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REGULATING TRANSPARENCY ON HUMAN RIGHTS AND MODERN SLAVERY IN CORPORATE SUPPLY CHAINS: THE DISCREPANCY BETWEEN HUMAN RIGHTS DUE DILIGENCE AND THE SOCIAL AUDIT

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Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: the discrepancy between human rights due diligence and the social audit

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Introduction

The last decade has seen growing understanding of the prevalence and intractability of ‘modern slavery’ worldwide (e.g. APH 2017). Simultaneously we have seen greater awareness of how globalised purchasing and consumption behaviours may be structurally implicated in this problem and increasing interest in how larger firms are addressing the risk of serious human rights abuses occurring within supply chains (e.g. New 2015; Safarty 2015; Nolan and Boersma 2019). Some of this has manifested in various national-level legislative schemes partly intended to engage larger companies in anti-slavery efforts through exercising leverage down their supply chains. Some schemes require affected firms to implement supply chain human rights due diligence (‘HRDD’) measures.¹ However, mostly the legislative trend involves the development of corporate disclosure or reporting regimes. Australia’s *Modern Slavery Act 2018* (Cth) (‘MSA’) is the latest among various existing or proposed human rights reporting regimes relating to supply chains.² Many of these schemes implicitly assume but do not explicitly require HRDD adoption, compliance instead consisting of reporting on any measures taken to address modern slavery or other human rights risks.

A principal design assumption in such models is that firms will produce (i.e. report) information about their management of human rights risks that the market, consumers and other actors can use to evaluate and respond to. An equally important assumption, of interest here, is that the reporting obligations will stimulate internal processes, such as HRDD, so that human rights risks become a ‘serious integral part’ of corporate decision-making (Muchlinski 2012, 158). HRDD is a relatively new concept for most firms, at least in Australia, and envisages a comprehensive approach to identifying and assessing human rights risks. The MSA is also a recent development, making it difficult to measure how Australian firms are preparing to respond (Ford, Islam and Nolan 2019).³ We consider one plausible scenario to be that instead of fulsome HRDD (and related significant internal integration of slavery awareness and prevention), MSA ‘reporting entities’ may rely too heavily on a more familiar, entrenched corporate practice as a proxy for HRDD. That practice is so-called ‘social auditing’ of suppliers, already prevalent in corporate environmental and social reporting. This article explores existing experiences with social auditing, currently the dominant form globally of labour standards verification in supply chains, because Australian firms may well resort to this practice when preparing their MSA reporting. We argue that reliance on such audits (and especially over-reliance) would be problematic because of what we show to be significant limitations of supplier audits. Motivating our particular concern with the risk that social audits

¹ *Duty of Vigilance Law 2017* (France) and *Child Labour Due Diligence Law 2017* (Netherlands).

² *Tariff Act of 1930*, 19 USC § 1654 (US); *Federal Acquisitions Regulation (FAR)* 48 CFR 1, 22.17 (US); *Modern Slavery Act 2015* (UK), s 54; *Dodd-Frank Wall Street Reform and Consumer Protection Act* 12 USC § 1502; *Transparency in Supply Chains Act of 2010*, Cal Civil Code §1714.43; *Conflict Minerals Regulation 2021* (EU), *Responsible Business Initiative* (Switzerland), *Modern Slavery Act 2018* (Cth); *Modern Slavery Act 2018* (NSW).

³ Even under the slightly older UK *Modern Slavery Act 2015* there is limited information available as to how companies are actually conducting HRDD: McCorquodale et al 2017, 196.

become the dominant MSA-related ‘HRDD’ activity is two decades of evidence that such programs ‘generally fail to detect or correct labo[u]r and environmental problems in global supply chains’ (LeBaron et al 2017, 1). When understood in the context of the paucity of evidence that non-penal reporting regimes can or do stimulate significant internal behavioural change within firms, the problems with social audits, we argue, could result in cosmetic, shallow or narrow self-legitimizing compliance-oriented responses by firms (Ford 2015, 11; Narine 2015; Ford and Nolan 2017; Landau 2019). Unless audit processes are reformed, over-reliance on these may mean that two key MSA design assumptions go unmet. First, reporting comes to involve audit-derived information that neither reveals nor addresses slavery risk accurately. Second, the MSA does not result in society harnessing corporate resources and influence in support of substantive anti-slavery efforts and the MSA becomes unable to serve as a generational catalyst for significant internal change within firms on human rights risk.

This article proceeds as follows. Section 1 analyses the MSA in its wider normative context, in particular the focus within the 2011 UN *Guiding Principles on Business and Human Rights* (‘UNGPs’)⁴ on corporate HRDD processes. We explore the apparent assumptions underpinning the overall governance approach of reporting models like the MSA, in particular the idea that firms might supplement state governance of human rights, principally by firms transforming their internal cultures and processes. We explain our scepticism about whether reporting regimes, however well intended, tend to lead to fulsome HRDD and/or can otherwise generate such profound consequences. In our attempt therefore to explore future scenarios around corporate responses under the MSA, Section 2 observes patterns in the growth of social auditing as a corporate responsibility reporting practice. Section 3 expresses caution about the risks that social auditing becomes a proxy for or synonymous with HRDD, particularly because of the superficiality in audit verification processes and the tendency for audit processes to focus on symptoms, rather than root causes, of human rights problems. We do not seek or need to show that reporting schemes are a regulatory ‘failure’ (cf. Ben-Shahar and Schneider 2011; 2014). Our intent is to highlight the risks involved in relying uncritically on the assumption that reporting, especially if disproportionately audit-based, will generate useful information for external stakeholders or transformative change within firms’ business cultures and practices. Section 4 briefly considers three mechanisms that might enrich the social auditing process: engaging workers, greater transparency around audit processes and results, and incorporating remedial dimensions.

