

# Hardening Soft International Law of Corporate Responsibility in Domestic Courts: A Tort Law Approach

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Soft international law is in every corner, in particular those upon multinational corporations (MNCs). How to harden soft international law on MNCs is a continuing issue yet with unsatisfied solutions. Previously, scholars have proposed to create legally binding treaty or deploy soft international law in international arbitral decisions. However, those approaches cannot sufficiently harden soft international law. Different from those insufficient approaches, this Article synthesizes an emerging tort law approach to hardening soft international law by analyzing cases from the United Kingdom, the United States, and the Netherlands. It argues that it is plausible for courts—across the globe—to refer to soft international law to impose obligations and liabilities on MNCs.

This Article makes three contributions. First, it dissects the rise of the tort law approach to MNC obligations and liabilities. Second, building on the tort law approach, it synthesizes two typologies of referring to soft international law, respectively, in common law principles and civil law statutes. Third, with the explanation of the rise of the tort law approach, this Article assesses the challenges and prospects of referring to soft international law under the tort law approach.

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## Introduction

Soft international law refers to declarations, codes of conduct, and other normative instruments adopted by international organizations and conferences.<sup>1</sup> It is everywhere, from environment<sup>2</sup> to international finance<sup>3</sup> to foreign

1. Dinah Shelton, *Introduction*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION* 1 (Dinah Shelton ed. 2011). For similar definition, see Christine M Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *INT'L & COMP. L. Q.* 850 (1989) (Soft law "range[s] from treaties . . . to nonbinding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organisations . . . to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles.").

2. See Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 *MICH. J. INT'L L.* 420 (1990).

3. Chris Brummer, *Why Soft Law Dominates International Finance—and not Trade*, 13 *J. INT'L ECON. L.* 623, 627 (2010) ("Most of the sources of international financial law

relations.<sup>4</sup> Scholarship on soft international law has covered its almost every aspect, from its non-legal character<sup>5</sup> to its redundancy,<sup>6</sup> its quasi-legal nature,<sup>7</sup> the underlying reasons for its adoption,<sup>8</sup> and to various approaches to soft international law.<sup>9</sup> The scholarship emphasizes that soft international law is non-binding but with some normative force affecting state behavior.<sup>10</sup> For instance, Joel Trachtman defines soft law as “rules . . . that . . . are non-binding under formal international law . . . expected to affect state behavior.”<sup>11</sup> Andrew Guzman and Timothy Meyer assume that soft law is considered by states as normative guidance for conduct and emphasize the lower costs for non-compliance with it.<sup>12</sup> Gregory Shaffer and Mark Pollack consider that soft law has real normative purchase.<sup>13</sup> However, these theories on soft international law have ignored how soft international law affects private actors, such as multinational corporations (MNCs). Nowadays, as one major approach to the regulation of MNCs,<sup>14</sup> soft international law spreads widely to address the impact of MNCs on environmental and human rights issues.<sup>15</sup> These soft international norms include OECD Guidelines for Multinational Enterprises (the OECD Guidelines),<sup>16</sup> the Tripartite Declaration of Principles Concerning Multinational Enterprises and

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are informal, intergovernmental institutions that set agendas and standards for the global regulatory community.”)

4. See Curtis Bradley, et al., *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90.5 *UNI. CHICAGO L. REV.* 1281 (2023).

5. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 *AJIL* 413 (1983); Jan Klabbers, *The Undesirability of Soft Law*, 67 *NORDIC J. INT'L L.* 381 (1998).

6. See Jan Klabbers, *The Redundancy of Soft Law*, in *SOURCES OF INTERNATIONAL LAW* 600 (Martti Koskeniemi ed. 2000).

7. See Timothy Meyer, *Soft Law as Delegation*, 32 *FORDHAM INT'L L.J.* 888 (2008).

8. See Charles Lipson, *Why are Some International Agreements Informal?*, 45 *INT'L ORG.* 495 (1991); Kenneth W Abbott & Duncan Snidal, *Hard and Soft law in International Governance*, 54 *INT'L ORG.* 421 (2000); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft law: Alternatives, Complements, and Antagonists in International Governance*, 94 *MINN. L. REV.* 706 (2009); JOEL P TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT* (Cambridge Univ. Press. 2013); DINAH SHELTON, *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* (Oxford Univ. Press. 2003); Tomer Bronde & Yahli Shereshevsky, *Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavior Hypotheses*, in *INTERNATIONAL LAW AS BEHAVIOR* (Harlan Grant Cohen & Timothy Meyer eds., 2021).

9. See Matthias Goldmann, *We Need to Cut off the Head of the King: Past, Present, and Future Approaches to International Soft Law*, 25 *LEIDEN J. INT'L L.* 335 (2012).

10. See Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 *J. LEGAL ANALYSIS* 171 (2010).

11. TRACHTMAN, *supra* note 8, at 32.

12. Guzman & Meyer, *supra* note 10, at 177.

13. Shaffer & Pollack, *supra* note 8.

14. PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 107 (3rd ed. Oxford Univ. Press 2021) (“The majority sources are ‘soft law’ instruments, based on moral force, enforced through the shame of non-adherence.”).

15. See Sean D Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 *COLUM. J. TRANSNAT'L L.* 389, 397-420 (2004); ELISA MORGERA, *CORPORATE ENVIRONMENTAL ACCOUNTABILITY IN INTERNATIONAL LAW* (OUP. 2020) (International legal standards adapts and translates inter-State obligations embodied in international environmental law into specific normative benchmarks to determine the legitimacy of the conduct of the private sector.).

16. Organisation for Economic Co-operation and Development (OECD), *Guidelines for Multinational Enterprises* (Paris, OECD Publishing, 2011).

Social Policy (the Declaration),<sup>17</sup> the Draft Code of Conduct for Transnational Corporations,<sup>18</sup> the UN Global Compact,<sup>19</sup> Norms on the Responsibility of Transnational Corporations and other Business Enterprises,<sup>20</sup> the UN Guiding Principles on Business and Human Rights (the UNGPs),<sup>21</sup> and OECD Due Diligence Guidance for Responsible Business Conduct.<sup>22</sup> The soft international law approach establishes MNC operational standards in order to self-regulate their behaviors and to promote global social responsibility.

Today, while MNCs enjoy significant benefits by adopting various forms in global operations, their associated corporations have caused serious harms to local citizens.<sup>23</sup> Victims of MNC torts have adopted various strategies to seek compensation from MNCs in the states where the MNCs are incorporated. Among the various strategies, a new and notable one is that domestic courts are referring to soft international law to interpret common law or domestic statutes to impose obligations and liabilities on MNCs—what I call “hardening soft international law in domestic courts.”<sup>24</sup>

Attempting to move the discussion forward, this Article argues that it is plausible for courts—across the globe—to refer to soft international law to impose obligations and liabilities on MNCs. To support the argument, it explores the specific mechanisms and prospects of applying soft international law against MNCs in domestic courts. It systematically investigates whether and how domestic courts can apply soft international law to impose obligations and liabilities on MNCs.<sup>25</sup> By clearly seeing the application of soft international law, this Article illuminates an angle of soft international law that supplements the

17. *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, INTERNATIONAL LABOUR ORGANIZATION [https://perma.cc/3YNU-VCHS].

18. *U.N. Code of Conduct on Transnational Corporations*, 23 I.L.M. 626 (1984) [https://perma.cc/9N5R-XPf3]. This code of conduct was never adopted.

19. *See United Nations Global Compact*, www.unglobalcompact.org [https://perma.cc/T63P-LBG6] (last visited Dec. 23, 2025).

20. *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [https://perma.cc/5H3R-5BEV].

21. *Guiding Principles on Business and Human Rights and Commentary, Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, U.N. Doc. A/HRC/17/31 (hereinafter “UNGPs”).

22. It has become the authoritative tool on risk-based due diligence processes to prevent, address and mitigate negative impacts related to business operations, their supply chains and business relationships.

23. Here associated corporations refer to two groups of corporations: MNC subsidiaries and corporations in MNC supply chains.

24. With respect to the meaning of “harden,” see Barnali Choudhury, *Hardening Soft Law Initiatives in Business and Human Rights*, CORPORATE GOVERNANCE CODES FOR THE 21ST CENTURY: INTERNATIONAL PERSPECTIVES AND CRITICAL ANALYSES 189 (Jean du Plessis ed., 2017); Chiara Macchi & Claire Bright, *Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, in LEGAL SOURCES IN BUSINESS AND HUMAN RIGHTS (Martina Buscemi, Nicole Lazzarini, Laura Magi & Deborah Russo eds., Brill 2020) (referring to turn “voluntary obligations” into “binding obligations” via domestic regulations or international treaties).

25. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 607-12 (2008) (Gersen and Posner discussed the relationship of domestic soft law made by Congress and statutory interpretation; but this paper has not discussed soft international law.).

existing understanding of soft international law. This Article proceeds as follows. First, this Article examines the existing mechanisms of hardening soft international on MNCs and reveals their insufficiency. Second, it dissects the rise of tort law approach to MNC obligations and liabilities. Third, it synthesizes how soft international law can be hardened in domestic courts by analysing recent domestic cases in the United Kingdom (UK), the United States, and the Netherlands. Importantly, it categorizes these hardening approaches into two typologies: incorporation into domestic public or private statutes, and incorporation into common law tort principles. Fourth, this Article explains the reasons for the rise of the tort law approach to hardening soft international law. Finally, it assesses the challenges and prospects of referring to soft international law in the future.

## I. The Insufficiency of Existing Mechanisms to Harden Soft International Law

To harden soft international law on MNCs, there are two existing approaches: making international treaties; and applying soft international law in international arbitral tribunals. First, to harden soft international law on MNCs, international organizations have proposed to enact a legally binding treaty.<sup>26</sup> The proposed legally binding instrument covers all internationally recognized human rights and fundamental freedoms.<sup>27</sup> However, this international-treaty approach faces significant obstacles: the state parties' struggle to reach consensus on this proposed internationally binding instrument, and its success depends on individual states' implementation. Regarding the first obstacle, states differ significantly on whether and how to regulate MNCs today. Some states prefer not to regulate MNCs; some prefer domestic law rather than international treaties to regulate MNCs. A distinctive example is that recently, the United States federal government abandoned enforcement of the Foreign Corrupt Practices Act (FCPA). On February 10, 2025 President Trump issued an executive order titled "Pausing Foreign Corrupt Practice Act Enforcement to Further American Economic and National Security."<sup>28</sup> The order directed the DOJ to halt FCPA investigations and enforcement actions for a 180-day review period, the first pause of FCPA enforcement and investigations. Moreover, some states may choose not to enforce treaty obligations when considering other interests, such as attracting MNCs' investment, expanding local employment, promoting economic development. Given conflicting interests, the implementation of treaty obligations often loses priority. Thus, the international

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26. See Open-Ended Intergovernmental Working Group (OEIWG), *Legally Binding Instrument to Regulate*, in INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (THIRD DRAFT), OEIWG, <https://www.ohchr.org/sites/default/files/LB13rdDRAFT.pdf> [<https://perma.cc/N6ZY-7E4A>] (last visited Dec. 26, 2025).

27. *Id.* art. 3(3).

28. Exec. Order No. 14209, 90 Fed. Reg. 9587 (Feb. 10, 2025) (pausing enforcement of Foreign Corrupt Practices Act to further American economic and national security).

treaty approach to regulating MNCs faces significant obstacles; to some extent, is impractical.

Second, hardening soft international law occurs in international arbitral rules or international investment tribunals. Launched in December 2019, the Hague Rules on Business and Human Rights (“Hague Rules”) establishes a set of arbitral rules specifically devised to settle disputes arising from the alleged breach of human and environmental rights by businesses and their supply-chain partners across borders.<sup>29</sup> Although a rule on arbitral procedure, the Hague Rules provide tribunals with wide flexibility in determining the rules applicable to the dispute: a tribunal may apply “the law, rules of law or standards” designated by the parties as applicable to the substance of the dispute.<sup>30</sup> In the absence of this selection, they can apply the “law or rules of law” they determine to be appropriate.<sup>31</sup> The Hague Rules may influence MNC obligations and liability.<sup>32</sup> Here, the critical issue is whether MNCs will consent to the Hague Rules.<sup>33</sup> Until today, very few MNCs have consented to the Hague Rules; thus, relying on the Hague Rules is insufficient to harden soft international law.

What is more, international investment tribunals often refer to soft international law to determine MNC obligations. Some MNC obligations in international investment treaties derive from soft international law.<sup>34</sup> Furthermore, a new generation of investment treaties impose direct obligations upon investors.<sup>35</sup> Building on these emerging obligations, international investment arbitral cases have adopted the contributory fault approach to MNC obligations.<sup>36</sup> For example, in *Urbaser v. Argentina*, Argentina counterclaimed that the investors failed to invest sufficiently under the concession for water and sewage services; thus, the investors violated obligations in relation to the human right to water.<sup>37</sup>

29. The Hague Rules on Business and Human Rights Arbitration, CENTER FOR INTERNATIONAL LEGAL COOPERATION (Dec. 12, 2019), <https://docs.pca-cpa.org/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration.pdf> [<https://perma.cc/KBD2-DUQS>].

30. *Id.* art. 46(1).

31. *Id.* art. 46.

32. See Ursula Kriebaum, *The Hague Rules on Business and Human Rights Arbitration*, 114 PROC. AM. SOC'Y INT'L L. ANN. MEETING 149 (2021).

33. See Bruno Simma & Giorgia Sangiuolo, *The Hague Rules on Business and Human Rights Arbitration: Some Challenges and Responses*, 28 SW. J. INT'L L. 401 (2022).

34. See Barnali Choudhury, *Investor Obligations for Human Rights*, 35 ICSID REV. 82 (2020).

35. Afr. Union Comm'n, Draft Pan African Investment Code (2016) arts. 37(3)-(4), 23 (Dec. 2016), [https://au.int/sites/default/files/documents/32844-doc-draft\\_pan-african\\_investment\\_code\\_december\\_2016\\_en.pdf](https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf) [<https://perma.cc/PDQ4-YA99>]; Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, art. 14, Dec. 3, 2016 (not yet in force); *Economic and Trade Expansion Agreement Between the Republic of Peru and the Federative Republic of Brazil*, art. 2.12, Apr. 29, 2016 (UNCTAD Investment Policy Hub) (not yet in force) [<https://perma.cc/JSY3-FWBW>]; *Agreement between Japan and The Kingdom of Morocco for the Promotion and Protection of Investment*, art. 19, Jan. 8, 2020 (Ministry of Foreign Affairs of Japan), <https://www.mofa.go.jp/files/000555641.pdf>.

36. Peter Muchlinski, *Can International Investment Law Punish Investor's Human Rights Violations? Copper Mesa, Contributory Fault and its Alternatives*, 37 ICSID REV. 359 (2022).

