Germany Takes Action on Corporate Due Diligence in Supply Chains: What the United States Can Learn From International Supply Chain Regulations

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GERMANY TAKES ACTION ON CORPORATE DUE DILIGENCE IN SUPPLY CHAINS: WHAT THE UNITED STATES CAN LEARN FROM INTERNATIONAL SUPPLY CHAIN REGULATIONS

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Abstract

This comment addresses the United States’ failure to pass comprehensive federal supply chain due diligence legislation. The United States presents itself as a global leader, but its failure to pass comprehensive supply chain due diligence legislation creates a gap in human rights due diligence that can lead to corporate human rights abuses. Although the United States has passed several human rights due diligence laws, a comprehensive federal law would be more effective at preventing corporate human rights abuses in the supply chains of business organizations that operate in the United States. This comment argues that American lawmakers should look to Germany’s recently passed Act on Corporate Due Diligence in Supply Chains as a model for comprehensive human rights supply chain due diligence legislation. First, the comment reviews the history of business and human rights, previous attempts at supply chain due diligence legislation in the United States, and current European due diligence legislation. Next, the comment analyzes the strengths and weaknesses of Germany’s Act on Corporate Due Diligence in Supply Chains and analyzes the recently enacted Uyghur Forced Labor Prevention Act. Finally, the comment argues that the United States should borrow the positive provisions from Germany’s Act on Corporate Due Diligence in Supply Chains, improve upon its weaknesses, and pass comprehensive federal legislation to reaffirm its position as a global leader in the elimination of corporate human rights abuses.

Table of Contents

I. Introduction ................................................... 191
II. Background ................................................... 191
A. The History of Business and Human Rights .......... 191
B. Overview of United Nations Guiding Principles on Business and Human Rights .......................... 192
C. Attempts at Supply Chain Due Diligence Legislation in the United States .................................. 193
D. Supply Chain Due Diligence Legislation in Europe .... 196
   i. France ................................................................ 196
   ii. Italy ................................................................ 197
   iii. United Kingdom .......................................... 197
III. Discussion ..................................................... 198

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Germany Takes Action on Corporate Due Diligence

A. Overview of Germany’s Act on Corporate Due Diligence in Supply Chains ............................................ 198
B. Human Rights Concerns in the German Supply Chain Act . 199
C. Environment Concerns in the German Supply Chain Act .... 199
D. Due Diligence Requirements in the German Supply Chain Act ....................................................... 200
E. Sanctions Under the German Supply Chain Act ............. 200
F. Positive Takeaways from the German Supply Chain Act ... 201
G. Weaknesses in the German Supply Chain Act .............. 201

IV. Analysis ...................................................... 202
A. Analysis of the Uyghur Forced Labor Prevention Act ....... 202
B. Gaps in Current United States Supply Chain Due Diligence Legislation................................................ 203

V. Proposal ...................................................... 204
A. Key Topics to Include in Any Future Supply Chain Due Diligence Legislation ...................................... 204
B. Other Concerns: Lobbying and Special Interest Groups ...... 207

Conclusion ................................................................ 208

I. Introduction

The German Parliament recently passed an act entitled, Act on Corporate Due Diligence in Supply Chains (“German Supply Chain Act” or “the Act”).¹ The German Supply Chain Act is designed to protect against human rights abuses in supply chains.² Both German and certain foreign companies are required to identify human rights and environmental risks in their supply chains and establish an effective plan to manage those risks.³ Importantly, the Act also references the United Nations Guiding Principles on Business and Human Rights (“Guiding Principles”).⁴

In contrast, the United States (“U.S.”) lacks a single, comprehensive federal law mandating human rights due diligence in supply chains, and although it has shown a strong commitment to the Guiding Principles, it has failed to introduce mandatory requirements for companies.⁵ This lack of federal supply chain due

² See INITIATIVE LIEFERKETTENGESETZ supra note 1, at 2.
³ Id. at 2-4 (stating that the Act currently applies to foreign business organizations that have a registered branch office in Germany and employ more than 3,000 people, and in 2024 will apply to companies that employ more than 1,000 people).
⁴ Id. at 2.
⁵ Tobias Koppmann et al., The New German Supply Chain Due Diligence Act (With a View Across the Border), NAT’l. L.R. at 1, 6 (Jul. 14, 2021), https://www.natlawreview.com/article/new-german-sup
diligence legislation creates a gap in supply chain human rights due diligence in the U.S. that can result in human rights abuses.

In addressing this regulatory gap, the Act can serve as a model for federal supply chain human rights due diligence legislation in the U.S. While the U.S. has passed several human rights due diligence laws, a comprehensive federal law would be more effective at addressing human rights abuses committed by domestic and foreign corporate organizations that operate in the U.S. The U.S. should implement the Guiding Principles, as discussed infra, and enact legislation that requires companies to conduct human rights due diligence reviews in their supply chains, using the Act as a model.

Part I of this comment will review the history of business and human rights, the Guiding Principles, previous attempts at supply chain due diligence legislation in the U.S., and current supply chain due diligence in select European countries. Part II will examine the German Supply Chain Act and discuss its human rights concern, due diligence requirements, and sanctions. Additionally, Part II will analyze the strengths and weaknesses of the Act. Part III will evaluate the Uyghur Forced Labor Prevention Act and examine current gaps in U.S. supply chain due diligence legislation. Part IV discusses key topics to include in any future federal U.S. supply chain due diligence legislation and lobbying concerns that might arise. Finally, Part V argues that the United States must pass comprehensive federal supply chain due diligence legislation in order to reclaim its role as a global human rights leader.

