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## Ranking for Good?: A Comparative Assessment of the Performance of French Corporations in Human Rights Rankings

ERIKA GEORGE\* AND DAVID RESTREPO AMARILES\*\*

### Introduction

The global business community plays an important role in both economic development and human development. When Nobel Laureate Amartya Sen proposed a “capabilities approach” to inform the analysis of economic development, he counseled that assessments of a country’s economic performance should also consider human development.<sup>1</sup> Sen’s capabilities approach considers human development—“what people are actually able to do and to be”<sup>2</sup>—as central to creating a meaningful measure of economic

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\*\* © 2019 David Restrepo Amariles. LL.B. UPB Colombia; M.A. International Institute of Sociology of Law; LL.M. Universiteit Leuven (KUB); Ph.D. Université Libre de Bruxelles; Post-doc University of Oxford is Assistant Professor of Law at HEC Paris. He is a Research Fellow of the Perelman Centre at the Université Libre de Bruxelles. He also extends his appreciation to Benedict Kingsbury and Kevin Devis for organizing the Conference Series on Indicators at NYU School of Law where this collaboration began, as well as to Rodolphe Durand for coordinating the seminar of the SnO Centre at HEC Paris, where some of the ideas discussed in this paper were subject to interdisciplinary scrutiny. He thanks Shahd Hammouri and Yasmine Bahi for their research assistance and the anonymous reviewers of the OECD conference on “Measuring the Impact of Business on Well-being” for their comments. This research was made possible, in part, thanks to the generous support from the HEC Paris Foundation.

1. See Amartya Sen, *Development as Capability Expansion*, in *Readings in Human Development: Concepts, Measures and Policies for a Development Paradigm* 3 (A. K. Shiva Kumar & Sakiko Fukuda-Parr eds., 2004).

2. Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, in *AMARTYA SEN’S WORK AND IDEAS: A GENDER PERSPECTIVE* 35 (Bina Agarwal, Jane Humphries & Ingrid Robeyns eds., 2005).

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development. For Sen, the capabilities concept seeks to assess the extent to which an individual is able to achieve their aims.<sup>3</sup> Certain social determinants (such as educational opportunities or health care access) may limit the ability of an individual to achieve their aims while others may make achievement more likely. Human development depends on the ability to enjoy fundamental human rights and to exist in a safe and healthy environment. Human rights and human development are relevant to any inquiry into human well-being.

In recent years, greater attention has been given to developing metrics that measure more than a country's gross domestic product (GDP).<sup>4</sup> Similarly, greater consideration has been given to more than just the financial performance of commercial enterprises; corporations are now expected to conduct business in ways that are responsible and sustainable, giving attention to a triple bottom line where the planet and people are prioritized along with profits.<sup>5</sup> Respect for human rights is increasingly relevant to business. Allegations of human rights abuses are no longer limited to nation-states as the only entities capable of violating human rights. As multinational corporations came to be implicated in alleged rights abuses, new indicators emerged ranking social performance and the impact of business enterprises on human rights. The Corporate Human Rights Benchmark (CHRB), an investor driven multi-stakeholder initiative to rank human rights performance, has assessed leading global corporations for human rights performance across different industry sectors.<sup>6</sup> Oxfam, a well-respected international, humanitarian nongovernmental organization (NGO), has developed a sector specific ranking of the human rights impacts of leading agriculture and multinational food and beverage brands; additionally, the Access to Medicines Index has rated the social performance of pharmaceutical companies.<sup>7</sup> Similarly, CSRHub has setup a composite indicator that includes several human rights dimensions across a range of industry sectors, including labor rights, anti-discrimination rights, and children's rights.<sup>8</sup>

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3. Sen, *supra* note 1, at 3 – 4.

4. See JOSEPH E. STIGLITZ ET AL., REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS 7 (2009).

5. See Aaron Chatterji & David Levine, *Breaking Down the Wall of Codes: Evaluating Non-Financial Performance Measurement*, 48 CALIF. MGMT. REV. 29 (Winter 2006).

6. See *Corporate Human Rights Benchmark*, CORP. BENCHMARK, <https://www.corporatebenchmark.org/> (last visited Sept. 22, 2019).

7. See *Ten of the World's Biggest Food and Beverage Companies Battle to Improve Their Social Sustainability Through the Behind the Brands Campaign*, OXFAM AMERICA (April 19, 2016), <https://www.oxfamamerica.org/press/ten-of-the-worlds-biggest-food-and-beverage-companies-battle-to-improve-their-social-sustainability-through-the-behind-the-brands-campaign>. See generally *Access to Medicine Index*, ACCESS TO MEDICINE FOUNDATION, <https://accesstomedicinefoundation.org/access-to-medicine-index> (last visited Sept. 22, 2019).

8. See *ESG Data to Drive Corporate, Financial, & Consumer Decisions*, SCRHub SUSTAINABILITY MGMT. TOOLS, <https://www.csrhub.com> (last visited Sept. 22, 2019).

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The Organisation for Economic Co-operation and Development (OECD) works to create a common base of understanding of how to measure the impact of businesses on well-being.<sup>9</sup> The OECD's efforts are timely and topical because courts are being asked to consider the extent to which business should be held accountable for alleged human rights abuses.<sup>10</sup> The OECD's efforts in measuring business impacts on people's well-being present an opportunity to ensure that human rights impacts are adequately assessed and are understood to be a basic measure of the performance of business. The OECD Guidelines for Multinational Corporations have incorporated by reference the United Nations' (U.N.) Guiding Principles on Business and Human Rights (UNGPs).<sup>11</sup> The UNGPs recommend that states craft national action plans to address adverse impacts of businesses on human rights.<sup>12</sup> The UNGPs also recognize that business enterprises have a responsibility to respect human rights.<sup>13</sup> To that end, the UNGPs maintain that businesses must be able to "know and show" how policies and practices impact human rights.<sup>14</sup>

Some multinational corporations have conducted human rights impact assessments pursuant to the UNGPs. Any common base of understanding on measuring the impact of business on well-being must appreciate the relevance of human rights to improving well-being. Particular provisions of the OECD Framework for Measuring Well-Being capture issues also identified by the authors of new leading business and human rights indicators.<sup>15</sup> To properly promote well-being, an understanding of business impacts on human rights, both positive and negative, is imperative. Rankings can play an important role.

Taking French government policy and the performance of French multinational corporations as a case in point, this article explores the ways in which emerging indicators and instruments on business and human rights are relevant to the impact of business on well-being. This article examines which reporting frameworks and ranking systems best capture human rights and sustainability risks that could compromise well-being. Specifically, the article analyzes the frameworks and indicators used to measure human rights performance and the impact of rights rankings on business management. It also reviews responses by corporations to rights rankings as indicia of how

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9. *Who We Are*, OECD, <https://www.oecd.org/about> (last visited Sept. 23, 2019).

10. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 17 (2011) [hereinafter OECD GUIDELINES].

11. *Id.* at 15.

12. John Ruggie (Special Representative of the Secretary-General), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, at 7, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *U.N. Guiding Principles*] (summarizing the work of the Special Representative of the Secretary General from 2005 to 2011 for consideration by the Human Rights Council).

13. *Id.* at 11.