37. *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016); see also Patrick Abel, *Counterclaims Based on International Human Rights Obligations of Investors in International*

However, neither of these two approaches directly address whether and how victims can refer to soft international law to impose liability on MNCs via the *existing* cause of actions in the State-based judicial mechanism. Indeed, State-based judicial remedies play a foundational role. The effective judicial mechanisms can enhance the effectiveness of non-judicial remedial mechanisms by incentivizing parties to participate in non-judicial remedies and to enforce outcomes. To a great extent, the effectiveness of access to remedy, including through non-judicial remedial mechanisms, depends on the effectiveness of judicial mechanisms.<sup>38</sup> Indeed, effective judicial mechanisms stand “at the core” of ensuring access to remedy;<sup>39</sup> other mechanisms, such as non-judicial mechanisms, should complement judicial remedies.<sup>40</sup> The State-based judicial mechanism focuses on the legal liability of business enterprises rather than the individual liability of officers and employees. In other words, States must “ensure that they put in place effective remedial mechanisms, including judicial remedies, that can deliver effective remedies,”<sup>41</sup> and that such remedies “result in some form of corporate accountability.”<sup>42</sup> Indeed, some domestic courts have begun providing judicial remedies by referring to soft international law in interpreting “constitutional and statutory provisions.”<sup>43</sup> Part II explores the rise of the tort law approach to MNC obligations and liabilities, in common law and civil law, respectively.

## II. The Rise of the Tort Law Approach to MNC Obligations and Liabilities

### A. The Rise of the Tort Law Approach in Common Law

In domestic law, the separate personality doctrine and limited liability doctrine in company law play an important role in defining MNC liability, especially the concept of “parent company liability.”<sup>44</sup> Under these two doctrines,

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*Investment Arbitration: Fallacies and Potentials of the 2016 ICSID Urbaser v. Argentina Award*, 1 BRILL OPEN L. 61 (2018).

38. UNGPs, *supra* note 21, princ. 26 & accompanying cmt.

39. *Id.* princ. 26 & accompanying cmt.

40. *Id.* princ. 27 & accompanying cmt.

41. U.N. General Assembly, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 15, U.N. Doc. A/72/162 (July 18, 2017), available at <https://docs.un.org/en/A/72/162>.

42. *Id.* ¶17.

43. Shelton, *supra* note 1, at 1.

44. John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 REG. & GOVERNANCE 317, 320 (2018) (“The main body of national law governing corporations is domestic corporate law and securities regulation. . .”). With respect to the doctrine of limited liability, the limited liability regime has spread across the world. And there are important efficiency justifications for the doctrine of limited liability: enabling aggregation of large amounts of capital from numerous small investors; reducing shareholders’ risk by diversifying portfolios; protecting shareholders from unduly risky corporate behaviour; relieving shareholders from costly monitoring efforts or participation in management; eliminating the need for shareholders to monitor each other; and facilitating the transferability of corporate stock. See David Milton, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1312-13 (2006); see also Nina A Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*,

a shareholder is generally not personally liable for the acts of the corporation.<sup>45</sup> Most MNCs' subsidiaries are majority or wholly owned and consequently controlled by their parent companies. An MNC does not generally be liable for its subsidiaries' liabilities merely because of the shareholding.<sup>46</sup> The Office of the United Nations High Commissioner for Human Rights (OHCHR) recognizes that, generally, the legal liability for the adverse human rights impacts of an MNC subsidiary's activities may not extend beyond the subsidiary itself.<sup>47</sup> However, the parent company may incur liability due to its own negligence. Indeed, parent company liability may serve as "the only way of securing an effective remedy for the human rights impacts of a subsidiary's activities, such as where the subsidiary has been dissolved, is insolvent or has insufficient resources to meet a legal claim for damages."<sup>48</sup>

With respect to MNC parent company liability, some scholars argue that it should be special and rare.<sup>49</sup> For instance, Martin Petrin and Barnali Choudhury propose that parent company liability should be special, in order not to "circumvent limits on veil piercing."<sup>50</sup> But the U.K. domestic courts refuted the existence of a special test for MNC tort liability in U.K. domestic courts.

Some U.K. courts have attempted to address "parent company liability," that is, when a parent company should be liable for its subsidiaries' torts.<sup>51</sup> In 2000, *Lubbe v. Cape Plc* addressed "parent company liability," concerning the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries.

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102 COLUM. L. REV. 1203, 1217-19 (2002); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 13-98 (1985).

45. ALAN DIGNAM & JOHN LOWRY, *COMPANY LAW* 14-17 (11th ed. Oxford Uni. Press 2020).

46. Office of the High Comm'r for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse*, U.N. DOC. A/HRC/32/19 (May 10, 2016), available at <https://docs.un.org/en/A/HRC/32/19> [<https://perma.cc/6WEL-P9JL>].

47. *Id.* at [¶ 22].

48. *Id.*

49. *Parent Company Liability*, in *CORPORATE DUTIES TO THE PUBLIC* 94, 106, 112 (Barnali Choudhury & Martin Petrin eds., 2019). ("Claims against parent companies, when they stem from occurrences involving a subsidiary, are not treated as simply an application of general liability principles."); Lisa Benjamin, *Group Companies and Climate Justice*, 74 CURRENT LEGAL PROBS. 235, 247-64 (2021); CHRISTIAN A. WITTING, *LIABILITY OF CORPORATE GROUPS AND NETWORKS* 351 ("But being based upon the exercise of control, negligence liability is capable of application only in vertical parent-subsidiary relationships.").

50. Martin Petrin & Barnali Choudhury, *Group Company Liability*, 19 EUR. BUS. ORG. L. REV. 771, 776 (2018) ("Claims against parent companies, when they stem from occurrences involving a subsidiary, are not treated as simply an application of general liability principles. The reason for the special treatment and attention that such claims receive stems from their potential to circumvent limits on veil piercing, as imposed by *Adams* and other cases, and—ultimately—their potential to undermine the principles of separate legal personality and limited liability.").

51. See *Lubbe v. Cape Plc.* [2000] UKHL 41, [2000] 1 WLR 1545; *Chandler v. Cape Plc.* [2012] EWCA (Civ) 525 [1] (Eng.); *Thompson v. Renwick Group Plc.* [2014] EWCA (Civ) 635 [3] (Eng.).



Specifically, it addressed whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken.<sup>52</sup>

In 2012, *Chandler v. Cape Plc* first succeeded in finding “parent company liability.”<sup>53</sup> Employed by a subsidiary of the defendant company Cape plc, the claimant Chandler worked in an asbestos-producing factory with open-sides. Fifty years later, the claimant contracted asbestosis, but the subsidiary had been dissolved. Then, the claimant brought a claim and sought relief from his employer’s still existing parent company. The issue was whether the parent owed the subsidiary’s employees a duty of care. The court stated that parent company liability could arise from the following non-exhaustive factors: “(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection.”<sup>54</sup> The Court of Appeal unanimously held that the parent company had provided substantial direction to its subsidiary in the handling of asbestos. This parent company was liable for that subsidiary’s employees who suffered from asbestosis.

In 2014, *Thompson v. The Renwick Group plc* reaffirmed the “parent company liability” theory developed in *Chandler*. Here, Mr. Thompson worked for a haulage company, which was later taken over by the defendant’s subsidiary DH. Sadly, Mr. Thompson had contracted pleural thickening, likely from exposure to asbestos dust. The claimant claimed that the defendant had been in breach of a direct duty of care owed to him to prevent such injuries. The question was whether the parent the Renwick Group plc had assumed a duty of care to employees of its subsidiary in health and safety matters when “[the] parent company [had] appointed an individual as director of its subsidiary company with responsibility for health and safety matters.”<sup>55</sup> The court denied the claim since the director was not acting on behalf of the parent but rather exercised his own duties towards the subsidiary. In addition, unlike *Chandler*, the court decided that the totality of evidence did not justify imposing a duty of care on a parent company to protect a subsidiary company’s employees from the risk of injury. Since the parent company only held shares in the subsidiary, the court held that the parent was not in a position of superior knowledge to protect subsidiary employees from risk of injuries.

Recently, courts have refused to find the existence of a special test for “parent company liability.” In *AAA v. Unilever*, Lord Justice Sales (now Lord Sales, Justice of the Supreme Court of the United Kingdom) stated that the tort liability of a parent for the activities of its subsidiary is not unique.<sup>56</sup> In *AAA*, the parent company Unilever was the ultimate holding company of its

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52. *Lubbe v. Cape Plc*. [2000] UKHL 41, [2000] 1 WLR 1545.

53. *Chandler v. Cape Plc*. [2012] EWCA (Civ) 525 [1] (Eng.).

54. *Id.* at [80].

55. *Thompson v. Renwick Group Plc*. [2014] EWCA (Civ) 635[24].

56. *AAA v. Unilever Plc*. [2018] EWCA (Civ) 1532 [36].

operating subsidiary Unilever Tea Kenya Limited (“UTKL”).<sup>57</sup> In 2007, amid the presidential election in Kenya, marauding mobs came onto UTKL’s tea plantations and caused damage to the 218 victims in serious inter-tribal violence.<sup>58</sup> The claimants alleged that both Unilever and UTKL owed them a duty of care in tort to take effective steps to protect them from this violence. The Court of Appeal stated that parent company liability depends on the application of “ordinary, general principles of the law of tort.” In other words, company liability depends on whether any third party is subject to a duty of care owed to a claimant dealing with a subsidiary.<sup>59</sup> The Court of Appeal concluded that the parent Unilever had neither taken over the management of the relevant activity of its subsidiary UTKL nor advised UTKL how to manage such particular risk relating to the political unrest and violence in Kenya.<sup>60</sup>

Later, in 2019, *Vedanta Resources v. Lungowe* also emphasized that the liability of parent companies in relation to the activities of their subsidiaries is not a distinct category of liability in common law negligence.<sup>61</sup> In *Vedanta*, the first defendant Vedanta Resources plc (“Vedanta”) is the ultimate parent company of the second defendant Konkola Copper Mines plc (“KCM”). Even though Vedanta did not wholly own KCM, its ultimate control of KCM was not regarded as any less.<sup>62</sup> The claimants alleged that toxic emissions from the Nchanga Copper Mine owed by KCM harmed surrounding Zambian citizens’ health and farming activities. The issue of this case was whether Vedanta as the parent company had incurred a common law duty of care to the claimants by intervening in the management of the mine owned by KCM.<sup>63</sup> The court stated that 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.<sup>64</sup>

Relying on *Vedanta*, the Supreme Court case *Okpabi* confirmed that parent company liability is not special.<sup>65</sup> In *Okpabi*, tens of thousands of Nigerian individuals bought claims against Royal Dutch Shell Plc (“RDS”) and its subsidiary, the Shell Petroleum Development Company of Nigeria Ltd (“SPDC”), which operates an oil pipeline that runs through the Niger Delta. The claimants alleged that leaks from the pipeline caused an environmental catastrophe, damaging their livelihoods and health. Supported by the RDS Control Framework, the RDS HSE Control Framework, and witness evidence—in particular the evidence of Professor Jordan Siegel and the identification of some of the most likely documents of relevance in the Dutch proceedings,<sup>66</sup> as well as the organizational and authority structure between RDS and SPDC,<sup>67</sup> the court held

57. *Id.* at [13].

58. *Id.* at [2], [11].

59. *Id.* at [36].

60. *Id.* at [37-41].

61. *Vedanta Resources Plc v. Lungowe* [2019] UKSC 20 [49], [54] (Lord Briggs).

62. *Id.* at [2].

63. *Id.* at [44].

64. *Id.* at [49], [54] (Lord Briggs).

65. *Okpabi & Ors v. Royal Dutch Shell Plc* [2021] UKSC 3 [151].

66. *Id.* at [54].

67. *Id.* at [158].

that there was a real issue to be tried following *Vedanta*.<sup>68</sup> In addition, the court stated that relying on any generalized assumption or presumption to approach the issue of a duty of care is incorrect.<sup>69</sup>

In summary, recent cases AAA, *Vedanta*, and *Okpabi* all stated that “ordinary, general principles of the law of tort” will apply to determine the duty of care imposed on a parent company.<sup>70</sup>

## B. The Rise of the Tort Law Approach to MNC Obligations and Liabilities in Civil Law

Indeed, the OHCHR states that domestic private law should be sufficiently robust to ensure that there is both a proper deterrence and an effective remedy, in the event of business-related human rights abuses. Ideally, domestic private law should “(a) provide the necessary coverage with respect to business-related human rights abuses; (b) ensure that there are causes of action for business-related human rights abuses corresponding appropriately to the varying degrees of severity and the different kinds of harm that can result from such abuse; and (c) be clear as to whether and the extent to which they impose legal obligations on companies.”<sup>71</sup>

Indeed, domestic tort law can address MNC obligations and liabilities. In Switzerland, the Swiss Due Diligence Act does not address the corporate liability for harm caused by its subsidiaries or suppliers; it leaves the issue to domestic tort law.<sup>72</sup> In Germany, the Supply Chain Due Diligence Act (“SCDDA”), which entered into force on January 1, 2023, applies to all entities with headquarters, main branches, or effective places of management within Germany, as well as all branches of foreign entities registered in the German commercial register.<sup>73</sup> With respect to compensation for victims, foreign individuals who believe that their human rights have been breached may go to German courts to claim compensation, with representation from trade unions or non-governmental organizations. Indeed, the SCDDA does not provide for any extension of civil liability.<sup>74</sup> In determining the liability of a German company for the wrongdoing of an overseas supplier, the question of liability would be resolved by applying the standard tort principles in German law. For instance, under German SCDDA, in April 2023, Bangladeshi workers complained against Tom Tailor,

68. *Id.* at [153].

69. *Id.* at [150].

70. AAA v. Unilever Plc., [2018] EWCA (Civ) 1532, [2018] [36].

71. Office of the High Comm’r For Human Rights, *supra* note 46, ¶ 12.1 (2016).

72. Nicolas Bueno & Christine Kaufmann, *The Swiss Human Rights Due Diligence Legislation: Between Law and Politics*, 6 BUS. & HUM. RTS. J. 542, 548 (2021).

73. Lieferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021, Bundesgesetzblatt, Teil I [BGBl I] at 2959 (Ger.) [hereinafter “SCDDA”] (As of January 1, 2023, SCDDA applies to companies with at least 3,000 employees that have their head office, administrative seat or statutory seat in Germany or companies that have a branch in Germany and usually employ at least 3,000 employees in this branch. As of January 1, 2024, SCDDA applies to companies with at least 1,000 employees that have their head office, administrative seat or statutory seat in Germany or companies that have a branch in Germany and usually employ at least 1,000 employees in this branch.).

