NOTE

Tempered Vigilance: Realizing Effective Remedy for Rightsholders Under the French Duty of Vigilance Law

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Following the promulgation of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011, several countries began statutorily requiring their largest companies to report on human rights risk across their supply chains. However, beyond reporting risk, no country had stood up a mechanism to enforce and remediate human rights impacts on rightsholders until 2017. In 2017, French President Francois Hollande signed the Duty of Vigilance (Loi de Vigilance) into law, adding new civil liability provisions to the French Commercial Code and inaugurating the first hard law regime for mandatory human rights and environmental due diligence (mHREDD) worldwide. Despite its pioneering approach, the Vigilance Law has failed to provide adequate remedy to rightsholders, especially for rightsholders operating across the Global South for French multinational enterprises. By interrogating the statutory and operational features of the Vigilance Law regime over the last seven years, this Note will argue that the French model erects insurmountable barriers to rightsholders in accessing remedy through the French judicial system. This Note then examines salient features of the German and Dutch approaches to mHREDD to contend that the Vigilance Law can be improved by, inter alia, erecting a public authority with enforcement power, clarifying legal burdens and streamlining discovery, and providing guidance to companies that seek to create operational grievance mechanisms. As the European Union (EU) has now formally adopted the Corporate Sustainability Due Diligence Directive (CS3D), it is critical to interrogate where extant mHREDD regimes have fallen short to date.

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I. INTRODUCTION

In recent years, mandatory human rights and environmental due diligence law (mHREDD) has generated a groundswell of new reporting, operational, and legal requirements for large multinational enterprises (MNEs). The United Nations Guiding Principles (UNGPs) provide the

origin of contemporary mHREDD law.[1] UN Special Representative Ruggie's 2008 "Protect-Respect-Remedy," (PRR) championed the idea that corporations carry a responsibility to "respect" human rights per Pillar II of the framework. The UNGPs, passed unanimously by the UN Human Rights Council in 2011, clarified the duties attendant to the corporate responsibility to respect human rights throughout all operations and activities.

The UNGPs do not create new legal duties for companies; they clarify existing responsibilities among all stakeholders within the larger "Business and Human Rights" (BHR) landscape. Businesses must take several steps to ensure their respect for human rights. First, according to Principle 16, they must construct a policy statement articulating their commitment to respect human rights, ensuring it is approved by the highest levels of management.[2] Second, per Principle 17, they must engage in a process of human rights due diligence, which requires companies to identify, prevent, and mitigate ongoing and future human rights impacts by "integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[3]

Fundamental to the UNGP regime is that mHREDD processes identify human rights "impacts" (the language the UNGPs adopt instead of "abuses") and that companies address such impacts by providing an effective remedy.[4] Per UNGP 22, when companies determine that they have *caused* or *contributed* to human rights impacts, they must provide remedy "through legitimate processes."[5] The provision of remedy can be variegated. Remedy can range from cooperation with state-based judicial mechanisms to standing up operational grievance mechanisms (OGMs) to participating in multi-stakeholder initiatives (MSIs) that provide an adjudicative forum for a range of rights-related disputes.

Several recent statutes have strengthened regulations targeting corporate activity on mHREDD. The recently finalized European Union Due Diligence Directive (CS3D) will be the most sweeping to date, calling upon all EU Member States to adopt national legislation compelling due diligence on environmental and human rights impacts.[6] Given the UNGPs

1. However, this Note recognizes that corporate procedures to identify salient risk, through both internal and external audits, precede recent HRDD regimes.

2. U.N. Hum. Rts. Off. of the High Comm'r, U.N. Guiding Principles on Business and Human Rights, art. 16, HR/PUB/11/04 (2011) [hereinafter UNGP].

3. *Id.* art. 17.

4. *Id.* art. 22.

5. *Id.*

6. *See* European Parliament Press Release, Due Diligence: MEPs Adopt Rules for Firms on Human Rights and Environment (Apr. 24, 2024), https://www.europarl.europa.eu/news/en/press-room/20240419IPR20585/due-diligence-meps-adopt-rules-for-firms-on-human-rights-and-

and CS3D's adoption of the International Labor Organization's (ILO) Core Convention as essential elements of mHREDD, workers' rights are foundational to the core human rights that business enterprises must respect.[7]

II. HUMAN RIGHTS DUE DILIGENCE AS A TRANSNATIONAL GALAXY OF NORMS

The emergence of hard law within the BHR field has been dynamic and transnational. Although France was the first state to codify a mHREDD regime, it was not the first country to pass meaningful legislation requiring companies to report on specific human rights risk. For example, the California Transparency in Supply Chains Act (2012) and the UK Modern Slavery Act (2015) generated new approaches to mandating MNEs consider their human rights risk. Each new statute within the BHR landscape generates new norms and approaches to mitigating salient human rights risk. For this reason, this Note subscribes to the process of transnational norm diffusion offered by Professors Mitt Regan and Elise Diggs in the article "Business and Human Rights as a Galaxy of Norms."[8] Rather than view BHR as a hierarchical taxonomy of hard law, the authors argue that BHR should be viewed as a series of concentric rings expanding outward, akin to a Galaxy.[9] Each "ring of norms" can "affect norms in other rings," where, for example, voluntary initiatives in a given sector might inform country-wide hard law on mHREDD, or vice versa.[10]

This "Galaxy" approach is important to this analysis for three primary reasons. First, it underscores the transnational, dialogic quality of mHREDD law; states will often mirror, model, and shape their mHREDD laws after the approach of other states. Second, France will soon have to amend the Vigilance Law to comport with the EU CS3D. Therefore, evaluating the Vigilance Law against the approach taken by states such as Germany and the Netherlands will be instructive when considering future French legislative efforts. Third, the Vigilance Law is a "breakthrough" within the broader BHR "Galaxy;" it has spawned and informed the

environment; Michael R. Littenberg et al., *European Commission (Finally) Proposes Mandatory Human Rights and Environmental Due Diligence Directive—A Deep Dive Q&A on the Commission Proposal*, ROPES & GRAY (Feb. 28, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/february/european-commission-finally-proposes-mandatory-human-rights.

7. *See* UNGP, *supra* note 2, arts. 11–12.

8. *See* Elise Groulx Diggs et al., *Business and Human Rights as a Galaxy of Norms*, 50 GEO. J. INT'L L. 309 (2019).

9. *Id.* at 309, 319.

10. *Id.* at 319.

trajectory of countless other regimes since 2017.[11] Professors Regan and Diggs described the law as a breakthrough, situating it within this "Galaxy" to explain how other normative "rings" would inform its development.[12]

A cornerstone of ensuring access to stakeholder remedy is how large MNEs normatively view risk. Central to Special Representative Ruggie's project was a reformulation of corporate risk. Rather than envisage risk as corporate risk—risk to a firm's bottom line—Ruggie exhorted companies to conceive of external risk to rightsholders: "Human rights risk management differs from commercial, technical and even political risk management in that it involves rights-holders . . . it is an inherently dialogical process that involves engagement and communication, not simply calculating probabilities."[13] Given the centrality of the rightsholder to mHREDD, this Note argues that although the Vigilance Law was novel in generating certain practices within the Galaxy (especially around corporate disclosure, policy statements, and social audits), the law has failed to deliver remedy to the rightsholders of French MNEs across their global supply chains (GSCs).

III. GENERAL BARRIERS TO LITIGATION AND REGULATORY ENFORCEMENT FOR RIGHTSHOLDERS

The UNGPs contemplate state-based judicial organs as the primary vehicle for rightsholders to access effective remedy. UNGPs 25–26 view eliminating practical and procedural barriers to state-based or judicial mechanisms as foundational to states' duty to protect human rights.[14] A constituent piece of Pillar I—the state duty to protect—is that "[s]tates facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so."[15] The UNGPs envisage that state-based judicial organs should "form the foundation of a wider system of remedy."[16]

The UNGPs clarify that creating state-based legal pathways, or rights of action, for rightsholders to bring their complaint against offending MNEs is often a separate concern from ensuring rightsholders can *access* those state-based pathways. In its official commentary to UNGP 26, Ruggie highlights these barriers by demonstrating, *inter alia*, that claimants may struggle to aggregate claims, lack access to representation, and lack the

11. *See generally Browse Laws*, BUS. & HUM. RTS. IN LAW, https://www.bhr-law.org/laws (last visited Apr. 19, 2024).

12. Diggs et al., *supra* note 8, at 310.

13. John Ruggie (Special Representative of the Secretary General), *Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 85, U.N. Doc. A/HRC/8/5 (Apr. 9, 2010).

14. UNGP, *supra* note 2, arts. 25–26.

15. *Id.* commentary to art. 25.

16. *Id.*

critical information necessary to make a claim.[17] Since the UN Human Rights Council unanimously promulgated the UNGPs in 2011, these structural barriers to remedy have often been termed the "remedy gap"[18] or "accountability gap."[19]

This "remedy gap" poses structural concerns for the BHR movement, especially given how critical effective remedy is to full compliance with the UNGPs. Civil society organizations (CSOs) consistently call for mHREDD regimes to strengthen states' regulatory toolkit to enforce sanctions and penalize violating firms that do not affirmatively provide remedy, rather than function as "box-ticking" exercises.[20] Many scholars argue that this "gap" emanates from mHREDD enabling a "narrow, compliance-focused approach," where MNEs can engage in "box-ticking" of requirements without an interrogation of their practices and operations.[21]

It is beyond the scope of this Note to survey the constellation of social, political, and legal factors that contribute to weak access to remedy throughout GSCs, especially for rightsholders within the Global South.[22] These "remedy gaps" are well surveyed within the literature.[23] Among other factors, they emanate from a lack of access to human rights lawyers, evidence, discovery proceedings, poor union infrastructure, and other information asymmetries.[24] There is a structural misalignment between the number of companies performing due diligence and the actual provision of remedy.