In concluding, Section 5 reflects on the social audit phenomenon in the light of the assumed role that HRDD is intended to play in transforming corporate practices internally. The limits of social auditing as typically practiced create the prospect that over-reliance on audits in corporate MSA responses may result in the scheme becoming a relatively narrow information-generating process that promotes an unsatisfactory shallow compliance-oriented rather than substantive problem-solving approach to modern slavery. If so, the MSA is unlikely to be the

⁴ *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, UN Doc A/HRC/17/31 (21 March 2011), Annex, adopted by the UN Human Rights Council: *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res. 17/4, UN GAOR, 17th sess., 33rd mtg., Agenda Item 3, UN Doc A/HRC/RES/17/4 (6 July 2011, adopted 16 June 2011; hereafter UNGPs); see *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect, Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008), adopted by Council HRC Res. 8/7, UN GAOR, 8th sess., 28th mtg., UN Doc A/HRC/RES/8/7 (18 June 2008).

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stimulus that it might have been for more fulsome, systematic, scaled and transformational corporate co-governance contributions to human rights.

1. Corporate governance contributions in context

1.1 Human Rights Due Diligence (HRDD) and the *Modern Slavery Act*

The UNGPs made clear that businesses cannot show (externally) that they respect human rights unless they know more about their operations and supply chains, for which they require certain policies and processes to be in place.⁵ The UNGPs introduced HRDD as a comprehensive, proactive, preventive (or mitigating) repeated exercise to discover actual and potential human rights risks in business activities.⁶ HRDD processes are the principal mechanism by which it was envisaged companies would discharge their UNGPs ‘responsibility to respect’⁷ human rights (Nolan 2014). HRDD differs from conventional corporate due diligence because its focus is not risk to the business but risks to people affected by the business’s activities.⁸ Given the great diversity of firms, sectors and circumstances, UNGPs-style HRDD is broadly framed, emphasising flexibility and context,⁹ while comprising five essential elements.¹⁰ In order to ‘identify, prevent, mitigate and account for’¹¹ how they address their adverse human rights impacts, businesses should: (1) identify and assess actual and potential adverse impacts; (2) integrate these findings internally,¹² taking appropriate preventative and mitigating action;¹³ (3) track the effectiveness of such responses;¹⁴ and (4) publicly communicate how they are doing HRDD.¹⁵ They ought also (5) have remediation processes where HRDD reveals that they cause or contribute to adverse impacts.¹⁶ The UNGPs and best-practice management scholarship on supply chain transparency emphasise that these steps are continuous and recurring.¹⁷

For HRDD (and related reporting) to work, firms need to map their supply chains and both collect and verify information on practices, performances and information gaps. They might require information from suppliers (e.g. by reference to an internal code of conduct) and may

⁵ Principle 15, Commentary.

⁶ ‘Business and Human Rights: Towards Operationalizing the ‘Protect, Respect and Remedy’ Framework’ Report to the UN Human Rights Council, Geneva, UN Doc. A/HRC/11/13 (22 April 2009), para [71]. Debates about HRDD in the UNGPs – from normative underpinnings or crystallisation to alleged mixed messages – are beyond this article’s scope; see for example Martin-Ortega 2014, or Ruggie and Sherman 2017, responding to Bonnitcha and McCorquodale 2017. Still, it is clear that the UNGPs’ normative focus is heavily on procedural HRDD requirements (cf. Ruggie and Sherman 2017).

⁷ Pillar II of the UNGPs; See the 2008 Framework, n6above.

⁸ Principle 17(a), and Commentary; see recently for example UNGA 2018, [15]. It is to understand and address specific impacts on specific people in specific contexts: UNGP Principle 18, commentary. Nevertheless, HRDD necessarily involves a series of ‘materiality’ assessments for the firm to gauge and reassess its own risk calibrations and goals (e.g. Bateman and Bonanni 2019, see too McCorquodale et al 2017, 199) and to be able to triage or prioritise by reference to the most severe and/or irremediable risks: Principle 24.

⁹ Principle 17(b), and Principle 14; see e.g. OHCHR 2012, 4.

¹⁰ Principle 17, and Principle 15(b); also Principle 13(b).

¹¹ Principle 17.

¹² Principle 19(a).

¹³ Principle 19(b).

¹⁴ Principle 20.

¹⁵ Principle 21.

¹⁶ Principle 15(c), and Principle 22.

¹⁷ UNGPs Principle 17(c); see recently for example Bateman and Bonanni 2019. For official guidance specific to steps relating to ‘modern slavery’ reporting, see for example UK Government 2015 and Australian Government 2019, Chapter 5.

verify or audit some of that information. Under MSA-type models, that information helps underpin the report or statement issued externally, but HRDD requires further action (indeed, interaction)¹⁸ on the information: engaging in the supply chain on the basis of the gathered information, including ‘supplier contact and collaboration, monitoring, and support’ and perhaps including third-party partnerships to access expertise not available internally (Bateman and Bonanni 2019). The UNGPs are only one (if significant) HRDD framework on which firms can draw.¹⁹

The UNGPs’ elements of HRDD correspond with the mandatory reporting criteria in section 16 of Australia’s MSA: describing supply chains and identifying risks;²⁰ taking action to assess and address those risks;²¹ and assessing the effectiveness of such actions,²² all roughly correspond to the first three elements of UNGPs-style HRDD. The fourth element (public communication) is the essence of the MSA, which as noted is a reporting scheme: section 16 does not *per se* oblige firms to undertake HRDD.²³ One critical question will be how entities gather the relevant information that forms not only the basis of their public communication, but which the firm can act on internally to follow through the cycle of self-analysis and improvement.

1.2 Co-governance of human rights: underlying design rationales

For the purposes of the cautionary, forward-looking tone that our article sounds, it is necessary to stand back from the MSA and explore some of the rationales potentially underpinning this choice of legislative model.²⁴ As noted above, the MSA is the latest example globally of legislative measures intended to supplement formal public regulatory power by harnessing two other sources of influence.²⁵ One is the leverage that larger businesses may have over their transnational and other supply chains to address potential business-related human rights abuses. The other is the pressure that investors, shareholders, insurers, customers and others may bring to bear by pushing such firms to exercise such leverage around human rights risks in the supply chain. The MSA model uses a social disclosure or reporting requirement to effectuate such logics of leverage.²⁶

¹⁸ Principle 18. See too for example Lundan and Muchlinski 2012, emphasising that HRDD requires extensive interaction with market and non-market actors and stakeholders.