74. *Id.*

Amazon, and IKEA for not adequately monitoring the conditions in their factories and for “endangering the workplace safety for employees.”<sup>75</sup>

In the Netherlands, under the Dutch Due Diligence Act (CLDD Act), companies that sell goods or services to Dutch end-users, including companies registered outside the Netherlands, are required to exercise due diligence to assess whether a “reasonable suspicion” exists that their services or goods were produced with child labor.<sup>76</sup> Although the CLDD Act creates criminal liability for perpetrators, it does not provide access to remedies for actual victims of child labor. Thus, victims of child labor have to rely on existing domestic law to seek remedies.<sup>77</sup>

### III. Hardening Soft International Law in Domestic Courts: Two Typologies

Generally, there are two lines of caselaw that refer to soft international law in domestic courts. First, some courts use soft international law to interpret binding international law or argue that soft law has crystalized into customary international law.<sup>78</sup> However, a majority of these cases refer only to the Universal Declaration of Human Rights (UDHR), suggesting that it is rare to use other soft international law in this way. A second line of cases discuss soft international law in the administrative law context.<sup>79</sup> These courts frequently found that a failure to follow soft law may violate the duty of reasonableness.<sup>80</sup>

However, scholars have seldom addressed whether domestic courts can use soft international law to impose obligations or liabilities on private parties, such as MNCs.<sup>81</sup> Although soft international law stresses the importance

75. Libby Annat, *First Case Filed under the German Supply Chain Due Diligence Act against Tom Tailor, Amazon, and IKEA by Bangladeshi workers*, DUE DILIGENCE DESIGN (Apr. 27, 2023), <https://duediligence.design/first-case-filed-under-the-german-supply-chain-due-diligence-act-against-tom-tailor-amazon-and-ikea-by-bangladeshi-workers/> [https://perma.cc/UAN5-F3HR].

76. Wet zorgplicht kinderarbeid [Child Labour Due Diligence Act], Stb. 2019, 401 (Neth.).

77. VIRGINIE ROUAS, *ACHIEVING ACCESS TO JUSTICE IN A BUSINESS AND HUMAN RIGHTS CONTEXT: AN ASSESSMENT OF LITIGATION AND REGULATORY RESPONSES IN EUROPEAN CIVIL-LAW COUNTRIES* 311 (Uni. of London Press 2022).

78. See generally *R v. Immigration Appeal Tribunal and another, ex parte Shah* (United Nations High Commissioner for Refugees intervening), [1999] UKHL 20; *Islam and others v. Secretary of State for the Home Department* [1999] 4 LRC 195; *Regina (on the application of Baiai and others) v. Secretary of State for the Home Department (Nos 1 and 2)* [2008] UKHL 53; *Regina (Bigoku and another) v. Same (Same intervening); Regina (Tilki) v. Same (Same intervening)*, [2009] AC 287, [13]; *Brown v. Stott (Procurator Fiscal, Dunfermline) & Another* [2001] 2 LRC 612, 638.

79. See generally Lorne Sossin & Chantelle Van Wiltenburg, *The Puzzle of Soft Law*, 58 OSGOODE HALL L.J. 623 (2021).

80. *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees, and Citizenship)*, 2020 FCA 196, para. 68 (Can.).

81. Soft international law may be regarded as authoritative source of information. See *Aroma Franchise Company Inc. v. Aroma Espresso Bar Canada Inc.*, 2023 CanLII 1827, para. 33 (Can. Ont.) (The Ontario Superior Court of Justice set aside two arbitral awards because there was a reasonable apprehension of bias. Specifically, the arbitrator accepted a second engagement with the same law firm, and the same senior counsel, mid-way through

of MNC obligations, it imposes only nonbinding obligations on MNCs.<sup>82</sup> In recent years, domestic courts in the United Kingdom, the United States, and the Netherlands have referred to soft international law when imposing obligations or liabilities on MNCs. The following section analyzes the use of soft international law to impose obligations and liabilities on MNCs in domestic courts. Then, it classifies recent trends into two typologies: incorporation into common law principles and incorporation into civil law statutes.

#### A. The First Typology: Incorporating Soft International Law into Common Law Principles

The following subsections analyze the incorporation of soft international law with common law principles through examples from the United Kingdom and the United States.

##### 1. *Incorporating Soft International Law into Common Law Principles in the United Kingdom*

The following subsections examine how domestic courts in the United Kingdom refer to soft international law to interpret common law tort principles to find MNC liability. Although the cases seeking MNC liability are still in the early stages of litigation or were later settled, they still illustrate the role of soft international law in domestic courts.

Based on the common law assumption of responsibility doctrine, an MNC can assume obligations and liabilities for harm caused by its subsidiaries or suppliers. Importantly, soft international law may affect the scope of the responsibility assumed by an MNC. The following section examines the origin of this doctrine and its potential application in MNC context.

Laws often imposes a duty of care not to make a situation worse, but the law rarely imposes a duty to make a situation better.<sup>83</sup> As a general rule, English law does not impose liability on a defendant for injury or damage to a claimant's person or property caused by third-party conduct.<sup>84</sup> However, this rule is not absolute. In addition to statutory exceptions, the common law recognizes other types of situations in which liability may be imposed for failing to confer a benefit. In their seminal paper, Tofaris and Steel summarized four such exceptions: A has assumed a responsibility to protect B from that danger; A has done something which prevents another from protecting B from that

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the Aroma arbitration. The Court also considered the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines). While the parties did not expressly adopt the IBA Guidelines, the Court noted that the guidelines are "widely recognized as an authoritative source of information as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases.").

82. Steven R. Ratner, *Introduction to the Symposium on Soft and Hard Law on Business and Human Rights*, 114 AM. JOURNAL OF INT'L LAW UNBOUND 163, 164 (2020).

83. *Hamida Begum v. Maran (UK) Ltd.* [2021] EWCA Civ 326, [60] (appeal taken from Eng.).

84. *Smith v. Littlewoods Organisation Ltd.* [1987] AC 241 (HL) 270 (appeal taken from Scot.).

danger; A has a special level of control over that source of danger; or A's status creates an obligation to protect B from that danger.<sup>85</sup>

Following Tofaris and Steel's framework, some UK courts recently attempted to clarify the issue of the "parent company liability," which arises when a parent company should be liable for its subsidiaries' tortious acts. In 2019, *Vedanta v. Lungowe* held that under common law negligence, the liability of a parent company in relation to the activities of its subsidiaries is not a distinct category of liability; rather, it should follow Tofaris and Steel's framework.<sup>86</sup> The Supreme Court concluded that parent company Vedanta may "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," citing the relevant internal documents and communications between Vedanta and Konkola Copper Mines.<sup>87</sup> The key statement at issue came from Vedanta's 2012–13 Sustainable Development Report, "Embedding Sustainability." It read as follows:

Maintaining aquifer quality is the core aim driving our water policies and standards—an inability to fulfil a local community's water requirements, or causing permanent damage to an aquifer, would seriously restrict our ability to operate. In this regard, we have a governance framework to ensure that surface and ground water do not get contaminated by our operations. Our environmental policies and management standards are mandatory across the Group and address contaminated land management concerns: the standards require operations to prevent contamination of land and water.<sup>88</sup>

Lord Briggs, who wrote the leading judgment, attributed legal significance to Vedanta's statements. He said:

It seems to me that the parent [Vedanta] may incur the relevant responsibility to third parties [the Zambian villagers] if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so.

In such circumstances its very omission [Vedanta's omission to exercise supervision and control] may constitute the abdication of a responsibility which it [Vedanta] has publicly undertaken.<sup>89</sup>

Thus, the Supreme Court found that there was a triable issue as to whether Vedanta could be liable for the harm caused to 1,826 Zambian residents when toxic matter escaped from its mine and polluted the local watercourses.

*Vedanta* clearly held that parent company liability "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

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85. Stelios Tofaris & Sandy Steel, *Negligence Liability for Omissions and the Police*, 75 CAMBRIDGE L.J. 128, 128-29 (2016).

86. *Vedanta Resources Plc v. Lungowe* [2019] UKSC 20, [49] (appeal taken from Eng.).

87. *Id.* at [61] (emphasis added).

88. *Vedanta Resources Plc.*, *supra* note 86; *Embedding Sustainability: 2012–13 Sustainable Development Report* 43 (2013).

89. *Vedanta* [2019] UKSC 20 at [53].

the relevant operations'. . . of the subsidiary."<sup>90</sup> The court identified two other instances in which the parent company liability could be found: the parent company not only proclaims group-wide policies, but also takes active steps to see these policies are implemented by subsidiaries, or the parent company represents itself as exercising a high degree of supervision and control over its subsidiaries.<sup>91</sup>

Following *Vedanta, Okpabi v. Royal Dutch Shell* reiterated the four *Vedanta* routes to find parent company liability: "a parent company taking over the management or joint management of the relevant activity of its subsidiary; a parent company providing defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented by its subsidiary; a parent company promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation by its subsidiary; and the parent holding out that it exercises a particular degree of supervision and control of its subsidiary."<sup>92</sup> In particular, when an MNC states or acts like it would exercise a high degree of supervision and control over its subsidiaries because of soft international law, it may owe a duty of care to the affected parties. The Supreme Court in *Okpabi* implicitly affirmed the classification of *Vedanta* routes.<sup>93</sup> By unanimously overturning the majority in the Court of Appeal, the *Okpabi* court held that the claims against the subsidiary defendants, Shell, gave rise to a triable issue against the parent company, RDS.

Although these cases were still in the early phases concerning jurisdiction, they still implicate substantive issues regarding the duty of care because they found *real triable issues* regarding parent company liability.

#### a. Referencing Soft International Law for the Assumption of Responsibility

According to the *Vedanta* routes, a defendant assumes a legal responsibility to a claimant when he assures the claimant that he will take care of the claimant's interests or save the claimant from harm, and when the claimant then relies on the defendant.<sup>94</sup> Although an MNC is not normally liable for harm caused by its subsidiaries, under the assumption of responsibility doctrine, the MNC may incur a duty of care if it voluntarily assumes a relevant responsibility to a third party. The following subsections will analyze how soft international law affects the scope of responsibility assumed by an MNC.

MNC assurance is essential to constitute the assumption of responsibility. The assurance can be expressed in a statute, or it can be implied from the "reasonable foreseeability of reliance on the exercise of such care."<sup>95</sup> Additionally, the assurance can be inferred from the way one has behaved towards another in particular circumstances.<sup>96</sup>

The assurance must be specific and voluntary. To be specific, "the defendant must have assumed responsibility for the claimant or a group of persons

90. *Id.* at [49].

91. *Id.* at [53].

92. *Okpabi v. Royal Dutch Shell Plc.* [2021] UKSC 3, [26] (appeal taken from Eng.).

93. *Id.* at [153].

94. NICHOLAS J. MCBRIDE & RODERICK BAGSHAW, *TORT LAW* 203 (Pearson, 6th ed. 2018).

95. *Poole Borough Council v. GN* [2019] UKSC 25, [80].

96. *Id.* at [82].

of which the claimant is a member, as opposed to some third party, or to the world at large.”<sup>97</sup> The assumption of responsibility must also be voluntary. In *Caparo v. Dickman*, Lord Oliver defined voluntariness as one’s act in “making the statement or tendering the advice was voluntary.”<sup>98</sup> *Customs and Excise Commissioners v. Barclays Bank plc* held that a voluntary act must be “conscious; ‘considered’ or ‘deliberate.’”<sup>99</sup>

With respect to the requirement of specificity, MNCs often make assurances to the public without directing their statements at any specific local citizens. An MNC may publicize a social responsibility report or a sustainability report due to reputational pressure. These reports are for propaganda or for the general public good, rather than for specific classes of people or individuals. Thus, when an MNC makes assurance to the public, an MNC cannot satisfy the specificity requirement and does not have an assumption of responsibility. However, if an MNC publishes a report only to certain groups, it could meet the specificity requirement.

When an MNC represents to the public holds as exercising a particular degree of supervision and control over its subsidiary, it assumes a duty of care to those who reasonably rely on the MNC’s representation. Lord Briggs affirmed this point in *Vedanta*, stating that if a parent company represents itself as exercising a certain degree of supervision and control over its subsidiaries, the parent company may owe a duty of care to third parties, even if it does not actually supervise and control the subsidiary.<sup>100</sup> *Okpabi* also confirmed this point.<sup>101</sup>

Following this principle, an MNC assumes responsibility when it holds itself out to the public pursuant to soft international law. The following subsections analyze whether an MNC’s policy commitments or communications satisfy the two elements of assurance and reliance based on whether the MNC assumes responsibility. It is courts, rather than the parties, who determine whether these two elements are present.<sup>102</sup>

### (1) MNC Assurance

The UNGPs state that a business enterprise’s policy commitment to meet its corporate responsibility to respect human rights should be publicly available.<sup>103</sup> The policy commitment should be accurate and honest,<sup>104</sup> and it should be actively communicated to contractors, investors, and other potentially affected stakeholders.<sup>105</sup> This communication can take the form of annual

97. JAMES GOUDKAMP & DONAL NOLAN, WINFIELD AND JOLOWICZ ON TORT 5-44 (Sweet & Maxwell 20th ed. 2020).

98. *Caparo Industries Plc. v. Dickman* [1990] 2 AC 605 (HL) 637 (appeal taken from Scot.).

99. *Comm’r of Customs and Excise v. Barclays Bank Plc.* [2006] UKHL 28, [73] (appeal taken from Eng.).

100. *Vedanta* [2019] UKSC 20, [53].

101. *Okpabi* [2021] UKSC 3, [26].

102. *Michael v. Chief Constable of South Wales Police*, [2015] 2 All E.R. 635, [100]. See also *Williams v. Natural Life Foods Ltd.* [1998] 1 WLR 830, 835 (Lord Steyn); *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145.

103. *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, U.N. Doc. HR/PUB/12/02 15 (2012) (hereinafter “Interpretive Guide”).

104. *Id.* at 61.

105. UNGPs, *supra* note 21, princ. 15 accompanying cmt.



reports, corporate social responsibility reports, integrated reports, or online updates. Moreover, business enterprises should strive to “track the effectiveness of their responses to impacts on individuals” who may be at “heightened risk of vulnerability or marginalization.”<sup>106</sup>

In the MNC context, assurances often appear in formal reports, such as, “self-standing reports on the enterprise’s human rights performance alone, part of a wider report on non-financial performance covering social and environmental issues or part of an integrated report on both financial and non-financial performance.”<sup>107</sup> Sometimes, MNCs make assurances to the general public that are not directed to specific local citizens. These assurances may focus on MNCs’ general approaches to addressing human rights risks. For instance, a retail company can communicate how it addresses potential or actual human rights abuses in its supply chain. MNCs with high water use can communicate how they address the related risks to human rights. Pharmaceutical MNCs can communicate how they “ensure that drug trials are conducted safely and with adequate information and consent.”<sup>108</sup> Moreover, an MNC may also publish a social responsibility report or sustainability report due to reputational pressure. For instance, Adidas AG’s Human Rights Policy states that Adidas “is committed to respecting human rights” in accordance with the UNGPs, and it *draws on guidance* from the OECD Guidelines.<sup>109</sup> Similarly, Nike is *committed to respecting* human rights and *look to* the Universal Declaration of Human Rights, the Declaration on Fundamental Principles and Rights at Work, the UNGPs, and the OECD Guidelines as best practice for understanding and managing human rights risks and impacts.<sup>110</sup> Coca-cola states that it *endorses* the UNGPs.<sup>111</sup> Moreover, a growing number of technological MNCs are publishing human rights policy commitments making explicit reference to the UNGPs.<sup>112</sup> These reports are for the purpose of propaganda or for the public good rather than for specific classes of people or individuals.<sup>113</sup> Thus, when an MNC makes policy commitments or communications to the general public, it cannot satisfy the “specific” requirement and cannot constitute an assumption of responsibility.

Sometimes, MNC assurance can be specific by being directed to specific local citizens. For instance, an MNC may contract private military and security

106. *Id.* princ. 20.