14. *Id.*

15. *Measuring Well-Being and Progress: Well-Being Research*, OECD, <https://www.oecd.org/statistics/measuring-well-being-and-progress.htm> (last visited Sept. 25, 2019).

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measurements might be perceived as likely to result in changes in investor and consumer behavior or place brand reputation at risk.

This article proceeds as follows. First, it will define well-being and discuss the ways in which a range of human rights must be protected to promote well-being. Next, it will explain the ways businesses can impact well-being, for good or for ill. This will be followed by a discussion on the relevant legal and policy frameworks in France that regulate information relevant to the social and environmental impacts of business, including the Duty of Vigilance Law and the National Action Plan of France for Implementing the U.N. Guiding Principles on Business and Human Rights. Using examples of leading French multinational corporations in the food, pharmaceuticals, energy, and information sectors, this article then examines the rankings of Danone, Sanofi, and Total on human rights performance relevant to the OECD Framework for Measuring Well-Being. In particular, it will map how the “current well-being” criteria of “health status,” “environmental quality,” “personal security,” and “future well-being” are counted in the human rights rankings that have been used to assess French corporations to date. Finally, this article will analyze corporations’ responses to rankings to show how ranking business impacts on human rights as relevant to well-being operates to influence constituencies of interest to corporations including investors and consumers.

## **I. Human Well-Being and Human Rights**

Respect for human rights promotes well-being. Accordingly, the ability to measure human rights performance will help advance well-being. Well-being was originally coined in psychology to signify satisfaction in life or positive psychological functioning.<sup>16</sup> Later the term appeared in the domain of development economics in response to a general frustration with existing frameworks. In the 1990s, the United Nations Development Program’s (UNDP) Human Development Report<sup>17</sup> rationalized that development policy ought to be centered on human development rather than economic growth. Prompted by the inadequacy of the GDP as an instrument to measure development because GDP was no longer seen “as means to an end but rather an end in itself,” the United Nations adopted a multi-dimensional Human Development Index in 1990.<sup>18</sup> At the same time, experts developed other alternatives to the GDP as a measure of well-being. Upon request of the French government, economists Amartya Sen, Jean Paul Fitoussi, and Joseph Stiglitz conducted a study in 2008,<sup>19</sup> which was followed in 2011 by

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16. Carmelo Vázquez et al., *Psychological Well-Being and Health. Contributions of Positive Psychology*, 5 ANNUARY OF CLINICAL & HEALTH PSYCHOL. 15, 16 (2009) (discussing the definition of well-being).

17. See U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1990 iii, 42 – 43 (1990).

18. See *id.* at 13.

19. STIGLITZ ET AL., *supra* note 4, at 7.

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the OECD's *How's Life?* report on well-being.<sup>20</sup> These initiatives led to an international consensus about the need to develop subjective well-being standards.

Despite the recurring use of the term “well-being,” development economists, like psychologists, have faced the same difficulty in articulating a precise definition.<sup>21</sup> Some early definitions of well-being were rather reductive because they only referred to well-feeling, pleasure, or utility; later, a multi-dimensional approach was introduced to embrace a diversity of aspects underlying the term such as knowledge, self-expression, affiliation, bodily integrity, health, economic security, etc.<sup>22</sup> Conversely, others argued that the main dimension for identifying well-being was its “universal dimension” and recognized only two basic universal needs: physical health and autonomy of agency.<sup>23</sup> Alternatively, as a part of his capability approach, Sen took a more progressive stance regarding the grounds for identifying well-being.<sup>24</sup> Sen argued that there are certain implicit value-based judgments that need to be made explicit to inform policy making and personal choices.<sup>25</sup> To that end, Sen coined the term “functionings,” which stands for parts of the state of person—in particular the things that he or she manages to do or be in leading a life; Sen also conceptualized well-being as the capability to achieve a valuable combination of “functionings.”<sup>26</sup>

At the same time, the concept of economic development is evolving towards further integration with the concept of sustainable development, which today stands out as the new paradigm of development. As previously noted, development is no longer just about economic performance but also about the population's well-being. This change came about with the creation of the Human Development Index (HDI) and the shift towards sustainable development.<sup>27</sup> From here, perception of development changes because it intends to create an environment that “foster[s] fulfillment so that people can enjoy a long, healthy, and creative life.”<sup>28</sup> Based on this perspective, human rights were thought as a condition to development and well-being as their common goals. In the UNDP 2000 report, human development and human rights were said to “share a common vision and a common purpose: to secure the freedom, well-being and dignity of people

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20. See OECD, *HOW'S LIFE? 2011: MEASURING WELL-BEING* (2011).

21. Des Gasper, *Human Well-Being: Concepts and Conceptualizations*, in *HUMAN WELL-BEING: CONCEPT AND MEASUREMENT* 23, 25 – 26 (Mark McGillivray eds. 2007).

22. *Id.* at 26 – 27; Mark McGillivray, *Human Well-Being: Issues, Concepts and Measures*, *HUMAN WELL-BEING: CONCEPT AND MEASUREMENT* 3 – 4 (Mark McGillivray eds., 2007).

23. McGillivray, *supra* note 22, at 3 – 4.

24. *Id.* at 4.

25. *Id.*

26. *Id.*

27. *Human Development Index (HDI)*, UNITED NATIONS DEVELOPMENT PROGRAMME, <http://hdr.undp.org/en/content/human-development-index-hdi> (last visited Sept. 23, 2019).

28. Ban Ki-Moon, *Foreword for the 25th Anniversary of the Human Development Report*, HDR.UNDP.ORG, <http://hdr.undp.org/en/content/foreword-25th-anniversary-human-development-report> (last visited Sept. 23, 2019).

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everywhere.”<sup>29</sup> Building on this concept of human development, modern sustainable development must place human rights at its heart and aim for inter- and intra-generational development, where economic development’s durability is concerned with future generations, including social and environmental aspects.<sup>30</sup>

These views that emphasize the multi-dimensional nature of well-being translate into the OECD’s conceptualization of well-being. The latter avoids the ambiguities put forth by the sole use of objective measurement and integrates subjective measures that engage perceptions and preferences of different communities. As a result, it puts people at the center of the well-being assessment to examine the outcomes that are directly and intrinsically important to them.

A. WHAT ARE HUMAN RIGHTS?

Human rights are understood to have a universal dimension—everyone everywhere is entitled to certain rights by virtue of their humanity. Regardless of race, color, sex, where an individual may reside, or how he or she may worship, the basic human rights of all people are to be protected and respected. Human rights give expression to universally shared moral and ethical values that are grounded in the accepted assumption that all humans possess a dignity worthy of respect. These values are expressed in international agreements.

Chief among the many legally binding international instruments that have subsequently codified the substantive rights contained in the Universal Declaration of Human Rights are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The International Bill of Human Rights consists of the UDHR, together with the ICCPR and the ICESCR. As a practical matter, the ICCPR has been treated as taking precedence over the ICESCR. Commentators refer to civil and political rights as “first generation” rights, while socioeconomic and cultural rights are sometimes called “second generation” rights.<sup>31</sup> According to some scholars and commentators, a “third generation” of rights, addressing economic development and the environment, is emerging; it is essential for the continued protection of human dignity.<sup>32</sup>

As a matter of principle, the Vienna Declaration on Human Rights has clarified that all of the rights contained in the International Bill of Rights are

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29. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2000, at 1 (2000).

