast, the FCPA for Human Rights would require companies to conduct due diligence processes and report on their due diligence, without dictating what those processes should look like. As long as companies are complying with European mandatory HREDD processes in good faith, there should be no human rights abuses in their supply chains, which would make them in compliance with the FCPA for Human Rights.

### **The FCPA for Human Rights: Main Elements**

Human Rights and Environmental Abuse Prohibitions: The FCPA for Human Rights would prohibit knowingly violating human rights and environmental protections that are already recognized under U.S. law. This prohibition would apply to the activities of covered individuals and entities occurring anywhere in their global supply chains.

The FCPA for Human Rights would empower the DOJ to pursue penalties for violations including injunctive relief or civil and criminal penalties against violators.

Private Right of Action: Victims of FCPA For Human Rights violations would also be empowered to seek civil action against violators.

Due Diligence and Record Keeping Provisions: The due diligence provisions of the FCPA for Human Rights would require covered entities to:

1. Conduct human rights and environmental due diligence in line with the UN Guiding Principles on Business and Human Rights
2. Report to the SEC (a) their due diligence activities and (b) all supply chain relationships, including upstream and downstream relationships.
3. Maintain records of their due diligence measures

The SEC would be empowered to pursue penalties against covered individuals and entities who violate the due diligence and record keeping provisions.

Government sanctioning of companies violating the FCPA for Human Rights would allow the U.S. government to strengthen its role as a leader for human rights around the world. In addition to U.S. interests, the FCPA for Human Rights could also ensure that victims of violations could access a remedy through the law. Considering the gradual weakening of valuable laws that provide victims of corporate abuse with the ability to sue in U.S. courts, such as the ATS, the FCPA for Human Rights could create a strong right of action for victims of FCPA for Human Rights violations. A private right of action for FCPA for Human Rights violations would supplement existing

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<sup>74</sup> EUROPEAN PARLIAMENT, *Corporate Sustainability Due Diligence*, *supra* note 61.

legislation and create opportunities for justice where they don't already exist under U.S. law. The right of action in the FCPA for Human Rights would need to explicitly state extraterritorial application to overcome the presumption against extraterritoriality.

## Conclusion

The FCPA for Human Rights, like the FCPA, shares the goal of sanctioning corporations that profit from abusive business practices. Like the FCPA, the FCPA for Human Rights would allow companies to tailor their compliance regimes to their assessed risk, providing companies with flexibility, while still holding them accountable for human rights violations. The FCPA for Human Rights would also follow the lead of the FCPA in significantly altering corporate behavior by disincentivizing human rights abuse through prohibitively high fines and penalties.

The proliferation of successful corporate compliance mechanisms to combat bribery, as stipulated by the FCPA, indicate that other varieties of widespread abuse can be significantly reduced with proper regulation. The framework that established the United States as a global leader in fighting corruption can now pave a path for the country to be among those sanctioning and preventing violations of human rights by companies around the world.

The United States demonstrates its potential for creating accountability through the FCPA, but when corrupt activities are directly tied to human rights abuses, the abuses are left without accountability and those companies continue with impunity. Victims can seek redress through legislation such as the ATS, but the Supreme Court continues to dwindle that option. With the state of the ATS, victims have few options. Similarly, the TVPRA applies in very limited scenarios, limiting the scope of who can seek redress. Companies can be prevented from shipping their goods to the U.S. through the Tariff Act or the UFLPA, but they can always reroute them to other countries and continue to profit. The United States needs legislation to combat corporate human rights abuses that is as strong as the FCPA, something that will disincentivize companies from human rights abuses. The U.S. needs an FCPA for human rights, not just for corruption.

Internationally and domestically, the communities rallying to prevent human rights abuses during the course of business are calling for mandatory HREDD legislation. The United States lags behind Europe in establishing such measures. As the world leader in the fight against corruption, the United States should not have its legacy undermined by enabling unethical business practices abroad. The FCPA for Human Rights would be a bold step towards global leadership on the issue—as more avenues for accountability are exhausted, the need for direct legal redress becomes more pressing. The quicker mandatory HREDD begins to inform the legislative discussion, the closer the United States will be to fostering a corporate culture that sustains its international law obligations.