107. Interpretive Guide, *supra* note 103, at 60.

108. *Id.* at 58.

109. *Sustainability Policies*, ADIDAS, <https://www.adidas-group.com/en/sustainability/transparency/policies> [<https://perma.cc/3NPE-X37C>] (last visited Dec. 24, 2025).

110. *Human Rights and Labor Compliance Standards*, NIKE, <https://about.nike.com/en/impact-resources/human-rights-and-labor-compliance-standards> [<https://perma.cc/VYX9-NH43>] (last visited Dec. 24, 2025).

111. *Our Commitment to Human Rights*, THE COCA-COLA COMPANY, <https://www.coca-colacompany.com/social/human-rights> [<https://perma.cc/92BD-E2DW>] (last visited Dec. 24, 2025).

112. *See Reflections on the Status of Business Respect for Human Rights in the Technology Sector*, UNITED NATIONS HUMAN RIGHTS, (June 2021), [https://media.business-humanrights.org/media/documents/Reflections\\_On\\_the\\_Status\\_of\\_Business\\_Respect\\_For\\_Human\\_Rights\\_in\\_the\\_Technolo\\_dE1XPPm.pdf](https://media.business-humanrights.org/media/documents/Reflections_On_the_Status_of_Business_Respect_For_Human_Rights_in_the_Technolo_dE1XPPm.pdf) [<https://perma.cc/44BA-LQQB>].

113. Nic Paton, *A Worthwhile Policy or Simply Propaganda?*, THE GUARDIAN, (Jul. 16, 2004), <https://www.theguardian.com/business/2004/jul/17/ethicalbusiness.ethicalmoney> [<https://perma.cc/4FXH-49YQ>].

companies (PSMCs) to secure its operation; if this security force attacks local citizens, the MNC should “communicate how it is addressing the resulting human rights abuses and the risk of their recurrence.”<sup>114</sup> The purpose of the communication is important in making specific assurance. When the purpose is to demonstrate how the MNC is addressing a particular human rights risk it has identified, then the communication could be limited to specific groups.<sup>115</sup> When the purpose is to account to shareholders and other interested parties, for how the enterprise is addressing a specific risk or risks in general, then the communication could be in the form of “documents and presentations at an annual general meeting, web updates, messages to electronic mailing lists of those who self-identify as interested parties.”<sup>116</sup> Thus, when an MNC makes specific policy commitments or communications to a specific group, it can satisfy the “specific” requirement under assurance.

With respect to MNC voluntariness, when an MNC represents to the public that it exercises a particular degree of supervision and control over its subsidiary, it assumes a duty of care toward those who rely on that representation. Recent cases support this point. In *Vedanta*, Lord Briggs stated that if a parent company holds itself out as exercising that degree of supervision and control over its subsidiaries—although it does not do so in reality—it may owe a duty of care to third parties.<sup>117</sup> Indeed, *Vedanta* bridges soft international law and the common law of negligence for the first time.<sup>118</sup> *Okpabi* also confirmed that a parent company can owe a duty to care to third parties when it holds itself out as having control.<sup>119</sup>

When an MNC holds itself out to a specific group pursuant to the UNGPs or other international norms, that may constitute assurance. For example, Royal Dutch Shell may issue an annual social responsibility report to show its willingness to abide by the UNGPs. On the sixtieth anniversary of the adoption of the Universal Declaration in 2008, ExxonMobil published an op-ed in *The New York Times* stating that respecting human rights “is a responsibility that the more than 80,000 ExxonMobil employees around the world work to uphold every day.”<sup>120</sup> The corporate responsibility to respect human rights is also among the commitments companies undertake when joining the UN Global Compact.<sup>121</sup>

In the allegations against Dyson, migrant workers from Nepal and Bangladesh employed at ATA Industrial—a major electronics manufacturer in Malaysia producing many Dyson products—suffered forced labor, physical and psychological injuries, false imprisonment, cruel and degrading treatment, and exposure to extremely hazardous working conditions. Workers claimed that “Dyson was unjustly enriched as a result of the unlawful, exploitative and

114. Interpretive Guide, *supra* note 103, at 58.

115. *Id.* at 59.

116. *Id.*

117. *Vedanta Resources Plc v. Lungowe* [2019] UKSC 20, [53].

118. Daniel Leader, *Human Rights Litigation against Multinationals in Practice: Lessons from the United Kingdom*, in *HUMAN RIGHTS LITIGATION AGAINST MULTINATIONALS IN PRACTICE* 58, 6 (Richard Meeran & Jahan Meeran eds., 2021).

119. *Okpabi v. Royal Dutch Shell Plc.* [2021] 3 All ER 191 [26].

120. *New York Times*, see “2010 Financial & Operating Review,” EXXONMOBIL (2010), <https://investor.exxonmobil.com/sec-filings/all-sec-filings/content/0000950123-11-031215/d80379exv99.htm> [<https://perma.cc/NTZ5-VW6K>].

121. United Nations Global Compact, *supra* note 19.

dangerous conditions at the factory”; and that Dyson is “liable for the breaches of their legal rights due to the company’s knowledge of the alleged unlawful practices at the ATA factory.”<sup>122</sup> Arguably, Dyson may have assumed responsibility through numerous public statements regarding its policies and procedures for detecting and preventing forced labor and exploitation in its supply chains, including Dyson’s Modern Slavery and Human Trafficking Statement 2020.<sup>123</sup>

Another example arises in *Vilca v. Xstrata Ltd.*, in which two protestors were killed and many others injured during a disturbance at a mine.<sup>124</sup> The defendants, who were part of a multi-national mining group, had engaged the national police force to help deal with the protestors and paid for their services. The claimants asserted that the police had used excessive violence, and the issue to be determined at trial was whether the defendants had any legal responsibility for that alleged violence. Here, the mining company Xstrata Group adopted the “Voluntary Principles on Security and Human Rights,” a set of principles designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights.<sup>125</sup> Here, it is possible to argue that Xstrata Group assumed responsibility through the adoption of the principles.

At the same time, MNCs can issue disclaimers to deny a formal assumption of responsibility. To determine whether a responsibility has been assumed, a factor-based approach was adopted in *Seddon v. Driver and Vehicle Licensing Agency (DVLA)* in 2019.<sup>126</sup> Based on a series of precedents,<sup>127</sup> *Seddon v. DVLA* summarized twelve factors to determine an assumption of responsibility, among which “a disclaimer of responsibility” is one.<sup>128</sup> The leading textbook also supports that “statements disclaiming responsibility or purporting to exclude liability will almost always establish that responsibility was not assumed.”<sup>129</sup> In their social responsibility report, MNCs can claim that they do not officially

122. *Allegations of Forced Labour and Dangerous Conditions at Dyson Malaysian Factory to be Heard in High Court*, LEIGH DAY (July 10, 2023), <https://www.leighday.co.uk/news/news/2023-news/allegations-of-forced-labour-and-dangerous-conditions-at-dyson-malaysian-factory-to-be-heard-in-high-court/> [<https://perma.cc/5T8G-M8WR>].

123. *Dyson Modern Slavery and Human Trafficking Statement 2020*, DYSON (Feb. 2020), <https://modernslaveryregister.gov.au/statements/VUYXlh2c2bS51ra/pdf/#:~:text=Dyson%20continues%20to%20assess%20and,supply%20chain%20risk%20management%20methodology> [<https://perma.cc/U5YK-HW4W>].

124. *Vilca v. Xstrata Ltd.*, 2016 EWHC 389 (QB).

125. *Id.* ¶12; Sustainability Report 2012, GLENCCORE XSTRATA (2012), <https://www.glencore.com/rest/api/v1/documents/68decda3b80adce22072f4d02494af99/2012-Sustainability-Report.pdf> [<https://perma.cc/PX3Q-PY5V>].

126. *Seddon v. Driver and Vehicle Licensing Agency* [2019] 1 WLR 4593.

127. These precedents include: *Customs and Excise Comm’rs v. Barclays Bank Plc.* [2007] 1 A.C. 181, *Hedley Byrne & Co Ltd v. Heller & Partners Ltd.*, 1964 A.C. 465 (H.L. 1964), *Junior Books Ltd v. Veitch Co. Ltd.*, 1 A.C. 520 (H.L. 1983), *Smith v. Eric S. Bush* [1990] 1 A.C. 831 (H.L.), *Caparo Industries Plc v. Dickman* [1990] 1 ALL E.R. 568, *Rowley v. Secretary of State for Work and Pensions* [2007] 1 WLR 286, *James McNaughton Paper Group v. Hicks Anderson & Co.* [1991] 2 QB 113 (CA), *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145, *X (Minors) v. Bedfordshire County Council* [1995] 2 A.C. 633 (H.L.), *White v. Jones* [1995] 1 ALL E.R. 691.

128. *Seddon* [2019] 1 WLR 4593 ¶57.

129. GOUDKAMP & NOLAN, *supra* note 97, at ¶ 5-045.

assume legal responsibility and the audience should not rely on the report. Such disclaimers discourage reliance and exclude the possibility of an MNC's assumption of responsibility.

## (2) Claimants' Reliance on MNC Assurance

With respect to reliance, in *Hedley Byrne*, Lord Devlin stressed that the core of an assumption of responsibility is the acceptance of responsibility.<sup>130</sup> In *Poole*, reliance is an essential component of establishing the assumption of responsibility. In *Barclays Bank*, Lord Bingham of Cornhill stated that reliance means that "if A had not relied on B he would have acted differently."<sup>131</sup> The reliance can be express or implied; in words or in deed.

In *Rihan v. Ernst & Young Global Ltd & others*, regarding a global gold trader in Dubai, a former EY partner Mr. Rihan and his team uncovered serious incidences of this trader's non-compliance with relevant industry-wide standards and reported them to senior managers within the EY corporate group. Instead of reporting the findings, the senior managers covered up with the Dubai regulatory authorities and ultimately published a sanitized version of the audit without referring to the serious incidents. After Mr. Rihan resigned, he brought legal claims against four UK-based companies within the EY global network to whom he had escalated his complaint. The defendants argued that they could not be held liable since they were merely global service companies and since Mr. Rihan had been employed by EY Dubai.<sup>132</sup> However, the High Court ruled that the defendants had taken responsibility for investigating the concerns and managing the audit. Further, relying on the principles in *Vedanta*, the High Court held that the UK parent entities were not merely global service companies as they contended but had taken responsibility for risk management and compliance across the group.<sup>133</sup> Those entities owed Mr. Rihan a duty of care to act ethically, and they had failed to do so. Furthermore, the High Court stated that businesses should anticipate that human rights standards that are adopted even on a voluntary basis may give rise to legal liability.<sup>134</sup>

## 2. Incorporating Soft International Law into Common Law Principles in the United States

Although plaintiffs did not succeed in their claims, the First Circuit and Third Circuit in the United States did refer to soft international law to interpret common law principles. In *Tomasella v. Nestlé USA, Inc.*, in February 2018, Massachusetts resident Danell Tomasella brought consumer class actions against chocolate manufacturers Nestlé, Hershey, and Mars for failing to disclose on candy wrappers that their production processes relied on child and slave labor.<sup>135</sup> She asserted two possible violations of the Massachusetts Consumer Protection Act, Chapter 93A: the omissions were deceptive because

130. *Hedley Byrne*, [1964] A.C. at 531.

131. Customs and Excise Comm'rs, *supra* note 127.

132. *Rihan v. Ernst & Young Global Ltd.* [2020] EWHC 901 (QB) ¶¶ 514-16.

133. *Id.* ¶ 635.

134. *Id.* ¶¶ 608-35.

135. *Tomasella v. Nestlé USA*, 962 F.3d 60 (1st Cir. 2020).

they lured reasonable consumers into buying chocolate that they otherwise would not have purchased “had they known the truth;”<sup>136</sup> the omissions were unfair because they made consumers “unwitting support[ers] of child and slave labor.”<sup>137</sup> Regarding unfair practice, in a footnote, the First Circuit explained that soft international law—such as the UNGPs—would not “extend to point-of-sale disclosures on products that implicate human rights violations.”<sup>138</sup>

In early 2020, the U.S. District Court for the District of Delaware referred to soft international law to support the application of a common law principle in its Memorandum Opinion in *Acuna-Atalaya v. Newmont Mining Corp.*<sup>139</sup> This case arose out of a land dispute between indigenous subsistence farmers in Peru and the Peruvian subsidiary of a multinational gold mining company headquartered in the United States. Plaintiffs complained defendants’ repeated invasions of their farm, their threats on their lives, and the destruction of livestock and crops. They sought to hold the American parent companies responsible for their subsidiaries’ actions on the ground in Peru, contending that Peruvian courts are inadequate to protect them. Defendant Newmont Mining Corporation and its affiliates contested the facts and moved to dismiss the case by invoking the doctrine of *forum non conveniens* (FNC). The court stated that the defendants had “endorsed and adopted established human rights frameworks such as the [UNGP]s and the [Voluntary Principles on Security and Human Rights], in addition to a series of internal policies and standards” to support the adequacy of Peru as an alternative forum, one element in the analysis of FNC.<sup>140</sup> Later, the Third Circuit affirmed the district courts’ dismissal.<sup>141</sup>

In sum, domestic courts have referred to soft international law in interpreting common law doctrines to determine the issue of MNC liability. Besides the potential of referring to soft international law in common law doctrines, courts can refer to soft international law in interpreting domestic statutes to determine the issue of MNC liability.

## B. The Second Typology: Incorporating Soft International Law into Civil Law Statutes

The typology of incorporating soft international law in domestic private statutes is clearly demonstrated in the courts in the Netherlands. In the Dutch Civil Code, “a tortious act is regarded a violation of someone else’s right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to *unwritten law* has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.”<sup>142</sup>

The unwritten duty of care was first articulated by the Dutch Supreme Court in 1919.<sup>143</sup> Later in 1965, it was considered in the milestone *Kelderluik*

136. *Id.* at 67.

137. *Id.*

138. *Id.* at 81 n. 18.

139. *Acuña-Atalaya v. Newmont Min. Corp.*, 308 F. Supp. 3d 812, 815 (D. Del. 2018).

140. *Id.* at 825.

141. *Acuna-Atalaya v. Newmont Mining Corp.*, 838 F. App’x 676, 682 (3d Cir. 2020).

142. Dutch Civil Code (Burgerlijk Wetboek) art. 6:162 (emphasis added).

143. *Lindenbaum v. Cohen*, ECLI:NL:HR:1919:AG1776 (Supreme Court, Jan. 31, 1919).

case.<sup>144</sup> In that case, one employee of the Coca-Cola corporation left the cellar hatch of the pub open when making his delivery. As a precautionary measure, he left some crates with bottles next to the door to warn about the hole in the floor left by the open cellar hatch. Unfortunately, when a customer was on his way to the men's room, that customer fell through the cellar hatch and his leg was broken. The core issue was whether the employee had taken sufficient precautions when he left the cellar hatch open. The Dutch Supreme Court stated that since individuals cannot always pay sufficient attention to their environment and circumstances, some circumstances would require special precautionary measures. To assess the sufficiency of precautionary measures, the Supreme Court considered several factors: the probability that potential victims would not exercise the required attention and due care; the chance that accidents would ensue as a result; the seriousness of the possible consequences; the onerousness of precautionary measures; the 'normality' of precautionary measures; and the nature of the conduct.<sup>145</sup> The Supreme Court held that the employee had not taken into account customers' possible carelessness and thus failed to take sufficient precautionary measures.