17. UNGP, *supra* note 2, commentary to art. 26.

18. *See* David Kovick, *Rethinking Remedy and Responsibility in the Financial Sector*, SHIFT (May 2019), https://shiftproject.org/rethinking-remedy-and-responsibility-in-the-financial-sector/.

19. *See* SHIFT, ACCOUNTABILITY AS PART OF MANDATORY HUMAN RIGHTS DUE DILIGENCE (2020).

20. *See* BUS. & HUM. RTS. RES. CTR., CLOSING THE GAP: EVIDENCE FOR EFFECTIVE HUMAN RIGHTS DUE DILIGENCE FROM FIVE YEARS MEASURING COMPANY EFFORTS TO ADDRESS FORCED LABOUR 4 (2022).

21. *Id.* at 7–8; *see also Mandatory HRDD at EU Level Needs Liability, a Value Chain Approach and Governance Support "Quality,"* HUM. LEVEL (Oct. 5, 2020), https://www.wearehumanlevel.com/content-hub/mandatory-hrdd-at-eu-level-needs-liability-a-value-chain-approach-and-governance-support-quality.

22. *See, e.g.*, Almut Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?*, 22 HUM. RTS. REV. 109, 113 (2021).

23. *See generally* DANIEL BLACKBURN, REMOVING BARRIERS TO JUSTICE 9 (2017) (explaining that a binding treaty on business and human rights could address the jurisdictional, procedural, and practical barriers that rightsholder face); POL'Y DEP'T, DIRECTORATE-GENERAL FOR EXTERNAL POLICIES, ACCESS TO LEGAL REMEDIES FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSES IN THIRD COUNTRIES (2019) (providing an in-depth study of the many barriers that rightsholders face by analyzing thirty-five relevant cases).

24. *See* POL'Y DEP'T, *supra* note 23, at 16–17.

IV. THE FRENCH DUTY OF VIGILANCE LAW

A. Basic Statutory Background

In March 2017, following a multi-year legislative struggle,[25] President Hollande signed the Duty of Vigilance into law, adding two new articles to the French Commercial Code.[26] French legislators did not intend for the Vigilance Law to be a cure-all for preventing and remedying corporate human rights violations throughout GSCs. It was viewed as a *passe-muraille*, designed as an initial legal foray to begin eroding barriers to remedying corporate human rights abuses and to "spur a legislative movement that would go beyond France's borders."[27] Concerningly, at the time of passage, the Ministry of the Economy, led by now-President Macron, stridently opposed the Law's creation.[28] Nonetheless, the Law passed, representing a legislative compromise four years in the making.[29]

The Vigilance Law imposes an affirmative duty on companies within its scope to construct, report on, and publicize a human rights due diligence regime, also called "vigilance plans."[30] The horrific spectacle of the Rana Plaza disaster in 2013, in which French companies' suppliers were linked to the collapse of a Bangladeshi garment factory that killed hundreds of workers, generated momentum from civil society and members of the French National Assembly to push for a new mHREDD regime in France.[31] The law invokes its tragic underpinnings and the Rana Plaza disaster; the Vigilance Law's accompanying memorandum (*exposé des motifs*) explains that it seeks to "[prevent] tragic events" and to "obtain remediation for the victims."[32]

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25. The initial drafts of the Vigilance Law, championed by French NGO Sherpa, were much more stringent, including an application of the law to all French companies and reversing the burden of proof to companies to rebut the presumption that it did not take adequate steps to prevent the harm from occurring. *See* Schilling-Vacaflor, *supra* note 22, at 115–16.

26. FLORIAN WETTSTEIN, BUSINESS AND HUMAN RIGHTS 254 (2022).

27. *See* Elsa Savourey & Stéphane Brabant, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption*, BUS. & HUM. RTS. J. 141, 152 (2021).

28. *See* Maria-Therese Gustafsson et al., *Foreign Corporate Accountability: The Contested Institutionalization of Mandatory Due Diligence in France and Germany*, 17 REGUL. & GOVERNANCE 891, 902 (2023).

29. *Id.*

30. *See* Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 INT'L & COMPAR. L.Q. 789, 801 (2020); Code de commerce [C. com.][Commercial Code] art. L.225-102-4(I) (Fr.).

31. *See* Julie Zorilla & Roxane Castro, *France and the Duty of Vigilance, Picture of a Battlefield*, NAVACELLE (Dec. 18, 2022), https://navacelle.law/france-and-the-duty-of-vigilance-picture-of-a-battlefield/.

32. *See* Stéphane Brabant & Elsa Savourey, *Loi relative au devoir de vigilance, des sanctions pour prévenir et réparer?* [*A Closer Look at the Penalties Faced by Companies*], 50 REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L'ÉTHIQUE DES AFFAIRES 1–2 (2017).

The Vigilance Law enunciates a new corporate duty of care vis-à-vis impacts on human rights and the environment: "a legal obligation to adhere to a standard of reasonable care, while performing any acts that could foreseeably harm human rights or the environment. . . . Those harmed may bring civil (tort) action and claim remedy."[33] At the time of adoption, French civil society lauded the imposition of a novel fiduciary duty on corporate managers and directors.[34]

Yet, unlike the UNGPs universal application to all companies, only certain companies above a size threshold must comport with the Vigilance Law's requirements. First, it includes companies headquartered in France if they retain at least 5,000 employees in France or 10,000 employees worldwide.[35] Second, it covers companies headquartered outside France with French subsidiaries if those subsidiaries have at least 5,000 employees in France.[36] To date, estimates place the number of companies that meet the criteria between 100 and 256.[37] Significantly, the large employee-size threshold means that many smaller companies in sectors where human rights abuses are rampant—such as the garment sector—are excluded from the Vigilance Law's ambit.[38] Therefore, the Vigilance Law largely excludes the same French companies' suppliers that generated the Rana Plaza disaster.[39] The French Economy Minister found in a February 2020 report that "it is impossible to establish a reliable list of the companies concerned."[40] Given this ambiguity, French non-governmental organizations (NGOs) have begun to generate lists of qualifying MNEs based on publicly available information.[41] Sherpa, in partnership with CCFD-*Terre Solidaire* has launched a "Duty of Vigilance Radar" that collects and updates a list of the companies that exceed the statute's threshold.[42]

The Vigilance Law establishes that companies must take affirmative steps to mitigate risks or prevent human rights impacts with an attendant

33. *See* Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317, 318–19 (2017).

34. *Id.*

35. *See* Code de commerce [C. com.][Commercial Code] art. L.225-102-4(I) (Fr.); Sarah A. Altschuller & Amy K. Lehr, *The French Duty of Vigilance Law: What You Need to Know*, FOLEY HOAG LLP (Aug. 3, 2017), https://www.globalbusinessandhumanrights.com/2017/08/03/the-french-duty-of-vigilance-law-what-you-need-to-know/.

36. *See* Altschuller & Lehr, *supra* note 35.

37. SHERPA & CCFD TERRE SOLIDAIRE, LE RADAR DU DEVOIR DE VIGILANCE: IDENTIFIER LES ENTREPRISES SOUMISES À LA LOI 3–5 (2020), https://plan-vigilance.org/wp-content/uploads/2020/06/2020-06-25-Radar-DDV-Edition-2020.pdf.

38. *See* SHERPA ET AL., THE LAW ON DUTY OF VIGILANCE OF PARENT AND OUTSOURCING COMPANIES, YEAR 1: COMPANIES MUST DO BETTER 8 (2019).

39. *Id.* at 41.

40. *See* Savourey & Brabant, *supra* note 27, at 143.

41. *See* SHERPA ET AL., *supra* note 38, at 5.

42. SHERPA, *About: The Project* (2024), vigilance-plan.org/about/.

system to monitor the implementation of due diligence measures.[43] Companies must identify and prevent violations for actions taken by the company itself, for activities of companies "under its control," and for those companies, suppliers, or subcontractors with whom the company maintains an "established commercial relationship."[44] Several legal scholars have identified opacities concerning which suppliers and subcontractors fall within a company's vigilance plan. French law's definition of what can be considered an "established commercial relationship[]" is narrower than what the UNGPs prescribe for effective mHREDD concerning subcontractors and suppliers.[45] Although NGOs have requested public-facing data or lists of suppliers which fall within the ambit or *rationae personae*, no MNE has provided such a list.[46] In addition, companies must engage with stakeholders in creating mHREDD processes and an effective OGM.[47]

Despite its many requirements, the Vigilance Law does not establish a public authority to investigate compliance issues or respond to whistleblower complaints.[48] Some scholars argue that the failure to stand up an authority or empower an agency to enforce the Vigilance Law reflects a lack of French political will.[49] For example, France has stood up enforcement agencies to administer other laws concerning corporate activity as it concerns the breach of financial regulations[50] and data privacy.[51] With no French agency empowered to enforce the law, enforcement falls exclusively to the capacity of civil society to bring civil lawsuits.