30. EMMANUELLE JOUANNET, QU’EST-CE QU’UNE SOCIÉTÉ INTERNATIONALE JUSTE? [WHAT IS A JUST SOCIETY?] 273 (2011).

31. Hans-Otto Sano, *Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development*, 22 HUM. RTS. Q. 734, 737 – 38 (2000).

32. *Id.*

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interdependent, interrelated, and indivisible.<sup>33</sup> For example, the right to education can support the right to participate in public affairs by helping to create a society of informed voters. The right to freedom of expression can support the right to education by fostering the free flow of information and ideas. The right to food can support the right to health, as adequate nutrition is essential to enjoy good health.

There are responsibilities correlated with human rights. Civil and political rights are often understood as *negative* liberties—that is, the idea that governments should refrain from interfering with civil liberties. For example, enjoying the right to freedom of expression is correlated with the government responsibility not to censor or repress speech. Socioeconomic rights are often understood as *positive* obligations such that governments should offer protections and provide conditions conducive to realizing capabilities. For example, enjoying the right to health or the right to education depends in some measure on government service or provisions to create schools and health care delivery systems.

**B. HOW CAN BUSINESS IMPACT WELL-BEING AND HUMAN RIGHTS?**

At the end of his appointed research mandate at the United Nations, Professor John Ruggie, the Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, found that, “there are few, if any, internationally recognized human rights [that] business cannot impact—or be perceived to impact—in some manner.”<sup>34</sup> Years prior to the appointment of a Special Representative to address the issue of human rights and business, several human rights groups expanded their field of vision to include private actors. Rights activists working on social, economic, and cultural rights started to highlight the role of private industry in impeding and advancing human rights and no longer limited their monitoring and advocacy to abuses involving states and governments.<sup>35</sup> Moreover, environmental organizations, like EarthRights, began to find common cause with human rights organizations, as extractive sector corporations were alleged to be involved in violating the rights of environmental activists.<sup>36</sup>

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33. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (June 25, 1993).

34. John Ruggie (Special Representative of the Secretary-General), Rep. on the *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, at 15, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

35. Zeid Ra’ad Al Hussein, *Dollars and Sense: How – and Why – the Private Sector Needs to Stand Up for Human Rights*, SECRETARY-GEN.’S ENVOY ON YOUTH (2017), <https://www.un.org/youthenvoy/2017/01/dollars-sense-private-sector-needs-stand-human-rights/>.

36. See, e.g., *Bowoto, et al. v. Chevron Corp.*, 481 F. Supp. 2d 1010, 1011, 1015 (N.D. Cal. Mar. 14, 2007); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D. N.Y. Mar. 19, 2003).

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Human rights advocacy organizations have investigated the role of corporations in the extractives industries. For example, they have documented allegations of abuse with respect to a range of fundamental rights standards, including the right to the security of the person, economic and social rights, civil and political rights, labor rights, and the rights of indigenous people.<sup>37</sup> Human rights activists have implicated corporations in the food, beverage, and agricultural sector in labor rights abuses and unsustainable use of environmental resources that endanger rights.<sup>38</sup> Firms in the pharmaceutical sector have faced allegations of having an adverse impact on the human right to health where essential medicines are not available due to pricing policies and demands for aggressive intellectual property enforcement.<sup>39</sup>

While some NGOs prefer to deploy strategies that seek to challenge and confront companies by exposing rights abuses alleged to involve business policies or practices, other NGOs have developed self-assessment and voluntary management tools for companies wishing to mitigate human rights risks.<sup>40</sup> For instance, the Danish Institute for Human Rights developed a set of human rights compliance assessment tools that it uses in its partnerships with corporations, like Total, to consult on issues that range from human rights due diligence reports to conducting studies in host countries, which facilitates compliance in business and human rights nationally and internationally.<sup>41</sup> All of this is done in the spirit of Goal 17 of the U.N. Sustainable Development Goals.<sup>42</sup> Similar tools and partnerships shed light on the mutual benefits of promoting human rights and business principles. For corporations, this assistance paves the way for compliance with human rights and well-being standards. As discussed below, this compliance benefits the corporation in many ways, such as mitigating litigation risks with respect to potential victims, furthering planning that promotes investment sustainability designed to address the needs of the local environment, mitigating future insurgencies, and safeguarding the corporation's reputation. These cooperative approaches allow for a subjective approach towards the well-being of the local communities as they

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37. *Human Rights in 2018: Ten Issues That Made Headlines*, HUMAN RIGHTS WATCH (Dec. 9, 2018), <https://www.hrw.org/news/2018/12/09/human-rights-2018-ten-issues-made-headlines>.

38. See, e.g., *Cardona v. Chiquita Brands Int'l*, 760 F.3d 1185, 1187 (11th Cir. 2014).

39. See, e.g., CENTER FOR STRATEGIC STUDIES AND DEBATES, *BRAZIL'S PATENT REFORM: INNOVATION TOWARDS NATIONAL COMPETITIVENESS* 22, 50 (2013), [http://infojustice.org/wp-content/uploads/2013/09/Brazilian\\_Patent\\_Reform.pdf](http://infojustice.org/wp-content/uploads/2013/09/Brazilian_Patent_Reform.pdf); *Inside Views: Brazilian Supreme Court Refuses to Judge its Biggest Case on IP and Access to Medicines, and Benefits Big Pharma with Undue Monopolies*, INTELL. PROP. WATCH (Sept. 13, 2018), <https://www.ip-watch.org/2018/09/13/brazilian-supreme-court-refuses-judge-biggest-case-ip-access-medicines-benefits-big-pharma-undue-monopolies>.

40. See *Total Partnership*, DANISH INST. FOR HUM. RTS., <https://www.humanrights.dk/projects/total-partnership> (last visited Sept. 22, 2019).

41. *Id.*

42. *Id.* See G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, at 26 (Sept. 25, 2015).

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bridge any communication deficiencies and allow the corporation to respond to the needs of its local environment. Approaches that challenge corporations, while less cooperative, often provide impetus to prioritize human rights issues.

On the other hand, the rise of Corporate Social Responsibility (CSR) has triggered incentives for multinational corporations to be more socially responsible.<sup>43</sup> If corporations still struggle to comply, some progress may be observed in particular among multinational corporations. This has come to light with the adoption of internal policies that are more socially oriented in different domains. For instance, in relation to labor rights, corporations have started adhering to standards issued by associations such as the Fair Labor Association.<sup>44</sup> These efforts are later reflected by their rankings on human rights and CSR indicators. One of these corporations, Unilever, expanded its CSR policies to include concern for local communities, the environment, and education.<sup>45</sup>

While many corporations have overlooked human rights and well-being considerations in their conduct, the overall positive effects of corporate activities in our societies, and the current efforts being put in to place (either voluntarily or in compliance with laws) are undeniable. As a prominent example, Uber and Airbnb were very efficient in disaster relief efforts during Hurricane Irma in Florida, U.S.A, in 2017.<sup>46</sup> These examples show that it may be possible to balance corporate interests and human rights by focusing on the standards of well-being. Human rights indicators are useful to track these transformations.