This unwritten duty of care emerged again in the landmark case in *State of the Netherlands v. Urgenda Foundation*.<sup>146</sup> Here, Dutch environmental organization Urgenda claimed against the Dutch State and demanded the Dutch State to reduce its CO2 emissions by at least 25 percent by 2020 compared to 1990 levels. Urgenda argued that the State was infringing upon the subjective right to life and the right to respect for private and family life in the European Convention on Human Rights (ECHR); and that the State violated its unwritten duty of care by not taking sufficient precautionary measures. The District Court applied the *Kelderluik* and granted the injunction.<sup>147</sup> Later, the Court of Appeal upheld the decision by relying more directly on the ECHR.<sup>148</sup> In 2019, the Supreme Court confirmed that decision. Regrettably, the Supreme Court did not elaborate the "unwritten duty of care."

In 2021, based on an unwritten duty of care in Dutch tort law, the Hague District Court in *Milieudefensie et al. v Royal Dutch Shell plc* recognized that Shell had an "obligation of result" to reduce carbon dioxide emissions resulting from the Shell group's activities and a "best-efforts obligation" to reduce emissions generated by its business relations, including suppliers and end-users.<sup>149</sup> Whereas Shell was not found to be in violation of its reduction obligation, the court held that there was danger of an "imminent breach" because it considered Shell's climate policies insufficient. The court derived this twin obligation from Dutch tort law, which imposes a duty not to act in conflict

144. *Coca-Cola v. Duchateau*, ECLI:NL:HR:1965:AB7079 (Supreme Court, Nov. 5, 1965).  
145. *Id.*

146. *State of the Netherlands v. Urgenda Foundation*, ECLI:NL:HR:2019:2007, Judgment (Supreme Court of the Netherlands, Dec. 20, 2019).

147. *Urgenda Foundation v. State of the Netherlands*, ECLI:NL:RBDHA:2015:7196, Judgment (Dist. Ct. The Hague June 24, 2015).

148. *Urgenda Foundation v. State of the Netherlands*, ECLI:NL:GHDHA:2018:2610, Judgment ¶¶ 35-36 (Ct. App. The Hague Oct. 9, 2018).

149. *Milieudefensie v. Royal Dutch Shell Plc.*, ECLI:NL:RBDHA:2021:5339, Judgment (Dist. Ct. The Hague, May 26, 2021).

with “what according to unwritten law has to be regarded as proper social conduct.”<sup>150</sup> Here, to determine the proper social conduct, the court relied on fourteen elements, including international soft law instruments such as the OECD Guidelines and the UNGPs. Although the District Court acknowledged that the UNGPs do not impose legally binding obligations, it reasoned that, due to their “universally endorsed content,”<sup>151</sup> they were a suitable “guideline” for interpreting the unwritten standard of care.<sup>152</sup> The District Court considered that it was irrelevant whether RDS itself had committed to the UNGP (although the Shell group’s website indicated that it had).

On November 12, 2024, the Hague Court of Appeal overruled the District Court’s decision, ruling that no concrete reduction obligation can be imposed on Shell, for either Scope 1-2 or Scope 3 emissions.<sup>153</sup> For Scope 1-2 emissions, the court ruled that Shell was already making sufficient progress.<sup>154</sup> For Scope 3 emissions, the court ruled that there was not a clear evidence base for a concrete reduction obligation (of 45% by 2030); and Milieudefensie could not prove that Shell complying with the obligation would actually lead to global emission reductions.<sup>155</sup>

However, the Hague Court of Appeal did refer to soft international law in determining the “social standard of care.” The Hague Court of Appeal noted that Shell has endorsed the UNGPs and the OECD Guidelines<sup>156</sup> as well as other initiatives, including the UN Global Compact, which “can have an impact on private law relationships by giving substance to open standards, such as the social standard of care.”<sup>157</sup> Furthermore, the Hague Court of Appeal concluded that companies, especially those that have significantly contributed to the problem and who have the power to help mitigate it, are obliged to act, “even when (public law) rules do not necessarily compel them to do so.”<sup>158</sup> This obligation arises from soft international law—the OECD Guidelines and the UNGPs—which assign responsibility to MNCs to protect against dangerous climate change and urge them to take appropriate measures to address it.<sup>159</sup> The Hague Court of Appeal unequivocally reasserted that companies like Shell “have their own responsibility in achieving the targets of the Paris Agreement.”<sup>160</sup>

In sum, this “unwritten standard of care” in the Dutch Civil Code is an open norm; courts may interpret this standard by considering prevailing social norms and conventions that could include soft international law.

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150. Dutch Civil Code (Burgerlijk Wetboek) art. 6:162 [<https://perma.cc/U6LE-E3ND>].

151. Milieudefensie, *supra* note 149, ¶ 4.4.11.

152. *Id.*

153. Milieudefensie v. Royal Dutch Shell Plc., ECLI:NL:GHDHA:2024:2100, (Ct. App. The Hague, Nov. 12, 2024).

154. *Id.* ¶¶ 7.63-7.66.

155. *Id.* ¶¶ 7.67-7.111.

156. *Id.* ¶ 7.22.

157. *Id.* ¶ 7.24.

158. *Id.* ¶ 7.26.

159. *Id.* ¶ 7.26.

160. *Id.* ¶ 7.27.

#### IV. The Reasons for the Rise of the Tort Law Approach

Three points can account for the turn towards the private law approach: the lower threshold of bringing claims under the private law approach, its broad applications to various MNC structures, and the close link between due diligence obligations and tort liability. The following parts detail each of these accounts.

##### A. The Lower Threshold of Bringing Tort Claims

The threshold of bringing claims under tort law is lower than that under the human rights due diligence approach. Although the term “human rights due diligence” is not fully defined in the UNGPs, the Office of the United Nations High Commissioner for Human Rights (OHCHR) states:

Human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.<sup>161</sup>

The identification, prevention, and mitigation of adverse human rights impacts, as well as the communication of the effectiveness of these efforts externally, are essential to human rights due diligence.<sup>162</sup> Here, human rights due diligence is concerned with risks to people, as opposed to business due diligence, which is generally concerned with “identifying, preventing, and mitigating risks to business.”<sup>163</sup>

Bringing claims under the human rights due diligence approach is a very high bar for a victim. For instance, in France, the Vigilance Law allows victims to bring a tort claim against an MNC parent company in tort law for its violation of due diligence obligations, including extraterritorial due diligence obligations.<sup>164</sup> However, such liability of MNC parent companies can be imposed only when satisfying the following elements: the existence of due diligence obligations, the breach of due diligence obligations, causation, and damage.<sup>165</sup> In particular, what constitutes the fault—the MNC’s failure to draw up and effectively carry out a vigilance plan—remains unclear.<sup>166</sup> And the victims would find it difficult to prove MNC liability due to the difficulty of accessing relevant internal documents.<sup>167</sup>

In assessing MNC due diligence, courts count on some variables, such as an MNC’s technical, financial, or economic capacities.<sup>168</sup> The question of

161. Interpretive Guide, *supra* note 103, ¶ 6.

162. UNGPs, *supra* note 21, Principles 17-21 & accompanying cmt.

163. U.N. High Comm’r for Hum. Rts., *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability*, UN Doc A/HRC/32/19/Add.2 ¶ 8 (2018).

164. ROUAS, *supra* note 77, at 307.

165. Dalia Palombo, *The Duty of Care of the Parent Company: A Comparison between French law, UK Precedents and the Swiss Proposals*, 4 BUS. & HUM. RIGHTS. J. 265, 276 (2019).

166. ROUAS, *supra* note 77, at 307.

167. Palombo, *supra* note 165, at 284.

168. See, e.g., SCDDA, *supra* note 73 at § 3 (2) (“The appropriate manner of acting in accordance with the due diligence obligations is determined according to the nature and



how much MNC capabilities can affect the due diligence defence is salient. On the one hand, MNCs with abundant resources are better at preventing risks. Their failure to prevent risks should be evaluated more rigorously. On the other hand, leaning too much on MNC capabilities may penalize those MNCs with large capacities. The requirements of due diligence should be proportionate to “the size of the enterprise, the risk of the severe impacts, and the nature and context of the business operations.”<sup>169</sup> For instance, an MNC without sufficient capacity may not be able to meet the standard of behaviour of wealthier MNCs. In *Tesco Supermarkets Ltd. v. Natrass*, Lord Diplock stated that in order to prevent the commission of an offence, what can be reasonably expected for the MNC to do will “depend upon the gravity of the injury” and “the nature of the business.”<sup>170</sup> The UNGPs also recognise that human rights due diligence “will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations,”<sup>171</sup> as well as “size, sector, operational context, ownership and structure.”<sup>172</sup>

Different from the due diligence approach, tort law is based on the culpable violation of private rights. While the protected interests may be more limited than under international human rights law, life and health are usually included. One can also distinguish between different forms of fault. For physical injury, negligence is usually sufficient. The U.S. Restatement of Torts states: “An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability. . . .”<sup>173</sup> The Principles of European Tort Law (PETL) similarly notes: “A person to whom damage to another is legally attributed [e.g. because they have caused it by conduct constituting fault] is liable to compensate that damage.”<sup>174</sup> Therefore, from the perspective of victim protection, it would be better to base compensation on the violation of a private right rather than a human rights abuse, as is usually the case in tort law.<sup>175</sup>

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extent to the enterprise’s business activities; the ability of the enterprise to influence the party directly responsible for a risk to human rights or environment-related risk or the violation of a human rights-related or environment-related obligation; the severity of the violation that can typically be expected, the reversibility of the violation, and the probability of the occurrence of a violation of a human rights-related or an environment-related obligation; as well as the nature of the casual contribution of the enterprise to the risk to human rights or environment-related risk or to the violation of a human rights-related or environment-related obligation.”).

169. Office of the High Comm’r for Human Rights, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/73/163 ¶ 14 c (July 16, 2018). See also OECD, *Due Diligence Guidance for Responsible Business Conduct* 18 (2018).

170. *Tesco Supermarkets Ltd. v. Natrass* [1972] AC 153 ¶ 194 E-G (Lord Diplock).

171. UNGPs, *supra* note 21, Principle 17.

172. *Id.* at 14.

173. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 (AM. L. INST. 2010).

174. *Principles of European Tort Law Art. 1(101)*, EUROPEAN GROUP ON TORT LAW (2025), <http://www.egtl.org/PETLEnglish.html> [<https://perma.cc/3FDT-HDD7>]; see also PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE art. VI.1 (Christian von Bar et al. eds.).

175. Carsten Koenig, *Human Rights or Private Rights? – Effective Protection of Victims in Global Supply Chains*, 118 AM J. INT’L L. UNBOUND 269 (2024).

## B. The Wider Applicability of Tort Law Approach

The doctrine of veil-piercing may be able to hold MNCs liable for their subsidiaries. It can arguably extend to a subsidiary and its parent company in the MNC context.<sup>176</sup> Easterbrook and Fischel explain that courts are more willing to pierce the corporate veil when the defendant company is a close corporation, is a shareholder, is undercapitalized, or is committing a tort.<sup>177</sup> However, in *Prest v. Petrodell*, the Supreme Court limited the application of this doctrine to certain settings “when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control.”<sup>178</sup> Moreover, Lord Sumption stated that veil piercing would only apply in the absence of other possible remedies.<sup>179</sup> Thus, parent companies would rarely assume liability for subsidiaries’ tort harms.<sup>180</sup> In particular, by focusing on parent-subsidiary ownership, the veil-piercing approach cannot be applied to certain MNC internal structures, such as an MNC’s direct interference with subsidiaries’ business without ownership control.<sup>181</sup>

In contrast, this tort law approach to hardening soft international law enjoys one particular advantage: its wide application to various MNC group structures. Common law tort doctrines apply not only vertically between a parent company and its subsidiaries or suppliers, but also horizontally between group subsidiaries. In *Vedanta*, the four routes apply to any MNC without focusing on MNC structures. Following *Vedanta*, *Okpabi* (in the Court of Appeals) identified four *Vedanta* routes: “a parent company taking over the management or joint management of the relevant activity of its subsidiary; a parent company providing defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented by its subsidiary; a parent company promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation by its subsidiary; and the parent holding out that it exercises a particular degree of supervision and control of its subsidiary.”<sup>182</sup> The Supreme Court in *Okpabi* implicitly affirmed the classification of *Vedanta* routes.<sup>183</sup> Regardless of MNC group structures, the core point in *Vedanta* is how an MNC manages or intervenes in the affairs of its subsidiaries or suppliers. Indeed, *Vedanta* clearly pointed out that parent company liability “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’. . . of the subsidiary.”<sup>184</sup> Moreover, the principles of common design apply in various MNC group structures.

176. *Adams v. Cape Industries Plc.* [1990] Ch. 433, 530-49 (Eng. Ct. App.).

177. Easterbrook & Fischel, *supra* note 44, at 109-13.

178. *Prest v. Petrodell Resources Ltd.*, [2013] UKSC 34, 3 WLR 1, 20. See also *Hurstwood Properties (A) Ltd. v. Rossendale Borough Council*, 2 WLR 1125 ¶ 68-75 (UKSC 2021).

179. *Prest*, 3 WLR 1, 20.

180. Peter B. Oh, *Veil-Piercing*, 89 TEX L. REV. 81, 110 (2010).

181. See Phillip Lipton, *The Mythology of Salomon’s Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective*, 40 MONASH UNI. L. REV. 452 (2014).

182. *Okpabi* [2021] UKSC 3, [26].

183. *Id.* [153].

184. *Id.* [49].

Common design focuses on whether an MNC intends to secure doing something that proves to be a tort eventually.

### C. The Easier Transformability from Soft Responsibility to Tort Obligations

The potential transformability from soft law responsibility to tort obligations provides opportunities for the application of tort law upon MNCs.<sup>185</sup> The UNGPs— influential soft international law—require that corporations should avoid *causing* human rights impacts through their *own* activities; avoid *contributing to* adverse human rights impacts through their own activities or other entities; and prevent or mitigate adverse impacts that are directly linked to their business by virtue of their business relationships.<sup>186</sup> The UNGPs’ trilogy—“causation, contribution, and business relationship”—can be analyzed in the framework of negligence or secondary liability in tort.