¹⁹ OECD 2016 (albeit devoted to minerals supply chains). These steps are (i) strong company management systems; (ii) identify and assess supply chain risks; (iii) develop a strategy to address identified risks; (iv) independent audit of supply chain HRDD; and (v) report annually on HRDD. See too (not limited to supply chains) OECD ‘Due Diligence Guidance for Responsible Business Conduct’ (Paris, 2018). See now too the French Duty of Vigilance Law, n. 1 above.

²⁰ Subsection 16(1)(b) and (c).

²¹ Subsection 16(1)(d), which provides that the MSA statement must ‘[d]escribe the actions taken ... to assess and address those risks, including due diligence and remediation processes’.

²² Subsection 16(1)(e).

²³ Moreover, the MSA does not penalise reporting non-compliance as such, instead relying on markets and consumers to use reporting behaviours or the disclosed information to pressure firms to address modern slavery risks (see e.g. Ford 2018).

²⁴ Consideration of the political circumstances informing or constraining MSA design options is beyond our article’s scope.

²⁵ For a recent typology of such schemes, intended as the first step in systematically mapping and analysing the design and effectiveness of disclosure legislation on human rights labour standards, see Phillips, Le Baron and Wallin 2018.

²⁶ This is a ‘Type 1’ regulatory model for the purposes of the 2018 typology in Phillips et al, *ibid*.

Corporate social accountability reporting generally has both internal and external purposes (Hodges 2015; Crowther 2017; Mares 2018).²⁷ The two broad assumptions underlying the MSA model are that the statutory requirement to report will generate internal actions within firms to identify and address risks, and that it will also generate (reported) information about such measures to external market and other stakeholders so that they can accordingly exert pressure upon or reward firms. In this article we are mainly interested in exploring the first of the above assumptions, that of the MSA's potential in stimulating improved internal processes within organisations (Mares 2018, 194). What confidence can we have that a reporting requirement might trigger fulsome internal HRDD activities that not only will yield quality information for external audiences to act upon, but also deeply and meaningfully embed social responsibility for supply chain integrity within corporate governance structures and cultures (e.g. Govindan et al 2016)?²⁸ In asking this question and focussing on the internal aspect, we are conscious that there may be (or perhaps should be) a dynamic, reflexive relationship between the 'internal' (management and corporate processes and culture) and the 'external' (stakeholder engagement with information that firms produce and report). We see some parallels with Buhmann's enquiry (2018) into whether HRDD pursuant to the EU's *Non-Financial Reporting Directive* might induce altered and prevention-oriented business conduct and not only after-the-fact reporting on facts obtained or measures taken.

The 'co-governance' rationale on which the MSA rests – of deliberately harnessing the 'regulatory' power of business (David et al 2012; generally Braithwaite and Drahos 2000; Braithwaite 2008) – is not necessarily illegitimate or ill-conceived. Its basic premise is that it is not only governments that can address human rights issues, and we must engage business in efforts to promote and protect the human rights that their activities affect (Annan 1999). Government still leads but does so by, among other things, requiring reporting on risk management processes. Such disclosure regimes are established policy tools elsewhere (from child protection to workplace gender quotas). The 'new governance' (e.g. Ford and Condon 2011) logic involved posits that effective regulation is not just about rules and inspectors but enrolling and encouraging the ordering power of regulatees' own systems (Ayres and Braithwaite 1992; Parker 2002). State regulators then either audit those risk management systems or, as with the MSA, essentially leave oversight and action to market or citizen actors (Grabosky 2017). Thus non-state governance resources do not just foster regulatory compliance (Grabosky 2014) but contribute to the underlying regulatory objective, with firms both reporting on slavery risks and co-governing those risks alongside the state requiring the reporting.

Proponents (e.g. OBPR 2012) see such reporting schemes as potentially easier and more cost-effective than direct traditional regulatory intervention, and more suited to complex diverse contexts with limited state insights (such as transnational supply chains). The MSA's implicit co-governance logic accords with the UNGPs' own design premise, of a 'polycentric' governance scene explicitly drawing the regulatory contributions of business and of market and social stakeholders acting on businesses' reporting (see e.g. Ostrom 2010; Taylor 2011; Ruggie 2014; Prekert and Shackelford 2014; Melish & Meidinger 2012; Ford and O'Brien 2019). The UNGPs revolve around a deliberate normative strategy of using the empirical fact

²⁷ In Mares' typology, our concern is with the 'internal and indirect' (but intended) effects of the MSA in terms of the ways that companies might 'change their decision-making as new information [becomes] available': Mares 2018, 190.

²⁸ It is beyond the scope of this paper to explore theories of how, in internal management scholarship, such internal transformation occurs, such as the 'innovation diffusion theory' used in MIT's Sustainable Supply Chains project: <https://ctl.mit.edu/research/current-projects/sustainable-supply-chains>.

of governance plurality, addressing governance gaps by leveraging multiple sources of influence.²⁹ This approach also accords with what the International Labour Organisation refers to as ‘synergistic governance’ (ILO 2016, 24).³⁰ Yet one key assumption in this co-governance approach is that compliance will not only facilitate non-state stakeholders holding firms to account but will also invariably ‘open’ the corporation (Parker 2002) to public policy imperatives. That is, MSA-type schemes might transform the mindset of regulatory target firms in the process of the state also drawing on those corporations’ systems to help address hard problems such as slavery.

Transparency about human rights in global supply chains relies on creating a culture of *continuous improvement within the organization* and across value chains (Bateman and Bonanni 2019). It seems tolerably clear that the MSA is intended, in the act of drawing on firms’ co-governance power, to cultivate internal cultural (managerial and procedural) changes within Australian firms. The government intended the MSA (in part) to ‘*transform* the way [that] the Australian business community responds to modern slavery’ (Minister 2018, emphasis added). Firms are to use this ‘risk-based framework’ to ‘drive a ‘race to the top’ as entities compete for investor and consumer support’ (Minister 2018).³¹ Clearly implicit in this is that firms will need to adopt certain internal measures in order to compete in this ‘race’. This aligns with a key ‘internalisation’ rationale of the UK MSA, intended in part to ‘embed’ modern slavery awareness ‘further into company culture’ (UK Government 2019, Vol.2, para [2.3]). This corresponds to the UNGPs’ ‘effective horizontal integration’ notion, which relies principally on HRDD processes.³²