### C. WHY MEASURE BUSINESS IMPACTS ON WELL-BEING, HUMAN RIGHTS?

Management expert Peter Drucker observed that what gets measured gets managed.<sup>47</sup> Measuring the potential impact of business—for better or worse—may offer insight to understand how businesses can do better in advancing the goals set by the international community to promote well-being and commitments to protect human rights. Measuring business impacts to assess and improve business policies and practices regarding well-being and human rights may also enable management to craft innovative solutions in conditions that present risks to rights. Indicators to assess business performance related to human rights issues are being designed.

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43. *Sustainability & CSR*, U. TEX.: ETHICS UNWRAPPED, <https://ethicsunwrapped.utexas.edu/subject-area/sustainability-csr> (last visited Sept. 23, 2019).

44. See FAIR LABOR ASS'N, 2017 ANNUAL PUBLIC REPORT 14 (2017).

45. See UNILEVER, HUMAN RIGHTS PROGRESS REPORT 2017 1, 31–32, 43 (2017) [https://www.unilever.com/Images/human-rights-progress-report\\_tcm244-513973\\_en.pdf](https://www.unilever.com/Images/human-rights-progress-report_tcm244-513973_en.pdf).

46. See, e.g., Alison Griswold, *Tech Companies Are Redefining How We Respond to Natural Disasters—In A Good Way*, QUARTZ (Sept. 13, 2017), <https://qz.com/1075435/tech-companies-are-redefining-how-we-respond-to-natural-disasters-in-a-good-way/>.

47. See PETER F. DRUCKER, PEOPLE AND PERFORMANCE: THE BEST OF PETER DRUCKER ON MANAGEMENT 119 – 20 (2011).

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Tools to measure the impacts of business on well-being could have points of complementarity with assessments of risks to human rights.

Upon their emergence, human rights indicators were mainly used to assess the efforts of nation states to realize their human rights obligations. The international community has identified three categories of human rights indicators: (1) structural indicators that assess the formal efforts of the state to put forth human rights policies either by internal legislation or the ratification of international treaties; (2) process indicators that assess the efforts by the state to realize its commitments; and (3) outcome indicators that resemble classic development indicators to assess the actual impact of these policies.<sup>48</sup> These tools are well known in business management as “key performance indicators,” and they are used to assess and optimize corporate outcomes.<sup>49</sup> To that end, both quantitative and qualitative approaches can be used in making these assessments, and the content can be either fact-based, or judgement-based.<sup>50</sup>

As indicators emerged to assess the impact of business activity on human rights, these tools were also used by investors, international initiatives, and NGOs to measure business human rights performance.<sup>51</sup> As discussed below, different kinds of indicators have been used to assess the business impact on human rights and well-being, and these different categories have yielded results that vary in their efficiency. These variances are mainly found in multiple instances. These variances include the assessment methodology of the indicator (which includes the category to which the indicator belongs), data collection policies (whether the indicator only relies on public information or it diversifies its sources), the group of corporations

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48. UNITED NATIONS HUMAN RIGHTS, HUMAN RIGHTS INDICATORS 33 – 38 (2012).

49. See *What Is A Key Performance Indicator (KPI)?*, KPI.ORG, <https://kpi.org/KPI-Basics> (last visited Sept. 22, 2019).

50. HUMAN RIGHTS INDICATORS, *supra* note 48, at 16 – 18.

51. These indicators vary in their technical and substantive approaches. The Measuring Business and Human Rights Project identified six categories of tools that feature business and human rights indicators: (1) Management tools for companies to track their performance and impact as previously indicated; (2) Reporting frameworks that provide a space for companies to summarize their efforts and results like those proposed by the Sustainability Reporting Guidelines by the Global Reporting Initiative; (3) Sustainable investment indexes such as the Dow Jones Sustainability Indexes that track the financial performance of the largest companies that lead their industries in terms of corporate sustainability; (4) Sustainable ratings such as the Responsible Supply Chain Benchmark created by the Dutch Association of Investors for Sustainable Development (VBDO), a qualitative and partly quantitative comparative investigation among forty Dutch publicly listed companies, whose aim is to inform stakeholders on responsible supply chain management; (5) Sustainability standards, multi-stakeholder initiatives, and certification schemes, such as the fair-trade standards that list the requirements for farmers and traders to farm and trade responsibly; (6) Human rights impact assessment tools such as the U.N. Global Compact’s Business Guide for Conflict Assessment and Risk. See *Measuring B&HR: List of Tools and Initiatives Featuring Business and Human Rights Indicators*, LONDON SCH. OF ECON. & POL. SCI. (Nov. 12, 2014), [https://www.business-humanrights.org/sites/default/files/reports-and-materials/MB%26HR\\_List%20of%20initiatives%20featuring%20indicators\\_12%20Nov%202014.pdf](https://www.business-humanrights.org/sites/default/files/reports-and-materials/MB%26HR_List%20of%20initiatives%20featuring%20indicators_12%20Nov%202014.pdf).

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targeted by the indicators and their sectors, the choice of indicators, and lastly the audience targeted by the administrators of the measurement. Concerning the last point, some target audiences include investors such as pension funds who are aiming towards an ethical investment. An example of such an indicator is the Equities and Bloomberg Intelligence platforms; others such as KnowtheChain have a wider audience that includes consumers.<sup>52</sup>

One of the early appearances of these indicators emerged in the spirit of the environmental, social, and governance factors (ESG), which are used to measure the sustainability and ethical impact of business activities. These ESG indicators have been integrated into several national legislations and are a popular standard among investors. The ESGs have been used in a wide range of measurements. The social ‘S’ factor includes human rights and well-being concerns while focusing mainly on the efforts rather than the effects of policies. Hence, they issue structural and process indicators rather than outcome indicators.<sup>53</sup>

By calculating socioeconomic factors and assessing policy impacts, experts use indicators to articulate the social and political progress of development. These indicators articulate whether specific policies promote conditions for the creation and maintenance of well-being, and they serve as a reminder that states are not the only actors involved in making and implementing these policies because multi-national stakeholders have a mounting power to deteriorate or ameliorate well-being in a given community.

## **II. Selected Standards on Sustainability, Human Rights, and Corporate Responsibility Relevant to Well-Being**

There is a role for indicators in measuring performance that is consistent with recommended practices of responsible business contained in global standards and guidance. To be meaningful tools of measurement, indicators should be connected to the substance of relevant standards that define objectives. The international standards, with sufficient salience to address a combination of concerns expressed in human rights instruments and conditions, are understood as components of well-being. The most salient and widely accepted standards on business and human rights are set forth by the OECD and the United Nations, which have developed instruments that provide general goals while others offer specific guidance on how to uphold certain principles or reach certain goals contained in the instruments. For example, these instruments include the United Nations Sustainable Development Goals (outlining targets to reach within a given timeframe), the OECD Guidelines for Multinational Corporations (discussing how to conduct business responsibly by adhering to accepted principles), and the United Nations Guiding Principles (UNGPs) on Business and Human

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52. KNOWTHECHAIN, <https://knowthechain.org/> (last visited Feb. 1, 2009).

53. See CASEY O’CONNOR & SARAH LABOWITZ, PUTTING THE “S” IN ESG: MEASURING HUMAN RIGHTS PERFORMANCE FOR INVESTORS 3, 8 – 9 (2017).