II. Background

A. The History of Business and Human Rights

From the 1950s through the end of the 20th century, international trade increased tremendously. Supply chains became more complicated, making it difficult for new transnational corporations to identify problems. For example, limited technology and other challenges in obtaining information prevented corporations from easily monitoring the people and materials in their supply chains. In response to the growth of multinational enterprises, the Organization for Economic Co-operation and Development ("OECD") introduced the OECD Guidelines for Multinational Enterprises ("OECD Guidelines") in 1976. During the
late twentieth century, as multinational enterprise and transnational corporations continued to grow, supply chains also became more and more complicated.\textsuperscript{11} The OECD Guidelines provide non-binding guidance for multinational enterprises to help them know how to operate responsibly in OECD territories.\textsuperscript{12}

After several years of research and consultations with various stakeholders, the United Nations recommended the Protect, Respect, and Remedy Framework (the "PRR Framework") for business and human rights in 2008.\textsuperscript{13} The PRR Framework acknowledges that both States and business organizations have responsibilities to protect against and prevent corporate human rights abuses.\textsuperscript{14} Importantly, in order to comply with their obligations under international human rights law, States must protect against human rights abuses by business organizations by preventing them where possible, and providing a functional remedy for victims when instances do arise.\textsuperscript{15} In 2011, the United Nations Human Rights Council sanctioned the Guiding Principles, which allowed the PRR Framework to be put into action.\textsuperscript{16}

B. Overview of United Nations Guiding Principles on Business and Human Rights

The Guiding Principles have three pillars: first, the State's obligation to prevent and protect against corporate human rights abuses; second, the corporate responsibility to prevent and protect against the same; and third, the need for access to effective remedies.\textsuperscript{17} The State's duty to protect human rights includes an obligation for States to clearly articulate the expectation that all business organizations protect against human rights abuses in both their domestic and international operations.\textsuperscript{18} For their part, States must meet their duty to protect against human rights abuses, and Principle 3(a) specifically asserts that States should "[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such

\footnotesize{\textsuperscript{11} See SEDEX, supra note 7.}


\footnotesize{\textsuperscript{14} The U.N. Guiding Principles on Business and Human Rights: An Introduction, supra note 13.}

\footnotesize{\textsuperscript{15} Id.}


\footnotesize{\textsuperscript{17} Guiding Principles, supra note 16, Principle 3 Comment.}

\footnotesize{\textsuperscript{18} Id. Principle 1.}
Germany Takes Action on Corporate Due Diligence

laws and address any gaps . . .” 19 The Guiding Principles also articulate corporate responsibility, stating in Principle 17:

"In order to identify, prevent, mitigate [sic] and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating [sic] and acting upon the findings, tracking responses, and communicating how impacts are addressed." 20

Although the Guiding Principles were endorsed unanimously among U.N. Member States, they are not binding, and companies frequently disregard them or institute ineffective measures in lackluster attempts at compliance. 21

C. Attempts at Supply Chain Due Diligence Legislation in the United States

In 2016, the United States produced a national action plan ("NAP") on business and human rights, but the plan required no federal legislation to implement the Guiding Principles. 22 Instead, the plan simply called for American companies “to implement the voluntary best practices contained in the . . . Guiding Principles . . . .” 23 Despite its failure to formally implement the Guiding Principles, the U.S. still has several regulations that apply to supply chain due diligence.

First, the California Transparency in Supply Chains Act of 2010 requires certain larger business organizations operating in California to include a disclosure on their websites detailing their “efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale.” 24 But the law does not require actual supply chain due diligence mechanisms – it simply requires disclosure. 25

Also, the Alien Tort Claims Act ("ATCA") provides federal courts with jurisdiction to hear cases with four elements: (1) a civil action, (2) taken by an alien, (3) for a tort, (4) “committed in violation of the laws of nations or a treaty of the United States." 26 In 1980, the Second Circuit held that non-U.S. citizens could access American courts by using the ATCA as a basis for claims relating to

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20 Id. Principle 17.
22 First National Action Plan for the United States of America, U.S. SEC’Y OF STATE 1, 1 (Dec. 16, 2016), https://mkglobalnapshvfi4.kinstacdn.com/wp-content/uploads/2017/10/NAP-USA.pdf; Lehr, supra note 5; ICAR, supra note 5, at preface, 8, 9-12 (explaining that the U.S.’s “NAP is heavily skewed towards voluntary measures, guidance, trainings, outreach, funding, and dialogue, and is severely lacking in commitments to new regulatory measures;” id. at 8.).
24 CAL. CIV. CODE § 1714.43(a), (b) (2010).
Germany Takes Action on Corporate Due Diligence

violations of universally recognized norms of international human rights law, such as politically-motivated torture.27 However, the Supreme Court recently limited the scope of the ATCA in *Nestle USA, Inc. v. Doe*, holding that “allegations of general corporate activity – like decision-making – cannot alone establish domestic application of the [ATCA].”28

Further, the United States Congress (“Congress”) recently but unsuccessfully attempted to introduce several comprehensive federal statutes. First, in 2019, Congress introduced the draft Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act,29 which aimed to require publicly listed U.S. companies to make mandatory human rights disclosures.30 Under the proposed legislation, companies would be required to file an annual report with the Securities and Exchange Commission listing risks to human rights within their operations and providing information on prevention strategies.31 However, the bill has not made any progress since it was originally introduced.32

Then in 2020, Congress again attempted to mandate human rights due diligence by introducing the Business Supply Chain Transparency on Trafficking and Slavery Act which aimed to “amend the Securities Exchange Act of 1934 to require certain companies to disclose information describing any measures the company has taken to identify and address conditions of forced labor, slavery,