B. Generating a Complaint in French Civil Courts

The Vigilance Law erects two distinct legal pathways for rightsholders. First, the law provides for rightsholders to seek injunctive relief based on a company's failure to announce or comport with a vigilance plan. To initiate the complaint for equitable relief, worker-plaintiffs must submit a formal

43. *See* Brabant & Savourey, *supra* note 32, at 2.

44. *See* Bueno & Bright, *supra* note 30, at 801.

45. *See id.* at 802; Anne Lafarre & Bas Rombouts, *Towards Mandatory Human Rights Due Diligence: Assessing Its Impact on Fundamental Labour Standards in Global Value* Chains, 13 EUR. J. RISK REGUL. 567, 575 (2022).

46. *See* Savourey & Brabant, *supra* note 27, at 144–45.

47. *See* Sophie Scemla, *The French Duty of Vigilance Law: A New Litigation Risk for European Companies*, INT'L BAR ASS'N (Dec. 1, 2023), https://www.ibanet.org/The-French-Duty-of-Vigilance-Law-a-New-Litigation-Risk.

48. *Id.*

49. *See* Schilling-Vacaflor, *supra* note 22, at 121.

50. *See* Laure de Batz, *Financial Impact of Regulatory Sanctions on Listed Companies*, 49 EUR. J.L. & ECON. 301 (2020).

51. *See* Paul Voigt & Axel von dem Bussche, *Enforcement and Fines Under the GDPR*, *in* THE EU GENERAL DATA PROTECTION REGULATION (GDPR): A PRACTICAL GUIDE 201 (2017); *CNIL (France)*, GDPR HUB (Feb. 27, 2024), https://gdprhub.eu/CNIL_(France).

notice urging the company to comply with its Vigilance obligations (*mise en demeure*) before requesting that a defendant company appear in court by a judicial writ of summons.[52] Once the plaintiff sends notice, the company has three months to comply with its vigilance obligations, during which period the plaintiffs should seek consultations with the MNE.[53] French courts have since clarified that notice and attempted consultation within these three months is an absolute requirement of the law.[54] If the plaintiff provides notice, three months have elapsed, and the violating actions do not cease, the case can proceed to the merits, where the claimant bears the burden of proof.[55]

Following the consultation stage, the claimant must prove a series of elements. First, the plaintiff must prove that the Vigilance Law applies to the company, creating a duty of care. Second, that the company breached a Vigilance Law obligation by failing to account for a specific impact within its plan. And third, the same breach proximately caused the plaintiff's injury.[56] In December 2017, the French Constitutional Court further determined that the law could not be imposed as a criminal penalty, as its terms were "vague" for criminal law purposes.[57] Following the decision, Professor Stephane Brabant found that the Constitutional Court's decision left two liability routes in place: 1) "periodic penalty payments," or *astreintes*, that are imposed as "injunctive fines payable on a daily or per-event basis until the defendant satisfies a given obligation" 2) or civil liability, *responsabilité civile*, with damages awarded to individual plaintiffs.[58] The same breach standard, "failure to establish, publish or effectively implement a vigilance plan" controls for both penalty payments and tortious civil liability.[59]

The text of the Vigilance Law does not demonstrate what series of corporate actions make a vigilance plan compliant. In parsing parliamentary debate, it appears that "contractual commitments, certifications,

52. *See* Eleonore Hannezo et al., *First Decision by French Courts on Duty of Vigilance Law: Dismissal of Claims Lodged by Six NGOs Against TotalEnergies*, LINKLATERS (Mar. 1, 2023), https://sustainablefutures.linklaters.com/post/102i8vw/first-decision-by-french-courts-on-duty-of-vigilance-law-dismissal-of-claims-lod.

53. *See* Code de commerce [C. com.][Commercial Code] art. L.225-102-4(II) (Fr.); Jacob Douds et al., *Business and Human Rights: First French Case-law on the Duty of Vigilance—Judges Adopt a Cautious Approach to Avoid Judicial Interference in Corporate Management*, MAYER BROWN (Mar. 14, 2023), https://www.mayerbrown.com/en/insights/blogs/2023/03/business-and-human-rights-first-french-caselaw-on-the-duty-of-vigilance--judges-adopt-a-cautious-approach-to-avoid-judicialinterference-in-corporate-management.

54. Douds et al., *supra* note 53.

55. *See* Savourey & Brabant, *supra* note 27, at 152.

56. *Id.*

57. *See* Conseil constitutionnel [CC][Constitutional Court] decision No. 2017-750DC § 13–14, Mar. 23, 2017 (Fr.); Douds et al., *supra* note 53.

58. Brabant & Savourey, *supra* note 32, at 1.

59. *Id.* at 2.

partnerships with stakeholders, etc." can redound to a finding of meeting the burden.[60] The law requires companies to take measures in implementing their plans to prevent and remedy human rights impacts—not ensuring they do not occur altogether.[61]

Second, the Vigilance Law generates a new civil cause of action within the French Commercial Code (*responsabilité civile*) for rightsholders to seek monetary damages in tort. Rightsholders must allege that a company's non-compliance with its Vigilance Law obligations proximately resulted in tortious injury.[62] The Vigilance Law does not erect a new liability scheme; rather, liability remains grounded in traditional tort law, codified in the Civil Code at Article 1240, where failure to implement a vigilance plan can create fault or *responsabilité pour faute*.[63] As such, the plaintiff must still demonstrate causality between the specific failure to comply with its vigilance obligations and the specific harm suffered.[64] Namely, the plaintiff must establish that the company had a (1) duty to exercise due diligence through a vigilance plan, (2) that there was damage caused by the company's supply chain, and (3) that the company's failure to exercise due diligence was causally linked to such damage.[65] For example, in their multi-party suit against the mass retail and supermarket chain, Casino S.A., Envol Vert alleged that Casino's failure to control mass deforestation due to its subsidiaries expansion of cattle farming within the Brazilian Amazon amounted to millions of euros in damages owed to indigenous communities.[66]

C. Interpretive Barriers to Rightsholders' Access to Remedy

Although the Vigilance Law generated a novel civil liability regime, it fails to create an adequate pathway to remedy for rightsholders as contemplated by the UNGPs. Since its adoption in 2017, different consortia of NGOs, often led by Sherpa, have brought suit under the Law. Despite being operative for over seven years, only one Vigilance Law case has proceeded to the merits.[67] There are several interpretive barriers embedded

60. *Id.* at 3.

61. *Id.* at 2.

62. *See* Code civil [C. civ.] [Civil Code] art. 1240 (Fr.); *France's Duty of Vigilance Law*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/frances-duty-of-vigilance-law/ (last visited Apr. 14, 2024).

63. *See* Brabant & Savourey, *supra* note 32, at 2.

64. *See* Scemla, *supra* note 47.

65. *See* Tribunal judiciare [judicial court] Saint-Etienne, Complaint, *Envol Vert et al. v. Casino Guichard-Perrachon S.A.*, Mar. 2, 2021, No. 13435 (Fr.), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210302_13435_complaint.pdf.

66. *Id.*

67. Tribunal judiciaire [judicial court] Paris, *Fédération des Syndicates Solidaires, Unitaires et Democratiques des Activites Postales et de Telecommunications (SUD PTT) v. S.A. La Poste*, Dec. 5, 2023, No. RG 21/15827 (Fr.).

within the Vigilance Law that frustrate stakeholders' efforts to advance their claims in French civil courts.

First, the language of the Vigilance Law, its accompanying memoranda, and the parliamentary debates surrounding its adoption, or *travaux parlementaires*, do not describe which rights are actionable under the law. While this creates flexibility in what actions are brought,[68] it also creates ambiguity for rightsholders.[69] In 2017, the French Constitutional Court found that the content of rights that a company's vigilance plan should account for is of a "broad and undefined nature."[70] In *travaux parlementaires,* the French Parliament rejected further clarifications on the content of rights covered, arguing that the rights implicated by the law could be intuitively deduced by the scope and ambit of France's international commitments—treaty-based and otherwise.[71] The French Executive Branch, in March 2017, later validated that view, finding that the Vigilance Law does not "target a corpus of pre-established norms."[72] While the Vigilance Law references certain conventions, many of which are found within the International Bill of Rights covered by the UNGPs, the list is not exhaustive.[73] For example, in January 2023, three transnational NGOs brought suit against Danone, a French MNE, concerning its failure to incorporate its plastics use and the effect on the environment into its vigilance plan.[74]

Rightsholders, especially those at informational disadvantages, would struggle to appreciate that a company's plastics manufacturing could be grounds for suit in a French civil court. A key interpretive barrier to overcome is the standard French civil courts will apply to determine when a vigilance plan is non-compliant. In March 2023, a Paris court interpreted the application of the Vigilance Law without reaching the merits. The court held that the law does not provide an evaluative text or guide to assess

68. *See ClientEarth, Surfrider Foundation Europe, and Zero Waste France v. Danone*, CLIMATE CHANGE LITIG. DATABASE, https://climatecasechart.com/non-us-case/clientearth-surfrider-foundation-europe-and-zero-waste-france-v-danone/ (last visited Apr. 14, 2024).