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Rights (calling for corporations to conduct human rights due diligence and make human rights impact assessments).<sup>54</sup>

This part summarizes pertinent parts of selected standards that speak to corporate responsibility in measuring impact and improving well-being. The following standards encompass several aspects of fundamental human rights such as well-being (whether current or future): environmental quality, health status, and personal security. These standards emphasize the interdependent elements in fulfilling both human rights and well-being, as well as the vital role of the business community in the process. Indicators can inform the discussion, but they must be designed to speak to standards that support well-being and the business responsibility to respect human rights.

A. INTERNATIONAL POLICY

1. *U.N. Sustainable Development Goals and OECD Guidelines on Multinational Enterprises*

As previously indicated, since international business has experienced structural changes and now confronts new social expectations, many large companies operating in an international environment have answered public concerns by adopting codes of conduct and practices promoting sustainable development. These initiatives can be diverse and comprise certification services, auditing, and consulting, as well as a dialogue between different stakeholders. To harmonize these private initiatives as well as complement them, international organizations have set out international standards and principles to implement responsible business conduct. Following international human rights standards, as dictated by international organizations such as the U.N. Sustainable Development Goals (SDGs)<sup>55</sup> and the OECD Guidelines for Multinational Enterprises, can be a first step to actually impacting well-being.

The Resolution adopted by the General Assembly on July 6, 2017, considers the Sustainable Development Goals as a plan of action for people, planet, and prosperity that seeks to strengthen universal peace and larger freedom as well as eradicating poverty.<sup>56</sup> In order to guide companies in the

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54. See BUSINESS AND SUSTAINABLE DEVELOPMENT COMMISSION, BUSINESS, HUMAN RIGHTS AND THE SUSTAINABLE DEVELOPMENT GOALS 3 – 4 (2016) (Executive Summary).

55. G.A. Res. 70/1, at 1, 14, 29. The U.N. 2030 Agenda for Sustainable Development is an ambitious “plan of action for people, planet and prosperity,” which seeks to promote peace and eradicate poverty; at the core of the Agenda are the Sustainable Development Goals (SDGs): the 17 Sustainable Development Goals to transform our world. *Id.* at 1. The Agenda’s goals cannot be reached without private sector participation and changes to certain business practices that contribute to adverse environmental and human rights impacts *Id.* at 29. Indeed, the last SDG is to “[s]trengthen the means of implementation and revitalize the global partnership of sustainable development.” *Id.* at 26. The business community is viewed as a partner in progress. *Id.* Efforts are underway to develop measures against which to assess businesses’ performance in advancing the SDGs.

56. G.A. Res. 71/313, at 1 (July 6, 2017).

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actions they should adopt to comply with these goals, the General Assembly has adopted a global indicators framework, which lists general goals and provides precise quantitative indicators to fulfill.<sup>57</sup> For example, regarding the end of hunger, provision 2.2.1 provides a measurement for the prevalence of malnutrition: the weight and height of a healthy child should be less than two or greater than negative two standard deviations from the mean of other children under 5 years of age.<sup>58</sup>

In its Guidelines for Multinational Enterprises,<sup>59</sup> OECD sets out fundamental principles that companies should follow to conduct a responsible business and promote sustainable development. In its first chapter entitled Global Policies, the OECD's first two guidelines urge companies to contribute to economic, environmental, and social progress and to respect human rights affected by companies' "activities."<sup>60</sup> This order shows the importance and the interdependence of these two core principles: sustainable development cannot be constructed without human rights respect.

The OECD's disclosure policies encourage multinational enterprises to disclose financial and non-financial information by being transparent in their operations and responsive to the public's demand. Such disclosures are later used by indicators to assess, benchmark, or rate corporations. But in order to measure, there must be information to assess. The aim is to improve "public understanding of enterprises and their interaction with society and environment."<sup>61</sup> Indeed, disclosing non-financial information can be a method for these enterprises to demonstrate that they commit to socially acceptable practices. For this reason, agreement on how best to disclose information contained in the OECD Guidelines offers an opportunity for indicators being designed to measure performance relevant to well-being and rights to obtain information about risks and opportunities.

In addition to general commitments concerning the conduct of business affairs, the OECD Guidelines contain provisions on best practices with respect to disclosures relevant to well-being assessments.<sup>62</sup> For instance, the Guidelines provide that:

Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This

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57. *Id.*

58. See Yunhee Kang et al., *Nutritional Status and Risk Factors for Stunting in Preschool Children in Bhutan*, 1 MATERNAL AND CHILD NUTRITION 3 (2018).

59. See OECD GUIDELINES, *supra* note 10, at 19.

60. *Id.*

61. *Id.*

62. See OECD GUIDELINES, *supra* note 10, at 27. ("Disclosure policies of enterprises should include, but not be limited to, material information on: (a) the financial and operating results of the enterprise; (b) enterprise objectives; . . . (f) foreseeable risk factors; (g) issues regarding workers and other stakeholders; (h) governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process.")

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information should be disclosed for the enterprise as a whole and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size, and location of the enterprise, with due regard taken of costs, business confidentiality, and other competitive concerns.”<sup>63</sup>

These types of disclosures could inform the development of indicators to assess performance towards advancing the SDGs. Finally, the fourth chapter of the OECD Guidelines, entitled Human Rights, urges companies to respect human rights by taking several measures to identify, prevent, and mitigate any activities harmful to them.<sup>64</sup>

The goals underlying the OECD and the U.N. SDGs implicitly contribute to well-being as defined by OECD. Every action’s impact taken as part of SDGs can be directly linked to an OECD criterion to assess well-being. Indeed, adopting sustainable practices contributes to the creation of resources for sustainable well-being by preserving natural, human, economic, and social capital, all of which impact quality of life and material conditions of the population affected by the companies’ activities. For example, implementing actions to achieve the SDG’s first goal—reducing poverty—can have a direct impact on material conditions of the population (for example, by increasing income, creating employment, and improving housing). Additionally, this could help adopt measures to end hunger that can have significant effects on life quality by enhancing the health status of a population. Lastly, climate actions can help preserve the natural capital and improve life quality by providing a better environment.

Similarly, respecting OECD guidelines on Multinational Enterprises can have some strong impacts on well-being. Indeed, OECD supports the idea that companies bring substantial benefits to host countries where they conduct their activities.<sup>65</sup> These benefits include a better consumer experience; a more fair return to suppliers; an efficient use of capital, technology, human and natural resources; an improvement in technology development and transfer; a better development of technology; and a contribution to human capital through employment opportunities and job-training. All these benefits can be achieved by implementing best practices recommended by the OECD and have of course a direct incidence on well-being. Improving the human capital can impact both material conditions and quality of life of the population affected by companies’ activities; applying the environmental guidelines can help preserve the natural capital; and respecting human rights can have a significant impact on the social capital.

Of course, the impacts of these actions are not isolated, and achieving one goal can create a domino effect (for example, ending poverty can improve material conditions, which can impact quality of life). Nonetheless, their

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63. *Id.*

64. *Id.* at 31.