27 STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10147, THE RISE AND DECLINE OF THE ALIEN TORT STATUTE 1, 2 (Jun. 6, 2018). In 1976, Joelito Filartiga was kidnapped, tortured, and murdered by Americo Norberto Pena-Irala ("Pena"). The Filartiga family filed a criminal complaint for Joelito's death in the Paraguayan court system, but the case did not make any progress. In 1978, Pena moved to the United States on a visitor's visa. Dolly Filartiga, Joelito's sister, learned that Pena was in the United States in violation of the term his visitor's visa and reported him to the Immigration and Naturalization Service. While Pena was being held in an immigration detention center in Brooklyn, New York, United States, the Filartigas served him with process. The district judge dismissed the case for lack of federal jurisdiction. However, the appellate court reversed, holding "that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within [U.S.] borders, [the ATCA] provides federal jurisdiction.” See *Filartiga v. Pena-Irala*, 630 F.2d 876, 878-80, 887-88 (2d Cir. 1980).


32 GIBSON DUNN, supra note 29.
Germany Takes Action on Corporate Due Diligence

human trafficking, and the worst forms of child labor within the company's supply chains.\(^{33}\) However, the draft bill did not make it out of committee.\(^{34}\)

Finally, the draft Slave-Free Business Certification Act was also introduced in 2020, whose purpose was to "require certain businesses to disclose the use of forced labor in their direct supply chain, and for other purposes."\(^{35}\) However, the bill similarly made no progress in Congress.\(^{36}\)

On the other hand, some federal U.S. legislation may apply to supply chain due diligence. Section 307 of the Tariff Act of 1930 prohibits the importation of any product that was "mined, produced, or manufactured" by forced labor, including forced child labor.\(^{37}\) In 2015, Congress passed the Trade Facilitation and Trade Enforcement Act ("TFTEA"), which amended Section 307 and eliminated the "'consumptive demand' exception."\(^{38}\) The consumptive demand exception made it easier to import certain goods that were in high demand but not domestically produced in sufficient enough quantities to meet that demand, regardless of forced labor concerns.\(^{39}\)

Section 307 enforcement generally increased after TFTEA was enacted.\(^{40}\) The United States Customs and Border Control ("CBP") has since issued dozens of withhold release orders ("WROs"), which prevent goods produced by or possibly produced by forced labor from entering into the United States.\(^{41}\) Although WROs are normally only issued for certain products or manufacturers, CBP has recently started issuing WROs that apply to entire industries and countries.\(^{42}\) Importantly, most WROs since 1990 have been issued in relation to Chinese-produced products, and recent Section 307 actions have followed the same trend.\(^{43}\)

In response to the Chinese government's horrendous treatment of the Uyghur and other minorities, Congress recently passed crimes against humanity against Uyghurs and other ethnic minorities, Congress passed legislation specifically targeting goods produced in Xinjiang, China.\(^{44}\) The Uyghur Forced Labor Pre-


\(^{39}\) Cimino-Issacs, supra note 38, preface.

\(^{40}\) Id. at 7.

\(^{41}\) Id. at 1.

\(^{42}\) Id.

\(^{43}\) Id. at 7.

\(^{44}\) See, e.g., United States Holocaust Memorial Museum's Simon-Skjodt Center for the Prevention of Genocide, "To Make Us Slowly Disappear": The Chinese Government's Assault on the Uyghurs 36, 44, 50 (Nov. 2021) ("[T]he persecution, mass detentions, and enforced sterilizations of
Germany Takes Action on Corporate Due Diligence

vention Act ("Uyghur Act"), almost unanimously supported in Congress, is the first comprehensive effort to require certain supply chain due diligence.\textsuperscript{45} The Uyghur Act is very broad and could impact a wide variety of products, including cotton, petroleum, minerals, and sugar, that pass through or derive from Xinjiang.\textsuperscript{46}

As discussed \textit{infra}, some provisions of the Uyghur Act mirror the German Supply Chain Act. For example, the burden of proof is placed on corporations, not customs officials, to prove that their Chinese factories and suppliers do not use forced labor.\textsuperscript{47} If companies can provide clear and convincing evidence that their goods were not made using forced labor, CBP will allow the goods to enter the United States.\textsuperscript{48}

D. Supply Chain Due Diligence Legislation in Europe

In July 2021, the European External Action Service, the diplomatic arm of the European Union ("E.U."), published guidance for E.U. companies on the prevention of human rights abuses, particularly forced labor, in supply chains.\textsuperscript{49} The guidance provides information on how to implement supply chain due diligence procedures in accordance with relevant international standards.\textsuperscript{50} This document is simply guidance and does not bind members of the E.U. to any specific procedures.\textsuperscript{51} Prior to the issuance of this guidance, however, several current and former E.U. members, including France, Italy and the United Kingdom, had passed legislation addressing the risk of human rights abuses in supply chains.\textsuperscript{52}

i. France

In 2017, France passed the Duty of Vigilance Act, which requires French-registered companies and foreign companies with French subsidiaries to publish an annual "vigilance plan" detailing their impact on human rights and the envi-

the Uyghur population are not only crimes against humanity, but also represent a serious risk of a genocide occurring or in progress. The persecution of the Uyghurs, and all of the underlying acts that comprise that persecution, show a clear pattern of discrimination against the Uyghurs on the basis of their ethnicity and religion," \textit{id.} at 44).  


\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.}


\textsuperscript{51} \textit{Id.} at 2, n.7.