First, despite the variations in different jurisdictions, a common formulation in demonstrating negligence is the existence of a duty of care towards affected individuals; the breach of the applicable standard of care; the resulting harm or injury; and causation between the breach and the harm.<sup>187</sup> The issue of the duty of care is often related to the foreseeability of the harm by the defendant and the proximity between the parties.<sup>188</sup>

Indeed, due diligence—a global standard for human rights in the UNGPs—is related to the standard of care in torts.<sup>189</sup> In many jurisdictions, a company’s human rights due diligence will be relevant to the question of whether the company had discharged the applicable standard of care.<sup>190</sup> For instance, whether an MNC has carried out human rights due diligence activities, as well as the scope, quality and effectiveness, may relate to the question of whether the MNC has met the applicable standard of care.<sup>191</sup> Although courts have seldom referred to the UNGPs to decide the standard of care,<sup>192</sup> the case-by-case method in common law can provide courts flexibility to respond to

185. With respect to the concept of “soft law responsibility,” see Peter Muchlinski, *Multinational Enterprises as Actors in International Law: Creating “Soft Law” Obligations and “Hard Law” Rights*, in *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* 9 (Math Noortmann & Cedric Ryngaert eds., Ashgate 2010); Jean-Marc Sorel, *The Concept of ‘Soft Responsibility?’*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 291 (James Crawford, Alain Pellet & Simon Olleson eds., Oxford Univ. Press 2010).

186. UNGPs, *supra* note 21, at 14.

187. Office Of The High Comm’r For Human Rights, *supra* note 163, ¶ 19.

188. Office Of The High Comm’r For Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance*, U.N. Doc. A/HRC/32/19/Add.1 (May 12, 2016), ¶ 55; see also Office of the High Comm’r For Human Rights, *supra* note 163, ¶ 20.

189. Office Of The High Comm’r For Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance*, U.N. Doc. A/HRC/32/19/Add.1 (May 12, 2016), ¶ 22.

190. *Id.* ¶ 55.

191. Illustrative examples for guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse, see Office Of The High Comm’r For Human Rights, *supra* note 46; Office Of The High Comm’r For Human Rights, *supra* note 189, ¶ 55.

192. Office Of The High Comm’r For Human Rights, *supra* note 163, ¶ 22.

“contemporary policy demands and societal expectations.”<sup>193</sup> The negligence liability is very related to corporations’ causing harm. Business enterprises should avoid *causing* human rights impacts through their *own* activities, for instance, avoiding the exposure of factory workers to hazardous working conditions without adequate safety measures; or avoiding the pollution of a community’s drinking water supply due to chemical effluents from production processes.<sup>194</sup> For MNCs, it means that an MNC should avoid causing an impact through MNC parent company itself. They should not be, for example: “retaining the passport of temporary foreign workers or migrant workers as a way to ensure their compliance with working schedules; affecting a community’s health through toxic emissions; or using threats to persuade peasants to sell their land to give way to a new infrastructure project.”<sup>195</sup>

Second, an MNC may assume secondary liability where it has caused or contributed to harm or loss caused by another wrongdoer.<sup>196</sup> The OHCHR states that domestic private law regimes should treat causes of action based on theories of secondary liability as distinct causes of action; and they should clarify the principles for assessing secondary liability that are applicable to companies.<sup>197</sup> Depending on the specific domestic law regime, secondary liability may result from inciting a wrongful act, assisting the primary wrongdoer, or omissions as well as positive acts.<sup>198</sup> Such secondary liability is very related to the “contributing” and “business relationship” scenarios. The UNGPs state that business enterprises should avoid *contributing* to adverse human rights impacts through their own activities or through other entities. Specifically, for MNCs, an MNC should avoid contributing to human rights impact through its own operations or through its subsidiaries or suppliers.<sup>199</sup> Moreover, business enterprises should prevent or mitigate adverse impacts that are directly linked to their business by virtue of their business relationships. Business relationships as “relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.”<sup>200</sup> Examples of harm through business relationship include:

193. *Id.* ¶ 23.

194. Interpretive Guide, *supra* note 103, ¶ 17.

195. OCHR, *Letter to Nieuwenkamp, re: Request for Guidance on Specific Aspects of the Guiding Principles and their Meaning in the Context of Financial Transactions and Institutions* (Dec. 3, 2013).

196. Office Of The High Comm’r For Human Rights, *supra* note 188, at 13; *see* Office Of The High Comm’r For Human Rights, *supra* note 163, ¶ 30.

197. Office Of The High Comm’r For Human Rights, *supra* note 46, ¶¶ 13.1-13.3.

198. Office Of The High Comm’r For Human Rights, *supra* note 188, ¶ 51.

199. *See* Office Of The High Comm’r For Human Rights, *supra* note 195, at 3 (“an MNC’s activities that can contribute to human rights impacts include: providing a financial loan to another company to construct a large plant built on village land, thus displacing villagers without appropriate consultation or compensation; setting an unrealistic timetable for a construction firm hired to build its offices and then causing excessive overtime to be imposed on workers; or hiring a private security company to investigate a claim, which infringes on the civil and political rights of a person.”).

200. UNGPs, *supra* note 21, princ. 13 & cmt. Here, the “direct linkage” refers to the linkage between the harm and the enterprise’s products, services and operations through another enterprise. And there is no such concept as ‘indirect linkage’ in the UNGPs. *See* Office Of The High Comm’r For Human Rights, *Letter to Nieuwenkamp, re: Request from the Chair of the OECD Working Party on Responsible Business Conduct*, ¶¶ 9, 18 (Nov. 27, 2013).

an enterprise providing financial loans to an enterprise for business activities that, in breach of agreed standards, result in the eviction of communities; or embroidery on a retail company's clothing products being subcontracted by the supplier to child laborers in homes, counter to contractual obligations.<sup>201</sup> How far an enterprise's responsibility extends in the value chain depends on several factors, including "the prevailing country and sector conditions" and "potential business partners and their sourcing practices."<sup>202</sup> The Commentary further affirms that where an enterprise's value chains comprise a significant number of entities, its due diligence should prioritize the areas where the risk of human rights impacts is significant.<sup>203</sup>

Secondary liability can be found in an extractive industry. An extractive MNC can directly employ security professionals; can directly contact with PSMCs; can ask help from State security forces to operate in and around the extractive site. Often, an extractive company can rely on all these actors, resulting in complex and fluid security arrangements.<sup>204</sup> With respect to PSMCs, extractive MNCs may contract them to provide a broad range of traditional security functions, such as devising risk assessments and mitigation measures, securing and guarding premises, securing the transportation of extractive products, and conducting security training for onsite extractive staff.<sup>205</sup> When host States do not have effective governance and do not own effective State security forces, extractive MNCs may rely on private security to perform non-traditional roles to secure their operations. For instance, mining companies may reinforce their private security personnel to address a high risk of kidnappings of their employees, criminal piracy, trafficking cartels, guerrilla forces, and expropriation efforts by corrupt government regimes.<sup>206</sup> In particular, companies could become complicit in human rights abuses in conflict situations.<sup>207</sup>

Some settled cases have demonstrated that the extractive MNCs' acts could constitute secondary liability in torts. For instance, in *Guerrero v. Monterrico Metals Plc*, a group of thirty-three indigenous Peruvians claimed against Monterrico Metals Plc, alleging that, following a protest about environmental issues, they were tortured, beaten, and sexually abused by the Peruvian police, who were assisted by mine employees at Monterrico's Rio Blanco mine in August 2005.<sup>208</sup> In *Magige Ghati Kesabo & Ors. v. African Barrick Gold Plc. &*

201. Interpretive Guide, *supra* note 103, at 17.

202. United Nation Human Rights Council, Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/11/13 ¶ 75 (Apr. 22, 2009).

203. UNGPs, *supra* note 21, Principle 17 & cmt.

204. United Nations Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination: Relationship Between Private Military and Security Companies and the Extractive Industry from a Human Rights Perspective*, U.N. Doc. A/HRC/42/42, ¶ 25 (July 29, 2019).

205. *Id.* ¶ 26.

206. *Id.* ¶ 56.

207. Office Of The High Comm'r For Human Rights, Report on the Sectoral Consultation Entitled "Human Rights and the Extractive Industry", U.N. Doc. E/CN.4/2006/92, ¶ 26(f) (Dec. 19, 2005).

208. *Guerrero v. Monterrico Metals Plc.* [2009] EWHC 247 (QB) (Eng.).

*Anor.*, the claimants alleged that the companies were complicit in the killings and injuries of villagers by police at the North Mara Mine in Tanzania and that the police were an integral part of the mine's security operation.<sup>209</sup>

## V. Hardening Soft International Law in Domestic Courts: Prospects and Challenges

### A. Challenges

#### 1. *Illegitimate Reference*

The first challenge is the legality of referring to soft international law as foreign sources in U.S. domestic courts. From administrative law perspectives, the application of soft international law may violate the nondelegation and sub-delegation doctrines, the procedural requirements on rule making, and due process norms.<sup>210</sup> Chief Justice Roberts responded to a similar question during his nomination hearings by saying, "if we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge."<sup>211</sup> According to the Congressional Record, Senator Cornyn (R-TX) had expressed concern:

[O]ver a trend that some legal scholars and observers say may be developing in our courts—a trend regarding the potential influence of foreign governments and foreign courts in the application and enforcement of U.S. law. If this trend is real, then I fear that, bit by bit, case by case, the American people may be slowly losing control over the meaning of our laws and of our Constitution. If this trend continues, foreign governments may even begin to dictate what our laws and our Constitution mean, and what our policies in America should be.<sup>212</sup>

Responding to this challenge, this part argues that it is MNCs themselves have accepted and consented to be bound by soft international law. An MNC can promise or act to indicate its willingness to be bound by the terms in soft international law. Indeed, governments and regulators increasingly incorporate soft international law into regulations, as well as in commercial agreements and company policies and processes, around the world.<sup>213</sup> MNCs accept soft

209. *Magige Ghati Kesabo v. African Barrick Gold Plc & Anor.* [2013] EWHC 4045 (QB).

210. To overcome these challenges, Jean Galbraith and David Zaring proposed to reframe soft international law as foreign relations law to further its domestic implementation in the United States. See Jean Galbraith & David Zaring, *Soft law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 755-62 (2013).

211. Adam Liptak, *Ginsburg Shares Views of Influence of Foreign Law on Her Court, and Vice Versa*, NEW YORK TIMES (Apr. 11, 2009), [www.nytimes.com/2009/04/12/us/12ginsburg.html](http://www.nytimes.com/2009/04/12/us/12ginsburg.html) [<https://perma.cc/WDW8-6KNL>].

212. 151 CONG. REC. 53124-02 (2005) (statement of Sen. John Cornyn).

213. Examples include: the 2013 revisions to the UK Companies Act requiring listed companies to report human rights issues where necessary to understand the company's business [<https://perma.cc/6CWW-E7LE>]; the 2015 UK Modern Slavery Act [<https://perma.cc/U5YK-HW4W>]; the European Parliament's 2014 Directive requiring 6,000 large public enterprises to report on their human rights performance; government policy developments, including the Recommendations of the Committee of Ministers of the Council of Europe on

international law in two categories: MNC codes of conduct or human rights policies stating that MNCs will follow soft international law; MNCs joining an international agreement to be bound by such agreement.

First, MNC codes of conduct or human rights policies state that they will follow soft international law. According to the 2023 Corporate Human Rights Benchmark study, more than three quarters of companies assessed disclose a clear commitment to respect human rights in 2023.<sup>214</sup> For instance, in Apple Inc.'s "Commitments to Human Rights," it states that "[w]e're deeply *committed* to respecting internationally recognized human rights in our business operations, as set out in the International Bill of Human Rights and the Declaration on Fundamental Principles and Rights at Work. Our approach is *based on* the UNGPs."<sup>215</sup> Similarly, for Shell plc, its "Approaches to Human Rights" state that "Shell is *committed* to respecting human rights as set out in the UN Universal Declaration of Human Rights and the Declaration on Fundamental Principles and Rights at Work. Our approach is *informed* by the UNGPs."<sup>216</sup> Shell supports the UNGPs, OECD Guidelines, and UN Global Compact.<sup>217</sup> In particular, it mentions that it has *implemented* the Voluntary Principles on Security and Human Rights.<sup>218</sup>

The second type would be that MNCs can join and to be bound by an international agreement—part of soft international law. An illustrative example is the 2010 International Code of Conduct for Private Security Service Providers (ICoC) that aims to create better governance, compliance, and accountability mechanisms for private security companies. In accordance with the ICoC, signatory companies commit to the responsible provision of security services so as to support the rule of law, respect the human rights of all persons, and protect the interests of their clients.<sup>219</sup> Currently, 160 private security companies

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human rights and business in 2016; the issuance of National Action Plans on business and human rights; the endorsement of the UNGPs by the G7 Leaders in 2015; and international standard-setting bodies (such as the OECD Guidelines for Multinational Enterprises).

214. The 2023 Corporate Human Rights Benchmark assesses 101 of the world's largest publicly traded companies against dozens of human rights indicators. See Corporate Human Rights Benchmark 2023 Insights Report, CORPORATE HUMAN RIGHTS BENCHMARK (Nov. 20, 2023), <https://www.worldbenchmarkingalliance.org/publication/chrb/> [<https://perma.cc/PVK6-URYC>].

215. *Our Commitment to Human Rights*, APPLE (May 2025), [https://s2.q4cdn.com/470004039/files/doc\\_downloads/gov\\_docs/2020/Apple-Human-Rights-Policy.pdf](https://s2.q4cdn.com/470004039/files/doc_downloads/gov_docs/2020/Apple-Human-Rights-Policy.pdf) [<https://perma.cc/4QFD-CW7G>].

216. *Shell's Approach to Human Rights*, SHELL, [https://www.shell.com/sustainability/people/human-rights/\\_jcr\\_content/root/main/section\\_586659054/text\\_474563035.multi.stream/1743688781743/17d226ba1dedb52a09b30f819f03cc617d1270ba/shells-approach-to-human-rights.pdf](https://www.shell.com/sustainability/people/human-rights/_jcr_content/root/main/section_586659054/text_474563035.multi.stream/1743688781743/17d226ba1dedb52a09b30f819f03cc617d1270ba/shells-approach-to-human-rights.pdf) [<https://perma.cc/2DYY-74UD>] (last visited Dec. 26, 2025).

217. *Id.*

218. *Id.* at 5; See *Voluntary Principles on Security and Human Rights*, [https://www.voluntaryprinciples.org/wp-content/uploads/2023/10/Voluntary-Principles\\_ENGLISH.pdf](https://www.voluntaryprinciples.org/wp-content/uploads/2023/10/Voluntary-Principles_ENGLISH.pdf) [<https://perma.cc/EG4S-2QWH>] (last visited Dec. 26, 2025). Here, the Voluntary Principles on Security and Human Rights are a multistakeholder initiative aimed at helping companies proactively identify situations with a high risk of human rights violations and devise effective strategies to prevent them. They outline corporate responsibilities to evaluate security risks and the likelihood of human rights violations, as well as to engage responsibly with both public and private security entities.

219. *The International Code of Conduct for Private Security Service Providers* ¶ 3, THE RESPONSIBLE SECURITY ASSOCIATION (ICoCA), <https://icoca.ch/the-code/> [<https://perma.cc/9ZTA-5724>] (last visited Dec. 26, 2025).

are members of the ICoC Association that is committed to the creation of an independent governance and oversight mechanism as well as a complementary complaint mechanism.<sup>220</sup>

To be noted, not all statements on sustainability policies and practices can bind MNCs. A statement about goals, or mere promises to act in the future, will not qualify.<sup>221</sup> Only those—meeting the MNC assurance and acceptance requirements discussed in the aforementioned Part III. A—qualify. Moreover, shareholder resolutions do not bind MNCs either, although they increasingly call on companies to implement soft international law, such as the UNGPs. For instance, “some of the world’s largest asset managers have cast votes in favor of human rights due diligence in the past two years.”<sup>222</sup>

In sum, by committing voluntarily to soft international law, MNCs are setting up public expectations for themselves—for which they should expect to be held accountable.<sup>223</sup> Although courts can refer to soft international law to interpret common law principles or civil statutes, they should act cautiously to avoid the conflict with the intention of the legislative body and to be consistent with the legality.