65. See generally OECD GUIDELINES, *supra* note 10.

effects on well-being is incontestable. Moreover, the OECD and U.N. Global Compacts have been operationalized by organisms for measuring sustainability, such as Global Reporting Initiative (GRI) (which provides general standards for measuring sustainability) and the Sustainability Accounting Standards Board (SASB) (which sets industry-specific sustainability standards).<sup>66</sup>

One of the companies praised for its commitment to the U.N. SDGs is Novartis, whose efforts to implement the SDGs had an observable impact on well-being due to the nature of the company's activities. Their Access-to-medicine programs reached approximately 685,000 treatments for patients in lower-income countries in 2017,<sup>67</sup> fostering elements of good health that allow for sustainable and inclusive growth. Another example of the implicit interaction of the SDGs and well-being as defined by the OECD is in Sainsbury's sustainability plan, which is in line with the SDGs.<sup>68</sup> This sustainability plan aims to respond to the health needs in the U.K. through better quality products, which relies on an internal measurement tool called the "living well index."<sup>69</sup> From the corporations discussed in research, Danone's Business Conduct Policy specifies that its conduct adheres to the OECD guidelines.<sup>70</sup> These commitments made by multinational companies fulfill overlapping instruments, which eventually feed into efforts towards increasing well-being worldwide.

2. *U.N. Guiding Principles on Business and Human Rights: Business Human Rights Due Diligence and Impact Assessments*

As mentioned above, human rights due diligence by corporations allows for an inspection of different elements of well-being. Due diligence reporting has become an essential standard internationally, where its language and practice are primarily dependent on the United Nations Guiding Principles for Business and Human Rights, and nationally in France, with the inception of the French national plan and the due diligence law. The UNGPs assert many of the principles advanced by the OECD guidelines and the U.N. Global Compact (among other principles).<sup>71</sup> In particular, these guidelines advocate for corporations to have a responsibility to respect human rights and recognize that the business community should

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66. See *Standards Overview*, SUSTAINABILITY ACCT. STANDARDS BOARD, <https://www.sasb.org/standards-overview> (last visited Sept. 22, 2019). See also *About GRI*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx> (last visited Sept. 23, 2019). Since 1997, the Global Reporting Initiative (GRI) has been an independent international organization that has developed business measurements for the purpose of sustainability reporting. *Id.*

67. NOVARTIS, NOVARTIS CORPORATE RESPONSIBILITY REPORT 2017, at 17 (2017).

68. See SAINSBURY'S, THE SAINSBURY'S LIVING WELL INDEX 3 (Oxford Econ. 2018).

69. *Id.*

70. Danone, BUS. & HUM. RTS. RESOURCE CTR., <https://www.business-humanrights.org/en/danone-0> (last visited Sept. 24, 2019).

71. See *U.N. Guiding Principles*, *supra* note 12, at 4.



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try to prevent or mitigate adverse impacts even where they have not directly contributed to the challenges by stating, “[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>72</sup> Furthermore, the UNGP explains,

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.<sup>73</sup>

Further still, under the UNGP,

The responsibility to respect human rights requires that business enterprises: (a) avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur, [and] (b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.<sup>74</sup>

Adherence to these principles is outlined in a due diligence mechanism that aims “to identify, prevent, mitigate and account for how they address their impacts on human rights,”<sup>75</sup> which is intended to prevent risks to human rights and the risk that corporations will be complicit in violations. To ensure the effectiveness of the mechanism, Guiding Principle 17 calls on companies that conduct human rights due diligence to act on findings:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.<sup>76</sup>

A human rights impact assessment complements the call for due diligence to discover risks to rights. Entities should assess their impacts and investigate the influence they may have on conditions by virtue of their relationships with other actors; “[i]n order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse

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72. *Id.* at 13.

73. *Id.*

74. *Id.* at 14.

75. *Id.* at 15; see also *Human Rights Due Diligence*, NAT’L ACTION PLANS ON BUS. & HUM. RTS., <https://globalnaps.org/issue/human-rights-due-diligence/> (last visited Sept. 24, 2019).

76. See *U.N. Guiding Principles*, *supra* note 12, at 16.

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human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.”<sup>77</sup>

It is not enough for businesses to conduct due diligence and identify impacts. The Guiding Principles call for a public disclosure as follows:

In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should (a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences [and] (b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved . . . .<sup>78</sup>

The adoption of the Guiding Principles has prompted many innovative mechanisms to promote and measure corporate efforts towards a sustainable policy that refrains from infringements. These corporate efforts benefit societies by providing the indicators for the information needed in order to make their measurements. Additionally, the OECD guiding principles, the U.N. Global Compact and other international instruments provide the language from which the indicators are tailored. According to John Ruggie, the endorsement of the Guiding Principles “will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step.”<sup>79</sup> This progress can be envisioned in the move towards well-being indicators to assess the effects of corporate activity.

Similarly, the obligation to conjure due diligence reports includes the obligation to conduct “[m]eaningful consultation with potentially affected groups and other relevant stakeholders.”<sup>80</sup> Another separate obligation is to provide proper remediation and tracking responses based on external feedback.<sup>81</sup> Upholding these obligations requires responding to external parties who bring forth complaints or inquiries. Empirical studies have measured the responsiveness of corporations in different sectors; the extractive sector has been the most responsive sector with a response rate of seventy-two percent, while pharmaceutical and chemical tied infrastructure and utilities for the least responsive with a rate of sixty-three percent.<sup>82</sup>

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77. *Id.* at 17.

78. *Id.* at 20.

79. *Id.* at 5.

80. *Id.* at 17.

81. *See id.* at 19.

82. *See* Menno T. Kamminga, *Company Responses to Human Rights Reports: An Empirical Analysis*, 1 *BUS. AND HUM. RTS. J.* 95, 100 (2015).

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Human rights indicators inspired by the Guiding Principles have the potential of speaking to the multi-dimensional aspects required in well-being assessment derived from a multitude of international instruments. This conversation takes place on two levels. First, indicators identify different areas of focus such as facilitating the inclusion of a subjective standpoint on these different areas. Second, the scope of companies included in human rights indicators can be based on their sector or focused on a specific geographical area—like the Cotton Sourcing Snap Shot initiative that surveys the corporate policy on forced labor in the field of cotton sourcing in Uzbekistan<sup>83</sup> or the Transparency in Myanmar Enterprises Index.<sup>84</sup> Alternatively, the scope of the companies is at times determined in accordance with the corporation's capital, such as the Dow Jones Suitability Index, which is focused on the largest corporations that lead their industry.<sup>85</sup>

Notably, many of these indicators include the corporation's subsidiaries, partners, or suppliers in their assessment, which, as demonstrated below, impacts the Human Rights Benchmark. Secondly, most of the indicators within their selected scopes take into consideration the effects of the corporation's conduct on different dimensions in relation to workers' rights, the environment, women's rights, and so on, intersecting with components of well-being that are implicitly measured.

In 2011, the OECD Guidelines were updated to include a chapter on human rights modeled on the UNGPs.<sup>86</sup> For instance,

Enterprises should, within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services

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83. *Cotton Sourcing Snapshot: 2015 Addendum*, RESPONSIBLE SOURCING NETWORK (2015), [https://static1.squarespace.com/static/594cbfa3440243aef3dfa1c4/t/5988e86ba5790ad5008b73e0/1502144620121/Cotton\\_Sourcing\\_Snapshot-2015\\_Addendum.pdf](https://static1.squarespace.com/static/594cbfa3440243aef3dfa1c4/t/5988e86ba5790ad5008b73e0/1502144620121/Cotton_Sourcing_Snapshot-2015_Addendum.pdf).