\textsuperscript{52} See Koppmann, \textit{supra} note 5.
Germany Takes Action on Corporate Due Diligence

Business organizations subject to the Duty of Vigilance Act must also analyze the impact of their subsidiaries, suppliers, and subcontractors. The vigilance plans will likely need to include information such as procedures for conducting regular human rights risk assessments, procedures for conducting regular reviews of the potential risks associated with "subsidiaries, subcontractors, and suppliers with which the company has a commercial relationship," certain mitigation and/or prevention actions, warning mechanisms, and mechanisms to analyze the plan’s efficacy. Additionally, the Duty of Vigilance Act provides a remedy mechanism – if a victim can show that a company’s failure to institute a vigilance plan caused them harm, the company is liable.

ii. Italy

Italy has not codified the Guiding Principles, but in 2016 the Italian government announced its NAP, which included its intent to implement corporate due diligence requirements. Under this NAP, Italy is reviewing a 2001 law that assigned corporate responsibility for human rights abuses committed domestically and abroad. However, this legislation is not perfect and would likely not meet the standards outlined in the U.N. Guiding Principle because it provides business organizations with the ability to avoid liability by simply creating a compliance program. Despite the liability avoidance provision, it is theoretically possible that a corporation could be liable for human rights violations committed in its supply chains if human rights abuses were present and it did not have a compliance program.

iii. United Kingdom

In 2015, the United Kingdom passed the Modern Slavery Act. Modern slavery is defined as "'slavery, servitude [sic] and forced or compulsory labor,' and

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54 Altschuller & Lehr, supra note 53.

55 Id.


58 ITUC, supra note 56, at 9.

59 Id.

60 Modern Slavery Act 2015, c. 30 (UK).
Germany Takes Action on Corporate Due Diligence

"human trafficking." The Modern Slavery Act requires certain business organizations to create an annual statement detailing their efforts to combat human rights abuses in their supply chains and post the report conspicuously on the homepage of their website. Although the Modern Slavery Act does not prescribe what exactly must be provided in the statement, it provides a list of information that organizations may consider including in their statements. This list suggests including information about the organization’s business structure and supply chains, its human rights policies and due diligence procedures, areas of risk in their supply chains, and the effectiveness of their due diligence procedures. Although the Modern Slavery Act represents significant progress in supply chain due diligence legislation, it is not as comprehensive as the German Supply Chain Act.

III. Discussion

A. Overview of Germany’s Act on Corporate Due Diligence in Supply Chains

Germany passed the German Supply Chain Act in July 2021, and it will enter into force in 2023. The Act references the Guiding Principles and aims to protect the human rights of people involved with global supply chains and increase compliance with certain environmental conventions.

Initially, the Act will only apply to companies with 3,000 or more employees that “have their central administration, their principal place of business, their administrative headquarters, or their statutory seat in Germany.” Subsequently, starting in 2024 the Act’s coverage expands to include German companies with 1,000 or more employees. The employee headcount includes temporary workers who are employed for at least six months and employees who work outside of Germany.

The Act will require relevant business organizations to conduct periodic supply chain risk assessments and publish annual reports on the status of their re-

62 Id. at 5, 14 (the Act requires such a statement from “[e]very organisation carrying on a business in the UK with a total annual turnover of £36m or more”).
63 Id. at 12.
64 Id.
66 INITIATIVE LIEFERKETTENGESETZ, supra note 1, at 2-4.
67 German Supply Chain Act § 1.
68 INITIATIVE LIEFERKETTENGESETZ, supra note 1, at 2.
69 German Supply Chain Act §§ 1(1), (2).
Germany Takes Action on Corporate Due Diligence

To respond to any risks identified. If those entities fail to comply with the law, the German government can take administrative action or levy monetary penalties.

B. Human Rights Concerns in the German Supply Chain Act

Section 2 of the Act defines a “human rights risk” as a factual situation in which a “sufficient probability” exists that would give rise to an “imminent” violation of one of a list of prohibited situations involving human beings. That list includes: illegally employing an individual who is fifteen years of age or younger; using forced labor or slavery, including for children; illegal disregard of safety requirements; disregard of employees’ rights to associate, including unionization; discriminatory employment or wage granting practices on specified grounds; and, using security forces to protect business projects if those forces commit human rights abuses, among others. Some of the risks relating to human rights also overlap with the risks relating to the environment, as noted below.

C. Environmental Concerns in the German Supply Chain Act

Similarly, the Act in Section 2 defines an “environment-related risk” as a factual situation in which a “sufficient probability” exists that would give rise to a violation of one of a list of prohibited environmental situations. Some environmental risk prohibitions include: bans relating to mercury compounds and waste in accordance with the Minamata Convention; bans on the use and storage of chemicals in accordance with the Stockholm Convention and its Annex A on Persistent Organic Pollutants (“POPs Convention”); and, bans on the export and import of hazardous waste in accordance with the Basel Convention. Additionally, human rights and environmental risks overlap, as the Act also prohibits:

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71 Id.; Gesley, supra note 65 (fines and penalties vary: “[l]arge companies with an annual global turnover of 400 million euros (about US$475 million) can be required to pay fines of up to 2% of their annual global turnover [and c]ompanies that have been fined a minimum of 175,000 euros (about US208,000) can be excluded from public procurement for up to three years.”).