## 2. *Inadequate Deterrence*

The tort-based regime may not adequately deter MNC risky conduct due to its narrow scope on tortious behaviors and its backward-looking, rather than forward-looking, nature.

To shield itself from liability, an MNC parent company may carry out financial rearrangement by locating risky physical processes in developing countries with relaxed safety standards and lower damages awards; keeping valuable assets offshore; or incorporating subsidiaries in low-regulation jurisdictions that allow for exclusion of liability in certain contexts.<sup>224</sup> Moreover, an MNC parent can transfer assets from one associated company to another via various channels, such as charging management fees, paying dividends to the parent, withdrawing financial support, providing unwarranted guarantees to other group companies, or commingling subsidiary assets with other companies.<sup>225</sup>

220. With respect to the information on the ICoCA, see *About Us*, THE RESPONSIBLE SECURITY ASSOCIATION (ICoCA), <https://icoca.ch/about/> [https://perma.cc/9S4G-C79Z] (last visited Dec. 26, 2025).

221. See Tibusay Morgandi, *Liability for Greenwashing in Company Sustainability Reports: A Novel Application of the English Tort Law Doctrine of Assumption of Responsibility*, 118 AM. J. INT’L L. UNBOUND 274 (2024).

222. *Taking Stock of Investor Implementation of the UN Guiding Principles on Business and Human Rights*, UNITED NATIONS HUMAN RIGHTS SPECIAL PROCEDURES (June 2021), [www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf] [https://perma.cc/8ZQT-ZMNH].

223. Daniel C. Esty & Nathan de Arriba-Sellier, *Zeroing in on Net-Zero: From Soft Law to Hard Law in Corporate Climate Change Pledges*, 94 U. COLO. L. REV. 635, 649 (2023).

224. Richard Meeran, *Perspectives on the Development and Significance of Tort Litigation against Multinational Parent Companies*, in HUMAN RIGHTS LITIGATION AGAINST MULTATIONALS IN PRACTICE 24, 48 (Richard Meeran & Jahan Meeran eds., 2021).

225. For various examples, see Richard Meeran, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States*, 3 CITY UNI. HONG KONG L. REV. 1, 25-41 Appendix: Examples of MNC Tort Cases (2011).



For instance, in *Sithole v. Thor*, Thor's parent company had undertaken a demerger which involved transfer of its subsidiaries to a newly formed business, Tato Holdings Limited. Moreover, the parent company changed its name to Guernica plc, given "the fascist nature of the attacks on Thor." Later, the claimants sought a declaration under the Insolvency Act 1986 that the transfer of assets was unlawful since its "dominant purpose" was to defeat their interests as creditors. The Court of Appeal held that in the absence of information to the contrary, the inference that the demerger of Thor was connected with the present claims was "irresistible."<sup>226</sup> In 2000, the *Sithole* case was settled.

In addition, an MNC may expand its shareholder power within MNC groups to assert its legitimate authority. As shareholders, MNCs may occupy a top position in the corporate governance hierarchy of their affiliated companies.<sup>227</sup> They can issue directives to directors through special resolutions, modify the articles, appoint or remove underperforming directors, and vote on crucial corporate actions. Under the fault-based system, an MNC—being a shareholder—may be shielded from liability. Indeed, courts have been hesitant to hold individuals accountable for the harmful outcomes of decisions made in their "constitutional function," especially when voting in formal company settings like the board of directors.<sup>228</sup> Thus, by expanding MNCs' constitutional power as shareholders, MNC parent companies can avoid liability.

Furthermore, an MNC can delegate its decision-making authority to other internal organizations to avoid potential liability. With the rise of information technology, MNCs adopt more open "heterarchical" organizational structures and collaborative arrangements among firms. In a decentralized structure, lower-tier organizations—like divisional headquarters or operating entities themselves—can make important decisions. Thus, MNCs can avoid tort liabilities by delegating decision-making authorities. In *Vedanta*, a parent company could be held liable in promulgating group-wide safety or environmental policies and taking active steps to ensure their implementation by subsidiaries.<sup>229</sup> To avoid liability, MNCs may delegate the authority of promulgating group-wide safety or environmental policies to their divisional units.

### 3. *Unmanageable Procedure*

Although soft international law can potentially broaden MNC substantive obligations, two procedural obstacles—jurisdiction and conflicts of law—often obstruct claimants.

First, jurisdictional issues refer to whether the court in the forum State has jurisdiction in relation to a case with extraterritorial elements. In most common law legal systems, a court would consider if the forum State is not the appropriate or most convenient forum for the matter (called *forum non*

226. *Sithole v. Thor Chemicals Holdings Ltd.* [2000] WL 14211830.

227. See Meeran, *supra* note 225.

228. See *Lubbe v. Cape Plc.* [2000] UKHL 41, [2000] 1 WLR 1545.

229. *Vedanta* [2019] UKSC 20, [53]. See also Astrid Sanders, *The Impact of the 'Ruggie Framework' and the 'United Nations Guiding Principles on Business and Human Rights' on Transnational Human Rights Litigation*, in *THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK* (Jena Martin & Karen E. Bravo eds., 2015).

*conveniens*, FNC), taking into account the location of the parties, witnesses, evidence, and the place of the harm. FNC has the potential to stymie any action brought in tort even where all the above hurdles are satisfied. Under the FNC, a court may refuse to exercise jurisdiction to hear a case on the basis that a court in another country is a more appropriate forum.<sup>230</sup>

For instance, in the United Kingdom, the application of the doctrine of FNC may obstruct the courts' jurisdiction. To satisfy an English court's jurisdiction in transnational tort disputes, the power to serve proceedings outside of the jurisdiction is discretionary.<sup>231</sup> Serving a claim on a foreign-based MNC subsidiary requires that: there is a "serious issue to be tried" in the case; the claim falls within the confines of one of the jurisdictional gateways within 6B PD 6B 3.1; and England is the proper forum in which the proceedings should be entertained.<sup>232</sup> While FNC has not been available for claims against UK companies under European Union law, the doctrine will likely return now that the UK has left the EU.<sup>233</sup>

Similarly in Canada, in *John v. Barrick Gold Corp.*, the Ontario Superior Court held that the claims would be better heard in Tanzania, following the doctrine of FNC.<sup>234</sup> Here, the plaintiffs are Indigenous Kuria from villages surrounding Barrick's North Mara Gold Mine Ltd. in Tarime District. The plaintiffs alleged that Barrick Gold and affiliated local security were involved in the deaths of at least five people and the beating of others near the North Mara Mine in Tanzania since 2019.<sup>235</sup> The plaintiffs further claimed that the Tanzanian police colluded with Barrick Gold in committing these violations. The applicant sought damages against Barrick Gold, arguing that the firm had a duty of care to the villagers on the basis that Barrick controlled the mine and that it had in place a number of ESG policies. The defendant argued that the court should dismiss the claims on the grounds of a lack of jurisdiction or for FNC.

Justice Morgan granted Barrick Gold's application for FNC, agreeing that Tanzanian courts would be better suited to handle the case. The justice rejected the plaintiff's submission that the Tanzanian judicial system was deficient and that no deference should be offered to foreign jurisdictions in cases where there are "clear violations of international law and fundamental human rights."<sup>236</sup> He categorized the plaintiff's application in the Canadian jurisdiction as "a springboard for the Plaintiffs to launch an attack at large on the Tanzanian justice system."<sup>237</sup> Justice Morgan also rejected the plaintiff's argument that they would be financially incapable of finding counsel in Tanzania, noting that "there are dozens of legal aid centers and clinics in Tanzania whose function

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230. In some circumstances, such as where substantial evidence is located overseas and where the host state has a functioning legal system, claimants may seek a stay of the matter in favor of it being heard in the host state jurisdiction.

231. A. V. DICEY, ET AL., *DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS* ¶11.141 (Sweet & Maxwell 15th ed. 2012).

232. *Seaconsar Far East Ltd v. Bank Markazi Jomhouri Islami Iran*, [1993] 4 All E.R. 456.

233. See Francesca Farrington, *A Return to the Doctrine of Forum Non Conveniens after Brexit and the Implications for Corporate Accountability*, 18 J. PRIV. INT'L L. 399 (2022).

234. *Matiko John v. Barrick Gold Corporation*, 2024 ONSC 6240 para. 175.

235. *Id.* ¶ 2.

236. *Id.* ¶ 62.

237. *Id.* ¶ 63.

it is to bring cases to court on behalf of indigent persons.”<sup>238</sup> In the United States, courts typically adopt a two-part test to determine whether they would grant an FNC motion. The first part is a balancing test weighing both private and public factors;<sup>239</sup> and the second part looks at what adequate alternative courts are available.<sup>240</sup>

The second jurisdictional obstacle is the issue of applicable law, which refers to which law would apply to the claim. In the United Kingdom, English Law can seldom apply when tortious damage happens abroad. Procedurally, English law can apply if the parties agree to submit their disputes to English law<sup>241</sup> or if the claimant cannot prove the pleaded foreign law satisfactorily.<sup>242</sup> Substantively, English law can apply under the special rule on environmental damage.<sup>243</sup> English law can also apply under several exceptions: if domestic laws can be classified as overriding mandatory provisions;<sup>244</sup> if application of foreign law violates the *ordre public*;<sup>245</sup> or given regulations on rules of safety and conduct.<sup>246</sup>

In contrast, it is likely that the law of the host state will be applied. Where foreign law of the host state applies to the dispute, it is that system of law that will provide the available causes of action to the victims. Whilst the substantive law will be that of the host state, the procedural law of the forum—that of the home state—will govern the conduct of proceedings. The mix of the application of law complicates such litigations over remedies.

## B. Prospects

To overcome these challenges, the strict application of soft international law would be a good choice. Those aforementioned typologies demonstrate the strictness in referring to soft international law: either incorporating soft international law into already *existing* common law doctrine, or into already *existing*

238. *Id.* ¶ 107.

239. The balancing test includes private factors and public factors. Private factors include: ease of access to evidence; interest of the two parties in their connections with the respective forums; if the plaintiff's chosen court would be burdensome to the defendant; if a court finds this factor to be true, then that is often sufficient to dismiss the case and accept a FNC claim; ease of obtaining witnesses; enforceability of judgment. Public factors include: whether the trial would involve multiple sets of laws, thus potentially confusing a jury; having juries who may have a connection to the case; local interest in having local interests heard at home; having the trial in a place where state laws govern. See Legal Information Institute, *Forum Non Conveniens*, CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/forum\\_non\\_conveniens](https://www.law.cornell.edu/wex/forum_non_conveniens) [https://perma.cc/2CRG-4RGT] (last visited Dec. 26, 2025).

240. Adequate alternative inquiry test means that: the defendant must offer an alternate court that is able to hear the case and the alternate court must have the ability to provide a remedy to the plaintiff. See *id.*

241. Council Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations [hereinafter Rome II Regulation] art. 14.

242. DICEY, ET AL., *DICEY, MORRIS AND COLLINS ON THE CONFLICTS OF LAWS* 318 (15<sup>th</sup> ed. 2012).

243. Rome II Regulation, *supra* note 241, art. 7.

244. *Id.* art. 16.

245. *Id.* art. 26.

246. *Id.* art. 17 (“In assessing the conduct of the person claimed to be liable, account shall be taken . . . of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.”).

domestic statutes. Such strict application can also transplant to other forums. The following parts demonstrate the potential to refer to soft international law across the globe for three reasons: claimants' increasing reference to it; the recalibration of causes of action in domestic courts; and the rising of domestic regulations mandating codes of conduct.

### 1. *The Increasing Reference to Soft International Law in Briefs*

International and transnational law can provide social actors "a common language" in collective action.<sup>247</sup> This common language sets up the foundation of transnational litigations against MNCs. In these transnational litigations, the claimants in the U.S. and Kenya courts have argued the application of soft international law to impose liability on MNCs, although courts had not referred to soft international law in their final decisions.

In the United States, parties have cited soft international law to buttress their arguments in a series of cases with similar facts. Plaintiffs purchased defendants' chocolate products; these products sourced at least some cocoa beans that are produced using child labor. Later, plaintiffs alleged that they would not have bought the chocolate or would not have paid as much for it if the manufacturer had disclosed, on the label itself, the existence of child and slave labor in its supply chain. Plaintiffs contended that defendants' failure to disclose the likelihood of forced labor in their supply chain violated some state statutes.

In *Wirth v. Mars, Inc.*, the plaintiffs sued Mars, Inc. and others for violations of California's consumer protection laws. In their complaint, the plaintiffs argued that "defendants' material omissions and failure to disclose are all the more appalling considering that defendants have identified the protection of human rights, including the elimination of all forms of forced or compulsory labor, as an integral part of their human rights policies."<sup>248</sup> The plaintiffs pointed to the defendants' own corporate policies, codes of conduct, and guidance documents to business partners, with the references to the UNGPs and other international human rights instruments with the principles enshrined, showing that, the "defendants recognize that the use of slave labor [. . .] is wrong."<sup>249</sup> The District Court dismissed all of the plaintiffs' claims and the Ninth Circuit affirmed this dismissal. Although neither the District Court nor the Ninth Circuit referred to soft international law, the plaintiffs did refer to soft international law to buttress their position.

Later, in *Hodsdon v. Mars, Inc.*, the claimants referred to soft international law to argue the unfairness prong required for the domestic law claim. In *Hodsdon v. Mars, Inc.*, the District Court engaged the international human rights issues albeit on a limited basis. In dismissing the complaint, the District Court held that the plaintiff's general references to the "statements of international non-governmental organizations and U.S. legislators relative to the horrors of child labor" without "any reference to specific legislative or regulatory acts" could not satisfy the unfairness prong required for the Unfair

247. Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 885 (2007).

248. Pl. Compl. at 6, *Wirth v. Mars Inc.*, No. 8:15-cv-1470, (C.D. Cal. Feb. 5, 2016).

249. *Id.* at 17-21.

Competition Law.<sup>250</sup> The Ninth Circuit affirmed the lower court's dismissal and concluded that the "challenged action" of failure to disclose on labels was "too far removed" from the "legislative policy ['against child and slave labor']" and "there [was] not a close enough nexus between [the two]."<sup>251</sup>

In Kenya, petitioners referred to soft international law in *Kenneth Gona Karisa v. Top Steel Kenya Limited*, although the court did not rely on soft international law in its reasoning.<sup>252</sup> In this case, the petitioner alleged that the Top Steel Kenya Limited's human resources manager forcefully undressed him in the presence of others in breach of his constitutional rights, certain principles in soft international law—such as the UNGPs and the Global Compact. In particular, the petitioner claimed that the defendant failed to respect internationally proclaimed human rights to ensure that its operations were not complicit in human rights abuses as provided in the UNGPs.<sup>253</sup> The Constitutional Court found that it lacked jurisdiction because it was an employment dispute rather than a constitutional one. In the end, the court dismissed the case.