1.3 Reasons for caution about HRDD integration

Before examining prevailing audit practice, some cause exists more broadly to doubt whether the MSA’s assumed internalisation, transformation and embedding will eventuate. Whatever the merits of schemes designed to enrol firms as ‘regulatory’ resources (Ford 2015b), company reporting schemes are hardly new as governance tools (e.g. Ford and Condon 2011), and for at least two decades now, significant questions have existed over their efficacy record in fact (e.g. dePiazza and Eccles 2002), particularly in social and environmental reporting (e.g. Gray et al 1995; Buhmann 2018). Whether or not this requires a ‘reality check’ (Kinderman 2016) about the above-mentioned design assumptions, at very least more research is needed (McPhail and Ferguson 2016; Mares 2018), including on the conditions under which reporting requirements might trigger business behavioural changes (e.g. Soutar et al 1995; Gond and Herrbach 2006; Crowther 2017). While sustainability reporting is assumed to drive organisational change within companies, limited scholarship exists on the exact link (e.g. the mix of internal motivations and external stimuli) between reporting obligations and corresponding internal cultural and other systemic change (Formentini and Tattichi 2016; Lozano et al 2016; generally

²⁹ Ruggie 2013, 2014; see for instance UN Doc. E/CN.4/2006/97, 22 February 2006, [22].

³⁰ That is, to ‘describe situations where public, private and social governance strategies are not merely layers of regulation, but are mutually reinforcing for effective compliance, and establish a level playing field for fair competition.’

³¹ Analysis of the rationale behind (incentives for) this inter-firm competition is a key question going to the likely effectiveness of the MSA model, but lies beyond the scope of this article.

³² Principle 19(a). One forward-looking study of future HRDD published at the time of the UNGPs’ endorsement included, as the first of its five overarching themes, the internal process of ‘developing human-centred approach[es] to business management’: IHRB 2011

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Govindan et al 2016)³³, or the barriers (e.g. Ritchey et al 2010) preventing companies from responding to external reporting requirements by more effective supply chain integration. Moreover, the MSA is a non-punitive, socially enforced information-based scheme, yet empirically such reporting models have, at best, mixed results in effecting the underlying social objective (e.g. Clarke et al 1999; Gunningham et al 2004; Ford 2005; Gunningham and Holley 2010; Holley 2017; cf. Ioannou and Serafeim 2017). Indeed this has been the reaction to date around the UK legislation on which Australia's MSA is based (UK Government 2019, 14-15, 23-24, Vol. 2, [2.5]).

Behind the MSA, then, is a 'distinct underpinning' governance rationale (Phillips, Le Baron and Wallin 2018, 19) including the assumption that firms will 'open' themselves (Parker 2002) and internalise the regulatory objective. We think this needs to be tested conceptually and (if possible) measured empirically, since existing scholarship and experience creates doubts about the link between MSA-style procedural reporting requirements and the generation of real internal organisational learning and change (Buhmann 2018, 26-27, 32, 36, citing Gond and Herrbach 2006), let alone substantive impact. With this context we now turn to explore the risk, instead, of shallow or cosmetic or ritualistic (Power 1999; also Charlesworth and Larking 2015) compliance where over-reliance on social audit practices dominates a company's conception of what comprises adequate HRDD.

2. Social audits through a human rights due diligence (HRDD) perspective

One critical question in the MSA scheme will be how reporting entities gather the information underpinning their public communication, and what those methods signal about whether and how firms are truly internalising a human rights culture. As noted, we know little about what internal steps firms are taking on pre-reporting internal activities (UK: McCorquodale et al 2017, 196; Australia: Ford, Islam and Nolan 2019).³⁴ Nevertheless, UK MSA empirical research suggests that supplier audit is the second most prominent method employed to identify human rights impacts or risks (McCorquodale et al 2017, 209). This is unsurprising given how the prevalence of social (or ethical) compliance auditing has increased as a tool to address exploitative labour conditions (Terwindt and Armstrong 2019, 248) and given the growing reliance more generally on what Section 1 outlined as essentially self-regulatory or market-based initiatives to combat human rights abuses in global supply chains (Locke 2013; Macdonald 2014).

Through social compliance auditing processes, firms aim to verify supplier compliance with human rights standards, typically contained in a code of conduct. The precise nature of a social audit varies depending on the sector and the entity undertaking it. It generally involves physical inspection of a facility (e.g. a factory, farm, mine or vessel), combined with documentary review (to the extent that records are kept) and interviews with management and perhaps employees.³⁵ The UNGPs contemplate social auditing as part of HRDD, and by associated

³³ It is beyond the scope of this paper to explore theories of how, in internal management scholarship, such internal transformation occurs, such as the 'innovation diffusion theory' used in MIT's Sustainable Supply Chains project: <https://ctl.mit.edu/research/current-projects/sustainable-supply-chains>.

³⁴ Meanwhile, observations from some years ago on the significant variation in how firms even within peer-groups are actually approaching HRDD (IHRB 2011) probably remain accurate.

³⁵ See for example, ISEAL Alliance, 'Assuring Compliance with Social and Environmental Standards: Code of Good Practice' (v1.0, October 2012), 5 < <https://www.isealalliance.org/online-community/resources/assurance-code-version-10>>, (ISEAL Alliance Code of Good Practice). The ISEAL Alliance is a multi-stakeholder initiative

guidelines and frameworks (e.g. OECD 2016).³⁶ Yet in those frameworks auditing is ascribed a reasonably limited role. The UNGPs refer to it solely in the context of tracking, listing it as one of an array of tools to assess the effectiveness of a company's response to its identified human rights impacts.³⁷ Thus while social auditing may be one of the actions a company takes at this stage of HRDD, it is not a substitute for the far more holistic HRDD approach outlined in Section 1.