72 German Supply Chain Act § 2(2).

73 Id.

74 Id.

75 Id.

76 Id. at § 2(3). Persistent organic pollutants, or compounds, known as POPs, are toxic chemicals that impact human health and the environment because they do not readily break down and can persist in and be passed through the food chain. Further, POPs can impact countries where they were not originally used because they are easily transported by wind and water. Consequently, in 2001 countries agreed to reduce the production, use, and release of certain POPs via the Stockholm Convention. The U.S. is a signatory. See Persistent Organic Pollutants: A Global Issue, A Global Response, U.S. ENV'TL PROT. AGENCY (updated Dec. 2009), https://www.epa.gov/international-cooperation/persistent-organic-pollutants-global-issue-global-response.
Germany Takes Action on Corporate Due Diligence

[...causing harmful soil alteration, water pollution, air pollution, harmful noise emission or excessive water consumption, which is likely to; (a) significantly affect the natural basis for the preservation and production of food, (b) deny a person access to safe drinking water, (c) impede or destroy a person’s access to sanitary facilities, or (d) harm the health of a person.]

D. Due Diligence Requirements in the German Supply Chain Act

Companies falling under the Act must set up due diligence procedures to protect human rights and environmental considerations in their global supply chains. The due diligence obligations include:

1. establishing a risk management system,
2. designating a responsible person or persons within the enterprise,
3. performing regular risk analyses,
4. issuing a policy statement,
5. laying down preventative measures in its own area of business and vis-à-vis direct suppliers,
6. taking remedial action,
7. establishing a complaints procedure,
8. implementing due diligence obligations with regard to risks at indirect suppliers,
9. documenting and reporting.

In order to comply with the documentation and reporting requirements, business organizations controlled by the act must post a free-of-charge, publicly available due diligence report on their websites.

E. Sanctions Under the German Supply Chain Act

Under the Act, business organizations that fail to comply with its provisions may be subject to financial penalties, administrative fines, or other sanctions. Business organizations with an annual income of more than 400 million (approximately $475 million) can be fined up to 2% of that annual income. Additionally, business organizations that fail to comply may be administratively punished by being prohibited from bidding on public contracts. Unfortunately, companies that violate the Act cannot be held liable in civil court, but individuals

78 German Supply Chain Act § 3(1).
79 Gesley, supra note 65.
80 German Supply Chain Act §§ 23, 24.
81 Id. § 24(3).
82 Id. § 22(1).
Germany Takes Action on Corporate Due Diligence

may pursue a claim under other existing and independent civil liability provisions.83

F. Positive Takeaways from the German Supply Chain Act

The Act marks an overdue turn away from voluntary corporate self-regulation to legally binding supply chain due diligence regulation.84 Now, relevant business organizations are legally required to account for human rights risks within their entire supply chains, which helps protect “paramount legal interests.”85 The Act also has an important preventative effect because it requires companies to take proactive measures to protect against human rights abuses and environmental destruction, rather than only addressing remedies for violations that have already occurred.86 Finally, the Act carries substantial penalties,87 which helps guarantee corporate compliance.88

G. Weaknesses in the German Supply Chain Act

However, the Act is not as effective as it could be.89 First, the due diligence obligations do not apply to indirect suppliers.90 Despite the fact that many human rights violations occur in indirect supply chains, relevant business organizations are only required to conduct a risk assessment for an indirect supplier if they have “substantiated knowledge” of potential human rights abuse.91 This limitation is not in line with the Guiding Principles, because companies cannot fully prevent human rights violations if they are not routinely reviewing their indirect supply chains for potential risks.92 Additionally, as mentioned supra, the Act

83 German Supply Chain Act § 3(3); see also Robert Grabosch, The Supply Chain Due Diligence Act, FRIEDRICH EBERT STIFTUNG 6 (2021), http://library.fes.de/pdf-files/iez/18755.pdf (“Due to the Rome-II-Regulation of the E.U. [dictating choice of law in transnational disputes], German law is rarely applicable to claims for damages, since foreign law regularly applies to damages sustained abroad. Civil liability under foreign law generally requires a finding of fault, [which] means a violation of due diligence duties. Thus, a civil court would have to at least consider [the German Supply Chain Act] due diligence duties which apply to the production facilities of German companies, since due diligence duties are rules of conduct under Art. 17 Rome-II-VO. An argument can be made that civil courts have to apply [German Supply Chain Act] duties as [an overriding rule] in the context of cross-border disputes (Art. 16 Rome-II-VO).”).

84 INITIATIVE LIEFERKETTENGESETZ, supra note 1, at 6.

85 Id. at 3.

86 See German Supply Chain Act § 6.

87 INITIATIVE LIEFERKETTENGESETZ, supra note 1, at 3.

88 German Supply Chain Act §§ 21(1), 23, 24(3) (corporations not in compliance risk exclusion from government contract awards [§21(1)], financial penalties [§23], and administrative fines [§24(3)]).

89 See INITIATIVE LIEFERKETTENGESETZ, supra note 1, at 4.

90 Id.

91 Id.

92 See INITIATIVE LIEFERKETTENGESETZ, supra note 1, at 4; Guiding Principles, supra note 16, Principle 12 Comment. (“Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review.”).
Germany Takes Action on Corporate Due Diligence

does not create civil liability for business organizations that violate its provisions, and this limits the ability of injured parties to successfully bring a claim against a business organization and inhibits the Act’s deterrent effect.\(^{93}\) Further, the Act does not require covered business organizations to consult with relevant groups to evaluate their human rights risks, which does not reflect the Guiding Principles.\(^{94}\)

Finally, the Act does not provide a comprehensive environmental due diligence obligation because it only requires relevant business organizations to comply with three conventions (as noted \textit{supra}, the POPs Convention, Minamata Convention, and Basel Convention).\(^{95}\) It also fails to address biodiversity loss and climate change, both of which are negatively impacted by the global supply chain.\(^{96}\) Domestic civic groups also weighed in on the environmental due diligence portion of the Act, criticizing its failure to impose a general environmental protection obligation.\(^{97}\)

The Act’s shortcomings are partly attributable to the work of business interest groups who were able to the influence German lawmakers to weaken certain portions of the Act.\(^{98}\) However, the Act is still an admirable step in the right direction,\(^{99}\) and may serve as a model for comprehensive U.S. legislation, especially when considered in conjunction with certain aspects of the Uyghur Act and Guiding Principles.