In Canada, in *Choc v. Hudbay Minerals Inc.*, the Ontario Superior Court considered whether a Canadian mining company could be held directly liable in negligence for alleged human rights impacts committed by contracted security personnel abroad.<sup>254</sup> Amnesty International submitted an amicus brief asserting that soft international law—such as the OECD Guidelines, the ILO's standards on corporate responsibility, and the UNGPs—all supported that corporations can be held directly liable. The court stated that "[t]hese documents have emphasized the heightened risk of becoming complicit in human rights violations in certain environments, such as conflict-affected areas."<sup>255</sup>

In sum, under the transnational movement against MNCs by claimants, other domestic courts can replicate the incorporation of soft international law in assessing similar claims against MNCs.

## 2. *The Recalibration of Causes of Action in Tortious Claims*

Arguably, US courts can refer to soft international law to interpret common law principles, in order to impose liabilities on MNCs. In *Tomasella v. Nestlé USA, Inc.*, regarding deception, the First Circuit Court held that MNC packaging omissions did not mislead consumers. There are two types of actionable omissions. The first is "half-truth,"<sup>256</sup> where an MNC omits information "necessary to prevent one of [their] affirmative statements from creating a misleading impression."<sup>257</sup> The second is when an MNC "remain[s] silent . . . under circumstances that constitute an implied but false representation."<sup>258</sup> They create a misleading impression about core features of the product without

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250. *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 866-67 (9th Cir. 2018).

251. *Id.* at 867.

252. See *Kenneth Gona Karisa v. Top Steel Kenya Limited* (2020) KLR ¶¶ 33, 35 (Kenya).

253. *Id.* ¶ 11.

254. *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414 ¶¶ 4, 18.

255. *Id.* ¶ 34.

256. *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60, 72 (1st Cir. 2020).

257. *Id.* (quoting *In the Matter of Int'l Harvester*, 104 F.T.C. 949, 1057 (1984)).

258. *Id.* (quoting *Int'l Harvester*, 104 F.T.C., at 1058).

speech—such as by presenting a used product as new.<sup>259</sup> The First Circuit stated that the manufacturers' omissions did not fit into either category for two reasons: the plaintiff did not allege any affirmative statements by MNCs about their labor practices on product packaging and MNC silence did not create any misleading impressions about the chocolate's core features.<sup>260</sup>

But the court overlooked that MNC publications in other locations could have played in generating consumers' misconceptions by restricting its deception inquiry to product packaging. While MNCs were silent about their labor practices on candy wrappers, they shared their practices in other forums. For instance, Nestlé Corporate Business Principles state that the company would "respect and promote human rights in [their] operations and entire value chain," in line with the UNGPs and the UN Global Compact.<sup>261</sup> They are also committed to soft international law, such as the Declaration and the OECD Guidelines.<sup>262</sup> Hershey's Supplier Code states that they would "operate in accordance with [their] endorsement of the UNGPs and [their] commitment to the Ten Principles of the UN Global Compact and the Sustainable Development Goals."<sup>263</sup>

Despite these commitments, MNCs publicly acknowledged their continued labor abuses and launched corporate remedial initiatives to stamp them out.<sup>264</sup> Nestlé recognized on its website that "there are children working on farms in Cote d'Ivoire in areas where [they] source cocoa."<sup>265</sup> Hershey conceded that "there is a potential for human and labor rights abuses occurring within our supply chain."<sup>266</sup> On its website, Mars stated that "child labor and trafficking are serious challenges facing many supply chains that originate in developing countries, particularly for the entire cocoa industry."<sup>267</sup>

Arguably, the court could pursue the route of half-truth to establish MNC liability. To establish liability based on deception, it is necessary to prove that MNCs' half-truths "ha[d] the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted."<sup>268</sup> In assessing deception, courts should adopt the holistic approach that examines the full range of MNC marketing campaigns to ascertain the overall information that consumers receive.<sup>269</sup> Given the strong

259. *Id.*

260. *Id.* at 74.

261. *Corporate Business Principles*, NESTLÉ, [https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/corporate\\_governance/corporate-business-principles-en.pdf](https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/corporate_governance/corporate-business-principles-en.pdf) [<https://perma.cc/J57Y-8636>] (last visited Dec. 26, 2025).

262. *Id.*

263. *The Hershey Supplier Code of Conduct*, HERSHEY, <https://www.thehersheycompany.com/content/dam/hersheyterms/supplier-code-of-conduct/supplier-code-of-conduct.pdf> [<https://perma.cc/X8MN-DQAM>] (last visited Dec. 26, 2025).

264. *Tomasella*, 962 F.3d at 66.

265. See *Tackling Child Labour in our Cocoa Supply Chain*, NESTLÉ, <https://www.nestle.com/sites/default/files/asset-library/documents/media/infographics/child-labour-cocoa-supply-chain-infographic.pdf> [<https://perma.cc/9KCL-W5CT>] (last visited Dec. 26, 2025).

266. Class Action Complaint ¶ 23, *Tomasella v. Hershey Co.*, 2018 WL 1051865 (D. Mass. Feb. 26, 2018) (No. 18-cv-10360).

267. *Id.* ¶ 21.

268. *Tomasella*, 962 F.3d at 71.

269. *Recent Cases*, 134 HARV. L. REV. 2257, 2265–66 (2021).

“representations prohibiting the use of child and slave labor, and given the materiality of labor abuses to some consumers,” these representations—whether online or on paper—could arguably “have misled reasonable consumers and caused them to purchase candy they otherwise would not have bought.”<sup>270</sup> MNCs may therefore face liability for telling only half the truth.

Such incorporation of soft international law and causes of action in common law can also apply in a series of green washing cases in the United States.<sup>271</sup> Today, as consumers focus more on how their consumption habits impact the environment, MNCs claim that their products are “green” even if these claims are dubious—a practice known as greenwashing. These statements can be deceptive and misleading to reasonable consumers because, through these statements, MNCs promise consumers that their products and actions avoid environmental harm, contribute to the restoration of a healthy planet and are better in every way of the planet; in reality, their actions and products may harm to the environment.

Here, MNCs may make statements to commit to soft international law, such as the UNGPs and the OECD Guidelines. For instance, in ExxonMobil’s report of “Respecting Human Rights,” it states that its policies and practices incorporate the UNGPs’ elements.<sup>272</sup> It also says that its practices are also guided by the goals of the Voluntary Principles on Security and Human Rights; U.N. Declaration on the Rights of Indigenous Peoples; and ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries. However, such commitment to soft international law can be false, deceptive, and misleading representations and omissions in tort. If MNCs had not misrepresented, omitted, concealed, or failed to disclose material facts regarding the sustainability and environmental impact of their products and actions, consumers either would not have purchased their products, or would have paid a lower price.

### 3. *The Rise of Regulatory Measures Referring to Soft International Law*

Regional or domestic regulations are rising and clearly state that an enterprise should be liable for its breach of due diligence obligations. The emerging regulations or guidelines—that refer to soft international law—can harden soft international law on MNCs. Pushed forward by various actors, domestic legislations on MNCs are ongoing. Now, the Netherlands,<sup>273</sup> France,<sup>274</sup>

270. *Id.* at 2265.

271. See *Berrin v. Delta Air Lines, Inc.*, 2024 WL 3304815 (C.D. Cal. Mar. 28, 2024); *Ellis v. Nike USA, Inc.*, 2024 WL 1344805 (E.D. Mo. Mar. 28, 2024); *Zajac v. United Airlines, Inc.*, 2024 WL 3784535 (D. Md. Aug. 13, 2024); *Simijanovic v. Koninklijke Luchtvaart Maatschappij N.V.*, 2024 WL 5059143 (E.D. Mich. Dec. 10, 2024); *Dorris v. Danone Waters of Am.*, 711 F. Supp. 3d 179 (S.D.N.Y. 2024).

272. *Respecting Human Rights*, EXXON MOBIL (Apr. 30, 2025) <https://corporate.exxonmobil.com/sustainability-and-reports/sustainability/safeguarding-people/respecting-human-rights> [<https://perma.cc/X6EX-P6VZ>].

273. *Wet Zorgplicht Kin-derarbeid* [Dutch Child Labour Due Diligence Act](2019) (Neth.). See ROUAS, *supra* note 77.

274. *Code de Commerce* (French Commerce Code) art. L 225-102-4 to -5 (Law No. 2017-399 of Mar. 27, 2017, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre)[French Law on the Corporate Duty of Vigilance].

Switzerland,<sup>275</sup> and Germany<sup>276</sup> have adopted their own due diligence laws to cover MNC obligations, even liabilities. In September 2022, forty-seven corporations, investors, and business associations jointly released a statement calling on the UK government to make a Human Rights and Environmental Due Diligence law.<sup>277</sup>

First, the emerging regulations mandating codes of conduct—that incorporate soft international law—can harden soft international law on MNCs. In the European level, the European Union's Corporate Sustainability Due Diligence Directive (CSDDD) entered into force on July 25, 2024.<sup>278</sup> Aiming to promote sustainability and ethical corporate conduct, it obliges businesses to align their strategies with the global agenda of mitigating climate change and promoting human rights. It creates a comprehensive framework for large corporations to identify, prevent, mitigate, and account for negative human rights and environmental impacts in their operations and supply chains beyond the first-tier of suppliers. The CSDDD requires that Member States shall ensure that companies integrate due diligence into all their relevant policies and risk management systems and have in place a due diligence policy that ensures risk-based due diligence.<sup>279</sup> Among these requirements, one requires companies to adopt codes of conduct,<sup>280</sup> which have been adopted by nearly 80 percent of European MNCs today.<sup>281</sup> The CSDDD states that the code of conduct must describe “rules and principles to be followed throughout the company and its subsidiaries, and the company's direct or indirect business partners.”<sup>282</sup>

Second, the importation of soft international law into domestic, nonbinding regulatory sphere can harden soft international law. Although these guidance are nonbinding, most U.S.-based MNCs comply with them in practice. On September 30, 2020, the U.S. State Department released its Guidance on

275. Swiss Code of Obligations art. 964j-64l, Dec. 3, 2021 [Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour; Section Eight: Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour], <https://www.swisslog.com/-/media/swisslog/documents/corporate/about-swisslog/purchasing/ddto-eng.pdf> [<https://perma.cc/D4TA-BFY9>]. See Palombo, *supra* note 165; Bueno & Kaufmann, *supra* note 72.

276. See SCDDA, *supra* note 73; see also David Weihrauch et al., *From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act*, REG. & Gov. 909 (2022).

277. *Calling for a New UK Law Mandating Human Rights and Environmental Due Diligence for Companies and Investors*, [https://media.business-humanrights.org/media/documents/UK\\_BUSINESS\\_STATEMENT\\_MHREDD\\_Sept22.pdf](https://media.business-humanrights.org/media/documents/UK_BUSINESS_STATEMENT_MHREDD_Sept22.pdf) [<https://perma.cc/BQ62-DZY9>] (last visited Dec. 26, 2025). The statement says: “[w]e call for the UK government to urgently bring forward ambitious primary legislation to mandate companies to carry out human rights and environmental due diligence. To level the playing field in practice, the requirement needs to be accompanied by consequences that will be strong enough to ensure that businesses that fall within the scope of the legislation carry out HREDD to a high standard and that victims have access to justice.”

278. Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, art. 7, 2024 O.J. (L 1760) (EU) [hereinafter “CSDDD”].

279. *Id.* art. 7 § 1.

280. *Id.* art. 7 § 2 (b).

281. Sarah Vandenbroucke et al., *Decoding Supplier Codes of Conduct with Content and Text as Data Approaches*, 31 CORP. SOC. RESP. & ENV'T MGMT. 472 (2024).

282. CSDDD, *supra* note 278, art. 7 §2 (b).



Implementing the UNGPs for Transactions Linked to Foreign Government.<sup>283</sup> The Guidance translates the UNGPs into practical and actionable steps for companies that work with dual-use technologies, particularly those products and services that can be misused to violate or abuse human rights or transactions that might be linked to foreign government end users.<sup>284</sup> Indeed, “businesses that implement this guidance will be better positioned to demonstrate to their stakeholders and the public at large their commitment to respect human rights.”<sup>285</sup> Later, the U.S. Department of Commerce Bureau of Industry and Security (BIS) released its guidance that affirmatively states that human rights concerns will be factored in when reviewing export license applications. It directs companies and exporters to the UNGPs and the U.S. State Department’s Guidance on Implementing the UNGPs when conducting human rights due diligence.<sup>286</sup>

On March 30, 2023, the U.S. Administration released a Code of Conduct, a non-binding document that outlines the commitments by subscribing states to take “human rights into account when reviewing potential exports of dual-use goods, software, and technologies that could be misused for the purposes of serious violations or abuses of human rights.”<sup>287</sup> In particular, the Code of Conduct calls on private actors to conduct due diligence in line with the UNGPs.<sup>288</sup>

In sum, domestic regulations are beginning to provide additional cause of actions for victims to bring claims against MNCs.

## Conclusion

This Article examines how soft international law on MNCs can be hardened in domestic courts by analyzing recent domestic cases in several states. It categorizes these privatizations into two typologies: incorporation into domestic statutes, and incorporation into common law principles. These typologies cover the application of soft international law in both common law and civil law context. The article then investigates whether such models can potentially spread globally. It argues that these typologies of hardening soft international law can be similarly applied in other states due to the increasing reference in

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283. U.S. Department of State Guidance on Implementing the “UN Guiding Principles” for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities, U.S. DEP’T OF STATE (Sept. 30, 2020), <https://2021-2025.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/due-diligence-guidance/> [https://perma.cc/5NLH-BYEW].

284. *Id.*

285. *Id.*

286. Bureau of Indus. & Sec., *Human Rights Frequently Asked Questions (FAQs)*, U.S. DEP’T OF COMMERCE (March 2023), <https://www.bis.gov/media/documents/2023-bis-human-rights-faqs.pdf-0> [https://perma.cc/2UUF-9755].

287. *Id.*

288. *Code of Conduct for Enhancing Export Controls of Goods and Technology that Could be Misused and Lead to Serious Violations or Abuses of Human Rights*, U.S. DEP’T OF STATE, <https://www.state.gov/wp-content/uploads/2023/03/230303-Updated-ECHRI-Code-of-Conduct-FINAL.pdf> [https://perma.cc/B9U8-AZ9C] (last visited Dec. 26, 2025).

briefs, the recalibration of causes of action in tortious claims, and the rise of regulatory measures referring to soft international law.

By detailing the mechanisms of hardening soft international law in domestic court, this Article explains the normative force of soft international law. It illustrates the specific channels through which soft international law can provide “some indirect legal effect through related binding obligations” under domestic law.<sup>289</sup> Soft international law can be incorporated into binding domestic law as an interpretation of either an existing domestic statute or as a common law doctrine. In addition, different from the traditional soft international law scholarship focusing on states’ behavior, this Article enlightens how soft international law can affect the behavior of private actors, MNCs in particular, across the world.

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289. Meyer, *supra* note 7, at 890.