69. Stéphane Brabant & Elsa Savourey, *French Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Perspective*, 50 REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L'ÉTHIQUE DES AFFAIRES 1, 3–5 (2017).

70. *Id.* at 6.

71. *Id.*

72. *Id.*; *see* Observations du Gouvernement sur la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Government's Observations on the Law on the Duty of Care for Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, ¶ 1(D).

73. For example, scholars have questioned whether courts could rule that France's international commitments related to the environment and public health must be accounted for in vigilance plans. *See* Stéphane Brabant et al., *The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance*, REVUE INTERNATIONEL DE LA COMPLIANCE ET DE L'ÉTHIQUES DES AFFAIRES 1, 6–7 (2017).

74. *See Latest News Regarding the French Corporate Duty of Vigilance Law*, SIMMONS & SIMMONS (Mar. 10, 2023), https://www.simmons-simmons.com/en/publications/clf2ktvec022iu7l00mypqgri/latest-news-regarding-the-french-corporate-duty-of-vigilance-law.

"conformity" of the vigilance plan with "guiding principles, international standards, nomenclatures, [and] classifications of due diligence."[75] Each French judge must determine whether a particular vigilance plan is sufficient. This discretionary standard fails to account for a judge's lack of expertise in sector-specific operations.[76] In addition, liability only extends to the harm that a French court finds could have been prevented by an adequate vigilance plan.[77] Because only one case has proceeded to the merits, knowing which standard judges would wield to determine compliance is challenging.[78]

Another key interpretive barrier to remedy concerns is which commercial relationships a court will find to be "established" such that companies must account for them within a vigilance plan.[79] In attempting to define the term, scholars have looked to other sources of French law, where the term is defined as any "stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last."[80] If this is the operative definition for future Vigilance Law judicial interpretation, it is narrower than envisaged by the UNGPs, which accounts for all business relationships where a company may even be "linked."[81] The complexity of supply chains also creates stakeholder ambiguity. For example, a worker in Myanmar may lack access to information to determine whether her factory falls within a "commercial relationship" definition. Without further clarity on what provisions within vigilance plans will meet these baseline standards of compliance, rightsholders will be left uncertain as to the viability of their case.

The Paris Civil Court's December 2023 decision in the *La Poste* case further weakened rightsholders' ability to determine if their employer falls within a vigilance plan's scope.[82] In the case—the first to reach the merits under the law—the French postal union, Fédération des Syndicats Solidaires Unitaires et Démocratiques des Activités Postales et de

75. *Lessons Learned from the 28 February Paris Court Ruling in the "TotalEnergies" Case*, RÖDL & PARTNER (Mar. 15, 2023), https://www.roedl.com/insights/france-paris-court-ruling-totalenergies-case-lessons-learned#lessons.

76. *Id.*

77. *See* Stéphane Brabant & Marie-Charlotte Epaud, *Duty of Vigilance: Accounting for Information Asymmetry in Adjusting the Burden of Proof*, VILL. JUST. (Aug. 12, 2022), https://www.village-justice.com/articles/spip.php?page=imprimer&id_article=43393.

78. *Total Sued Under France's New Duty of Vigilance Law*, BUS. & HUM. RTS. RES. CTR. (Oct. 23, 2019), https://www.business-humanrights.org/en/latest-news/total-sued-under-frances-new-duty-of-vigilance-law/.

79. *See* Bueno & Bright, *supra* note 30, at 802.

80. *See* Cossart et al., *supra* note 33, at 320.

81. *See* Bueno & Bright, *supra* note 30, at 802.

82. Tribunal judiciaire [judicial court] Paris, *Fédération des Syndicates Solidaires, Unitaires et Democratiques des Activites Postales et de Telecommunications (SUD PTT) v. S.A. La Poste*, Dec. 5, 2023, No. RG 21/15827 (Fr.).

Télécommunications (SUD PTT) brought suit against La Poste SA, France's largest postal service company.[83] Among a number of other complaints concerning La Poste's vigilance plan, SUD PTT alleged that La Poste had failed to disclose its suppliers and subcontractors as part of its risk mapping process.[84] In responding to the claim, the court first rejected the claim that such disclosure was essential to effective risk mapping. Second, the court found that to force La Poste to disclose the extent of its commercial relationship with "thousands of companies" would be to violate other provisions of the French Commercial Code. Namely, Article L.151-1 of the French Commercial Code safeguards companies from disclosing sensitive commercial information that could give other companies an advantage.[85] As such, the *La Poste* holding confirms that the Paris Civil Court will not compel companies to disclose the extent of their commercial relationships to aid stakeholders in generating Vigilance Law claims.

D. Procedural Barriers to Remedy for Rightsholders Across Supply Chains

Beyond issues of interpretation, the actual procedure contemplated by the Vigilance Law disfavors rightsholders across the Global South. To access injunctive relief—often to compel the company to cease the harmful activity—the law requires that parties with standing file a formal complaint with the MNE in question, participate in three months of mandatory consultation with company representatives, operate through a union or NGO, lodge their complaint in the Paris Civil Court, and make their complaint while the current vigilance plan is still relevant (that the plaintiff has not filed against a vigilance plan that is now moot).[86]

Before any Vigilance Law complaint can reach the merits, the plaintiff must file a formal complaint with the company and engage in a mandatory three-month consultation period. For example, in the same 2023 Judicial Court of Paris case discussed *supra*, the court ruled that because the NGO consortium only provided notice to the company for its 2018 vigilance plan, the summons had become moot as the company had promulgated three subsequent plans.[87] The court further found that the NGOs failed to engage in the mandatory three-month consultation that the Vigilance Law contemplates.[88] The NGOs had refused such consultations, arguing that

83. *Id.*

84. *Id.* at 17.

85. *Id.* at 19.

86. *See* Scemla, *supra* note 47. Standing is viewed broadly for the purposes of the Vigilance Law, with anyone who can claim a legitimate interest in the matter.

87. *See Lessons Learned from the 28 February Paris Court Ruling in the "TotalEnergies" Case*, *supra* note 75.

88. *Id.*

any negotiations would prove fruitless given TotalEnergies' immense investment in the Ugandan oil pipeline.[89]

The mandatory three-month consultation process presents a significant procedural hurdle for stakeholders and would-be plaintiffs in seeking injunctive relief. Although a French MNE may have myriad suppliers or subcontractors throughout host countries, it may have no permanent presence on the ground in those countries. As such, unless rightsholders or NGOs from the host state can travel to France or otherwise engage in consultations with the Vigilance Law company, rightsholders cannot sue for tort remedy. Moreover, without union or NGO representation, individual plaintiffs will struggle to engage in the formal party negotiations that the law mandates.[90]

The Vigilance Law's requirement for three months of consultation after filing notice reflects a principle in the American common law of corporations—directors should not be deprived of their "decision-making authority" improperly.[91] However, depending on the American jurisdiction, shareholders can demonstrate that demand on the Board of Directors would be futile—often requiring a showing that the directors are not disinterested nor independent from the matter at hand.[92] In the case of TotalEnergies, the French and Ugandan NGOs attempted to argue that consultation with TotalEnergies would have been fruitless—their financial, administrative, and operational commitment to the pipeline was such that requesting negotiations would be futile.[93] However, the Vigilance Law does not allow for demand futility. Worker-plaintiffs must engage in three months of negotiation, irrespective of the immense differentials in negotiating power, legal representation, and financial capacity. The Vigilance Law's insistence on this procedure will preclude effective consultation with stakeholders across their supply chains, nullifying the principal aim of the law—remediation of harm.[94]

Another key procedural barrier is the lack of well-publicized vigilance plans throughout French MNE supply chains. The actual text of the Vigilance Law requires that companies distribute their plan throughout their GSC.[95] However, beyond a cursory phrase indicating that plans should be

89. *Id.*

90. *Id.*

91. William Savitt et al., *Delaware Supreme Court Announces New Demand Futility Test*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 28, 2021), https://corpgov.law.harvard.edu/2021/09/28/delaware-supreme-court-announces-new-demand-futility-test/.

92. *Id.*

93. *See* America Hernandez, *French Court Dismisses Uganda Lawsuit Against TotalEnergies*, REUTERS (Mar. 1, 2023), https://www.reuters.com/business/energy/french-court-rejects-lawsuit-brought-against-totalenergies-uganda-pipeline-2023-02-28/#:~:text=The%20campaigners%20wanted%20the%20court,take%20measures%20to%20prevent%20them.

94. *See* Brabant & Savourey, *supra* note 32, at 1.

95. *See* Code de commerce [C. com.][Commercial Code] art. L.225-102-4(I) (Fr.).

made public, it says little of how companies should proceed to publicize their plans.[96] Without more guidance directing MNEs to publicize their plans, rightsholders across GSCs will struggle to root their civil complaint in the actual text of a company's plan. According to assessments by Sherpa, most companies have not published standalone "vigilance plans" but rather include a few pages on "social and environmental responsibility" within their annual reports.[97] Moreover, two-thirds of companies failed to adequately disclose "methods for the identification of risks."[98]

The Vigilance Law also procedurally bars worker access by not requiring consultation with stakeholders in drafting vigilance plans.[99] Rather, the law encourages such consultation by clarifying that the plan is meant to be elaborated in conjunction with the stakeholders.[100] This exhortation has not resulted in stakeholder engagement. Sherpa found that few companies adequately engaged with or referenced stakeholders in their vigilance plans.[101] Concerningly, a 2019 Shift report found that companies regressed in implementing stakeholder engagement per their public vigilance plans in the second year of Vigilance Law implementation.[102]

Another key procedural barrier to effective worker access is the narrowing of the venue for Vigilance Law complaints to only one court. In October 2021, following a multi-year struggle over proper jurisdiction of the law, a joint committee of French legislators agreed to confer exclusive jurisdiction for the Vigilance Law to the Paris Civil Court owing to its "judges [having] strong economic skills and a robust knowledge of corporate operations."[103] Therefore, the venue will now lie in one French court for all potential Vigilance Law claims, further narrowing the ability of workers to file complaints.