IV. Analysis

A. Analysis of the Uyghur Forced Labor Prevention Act

The Uyghur Act directs the Forced Labor Enforcement Task Force ("Task Force")\(^{100}\) to develop a plan to curtail U.S. importation of goods produced or manufactured using forced labor in the Xinjiang region of China.\(^{101}\) The Task Force will submit a report following a planning period, which will include a list of business entities in Xinjiang that use forced labor, a list of entities working with the Chinese government to impose forced labor on minority populations in

\(^{93}\) \textit{Initiative Lieferkettenge setz}, \textit{supra} note 1, at 4

\(^{94}\) \textit{Id.} at 5; \textit{Guiding Principles}, \textit{supra} note 16, Principle 18(b); Principle 18 Comment.; Principle 21 Comment.

\(^{95}\) \textit{German Supply Chain Act} § 2(3).

\(^{96}\) \textit{Initiative Lieferkettenge setz}, \textit{supra} note 1, at 6.

\(^{97}\) Schilling-Vacaflor, \textit{supra} note 77, at 8 (Germany’s Green Party submitted an amendment to the Act, arguing that the amendment should be adopted because it “enable[d] comprehensive protection of the environmental goods soil, air, water, biodiversity and global climate in the sense of the precautionary principle [. . .]. This also [would have] provide[d] preventive protection of human rights arising from cumulative and creeping environmental degradation.” The amendment was rejected by vote in the German Parliament).

\(^{98}\) \textit{Id.} at 4.

\(^{99}\) \textit{Initiative Lieferkettenge setz}, \textit{supra} note 1, at 6.


\(^{101}\) \textit{Id.} § 2.
Germany Takes Action on Corporate Due Diligence

that region, a list of products made with forced labor, a list of entities that have previously exported into the United States products made using Chinese forced labor, and a list of facilities that obtain materials from the Xinjiang region.102 The Task Force also must submit plans to identify additional facilities and sectors that might be covered by the Uyghur Act and create enforcement plans for the identified facilities and sectors.103 Further, the Task Force will make recommendations as to how CBP can best prevent forced labor products from the Xinjiang region from entering the U.S.104 Finally, the Task Force will provide guidance to importers, including due diligence recommendations, and supply chain tracing and management suggestions, to assist importers in complying with this mandate.105 The Task Force has 180 days after ratification of the Uyghur Act to submit its report to Congress.106

The Uyghur Act also creates the rebuttable presumption that goods produced in or sourced from the Xinjiang region are assumed to be in violation of Section 307 of the Tariff Act (i.e., that they were produced with forced labor) and cannot be imported into the United States.107 This presumption may be rebutted if CBP establishes that: (1) the importer has fully complied with the Act’s guidance on effective due diligence measures for importers under Section 2(d)(6); (2) it has adequately responded to all CBP inquiries; and, (3) CBP has clear and convincing evidence that the relevant goods were not produced using forced labor.108

Although the Uyghur Act shows that Congress is willing and able to produce meaningful supply chain due diligence legislation, it is, by definition, limited in its geographical application and will only prevent human rights abuses in this specific region.

B. Gaps in Current United States Supply Chain Due Diligence Legislation

Although businesses have a general responsibility to exercise reasonable care when importing goods into the United States, including a responsibility to take effective measures to ensure that imported goods were not produced with forced labor,109 a number of prominent American companies still have forced labor in their supply chains.110 For example, Apple and Nike have both been accused of

102 Uyghur Act, supra note 101, at § 2.
103 Id.
105 Id.
106 Uyghur Act §2(e). This statutory period expires in June 2022.
107 Id. §3.
108 Uyghur Act §3.
Germany Takes Action on Corporate Due Diligence

sourcing from factories in China that utilize forced Uyghur labor. Ideally, as a result of the passage of the Uyghur Act, the companies benefiting from forced Uyghur labor will begin shifting production out of Xinjiang to other countries or regions where forced labor is not present in the supply chain. However, simply shifting production or sourcing to another country will not resolve these human rights issues, as forced labor is present in the supply chain of many other countries. For instance, Cargill, Nestlé, Hershey, and other large international chocolate companies were accused of supply chain human rights abuses and sued after they allegedly sourced cocoa beans from plantations in Ivory Coast that were harvested by child slaves.

As discussed infra, some U.S. state and federal regulations apply to supply chain due diligence issues, but any existing legislation fails to fully guarantee that supply chains are free from human rights abuses, and further fails to assign responsibility to business enterprises. State statutes, like the California Transparency in Supply Chains Act of 2010, are generally inefficient. Creating comprehensive federal legislation would standardize guidelines, provide adequate notice, and ensure uniform enforcement.

V. Proposal

Act would significantly curb supply chain human rights abuses. Although the Act is not perfect, many of its provisions should be replicated in future United States federal statutes.