A consultancy 'empire' exists around mandatory disclosure and related audits (Ben-Shahar and Schneider 2011; 2014). As noted, social auditing alone is a burgeoning US\$50 billion industry estimated to account for up to 80% of ethical sourcing budgets (ETI Auditing Working Conditions; UK Joint Committee, 2019). It is also the most common tool utilised by multi-stakeholder and corporate-led initiatives established to address human rights impacts of global supply chains. The Ethical Trading Initiative (ETI) and analogous schemes³⁸ each promulgate a standard of conduct and rely on social auditing as the primary means of enforcing their standard.³⁹ Recognising the growing costs and complexity associated with extensive social auditing, some platforms now facilitate audit-sharing among companies.⁴⁰

Slavery, like sub-standard labour conditions generally, should be addressed through '[host] government regulation and inspection, together with pressure from organized labour groups like independent trade unions or worker organizations' (Terwindt 2019, 248). The reality is that government and union oversight are often lacking in many nodes along global supply chains. Governmental inability or unwillingness to enforce labour standards in workplaces often goes hand-in-hand with restrictions placed on the functioning of unions in those same working environments (AFL-CIO 2013). In the aftermath of Bangladesh's 2013 Rana Plaza factory collapse which killed over 1,100 workers, it was revealed that Bangladesh had fewer than 200 government inspectors conducting labour inspections of over 5,000 factories with over 4 million workers (Bose 2013). This problem is not limited to developing economies: the UK has 'an under-staffed labour inspectorate, less than half the global benchmark of one inspector per 10,000 workers' (Kenway 2019).

Alongside the limited resources or incentive to inspect labour conditions is a concerted effort by some states to hinder the efforts of organised labour. Organisations around the world

whose aim is to strengthen the sustainability standards of MSIs (and other standard setting and accreditation bodies).

³⁶ In addition see OECD 'Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector' (Paris, 2017); and the OECD-FAO 'Guidance for Responsible Agricultural Supply Chains' (Paris / Rome, 2016). Notably, in the context of impact assessment, these guides do not refer directly to social auditing but rather to monitoring and site level assessments, which are in effect a type of social audit. See too OECD 'Due Diligence Guidance for Responsible Business Conduct' (Paris, 2018), 27-28, 32. The OECD guidance documents highlight the need for significant worker involvement as well as consultation with a broad base of stakeholders including government authorities, trade unions, civil society and affected communities.

³⁷ Other tools contemplated include performance contracts and reviews, surveys and grievance mechanisms: UNGPs Principle 20, Commentary.

³⁸ For example, major initiatives in addition to ETI such as Social Accountability International (SAI), the Fair Labor Association (FLA), Worldwide Responsible Accredited Production (WRAP), Fair Wear Foundation, Business Social Compliance Initiative (BSCI), Electronic Industry Citizenship Coalition.

³⁹ Although the ETI does not itself conduct audits, its members have typically relied on auditing to implement the ETI code throughout their supply chains. It should however be noted that the ETI acknowledges the limits of social auditing, 'ETI Perspective 2020: A Five Year Strategy' (7 December 2015) <<http://www.ethicaltrade.org/resources/eti-perspective-2020-five-year-strategy>>.

⁴⁰ For example, Fair Factories Clearinghouse, the Responsible Sport Initiative, and SEDEX: <<http://www.wfsgi.org/activities>>; <<http://www.fairfactories.org/>>; <<https://www.sedexglobal.com/about-us/>>

fighting for vulnerable workers are increasingly silenced as governments crack down on workers' rights.⁴¹ The likelihood of exploitation diminishes where strong worker collectives exist, yet an ILO survey among 1,454 companies in global supply chains found that less than a third of workers are covered by a collective agreement (Vaughan-Whitehead and Caro 2017). It is in the reality of these conditions that company-commissioned social audits operate and seek, in theory, to complement and supplement the governance gaps in regulating global labour markets. Yet consistent findings now exist that reveal the limitations of audits both in identifying and in redressing labour exploitation (O'Rourke 2006; Locke 2013; AFL-CIO 2013; Macdonald 2014; LeBaron and Lister 2015; LeBaron et al 2017). The failure of social auditing is perhaps most tragically exemplified by various high-profile disasters and scandals in the apparel sector. On 1 September 2012, a fire in the Ali Enterprises garment factory in Karachi killed nearly 300 workers; on 24 November 2012, a fire at Tazreen Fashions in Dhaka killed 117 workers. The Tazreen factory had been audited multiple times by Wal-Mart. While safety issues had been raised, no remedial action was ever taken. The Ali Enterprises factory had been certified against SAI's code of conduct and also separately audited by an outfit accredited by both WRAP and the FLA. At least two of the factories in the Rana Plaza complex had passed social audits by BSCI just months before its collapse (Reinecke and Donaghey 2015; Pekdemir et al 2015).

3. Two limits of social audits: superficiality and symptom-focus

Following the Rana Plaza disaster, BSCI's Managing Director observed that it is 'very important not to expect too much from the social audit' (Terwindt and Armstrong 2019, 245). There are various reasons why social auditing is not a proxy for HRDD and should not form the backbone of MSA reporting.⁴² However, we highlight just two: audits' superficial nature, and the fact that an audit is designed to focus on information representing symptoms, rather than the root cause of the problems. These problems give reason to doubt not only the quality of reported information in MSA-type models, but also to doubt how deeply and meaningfully modern slavery will be internalised in business culture terms in the reporting firms that rely on such audits, which are often done by third parties.⁴³

First, the audit format itself is inherently superficial.⁴⁴ Social audits tend to be undertaken as a short checklist exercise, generally over a few days at one to two-year intervals. Underlying

⁴¹ 'In 2018, 65% of countries barred workers from the right to establish or join a trade union, 81% violated collective bargaining rights, and 87% violated the right to strike. Countries engaging in arbitrary arrests and detention of workers increased from 44 in 2017 to 59 in 2018, and countries where workers were exposed to murder, physical violence, death threats and intimidation rose from 59 in 2017 to 65 in 2018' (Nolan and Boersma 2019, 196).

⁴² Firms may not look or audit beyond 'tier-one' suppliers; information may be obscured or withheld; McCorquodale et al (2017, 223) note that some firms appear to struggle with shifting the focus from 'risks to the business' to 'risks to people' as per the UNGPs.. Likewise one report suggests that current audit-driven activities fail because they do not focus strongly enough on human rights, are not conducted by human rights experts, or are too limited in scope: Human Rights Watch 2016, 13. See too Shift 2013 for analysis of five factors said to help explain why the traditional audit paradigm has struggled to result in improved corporate social performance.

⁴³ As with social audits under consideration here, see Harrison 2013 for an analogous argument that prevailing shallow practices in Human Rights Impact Assessments (HRIA, being only one aspect of HRDD) raise reasons for concern about the credibility and robustness of likely HRDD practice if it focuses to heavily on HRIA.