These procedural hurdles have resulted in civil society only bringing a handful of lawsuits since 2017. The Business and Human Rights Resource Centre catalogs major suits brought under the law. According to their repository, several suits seeking injunctive relief have been brought by large French NGOs, sometimes in partnership with host state NGOs, like in the TotalEnergies case with Ugandan NGOs joining the action.[104] However, to

96. *Id.*

97. *See* SHERPA ET AL., *supra* note 38, at 11.

98. *Id.* at 15.

99. *See* Code de commerce [C. com.][Commercial Code] art. L.225-102-4(I) (Fr.).

100. *Id.* ("Le plan a vocation à être élaboré en association avec les parties prenantes de la société.").

101. *See* SHERPA ET AL., *supra* note 38, at 13, 15.

102. MICHELLE LANGLOIS, HUMAN RIGHTS REPORTING IN FRANCE TWO YEARS IN: HAS THE DUTY OF VIGILANCE LAW LED TO MORE MEANINGFUL DISCLOSURE? 8 (2019).

103. *See* Christelle Coslin & Margaux Renard, *Duty of Vigilance: The French Parliament Confers Jurisdiction on the Paris Civil Court Only*, HOGAN LOVELLS (Nov. 2, 2021), https://www.engage.hoganlovells.com/knowledgeservices/news/duty-of-vigilance-the-french-parliament-confers-jurisdiction-on-the-paris-civil-court-only.

104. *See France's Duty of Vigilance Law*, *supra* note 62.

date, only the *La Poste* case has proceeded to a ruling on the merits.[105] The delay in expedited adjudication of these claims presents another hurdle for rightsholders to overcome.[106] Professor Lindt has argued that given the protracted length of most transnational suits, coupled with the fact that claimants are what Professor Galanter has termed "one-shotters" (that they have one opportunity for their claim to be heard and rely upon the expertise of lawyers willing to take their case), the law's insistence on formal negotiations will hamper most aspiring plaintiff's claims for injunctive relief.[107] For example, in the *Lubbe* case, where Cape PLC exposed more than 3,000 South African workers to asbestos, countless workers died before the case reached preliminary phases.[108]

The lack of a centralized state regulator also complicates access to state-based remedy. The Vigilance Law does not deputize a state agency with oversight and enforcement.[109] There is no French agency that can field whistleblower complaints and elect to independently initiate an investigation. For this reason, enforcement lies with the caprice of a small pool of Paris Civil Court judges, complicated by the lack of governing precedent given France's civil law system.

E. Practical Barriers to Remedy for Rightsholders

At a base level, the Vigilance Law fails to address the practical barriers that prevent stakeholders across GSCs from accessing remedy in the Paris Civil Court. BHR scholarship is replete with evidence of the practical differentials and asymmetries[110]—informational, social, financial, etc.—that prevent rightsholders from advancing their claim in the home state of MNEs.[111] Among the many obstacles rightsholders face: transnational human rights cases require attorneys with extensive expertise, willing to take on cases that will stretch on for years,[112] MNEs maintain access to immense

105. *See* Tribunal judiciaire [judicial court] Paris, *Fédération des Syndicates Solidaires, Unitaires et Democratiques des Activites Postales et de Telecommunications (SUD PTT) v. S.A. La Poste*, Dec. 5, 2023, No. RG 21/15827 (Fr.).

106. *See, e.g.*, Ekaterina Aristova, *Call for EU Human Rights Due Diligence Legislation: What Can Be Learnt from France and the Netherlands?*, BUS. & HUM. RTS. RES. CTR. (June 23, 2020), https://www.business-humanrights.org/en/blog/call-for-eu-human-rights-due-diligence-legislation-what-can-be-learnt-from-france-and-the-netherlands/.

107. *See* Angela Lindt, *Transnational Human Rights Litigation: A Means of Obtaining Effective Remedy Abroad?*, 4 J. LEGAL ANTHRO. 57, 61 (2020).

108. *See* BLACKBURN, *supra* note 23, at 19, 56.

109. *See Lessons Learned from the 28 February Paris Court Ruling in the "TotalEnergies" Case*, *supra* note 75.

110. *See* Schilling-Vacaflor, *supra* note 22, at 113.

111. *See* Lindt, *supra* note 107, at 61.

112. *See* Liesbeth Enneking, *The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case*, 10 UTRECHT L. REV. 44, 48 (2014).

financial resources to protract litigation,[113] and claimants often have little knowledge of legal proceedings—or even the rights they can draw from to make a claim.[114] Although the Vigilance Law demands that MNEs publicize their respective vigilance plans, there is no precise guidance for involving stakeholders in the drafting process or for effective dissemination. In a report issued by the French Parliament in 2022, it identified stakeholder consultation in developing plans as "insuffisante" (inadequate), advocating that engagement should be made mandatory.[115]

A key practical barrier for rightsholders is adequate access to evidence, legal representation, and organizing power. UNGP 26 states that rightsholders are often at a major disadvantage when accessing information and legal advice.[116] Reflecting this asymmetry, vigilance suits have primarily emanated from consortia of expert NGOs, such as those bringing suit against Danone, who possess the legal creativity to bring an action concerning plastic production or some similar suit based on France's environmental obligations. While this has led to strong, transnational linkages between French NGOs such as Sherpa, Survie, CCFD-Terre Solidaire, Les Amis de la Terre and NGOs throughout the Global South,[117] such linkages are not sustainable for enforcement purposes. Litigation in French courts has required creative, industrious lawyering from NGOs and human rights defenders (HRDs) in-country. And while these efforts are laudable, they cannot form a sustainable basis for enforcing the Vigilance Law.

Gaining access to evidence has also proven fatal to rightsholders' claims. In many EU member states, the vast majority of which are civil law countries, discovery procedures are much more restrictive than in common law countries.[118] In France, the claimant will almost always bear the burden of proof.[119] And although the Vigilance Law's statutory drafters initially contemplated that companies would bear the burden, the final statutory language removed the provision. This unfavorable burden creates serious, often debilitating informational hurdles for plaintiffs. Rightsholders seldom have enough information to make out a claim based on the information available in the vigilance plan itself—often only a few pages long.[120]

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113. STUART KIRSCH, MINING CAPITALISM 85 (2014); Lindt, *supra* note 107, at 61.

114. Lindt, *supra* note 107, at 61.

115. *See* ASSEMBLÉE NATIONALE, RAPPORT D'INFORMATION ON THE ASSESSMENT OF THE LAW OF MARCH 27, 2027 ON THE DUTY OF VIGILANCE ON THE PART OF PARENT COMPANIES AND CONTRACTORS 41–42 (2022); Fabrice Fages et al., *French Parliament Publishes Evaluation Report on Corporate Duty of Vigilance Law*, LATHAM & WATKINS LLP (Mar. 18, 2022).

116. UNGP, *supra* note 2, commentary to art. 26.

117. *See* Schilling-Vacaflor, *supra* note 22, at 121; *France's Duty of Vigilance Law*, *supra* note 62.

118. *See* EUR. L. INST., BUSINESS AND HUMAN RIGHTS: ACCESS TO JUSTICE AND EFFECTIVE REMEDIES 27 (2022).

119. *See* BLACKBURN, *supra* note 23, at 54.

120. *See* SHERPA ET AL., *supra* note 38, at 11; EUR. L. INST., *supra* note 118, at 27.

Access to internal company documents is critical in transnational tort litigation. Yet, French plaintiffs "lack a formal right of pre-trial disclosure of documents."[121] French civil procedure frequently bars access to the documents that would determine whether a vigilance plan is sufficient in identifying and remedying human rights impacts, as "claimants are supposed to detail their claims already in the *assignation* (summons . . .), adducing any necessary evidence to support their claims."[122] As a result, civil courts often empower companies to deny the essential internal and operational documents that plaintiffs require to make a vigilance plan claim.

This legal hurdle around evidence has created serious challenges in other European civil fora. In Dutch transnational tort litigation surrounding the duty of care, plaintiffs must marshal technical, internal corporate information to meet their burden and have courts grant discovery requests (often requiring expertise or insider knowledge of corporate operations).[123] In a recent case against Royal Dutch Shell, where oil spills in the Ogoniland region of Nigeria contaminated groundwater and destroyed thousands of livelihoods, trial courts rejected the first series of discovery requests in the Netherlands.[124]

In 2017, the same year that the Vigilance Law was signed into law by President Hollande, the sixth UN Forum on Business and Human Rights in Geneva centered its program around effective remedy—assembling stakeholders from government, business, and civil society to address persistent lacunae in access to remedy across global supply chains.[125] At the outset of the Forum, Working Group Chair, Chairperson Surya Deva, captured the severity of the remedy gap, explaining that remedy remains "an exception rather than the rule."[126] Deva enunciated that "merely providing access to effective remedial mechanisms will not suffice."[127] Rather, states should take affirmative measures to ensure that remedy is accessible. Deva's clarion call for increased attention to remedy is critical given the Vigilance Law's performance to date. Although the Vigilance Law erects a novel pathway for would-be rightsholder-claimants across GSCs, it presents interpretive, procedural, and practical challenges that will continue to forestall meaningful access to French courts without immediate amendment or modification.