A. Key Topics to Include in Any Future Supply Chain Due Diligence Legislation

U.S. legislators looking to create federal due diligence legislation should look to the German Supply Chain Act, Uyghur Act, and Guiding Principles for direction. First, American lawmakers should look to incorporate the Guiding Princ-
Germany Takes Action on Corporate Due Diligence

ples into any new supply chain due diligence law. The German Supply Chain Act reflects the Guiding Principles, and any future U.S. legislation should as well. Importantly, the U.N. Guiding Principle, Principle 17, states that “[h]uman rights due diligence (a) should cover adverse human rights impacts that [a] business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.” This language, or similar language, must be included in legislation to indicate that the United States is incorporating the Guiding Principles.

Second, American lawmakers should replicate the applicability portion of the German Supply Chain Act, and explicitly state that both foreign and domestic companies that operate in the United States are required to conduct supply chain due diligence. Additionally, the American legislation should extend applicability to smaller companies. Creating a plan that mandates progressive compliance, such as requiring companies with 500 employees to comply by 2025, companies with 250 employees to comply by 2026, and so on, would help to capture more business organizations that operate in the United States.

Third, any proposed legislation should also include a comprehensive environmental due diligence component. This is an area where the German Supply Chain Act falls short. Specifically, the Act limits the number of environmental treaties with which corporations must comply to three. American lawmakers must include a more comprehensive general clause relating to environmental damages. This general clause would require companies to consider any potential environmental risks in their supply chains, rather than focusing on only a few conventions. Further, the clause should establish a general requirement to protect the environment, rather than only covering environmental damages when they infringe upon human rights. Including a general clause ensures mitigation of more environmental risks and eliminates uncertainty about which conventions should be chosen.

Fourth, American lawmakers should review the Uyghur Act and use some of its more crucial provisions as a model. Lawmakers may follow the Task Force model outlined in the Uyghur Act to focus on, for example, countries with the most slaves. Any proposed legislation should create a Task Force focused on

116 FED. REPUBLIC OF GERMANY, FED. FOREIGN OFF., PROGRESS ON IMPLEMENTATION OF THE NATIONAL ACTION PLAN FOR BUSINESS AND HUMAN RIGHTS (Aug. 13, 2021), https://www.auswaertiges-amt.de/en/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/adoption-nap/2477156 (specifically, Germany’s incorporation of its National Action Plan, or NAP, as mandated under the Guiding Principles was key to effectively implementing and monitoring implementation of the Guiding Principles, and that it was crucial to eventually creating the German Supply Chain Act).

117 Guiding Principles, supra note 16, Principle 17(a).

118 German Supply Chain Act § 2(3).

119 Uyghur Act § 2.

120 Arantxa Underwood, Which Countries Have the Highest Rates of Modern Slavery and Most Victims?, THOMSON REUTERS FOUND. NEWS (Jul. 30, 2018, 12:01 AM), http://news.trust.org/item/20180730000101-aj7ui/ (“North Korea has the world’s highest rate of slavery, with about one in 10 people enslaved, followed by Eritrea (9.3%) Burundi (4%), Central African Republic (2.2%), Afghanistan (2.2%), Mauritania (2.1%), South Sudan (2%), Pakistan (1.7%), Cambodia (1.7%) and Iran (1.6%). India is home to the largest number of slaves globally, with 8 million, followed by China (3.86 million), Pakistan (3.19 million), North Korea (2.64 million), Nigeria (1.39 million), Iran (1.29 million), Indonesia

Volume 18, Issue 2  Loyola University Chicago International Law Review  205
Germany Takes Action on Corporate Due Diligence

these and similarly compromised countries, mirroring the process outlined in the Uyghur Act. Further, future legislation should adopt the Uyghur Act provision that shifts the burden of proof to business enterprises. Corporations subject to such a provision would be required to prove that their supply chains, direct and indirect, do not contain human rights abuses, rather than placing the burden to prove the existence of human rights abuses on CBP or another governmental entity.

Fifth, Congress must also adopt some of the administrative measures that are outlined in the German Supply Chain Act. American lawmakers should require businesses to establish human rights risk management systems, conduct regular human rights risk assessments, and produce publicly available human rights policy statements. Additionally, American lawmakers should improve upon the Act and include a provision extending applicability to indirect suppliers. This expansion will ensure that more human rights abuses and environmental risks are prevented because businesses will be required to review their entire supply chains. Ensuring that indirect suppliers do not have human rights abuses in their supply chains will be an arduous task for many companies, but the legislation can allow for more time to formulate a plan for recognizing, preventing, and mitigating human rights abuses and environmental risks related to indirect suppliers.

Finally, American lawmakers must include an effective remediation mechanism for affected parties. The Guiding Principles recommend that businesses create a remediation mechanism for any human rights abuses that they assist in perpetuating. U.S. lawmakers may mirror other U.N. remediation mechanisms, such as those used by the U.N. Human Rights Committee, to submit complaints alleging supply chain human rights abuses or environmental destruction. The complaint procedure would allow individuals, including non-U.S. citizens, to file complaints against American companies who have allegedly violated the supply chain due diligence legislation. An independent governmental committee within

121 Charlie Mahoney & Mona Patni, Chart of the Week: Companies That Provide Human Rights Disclosure Outperform Those That Don’t, JUST CAPITAL (May 20, 2021), https://justcapital.com/news/chart-of-the-week-companies-that-provide-human-rights-disclosure-outperform-those-that-dont/ (explaining that in 2021, independent nonprofit Just Capital, an independent nonprofit that tracks large corporations on how they perform on the public’s priorities, ranked 928 American corporations and found only 458 provide a supplier code of conduct or a human rights policy statement).