84. See Thompson Chau, *Pwint Thit Sa 2019: Five Things You Need to Know*, MYAN. TIMES (May 6, 2019), <https://www.mmmtimes.com/news/pwint-thit-sa-2019-five-things-you-need-know.html>.

85. Press Release, S&P Dow Jones Indices, Results Announced for 2017 Dow Jones Sustainability Indices Review (Sept. 7, 2017) (on file with authors).

86. OECD, 2011 UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 33 (2012). See OECD GUIDELINES, *supra* note 10, at 31.

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by a business relationship, even if they do not contribute to those impacts.”<sup>87</sup>

The detailed OECD Guidelines on disclosure could lead to the development of indicators helpful for measuring hard issues. Such a development in the standards would allow for a clearer image as per the exact obligations of corporations when conducting due diligence in line with the UNGPs.

The emergence of guidelines has received different responses from the business sector. The UNGPs have prompted many multinational corporations to adopt due diligence measures and reporting schemes.<sup>88</sup> The reasons behind this compliance vary across companies and industries. Yet, the move of the UNGPs’ standards towards the mainstream is indeed observable. A notable example are the policies adopted by the retail giant H&M, which has built its policies based on the UNGPs, assessing the risks relevant to their activities and identifying the most salient human rights issues.<sup>89</sup> Through these studies, H&M has identified the issues of living wages as its most salient human rights issue. In response, it implemented a fair living wage policy in 2013 directed at improving the well-being of the 1.6 million workers in its factories.<sup>90</sup>

The UNGPs’ certainty leaves a wide range of appreciation for the corporations to tailor their reports. This margin of uncertainty can be of concern to corporations wishing to obtain a clear definition of the boundaries of their responsibilities. To that end, such standards are yet to be further defined either using the OECD standards or national standards, such as discussed for France below. This standardization can provide further grounds on which the UNGPs can be used towards promoting well-being.

## B. DOMESTIC LAW AND POLICY

### 1. *French National Action Plan*<sup>91</sup>

The SDGs and the UNGPs call on governments to engage with the goals and offer guidance. The French government responded to the call to lead on issues of responsible business conduct. The European Commission also requested that Member States establish “their own plans or national lists of

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87. OECD GUIDELINES, *supra* note 10, at 31.

88. *Id.*

89. *Id.*

90. *H&M’s Fair Living Wage Strategy*, SHIFT, <https://www.shiftproject.org/sdgs/living-wages/hm-fair-living-wage-strategy/> (last visited Sept. 25, 2019).

91. See *generally* MINISTRE D’AFFAIRES ÉTRANGERS ET DU DÉVELOPPEMENT INTERNATIONALE [MINISTER OF FOREIGN AFFAIRS AND INT’L DEV.], PLAN NATIONAL D’ACTION POUR LA MISE EN OEUVE DES PRINCIPES DIRECTEURS DES NATIONS UNIES RELATIFS AUX DROITS DE L’HOMME ET AUX ENTREPRISES [NATIONAL ACTION PLAN FOR THE IMPLEMENTATION OF THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS] 4 (Oct. 24, 2013) [hereinafter PNDA].

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priority actions to promote CSR.”<sup>92</sup> In 2012, organizations representing employers, employees, and civil society asked the French Prime Minister to establish a national platform for exchange between different sectors in French society on CSR issues.<sup>93</sup> Established in 2013, the French platform for promoting global action brought together a “multi-stakeholder consultation body composed of five main groups: economic organizations, trade unions, CSR researchers and developers, public institutions and civil society.”<sup>94</sup> The consultations resulted in commitments and identified actions already underway to promote action. Risk analysis, impact assessment and reporting were identified as critical components for CSR by the French and explained in a National Action Plan.<sup>95</sup> The National Action Plan developed by the group acknowledged, *inter alia*:

The State and local government are committed to promoting and respecting the U.N. Guiding Principles in all of their activities—as lawmakers, employers and producers. The State is committed to ensuring that businesses in which it holds shares respect human rights and the environment. France ensures that the U.N. Guiding Principles and other established international texts are respected in public procurement guides, public procurement policies and training for purchasers. France is implementing the act on the corporate duty of vigilance.<sup>96</sup>

The National Action Plan also emphasized the importance of metrics and indicators to understand impacts: “Businesses must understand the type and scope of adverse human rights impacts (both real and potential) caused directly or indirectly by their operations, particularly in their business relationships. This enables them to identify measures to prevent, remedy and mitigate these impacts.”<sup>97</sup>

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92. *Commission Communication for A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, at 13, COM (2011) 681 final (Oct. 25, 2011).

93. PNDA, *supra* note 91, at 26.

94. *Id.*

95. *Id.*

96. *Id.* at 26 – 27.

97. *Id.* at 40. The PNDA also states

Practically speaking, businesses analyze their human rights risks by: Using external risk analysis tools (see below), which may or may not be adaptable; Identifying human rights issues that are specific to their operations or sector; Carrying out country risk assessments by compiling the available external data; Carrying out background checks and audits on suppliers and other stakeholders. Many tools are available to help businesses analyze risks and assess the impact of their operations. If necessary, they can also call on employers’ organizations and other appropriate stakeholders. *Id.*

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2. *French Vigilance Law*<sup>98</sup>

In 2017, the French National Assembly adopted a law establishing a “duty of vigilance” for large multinational entities carrying out all or part of their activities in France.<sup>99</sup> The French law regulates business enterprises headquartered in France that employ 5,000 (including direct or indirect subsidiaries), and it regulates global or foreign enterprises that are headquartered outside of France that employ 10,000 globally (including direct and indirect subsidiaries).<sup>100</sup> These corporations are required to implement a vigilance plan, including due diligence measures to identify and prevent adverse human rights and environmental impacts in connection with business operations: “Companies must make their vigilance plans and regular reports on the implementation of the plan public as part of their annual reports.”<sup>101</sup>

The Duty of Vigilance law reflects what is expressed in the National Plan. The plan provides: “Businesses must monitor the human rights measures they adopt and disclose on them initiatives in this field . . . Under European Directive 2014/95/EU, human rights will become one of the pillars of CSR.”<sup>102</sup> Thus, human rights as relevant to CSR would become “reflected in French reporting requirements when the directive is transposed into national law.”<sup>103</sup> To some degree, according to the National Plan, “human rights reporting is already a requirement under the regulatory provisions of the Commercial Code. Decree 2012-557 of 24 April 2012 on the social and environmental transparency obligations of businesses places human rights on an equal footing with other issues.”<sup>104</sup> How helpful or complete reporting will be remains to be seen.

The reactions to the law varied across corporations. Many corporations confirmed that some of these practices have already been normalized at their institutions either because of reputational incentives or international mechanisms like the OECD national contact points.<sup>105</sup> Nonetheless, companies all over France have hired consultants and experts in business enterprise and human rights to begin drafting their due diligence and human rights policies pursuant to the French Due Diligence Requirements

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98. See generally Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of March 27, 2017 Relating to the Duty of Care of Parent Companies and Contractors], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017 (Fr.).

99. *Id.*

100. *Id.*

101. *Id.* art. 1.