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121. BLACKBURN, *supra* note 23, at 54.

122. Sandra Cossart & Lucie Chatelain, *Human Rights Litigation Against Multinational Companies in France*, *in* HUMAN RIGHTS LITIGATION AGAINST MULTINATIONALS IN PRACTICE 230, 248 (Richard Meeran & Jahan Meeran eds., 2021).

123. *See* BLACKBURN, *supra* note 23, at 54–55.

124. *Id.*

125. *See* Surya Deva, Chairperson, Working Group on Bus. and Hum. Rts., Opening Statement at the 2017 UN Forum on Business and Human Rights (Nov. 27, 2017).

126. *Id.*

127. *Id.*

V. OPERATIONAL-LEVEL GRIEVANCE MECHANISMS: BARRIERS TO CREATION

Beyond state-based judicial remedy, the UNGPs contemplate that other remedy forms have a critical role in remediating human rights impacts. The UN Working Group on Business and Human Rights has championed a "bouquet of remedies," arguing that non-state, non-judicial mechanisms can offer novel pathways as part of a larger "remedy ecosystem."[128] The UNGPs acknowledge that these non-state fora often provide remedy more immediately than traditional litigation, which can extend for years—especially due to the ample legal resources of MNEs. Specifically, UNGP 28 states that OGMs can offer "speed of access and remediation, reduced costs and/or transnational reach."[129] Special Representative Ruggie did not contemplate that state-based litigation would be a complete curative; rather, he anticipated an "ecosystem of remedy," with OGMs as a key component of the constellation of options available to rightsholders across GSCs.

In 2023, over a decade removed from the UNGPs, the effective use of OGMs remains rare. Professor Lisa LaPlante oversees a large multimedia project archive to document and track the effectiveness of more than 700 OGMs worldwide.[130] In Professor LaPlante's most recent "Trend Report" for global OGMs, only three of the more than 700 OGMs reported any remediation to impacted rightsholders.[131] Without additional reporting on how companies adjudicate grievance claims, workers across GSCs cannot ascertain the "predictability and transparency" of OGMs within their own company or in a parent company further up their supply chain.[132]

Recognizing that Pillar III of the UNGPs, Remedy, has failed to "fulfill[] [its] envisaged role," the UN Human Rights Council passed resolution 26/22, requesting that OHCHR report back to the Council with concrete recommendations to bolster stakeholders' access to remedy.[133] The third report that OHCHR provided to the Council concerned non-

128. *Access to Remedy: Working Group on Business and Human Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/special-procedures/wg-business/access-remedy (last visited Apr. 29, 2024).

129. *See* Hum. Rts. Council, Rep. of the United Nations High Commissioner for Human Rights on Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse Through Non-State-Based Grievance Mechanisms, ¶ 6, U.N. Doc. A/HRC/44/32 (May 19, 2020).

130. *See Operational-Level Grievance Mechanism Research Project*, NEW ENG. L. BOS., https://www.nesl.edu/practical-experiences/centers/center-for-international-law-and-policy/projects/operational-grievance-mechanisms-project (last visited Apr. 14, 2024).

131. LISA J. LAPLANTE & OLIVIA BELANGER, PERIODIC PROJECT REPORT: TRENDS AND GENERAL PRACTICES OF COMPANY OPERATIONAL-LEVEL GRIEVANCE MECHANISMS 9 (Ctr. for Int'l L. & Pol'y & New Eng. L. Bos., 2021).

132. *Id.* at 15.

133. *See* Hum. Rts. Council, *supra* note 129, ¶¶ 2, 7.

state, non-judicial remedies. The report primarily addressed how states could better facilitate the operation of OGMs—through law, policy guidance, and international agreements.[134] Among other recommendations, the report counsels that states should monitor the effectiveness of OGMs within their jurisdiction and review laws that could enable their functioning. Moreover, states should strive for "policy coherence" between its domestic legal systems and OGMs, actively "raise awareness" of the existence of OGMs to stakeholders, and take measures to encourage OGMs, especially among companies with whom it does business via public contracts.[135]

A. The Vigilance Law's Effect on Operational-Level Remedy

The French Vigilance Law views "remediation" as one of two primary objectives.[136] Given the barriers to state-based litigation in France, *supra*, access to OGMs is increasingly important for rightsholders across GSCs. However, the Vigilance Law is opaque in its guidance for establishing OGMs, and MNE uptake has been accordingly slow.

The Vigilance Law provides little practical or operational guidance for how companies should develop, monitor, and engage with stakeholders throughout the company-level remediation process. Article 1 of the Vigilance Law provides that companies must include in their vigilance plans a measure for an alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organization representatives of the company concerned.[137] Importantly, the Vigilance Law does not indicate to whom the alert mechanism should be made available after it is developed via consultation.[138]

While stakeholder consultation is essential for OGM's success, the Vigilance Law narrowly cabins its prescription to trade union representatives. In countless states throughout the Global South, anti-union policy and repressive labor violence are endemic. In 2023, the International Trade Union Confederation documented that state authorities obstructed independent union registration in 73 percent of countries.[139] Further, 79 percent of countries surveyed violated the right to engage in collective bargaining, with 77 percent excluding workers from joining independent

134. *See generally id.* (surveying a number of legal and policy options that would render operational-level grievance mechanisms more equitable).

135. *See id.* ¶ 8, annex 3.1.

136. *See* Brabant & Savourey, *supra* note 32, at 1.

137. Code de commerce [C. com.][Commercial Code] art. L.225-102-4(I) (Fr.) ("Un mécanisme d'alerte et de recueil des signalements relatifs à l'existence ou à la réalisation des risques, établi en concertation avec les organisations syndicales représentatives dans ladite société.").

138. *See* LANGLOIS, *supra* note 102, at 8.

139. *See* INT'L TRADE UNION CONFED., 2023 ITUC GLOBAL RIGHTS INDEX 6 (2023).

trade unions altogether.[140] In countries such as Bangladesh, Belarus, Guatemala, the Philippines, Myanmar, Egypt, and Turkey,[141] workers are consistently targeted for independent union participation, with leaders facing arrests, reprisals (often summary dismissal), and violence.

Given these barriers to effective union representation, the French Parliament should amend the text of the Vigilance Law to mandate OGM engagement aligns with UNGPs 29–31, which requires that companies engage early and often with *all potentially affected* stakeholders to ensure that companies address impacts before they devolve into more serious abuses.[142] For the Vigilance Law to channel such engagement exclusively through union representatives forecloses a more diverse consultation process with unrepresented rightsholders, NGOs, and other stakeholders throughout civil society.

In late December 2019, the NGO Shift published a report evaluating how the 20 largest French companies had met their Vigilance Law obligations two years after adoption.[143] Concerningly, the authors reported that "grievance mechanisms and remediation" was the area of study where the companies performed the worst—only 35 percent of companies reviewed *reported* on their grievance mechanism or remediation system.[144] In another study of 80 vigilance plans, the authors found that OGMs were out of reach by most stakeholders. While companies like Engie, Casino, Total, and Orange have created OGMs, rightsholders must know a specific email address, French phone number, or have Internet access to make contact.[145] Only including a French number for employees flouts the UNGP requirement that OGMs are accessible to all stakeholders.[146]

The December 2023 Paris Civil Tribunal judgment in the *La Poste* case did little to clarify how companies should operationalize these "alert mechanisms."[147] The court held that La Poste (a public-private postal service company in France) had breached its vigilance obligation by not adequately consulting with the plaintiff union, SUD PTT, in developing the mechanism. Yet, beyond mandating that the mechanism should be adopted in concert between La Poste and SUD PTT, the court refrained from determining what specific features such an alert mechanism should possess.

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140. *Id.*

141. *See id.* at 29–38.

142. *See* UNGP, *supra* note 2, commentary to art. 29.

143. *See* LANGLOIS, *supra* note 102, at 4 (ranging from Airbus to BNP Paribas to LVMH).

144. *Id.* at 8.

145. *See* SHERPA ET AL., *supra* note 38, at 18.

146. *See* UNGP, *supra* note 2, art. 31(b).

147. Tribunal judiciaire [judicial court] Paris, *Fédération des Syndicates Solidaires, Unitaires et Democratiques des Activites Postales et de Telecommunications (SUD PTT) v. S.A. La Poste*, Dec. 5, 2023, No. RG 21/15827 (Fr.).

Further, it did not contemplate whether such a mechanism could actually be involved in the provision of remedy to impacted rightsholders.[148]

The Vigilance Law has not provided effective guidance on the operation of OGMs. The text of the Vigilance Law is narrow—only calling for consultation with trade unions and not specifying how companies should make alert mechanisms available. Without expedited judicial rulings or an agency tasked to centralize enforcement, French companies will not generate meaningful, accessible OGMs.