123 The Human Rights Committee considers individual complaints that concern States who are parties to both the International Covenant on Civil and Political Rights and the Optional Protocol. The Human Rights Committee decides the petitions in closed door meetings, but the Committee considers the opinions of non-governmental organizations (“NGOs”). NGOs may comment on individual complaints before the Committee renders its decision, and are allowed to make suggestions. After the Human Rights Committee has made its final decision, the Special Rapporteur on Follow-up to Views requests information to determine whether the issue was actually addressed. Klaus Hufner, GERMAN COMM’N FOR U.N. EDUC., SCI. & CULTURAL. ORG. (UNESCO), How to File Complaints on Human Rights Violations: A Manual for Individuals and NGOs, 58-60, 64-65 (2010). For an overview of how human rights issues are raised with the U.N. pursuant to any of the nine “core” relevant human rights treaties, see Individual Communications: Human Rights Treaty Bodies, OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., https://www.ohchr.org/en/treaty-bodies/individual-communications#overviewprocedure (last visited Apr. 23, 2022).
CBP would review the complaint and respond, and NGOs will be encouraged to participate. Decisions would mandate follow up with the business enterprise to determine whether they implemented the recommendations should a business enterprise be found guilty of violating the legislation.

Further, the remediation mechanism should provide for damages for victims, as well as the possibility of civil liability. A civil liability provision would ensure that injured parties have at least some opportunity to bring a successful claim against an American business enterprise for human rights violations or environmental harm. More importantly, such a provision would increase the deterrent effect of the legislation and subsequently increase preventative effect on businesses operating in the United States. Lastly, Congress should include a provision allowing fines to be levied against companies that violate the regulations. The German Supply Chain Act provides an example of proportional fines based on the size of the company that could be modeled.124

B. Other Concerns: Lobbyist and Special Interest Groups

Lobbying will likely play a role in the shaping of any new federal supply chain due diligence legislation in the United States.125 Germany ran into special interest issues when certain business groups, the Christian Democratic Union Economic Council, and its Federal Minister for Economic and Foreign Affairs and Energy pressured the German Parliament to weaken certain portions of the German Supply Chain Act.126 Considering the power of lobbying groups in the United States, it is inevitable that lobbyists and special interest groups will try to water down any supply chain due diligence legislation, and so American lawmakers should anticipate pressure from lobbyists.127 Lobbying reform is not the focus of this article, but it is something that American lawmakers can think about in tandem with any future supply chain legislation. Until major reforms happen, Americans should vote for candidates who are committed to rebuffing

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124 German Supply Chain Act § 24(3) ("legal persons with an average annual [income] of more than 400 million euros, a regulatory offence . . . may be punished with an administrative fine of up to 2 percent of the average annual [income]. . ."). id. § 24(4) ("[t]he economic circumstances of the legal person or association of persons are to be taken into account in the assessment [of administrative fines to be levied].").

125 AMNESTY INT’L, INJUSTICE INCORPORATED: CORPORATE ABUSES AND THE HUMAN RIGHT TO REMEDY 180-83 (2014) (explaining that, while a lack of transparency makes the impact of corporate influence difficult to ascertain, the effects of lobbying can be seen even when there is no insight into the closed-door meetings between lobbyists and government officials. For example, in 2012, Shell Oil Company received approval for its plan to drill for oil in the Arctic after hiring retired senators as lobbyists. It repeatedly sent them to the White House, and “maintained a steady flow of visits, letters and calls” with the agencies whose permit approval was required).

126 INITIATIVE LEIFERKETTENGESETZ, supra note 1, at 4.

127 Mike Tanglis, The Price of Zero: A Look at What $450 Million in Political Spending by 55 Corporations that Paid Zero Federal Corporate Income Tax, PUB. CITIZEN 4, 7 (2021) (In 2021, Public Citizen released a report detailing the political spending of fifty-five of some of the largest corporations in the U.S. Between 2015 and 2020 these fifty-five corporations employed an average of 526 lobbyists and spent $408 million on lobbying the federal government. It is estimated that their efforts successfully allowed these corporations to avoid $8.5 billion in taxes through related implemented regulations.).
Germany Takes Action on Corporate Due Diligence

lobbyists and corporate special interest groups. Additionally, present and future members of Congress should consider addressing these issues in their campaigns.

Conclusion

President Barack Obama's Administration identified global development as “a core pillar of American power” and acknowledged it “as a . . . moral imperative for the United States.” After some backsliding during former President Donald Trump’s Administration, current President Joe Biden reaffirmed that “restore[ing] American leadership on the global stage” meant overhauling strategic global development plans and increasing the foreign affairs budget by nearly $7 billion. Despite this substantial commitment, the United States still lacks a single, comprehensive federal law mandating human rights due diligence in supply chains. This lack of federal supply chain due diligence legislation creates a gap in human rights diligence in the United States that not only leads to human rights abuses, but also allows them to continue in plain sight.

The U.S. presents itself as a global leader, but it will fail as such if it does not present the correct tone on supply chain human rights abuses. If the U.S. wants to improve its record on corporate human rights abuses and continue in its global leadership role, Congress must pass federal supply chain due diligence legislation. The Uyghur Forced Labor Prevention Act is a positive development, but more comprehensive legislation, including legislation that applies to environmental destruction, is required. The United States should analyze Germany’s Act on Corporate Due Diligence in Supply Chains, borrow its effective provisions, learn from its weaknesses, and pass comprehensive federal legislation to help the United States reclaim its position as a world leader in the elimination of human rights abuses.

130 Koppmann, supra note 5.

208 Loyola University Chicago International Law Review Volume 18, Issue 2