⁴⁴ Since collaboration across the value chain is essential for achieving an industry-wide, scaled sustainability transformation, it has been argued that sourcing managers (Chief Purchasing Officers or CPOs) need to shift from a transaction-model 'contract negotiators' to 'relationship managers' (McKinsey 2019; also EY 2016, and see too Shift 2013 (recasting firms' relationships with suppliers, from 'policemen' (of codes of conduct) to 'partners' (in addressing human rights risk)). The transactional and tenuous, shallow, low-commitment year-to-year

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issues and causes are often ignored, with results at best only reflecting a snapshot in time (O'Rourke 2006, 907; Clean Clothes Campaign 2005, 26-28, 32-30; Locke et al 2009, 331-334; Locke 2013, 35-37; Le Baron and Lister 2015 and 2016; ETI Auditing Working Conditions; ILO 2016, 45). Instances of supplier fraud and evasion (for example, falsifying workers' records and 'cleaning up' facilities prior to inspections) are well documented (Clean Clothes Campaign 2005, 20-25, Clean Clothes Campaign 2009, 46-51; Locke et al 2009, 332;; Labowitz and Baumann-Pauly 2014, 18; HRW 2015). The current model of social auditing promotes a coercive culture that encourages cheating and corruption and reinforces underlying power asymmetries. Workers, unions, NGOs and other stakeholders who might counteract these issues and shed light on violations tend not to be meaningfully involved in the process at all (O'Rourke 2006, 908; Barrientos and Smith, 2006, 40; Barrientos and Smith, 2007, 726; Locke 2009, 331-334;; Utting 2014, 437). Audits may be announced or unannounced, but either way their design and scope are heavily influenced by the buyer or retailer atop the supply chain. They are used as a policing tool, to 'manage' the problem. They are rarely promoted as a tool for collaborative engagement. Audits are more typically focused on a buyer's direct or tier-one suppliers and are less commonly used in the lower tiers of supply chains where workers who are more vulnerable to exploitation are likely to be. One study noted that the majority of audits are "not trying to find things out, they're trying to prove that something is not there" (Le Baron et al 2017, 14). These patterns do not augur well for the accuracy of information for MSA reporting, or for the likelihood that auditing is part of an 'effective horizontal integration'⁴⁵ of HRDD into a firm's culture and processes.

These problems may be exacerbated when audits are used to identify modern slavery, which by its nature is often a well-hidden issue. Modern slavery is unlikely to be readily identified by an overly technical checklist audit approach. Its detection will typically require far more meaningful engagement with workers and communities. The audit may need to be framed in human rights terms rather than as part of wider sustainable or ethical sourcing audits.⁴⁶ A recent ILO study has shown that different types of auditors and differences in the timing, methodology, standards, and rigour of audit processes strongly impact the detection of labour abuse (Phillips, Le Baron and Wallin 2018). More generally, auditors may struggle to gather data on such a sensitive issue. Workers may be afraid to talk openly with auditors about slavery risks. For example, in an investigation by Australia's Fair Work Ombudsman (FWO) into the cleaning industry, the FWO highlighted the insufficiency of relying on vulnerable workers to formally self-report labour rights violations. The FWO found that many workers were reluctant to engage with or approach the FWO for assistance 'due to cultural reasons, immigration status, limited workplace rights knowledge, or concerns about employment security' (FWO 2018, 7).

Secondly, audits focus not on the root causes (why labour violations persist) but the problem's symptoms (wage discrepancies, forced overtime) and thus have limited utility in redressing the exploitation. One 'Big 4' audit firm has warned of a checklist approach to social compliance with clerical and Y/N audit approaches unsuited to detecting the underlying causes of problems

relationships at least in some retail sectors (e.g. McKinsey 2019: retail apparel) do not create incentives for suppliers to invest in helping achieve the regulatory outcome of addressing human rights risk.

⁴⁵ See Section 1 above.

⁴⁶ Research under the UK MSA has found that where human rights are indirectly taken into consideration through other due diligence processes, such as for labour, and health and safety issues, adverse human rights impacts are significantly less likely to be identified: McCorquodale et al 2017, 209.

(EY 2016, 3).⁴⁷ Labour violations in the apparel sector, for example, are not simply ‘a factory-level problem fixable by improved compliance monitoring’ but instead are a ‘pervasive and predictable outcome’ of the overall business model (Anner et al 2013, 1).⁴⁸ That model, specifically the purchasing practices of buyers (often but not always brand-focused companies) atop the supply chain, has a significant impact on workers’ conditions at the bottom. Yet while these lead companies have shown a readiness to impose occasional requirements upon their suppliers through demands to open their factories, fields and mines to auditors, lead companies have shown limited willingness so far to holistically address the impacts of their own practices and to innovate in the way in which they source. Again, this suggests that audit-heavy tick-box ‘HRDD’ is unlikely to catalyse internal learning and continuous improvement by firms relating to substantive human rights prevention and protection. Audits do not typically conduct a root cause analysis of violations and how pricing, purchasing and sourcing practices contribute to violations. Audit should not be relied upon as a proxy for developing a broader HRDD program. Meanwhile, co-governance philosophies (Section 1 above) combined with the acceptance of audit as a tool to uncover and address labour exploitation reinforces the notion that this is an issue that business can ‘own’ without the states’ involvement. Audit pursuant to the MSA ought not supplant localised governments’ role in labour standards inspection and enforcement, while sourcing country governments may need to specify (in the MSA and equivalents) what counts as ‘HRDD’.