VI. RECOMMENDATIONS BASED ON CURRENT AND FORTHCOMING MHREDD REGIMES

Drawing upon other mHREDD regimes, this Note offers recommendations to improve stakeholder access to remedy in the French model. While the following national regimes discussed are imperfect, they retain features that merit discussion in improving the Vigilance Law. These recommendations carry increased salience due to the recent approval and impending domestication of the EU's CS3D.[149]

On March 15, 2024, the EU Council agreed to a new compromise draft text. That compromise draft was finalized and approved by the EU Parliament on April 24, 2024.[150] It now awaits final approval by the EU Council, entering into force twenty days after its publication in the EU Official Journal.[151] At that point, member states will have two years to domesticate its provisions into national law.[152]

The CS3D, once in force, will compel all EU member states, including France, to adopt (or amend) domestic legislation to comply with its terms. The CS3D is not self-executing—it compels all EU member states to effectuate its terms through domestic law.[153] Given the CS3D's impending transposition into French law, it is critical that the Vigilance Law's weaknesses are accounted for as France considers the next iteration of the vigilance regime.

A. Stand Up a Public Authority to Oversee the Vigilance Law

Article 20 of the CS3D, as recently adopted by the EU Parliament, will force all EU states to stand up a supervisory authority to "supervise and

148. *Id.* at 22–23.

149. *See* European Parliament Press Release, *supra* note 6.

150. *Id.*

151. *Id.*

152. *Id.*

153. *See Corporate Sustainability Due Diligence*, EUR. COMM'N (May 12, 2023), https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.

impose effective, proportionate and dissuasive sanction, including fines and compliance orders" for failure to meet the due diligence requirements set forth by the Directive.[154] Article 20 clarifies that such a supervisory authority must possess the ability to impose pecuniary penalties based on a company's "net worldwide turnover," setting five percent of net turnover as the ceiling.[155]

The CS3D has galvanized civil society to consider how countries will transpose the CS3D requirement to create an enforcement authority. The Vigilance Law lacks any public authority to enforce it, relying upon civil society and NGOs to bring claims in French courts. However, other European countries have already empowered public authorities to enforce mHREDD compliance that can serve as instructive models.

In January 2023, the German Supply Chain Act ("Supply Chain Act") took effect, creating an mHREDD regime for companies with over 3,000 employees and "have their central administration . . . principal place of business . . . administrative headquarters or their statutory seat in Germany."[156] Germany outfitted its Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle) ("BAFA") to exercise enforcement functions. To enforce the law, BAFA can fine companies up to €8 million or exclude offending companies from securing public contracts.[157] In the Netherlands, legislators are currently drafting a domestic mHREDD regime, the Dutch Sustainable International Business Conduct Act ("Business Conduct Act"). The Business Conduct Act was initially set to come into force in July 2024, however a September 2023 amended bill has walked back from that timeframe.[158] If adopted, the Business Conduct Act will include a provision that will force MNEs that cannot prevent or mitigate adverse impacts within their GSC to terminate business relationships that contribute to such harmful human rights impacts. Critically, the Dutch Authority for Consumers and Markets will

154. *Id.*

155. *See* Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937—Letter to the Chair of the JURI Committee of the European Parliament, art. 20(3), 2022/0051 (COD) (Mar. 15, 2024) [hereinafter European Union Proposal], https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf.

156. Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten [LkSG] [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021, ELEKTRONISCHER BUNDESANZEIGER [EBANZ] at § 1 (Ger.); Michael Masling et al., *Recent Development of the New German Supply Chain Act*, MORGAN LEWIS & BLOCKIUS LLP (Aug. 8, 2023), https://www.morganlewis.com/pubs/2023/08/recent-developments-of-the-new-german-supply-chain-act.

157. *See* Masling et al., *supra* note 156.

158. *See* Sascha Allertz & Suzanne Kröner, *Responsible and Sustainable International Business Conduct Act*, NAUTADUTILH (Oct. 10, 2023), https://www.nautadutilh.com/en/insights/responsible-and-sustainable-international-business-conduct-act/.

enforce the Business Conduct Act, empowered to impose penalties up to 10 percent of a company's annual global profit.[159]

Despite the enforcement power offered by the German and Dutch models, French NGOs, like Sherpa, have criticized calls to deputize a large public authority with Vigilance Law enforcement. Upon a 2022 report by the French Parliament proposing, *inter alia*, a potential public authority to bolster enforcement of the Vigilance Law, Sherpa offered an immediate rebuke.[160] Sherpa's complaint is grounded in the fear that government enforcement will lead to co-option, such that any agency oversight would "distort the duty of vigilance—turning it into a compliance exercise."[161] Sherpa cited the French Directorate, which transposed the EU Timber and Conflict Minerals Directive, as an example of how regulation does not always lead to improved outcomes.[162] Sherpa found that the Directorate did not disclose non-compliant companies or commit to working with NGOs.[163] Sherpa also expressed concern that a Vigilance Law authority would only govern vigilance plans *ex-ante* and would not provide what the law contemplates: "vigilance as an obligation of *constant behaviour*."[164] In Sherpa's view, the stronger alternative is strengthening the civil adversarial system already in place.[165]

While this Note concedes that Sherpa's concerns are legitimate, French MNEs' failure to comply with the Vigilance Law calls for increased state regulation. Moreover, the CS3D will compel France to establish such an authority; therefore, the question becomes how to account for civil society's critique of such an agency.[166] This Note submits that a public authority charged with enforcement power can serve a complementary role to the adversarial system.

First, the authority should be empowered to receive worker and whistleblower complaints and initiate investigations that can form the basis of future judicial relief. This model would enable stakeholders to directly

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159. Michael R. Littenberg et al., *An Update on Proposed Dutch Mandatory Human Rights Due Diligence Legislation—The November 2022 Amended Bill*, ROPES & GRAY (Jan. 5, 2023), https://www.ropesgray.com/en/insights/alerts/2023/01/an-update-on-proposed-dutch-mandatory-human-rights-due-diligence-legislation-the-november-2022.

160. *See* Fabrice Fages et al., *French Parliament Publishes Evaluation Report on Corporate Duty of Vigilance Law*, LATHAM & WATKINS (Mar. 18, 2022), https://www.lw.com/admin/upload/SiteAttachments/Alert%202941%20v3.pdf.

161. SHERPA, CREATING A PUBLIC AUTHORITY TO ENFORCE THE DUTY OF VIGILANCE LAW: A STEP BACKWARD? 1 (May 11, 2021).

162. *See German Mandatory Human Rights Due Diligence Law Enters into Force*, BUS. & HUM. RTS. RES. CTR. (Jan. 27, 2023), https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/.

163. *See* CREATING A PUBLIC AUTHORITY TO ENFORCE THE DUTY OF VIGILANCE LAW: A STEP BACKWARD?, *supra* note 161, at 3.

164. *Id.* at 4 (emphasis added).

165. *Id.* at 7.

166. *See* European Union Proposal, *supra* note 155, art. 20(2a).

lodge complaints within the government instead of waiting for an NGO willing to take their complaint, pro bono, to the Paris Civil Court. Article 19 of the CS3D appears to approximate this recommendation, requiring that each EU Member States' relevant national authority is equipped to receive "substantiated concerns" from natural and legal persons that a company is failing to meet its due diligence obligations.[167] The authority must then assess the concern in an "appropriate period of time."[168] It will be critical to track how such authorities manage these "substantiated concerns" as they are submitted by rightsholders, as well as the criteria that will be deployed to determine when further investigation should proceed based on the initial complaint.

Second, enforcement should address the life-cycle of due diligence, not merely providing its *imprimatur* to the vigilance plan of an MNE, *ex-ante*. This authority should require periodic compliance checks, ensuring that companies have executed plans and affirmatively provided remedy to impacted rightsholders, *ex-post*. Third, the authority should mandate that companies comply with discovery requests, offering access to the documents that will inform the course of vigilance litigation.

B. Clarify the Burden of Proof, Subsidiary Liability, and Expand Discovery

The CS3D compels all EU members to ensure a pathway for civil liability. The text identifies in Article 22(1) that Member States "shall ensure that liable for a damage caused to a natural or legal person" if it intentionally or negligently failed to comply with its due diligence obligations *and* such failure caused the injury at issue.[169] However, Article 22(1) further clarifies that a company *cannot* be held liable if the damage was exclusively caused by business partners within its supply chain. Article 22(2a) further enunciates that the all EU Member States should provide plaintiffs with at least five years to initiate their claims.[170]

This revised provision departs significantly from earlier drafts of the CS3D. A late 2022 Draft Report (the Wolters Report) favored a strict liability approach for parent companies.[171] Since that initial formulation, the EU has moved away from a strict liability standard, beginning with an April 2023 meeting of the European Commission's Legal Affairs Committee

167. *Id.* art. 19(1).
168. *Id.* art. 19(3).
169. *Id.* art. 22(1).
170. *Id.* art. 22(2)(a).
171. *See* Eoghan MacDonagh, *Council of the EU Adopts Negotiating Position on the Proposed Corporate Sustainability Due Diligence Directive*, CLIFFORD CHANCE (Jan. 20, 2023), https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights-insights/2023/01/council-of-the-eu-adopts-negotiating-position-on-the-proposed-corporate-sustainability-due-diligence-directive.html.

agreeing to language that "remov[es] automatic parent company liability," and, as termed by the Policy Officer for the European Coalition for Corporate Justice, Christopher Patz, forces "victims . . . to shoulder the burden of proof."[172]

The April 2024 compromise CS3D clarifies that there will be no such default parent liability for companies within the supply chain of the parent. Further, CS3D Article 22(2a)(d) provides each Member State with the latitude to determine "the reasonable conditions" when it is appropriate for a trade union or NGO to bring a claim on behalf of a rightsholder.[173] And although both Recitals 58b and Article 22(2a)(d) of the current draft acknowledge that rightsholders face significant barriers to accessing evidence in foreign judicial fora, the draft only ensures that Member States' national courts *can* compel such evidentiary disclosures when "necessary and proportionate."[174] The EU Council left this "necessary and proportionate" standard vaguely defined, citing to a range of factors that courts should take into account when determining whether a plaintiff has made a sufficiently plausible claim for damages and that "additional evidence lies in the control of the company."[175]

In light of the EU Council's expected final endorsement of the CS3D, this Note recommends that France consider a series of clarifications and amendments to the Vigilance Law when transposing the CS3D into domestic law. First, the Vigilance Law should erect a liability standard sensitized to the evidentiary challenges stakeholders will face. Proving a parent's "controlled activities" requires substantial discovery proceedings, often unavailable in civil law countries. France should assume a European-leading approach by reducing the evidence threshold for proving "controlled activities," in line with Professors Hansmann and Kraakman's model—unlimited shareholder liability towards tort victims with extraterritorial reach.[176]

Second, the Vigilance Law should create a standard for *stakeholder* demand futility, drawing from American corporate law. Given the numerous barriers to formal negotiations that Global South stakeholders face, it is burdensome to require three months of corporate consultations when seeking injunctive relief. This concern is especially pronounced when companies have invested millions of dollars in the project, such as

172. *See European Coalition for Corporate Justice: MEP Vote Stops Just Short of Real Justice for Victims of Corporate Exploitation*, BUS. & HUM. RTS. RES. CTR. (Apr. 25, 2023), https://www.business-humanrights.org/en/latest-news/european-coalition-for-corporate-justice-mep-vote-stops-just-short-of-real-justice-for-victims-of-corporate-exploitation/.

173. *See* European Union Proposal, *supra* note 155, art. 22(2a)(d).

174. *See id.* ¶ 58b; art. 22(2a)(d).

175. *Id.* ¶ 58b.

176. *See* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991).

TotalEnergie's fossil fuel investment in Uganda.[177] Given that "remediation" was the animating legislative intent behind the law, the French Parliament should amend the law to include demand futility, addressing a key procedural obstacle to complaints.

Third, France should amend the Vigilance Law to shift the burden of proof to large MNEs (in line with MPs' original drafting), given the evidentiary challenges that stakeholders face.[178] The CS3D leaves the burden of proof to EU states to determine per Recital 58 and Article 22(2a)(d).[179] As the last seven years of Vigilance Law litigation have demonstrated, forcing plaintiffs to carry the burden of proof in a civil law system that disfavors discovery is debilitating to their litigation efforts. Therefore, France should modify the Vigilance Law to ensure that once a plaintiff has made a cognizable claim against a qualifying MNE, the company must then proffer evidence to demonstrate that its vigilance plan is adequate under the law. Brabant has proposed a similar approach, arguing that Paris Civil Court judges should be empowered to ensure an "equitable distribution of the burden of proof between the parties given the context of the law or the facts."[180] This approach is in a similar vein to the Dutch Business Conduct Act. Under the Dutch proposal, if a rightsholder-plaintiff can proffer evidence that may "give rise to a suspicion" between a company and an adverse human rights impact, the burden would shift to the MNE to affirmatively prove it has not caused or contributed to the adverse impact.[181]

Fourth, France should clarify the Vigilance Law to include a choice-of-law provision, allowing French substantive law to be applied in Vigilance Law cases and for the joinder of host-state subsidiaries.[182] As Blackburn illustrates, home-state litigation often provides stakeholders access to greater damage awards and an ability to enforce a decision against an MNE's entire GSC.[183] However, per the EU's Rome Regulation, most member states' default choice-of-law position is to apply host state substantive law.[184] Because only one Vigilance lawsuit has proceeded to the merits, it is unclear whether France would apply host state substantive law.[185]

177. *See* Hernandez, *supra* note 93.
178. *See* Brabant & Epaud, *supra* note 77.
179. *Id.*
180. *Id.*
181. *See* Littenberg et al., *supra* note 159.
182. *See* BLACKBURN, *supra* note 23, at 71.
183. *Id.* at 40.
184. *Id.* at 41.
185. *See* Tribunal judiciaire [judicial court] Paris, *Fédération des Syndicates Solidaires, Unitaires et Democratiques des Activites Postales et de Telecommunications (SUD PTT) v. S.A. La Poste*, Dec. 5, 2023, No. RG 21/15827 (Fr.).

Global South stakeholders often criticize host state law as reflecting corrupt governmental interests. In various British and Dutch suits against Royal Dutch Shell's Nigeria operations, local plaintiffs argued for home state law to apply, given concerns about judicial corruption in Nigeria.[186] For example, the lead plaintiff for the Nigerian Ogale community exclaimed that: "Shell is Nigeria and Nigeria is Shell . . . [y]ou can never, never defeat Shell in a Nigerian court. The truth is that the Nigerian legal system is corrupt."[187] As a result, this Note recommends that the Vigilance Law modify its language to include a favorable choice-of-law provision for plaintiffs, especially given the practical concerns with litigating foreign local law in the Paris Civil Court system. This innovation would be aligned with the 2019 *Vedanta* case before the English Supreme Court, which found that although Zambia may have been the correct venue, "substantial justice"[188] could not be found there, owing to the "practicable impossibility of funding such group claims where the claimants were all in extreme poverty; and secondly, the absence within Zambia of sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity to be prosecuted effectively."[189]

Finally, this memorandum recommends that the French Parliament expand the reach, capacity, and expertise of the Paris Civil Court to hear Vigilance Law claims. Although the National Assembly selected the court for exclusive jurisdiction due to its business expertise,[190] the Paris Civil Court cannot shoulder enforcement for the entirety of the Vigilance Law legal architecture. The court's capacity should be expanded, with sectoral and country experts integrated into proceedings to ensure that local conditions are accurately accounted for.

C. Publish Guidance and Standards for OGMs

A final recommendation for future Vigilance Law amendment concerns the guidance and incentive system for French MNEs to establish OGMs. As discussed, *supra*, the uptake of OGMs has been severely lacking among Vigilance Law companies. In Germany, the Supply Chain Act mandates that each qualifying company implement and publish its complaints procedure.[191] Moreover, it mandates an annual review of the effectiveness of such remediation and the complaints procedure.[192] Similarly, the draft

186. *See* BLACKBURN, *supra* note 23, at 39.

187. *Id.*

188. Vedanta Resources PLC v. Lungowe [2019] UKSC 20, ¶¶ 88–89.

189. *Id.*; *see* Cees Van Dam, *Breakthrough in Parent Company Liability: Three Shell Defeats, the End of an Era and New Paradigms*, 18 EUR. CO. & FIN. L. REV. 714, 719 (2021).

190. *See* Coslin & Renard, *supra* note 103.

191. *See* Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 156, § 3.1.7.

192. *Id.* § 10(2).

Dutch Business Conduct Act proposes a robust set of precise guidance for a "complaints mechanism" and "remediation procedure," delineating the exact actions that MNEs should take given their involvement in a human rights impact.[193] Drawing from the German and Dutch examples, France should require that whatever public authority it invests with Vigilance Law oversight (stemming from its transposition of the CS3D) imposes financial penalties on companies that do not adopt OGMs or render them inaccessible.

Ensuring that OGMs are accessible to stakeholders is a central theme articulated by the UN OHCHR's recent series of recommendations on improving global access to remedy, urging states to harmonize their policies on due diligence by focusing on company-level grievance mechanisms.[194] To date, no Vigilance Law complaint has *specifically* alleged that failure to create an OGM is the proximate cause of the harm. The civil adversarial system has proven poorly equipped to compel companies to adopt OGMs without other administrative or financial penalties. For this reason, this Note recommends that France consider adopting a robust pecuniary penalty or leverage access to public contracts, as Germany did, with failure to construct an adequate, accessible OGM.

VII. CONCLUSION

France's adoption of the Vigilance Law legislation represented a positive development within the broader BHR Galaxy. However, the law does not account for the legal, procedural, and informational barriers that prevent rightsholders throughout the Global South from accessing remedy. Beyond its legal ambiguities and procedural hurdles, the Vigilance Law fails to make tort remedy practically available to those most severely harmed by French MNEs. Concern for access to remedy has not yet penetrated the heart of the BHR Galaxy. For the Vigilance Law regime to meaningfully comport with the UNGPs, it must better reflect access to remedy as its bedrock foundation. Going forward, access to effective remedy should inform how the French Parliament domesticates the CS3D, designs a public authority, and issues guidance on how to generate effective grievance mechanisms.

193. *See* Littenberg et al., *supra* note 159.
194. *See* Hum. Rts. Council, *supra* note 129, ¶ 1.