4. Mechanisms to enrich auditing as part of HRDD

The question then becomes what alternative approaches might prove more effective in securing worker rights in global supply chains, including by stimulating procuring firms to more fully internalise a fulsome HRDD approach capable of seeing and solving supply chain problems. If social auditing is so pervasive, what modifications to it might enrich inevitable reliance on audits?⁴⁹

4.1 Empowering worker voice

In addressing social audits’ failure to fully capture issues at particular worksites, the Clean Clothes Campaign argues that the best auditors are ‘the workers themselves since they are continually present at the production site’ (Clean Clothes Campaign 2005, 79). Studies demonstrate that workers and representative organisations are crucial to an effective supply chains’ HRDD process. One study concludes that a main barrier to effective code implementation is lack of a ‘comprehensive and accountable means of engaging workers as well as their unions’ (World Bank 2003). Similarly, a 2017 OECD report states that ‘enterprises should involve workers and trade unions and representative organisations of the workers’ own choosing’ in HRDD (OECD 2017, 29). This is not the first article to examine the need and means for workers to be given a more significant role in supply chain monitoring and one of the key recommendations is that monitoring processes are not only worker-centred but also worker-driven (Claeson, 2019, Locke and Romis, 2007, Outhwaite and Martin-Ortega, 2019). That is, workers have a key role in designing and implementing monitoring processes that not only identify workplace issues but also provide redress.

⁴⁷ In relation to HRDD generally, Shift called (2013) for moving to comprehensive continuous improvement programs rather than audit-based pass/fail compliance, including by replacing audits with collaborative assessment and ‘root cause’ analysis.

⁴⁸ Anner et al describe an industry dominated by firms whose business model ‘is predicated on outsourcing production via highly flexible, volatile, and cost-sensitive subcontracting networks’.

⁴⁹ For an earlier attempt to outline improvements to social compliance practices, see Shift 2013.

Worker-driven social responsibility initiatives (WSR) are a relatively new practice and involve workers themselves as the drivers behind creating, monitoring and enforcing workplace standards. Some firms are adopting WSRs for more effective HRDD and to manage ongoing supply chain compliance and operational risks. Examples include two US-based programs (Fair Food Program and Milk with Dignity) and a new Australian initiative (the Cleaning Accountability Framework, CAF). CAF requires that cleaners are paid to attend two worker engagement meetings annually where cleaners are educated about the CAF code and given the opportunity to provide feedback via a survey on working conditions at the building. The follow-up meeting involves cleaners, CAF and a union and provides an opportunity for cleaners to speak without employers present. Issues raised by cleaners are an integral component of CAF's audit model. Issues raised are investigated and remediated at the workplace by relevant stakeholders in the supply chain.

Terwindt and Armstrong argue (2019, 257) that it is essential to ensure that a permanent grievance mechanism is available to workers to ensure direct input into factory evaluations during audit. Often workers are more of an afterthought than an integral part of the process and WSR initiatives aim to alter this imbalance. Traditionally social audits have limited involvement from workers, and do not necessarily enable workers to be interviewed confidentially and off-site. Even where they do, there is a low likelihood that the auditor would be able to develop the trust with workers necessary for fuller disclosures.

Technology is also increasingly being used to engage workers in supply chains. Various digital tools can enable workers to provide (often anonymous) input on working conditions.⁵⁰ Many are focused on gathering worker data so that companies might better understand specific issues or complaints, but questions remain about their efficacy in actually engaging workers in the evaluative process. A Verite report for Gap noted that 'worker engagement processes are treated as a separate activity... [and] are usually brand-centered and heavily oriented toward supply chain risk management' such that 'workers' interests are often overlooked or marginalised' (Verite 2018, 3). Thus tech-based approaches can fall into the same trap as social audits, being brand-driven not worker-driven. Technology may be a useful supplement to an audit, but much depends on the tool's accessibility and uptake (trustworthiness) among users.⁵¹ Any technology use must ensure users' security and may be most effective when combined with the face-to-face contact with workers so vital to facilitating a connection between them and those attempting to uncover and address workplace problems. Firms whose audits do not fully engage workers seem unlikely to learn from audits in ways that result in them experiencing significant internal cultural transformation.

4.2 Increasing transparency of audit information

To assess the utility of audit-derived information and to assess whether the audit might evince anything about a firm's internalisation of slavery risks, certain stakeholders (particularly workers themselves) need to be able to understand the process behind the audit.⁵² Audit processes and outcomes are typically not publicised. Yet workers and their representatives are

⁵⁰ For instance, custom-made apps in addition to social media and message apps.

⁵¹ For example, it may be useful to keep it simple and adapt a messaging app that workers already use on their phone (such as WeChat) to enable workers to supplement external auditing reports.

⁵² For example, was the audit pre-announced or unannounced, how were auditors trained or 'accredited', who hired and paid them, was it an internal or external third-party audit, how were workers involved, how long were auditors on-site, was the process and results made public?

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best placed to assess the audit's veracity and to be aware of what follow up (e.g. corrective action plan) is recommended. Appropriately translated, pictorialized and accessible audit results may then be useful to all workers and their representatives in ways that enrich HRDD (Clean Clothes 2019, 8).

For example, in 2019, the Swedish Regions (via Region Östergötland) commissioned independent social audits on disposable glove factories in Malaysia, which were highlighted as high-risk in an initial supply chains assessment. The audit found evidence of forced labour, amongst other violations, in the factories. The full audit results were made public (the three factories were de-identified). The initiative to publicise the audit results is significant as it does not benefit the procurer, long-term, in forced labour issues remaining hidden. Having audit methodologies and results available to national labour inspectorates and workers would help to ensure that audits in fact help to identify and accurately address workplace violations and help the procuring (MSA-reporting) firm to learn and improve as an organisation atop the supply chain. As Section 1 noted, 'synergistic governance' in this area, with 'mutually reinforcing' processes by various actors (ILO 2016, 24) requires availability of information about audits (and HRDD generally) (see too HRW 2016, 15).⁵³

4.3 Incorporating access to remedy

Given some entrenched limitations of prevailing social audit practice, an established process for obtaining redress must sit alongside the audit process if activities to support MSA reporting are also to catalyse internal change within firms and help them address substantive rights risks down their supply chains. Forms of remedy by and from businesses that might be appropriate include restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition, and other preventive measures (UN Working Group 2017, [43]-[54]). Audits may highlight problems, but HRDD requires that the audit exercise inform and extend to contemplating solutions in concrete contexts, while engaging workers on what 'remedy' should comprise.

Some recent WSR monitoring models have in-built mechanisms to better enable and channel remedy. For example, the Bangladesh Accord on Fire and Building Safety incorporates factory inspections, worker training, a complaints mechanism and a legally binding mechanism to hold companies to account for failure to meet Accord requirements.⁵⁴ Meanwhile the US-based, farmworker-driven Fair Food initiative that began as the 'Campaign for Fair Food of the Coalition of Immokalee Workers' (CIW) has relied on strong alliance-building with consumer groups and activists to persuade major brands to take steps to end farmworker exploitation, including nine cases of modern slavery involving over 1200 workers (CIW). The Fair Food Code is backed by binding agreements between CIW and buyer companies that buyers will suspend purchases from growers whom an independent audit finds are not Code compliant.⁵⁵ This gives growers a strong market incentive to comply with the Code. Notably, in remedial terms the CIW scheme involves a confidential complaints mechanism that typically shares with workers the outcome of complaints.

⁵³ Harrison notes (2013, 112) that transparency of the HRDD process itself (that is, its methodology etc.) is a 'sine qua non' of its effectiveness.

⁵⁴ <https://bangladeshaccord.org/>. The Accord represents the first time a binding arbitration procedure has been integrated into a global framework agreement for the resolution of business and human rights disputes.

⁵⁵ The independent audits are overseen by the Fair Foods Standards Council and, in relation to 4.1 above, incorporate worker interviews with 50% or more of the workforce on any given farm.

In August 2019, leading apparel brands, a union coalition and women's rights advocates and a major supplier established various agreements to combat gender-based violence and harassment in Lesotho's garment sector. Worker advocates had identified these issues as pervasive, but the brands' social audit programs had not picked this up. The agreements make the suppliers' continuing business conditional on compliance with the agreements and incorporate worker training and a confidential complaint mechanism to third-party local advocates (Abimourched et al 2019). The leading study on HRDD under the UK MSA has suggested that incorporating a grievance mechanism dimension is crucial to ensuring a full cycle process (McCorquodale et al 2017, 211).⁵⁶ Moreover, experiences with grievance mechanisms can only improve organisational learning within reporting firms.

5. Conclusion

One indicator of effectiveness (Phillips, Le Baron and Wallin 2018, 29) of corporate human rights disclosure regimes, we argue, is their capacity to catalyse transformative change within business actors. as the aim is to harness business's own governance resources and leverage in support of overall global anti-slavery efforts. 'Transformational change' in respect of how companies think and act on human rights would comprise widespread uptake of robust and meaningful HRDD around the world, corresponding to which one would see shifts in corporate cultures and ground-level human rights improvements (see Harrison 2013, 108).⁵⁷ A principal two-step assumption of MSA-style reporting regimes is that they will stimulate firms to adopt HRDD and, moreover, that HRDD will have transformative internal behavioural and learning effects (in addition to reporting's 'external' effects in terms of markets and consumers 'policing' compliance). Yet experience and evidence from reporting regimes in other socio-environmental spheres suggests good reasons to be cautious, notwithstanding the 'race-to-the-top' motif, about assuming that reporting regimes whose 'HRDD' turns on prevailing audit approaches might ever generate the sort of internal systemic awareness and change within firms. HRDD's centrality to the UNGPs scheme is praised as strategic because businesses are already very familiar with the 'due diligence' concept. Yet this familiarity also carries the risk that Australia's largest firms simply slot MSA reporting into their crowded compliance dashboard, rolling out familiar sustainability reporting techniques. Thus far, those reporting activities have been heavily reliant on social audits at least with respect to the 'social impact' dimension of the wider environmental, social and governance ('ESG') dimensions to the overall corporate sustainability agenda).⁵⁸

Soon after the 2011 UNGPs, Muchlinski warned (2012, 158) that HRDD as an obligation-of-process (cf. of outcome) carried the risk it might "degenerate into a 'tick-box' exercise designed for public relations purposes" rather than a serious integral part of corporate decision-making. Around that time one report noted how many companies continued to base HRDD solely on an audit approach even where they 'privately acknowledge that this is not working' (Shift 2013). Explicitly warning of the 'checklist' / 'tick-box' problem, EY has noted that the social compliance audit industry has not shown progress relative to investment, and the social audit

⁵⁶ See too themes 4 and 5 of IHRB 2011.

⁵⁷ Knowing whether and how reporting regimes actually reduce substantive human rights violations in supply chains would involve a complex empirical exercise and is not a question that has been authoritatively assessed: see Sarfaty 2015; Nolan, 2016, 275.

⁵⁸ HRDD can be (and are likely to be) included within broader enterprise risk management systems: UNGPs Principle 17 Commentary and Principle 18 Commentary. The paradox, of course, is that our call for HRDD integration within firms' management systems might also lead to MSA-related HRDD becoming just another compliance exercise among many in those systems.

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industry's volume of activity may indeed have created a 'dangerous illusion' of progress on the substantive labour standards themselves (EY 2016, 2). Recently the UK government's comprehensive MSA review restated verbatim Muchlinski's 2012 'tick-box' risk (UK 2019, para [2.3.1]).

Implementing HRDD is only implicit in Australia's MSA, which comprises a reporting requirement only. One MSA scenario, we have argued, is that reporting firms will display over-reliance on social audits as a proxy for (or disproportionate component of) more fulsome HRDD. If so, the 'tick-box' risk is a real one here (Ford, Islam and Nolan 2019).⁵⁹ Not only would quality / accuracy questions remain around MSA-reported information, but the MSA's assumed and intended transformative intra-firm 'embedding' effects and inter-firm 'racing' seem unlikely to be realised. Section 3 showed how the process within firms to undertake these audits can become superficial and compliance-oriented, 'business as usual' around supply chains (Labowitz and Baumann-Pauly 2014). MSA uptake within Australia's largest businesses that comes to revolve principally around narrow, compliance-oriented audit-centred activities might not render the MSA a 'hollow victory' (Mares 2018), but may represent a missed opportunity (Buhmann 2018) for the more profound corporate cultural and managerial shift -- listening, learning, preventing and engaging with substantive problems -- envisaged by the UNGPs and now the MSA. We have proposed three ways to enhance HRDD-related auditing. However, with existing audit patterns, more convincing evidence is required about the likelihood that non-penal reporting regimes might trigger the transformation within firms necessary to them fulfilling their potential 'synergistic' co-governance role of helping governments and civil society to address serious human rights risk.

⁵⁹ See Ford 2015, 11 for discussion of this risk in relation to business and human rights implementation more generally.

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