102. PNDA, *supra* note 91, at 44.

103. *Id.*

104. *Id.* at 44.

105. See Anna Triponel, *Implementing the French Duty of Vigilance Law: Reflections Shared by Michelin, Sanofi, Total and Vinci*, TRIPONEL CONSULTING (May 24, 2018), <https://triponelconsulting.com/2018/05/24/implementing-the-french-duty-of-vigilance-law-reflections-shared-by-companies-michelin-sanofi-total-and-vinci/>.

(HRDD).<sup>106</sup> Some resistance seems to come from the perception that the law might place French companies at a competitive disadvantage because their scope of liability widens and due diligence costs rise. Additionally, the scope of legal liability also remains too wide and vague, leaving a margin of harmful uncertainty. In comparison, Julie Vallat, head of the Ethic and Human Rights Unit at Total, noted that the U.K.'s Modern Slavery Act of 2015<sup>107</sup> offered a more defined scope of responsibilities; Vallat adds further that Total already takes similar measures and that such measures ought to be left on a voluntary basis.<sup>108</sup>

### C. INDICATORS FOR ASSESSING WELL-BEING

#### 1. *Existing Frameworks and Measurements of Business Impacts on Well-Being*

Well-being has always been at the very heart of OECD strategy. In 2017, the OECD organized a workshop to discuss the foundations of measuring business impacts on people's well-being. The sessions of the workshop focused on how companies today have a critical impact on people and society's well-being because they are engaged with many stakeholders in multiple ways.<sup>109</sup> Drawing on this, business activities seeking to run in the long term should take into account the social impact they create and not only focus on profit maximization.<sup>110</sup>

As mentioned above, instruments measuring sustainability already exist, such as the global indicators framework and targets developed by the U.N. (as well as the SASB, GRI, and ESG). New tools are also being developed to assess the correlation between financial and non-financial areas of performance such as IIRC.<sup>111</sup> But these models capture differently the complexity of a corporation's impacts on well-being because there are different definitions of well-being and sustainability. Developing well-being indicators for companies can be a precious tool to measure organizations' responsible business conduct and to convince them to adopt practices to positively impact well-being. For example, the OECD *How's Life?* 2017 report found that immigrants still face multiple challenges to their well-being, including a lower median of payments and a lack of acknowledgement for their skills.<sup>112</sup> A corporation's influence over such a phenomenon is

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106. Pierre-Louis Périn, *Devoir de vigilance et responsabilité illimitée des entreprises: qui trop embrasse mal étreint*, 2015 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL ET DE DROIT ÉCONOMIQUE [Q. REV. OF COMMERCIAL L. & ECON. L.] 215, 215 – 224 (2015).

107. Modern Slavery Act 2015, c. 30 (Eng.).

108. Speech of Julie Vallat, Les Droits Humaines et l'entreprise, Sciences Po (22 March, 2018).

109. *Measuring Business Impacts on People's Well-Being*, OECD (Feb. 23, 2017), <https://www.oecd.org/statistics/Workshop-on-Measuring-Business-Impacts-on-Peoples-Well-being-Session-Notes.pdf>.

110. See generally *Measuring Business Impacts on People's Well-Being*, *supra* note 109.

111. See generally *id.* at 5.

112. See OECD, *HOW'S LIFE? 2017: MEASURING WELL-BEING* 119 (2017).

addressed when the company conducts assessments under the GRI standard 405,<sup>113</sup> a standard that focuses on diversity and equal opportunity through assessment requirements that indicate the percentages of individuals in the company per employee category within certain diversity groups.

Other instruments reflecting on well-being can be found in environmental law such as principle 1 of the seminal Stockholm Declaration of the U.N. Conference on the Human Environment, which explicitly refers to well-being: “[people have] the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”<sup>114</sup> It is also in the context of environmental law that due diligence is encouraged by international institutions like the International Law Commission.<sup>115</sup>

These frameworks and measurements already work as effective incentives on corporations to comply with human rights and promote well-being standards by using the language of existing frameworks and measurements. For instance, a due diligence human rights report, administered with the assistance of the Danish Institute for Human Rights, found that private contractors working with Nestlé are getting paid below the living wage in some countries; in response, Nestlé launched a pilot project aimed at tackling the issue.<sup>116</sup> Meanwhile, Shell found that a high percentage of the complaints received in prior years regarded social issues, and, in response, Shell worked on resettlement programs for populations affected by its operations ensuring that their well-being does not deteriorate.<sup>117</sup>

## 2. *OECD Better Life Initiative: Measuring Business Impacts on People’s Well-Being*

The OECD Better Life Initiative aims to develop measurement guidelines on well-being. Its framework is built on the principles of the Commission on the Measurement of Economic Performance and Social Progress (the so-called Stiglitz–Sen–Fitoussi Commission) that measures the wealth and social progress of nations.<sup>118</sup> Accordingly, its framework focuses on three domains: material conditions, quality of life, and sustainability.<sup>119</sup> It does

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113. GLOBAL REPORTING INITIATIVE, GRI 405: DIVERSITY AND EQUAL OPPORTUNITY 2016, at 6 (2018).

114. See U.N. Conference on the Human Environment, *Stockholm Declaration*, U.N. Doc. A/CONF.48/14/Rev.1, at 4 (June 16, 1972).

115. Int’l L. Comm’n, Rep. on the Work of Its Seventieth Session, U.N. Doc A/73/10, at 174 (2018).

116. NESTLÉ & DANISH INST. FOR HUMAN RIGHTS, TALKING THE HUMAN RIGHTS WALK 7 (2013).

117. SHELL, SHELL SUSTAINABILITY REPORT 2017 2 (2017), <https://reports.shell.com/sustainability-report/2017/servicepages/download-centre.html>.

118. See *Better Life Initiative: Measuring Well-Being and Progress*, OECD, <http://www.oecd.org/statistics/better-life-initiative.htm> (last visited Sept. 22, 2019). See also STIGLITZ ET AL., *supra* note 4, at 10.

119. See *Better Life Initiative: Measuring Well-Being and Progress*, *supra* note 118.



this by advancing two distinct initiatives: (a) *How's Life?*, which inspects the material conditions and the community's quality of life from eleven different dimensions and (b) the "Better Life Index," which communicates with people around the world using an online tool to study people's perceptions on the most important aspects of well-being.<sup>120</sup>

The OECD measurement agenda aims to optimize the use of indicators towards well-being so different actors in the OECD and partner countries can create more informed policies.<sup>121</sup> To do so, the indicators are inclusive of a wide range of data to measure inequalities beyond income, shedding light on inequalities between different groups in the society and tracing the barriers to social mobility and civic engagement.

Although perhaps lost in translation, the notion of well-being is implicit in the goals underlying sustainable development and human rights protection. CSR should be understood as a branch of sustainable development and be defined as the way in which organizations voluntarily integrate environmental, social, and ethical concerns in their economic activities with respect to their interactions with all stakeholders.<sup>122</sup> These initiatives include international standards developed by international organizations, such as the United Nations Guiding Principles on Business and Human rights or OECD guidelines. These texts provide companies with frameworks for sustainable practices whose underlying goals include well-being as defined by OECD.

In seeking a correlation between the way companies do business and people's well-being, several questions arise: beyond a goal underpinned by CSR, does human rights compliance really have an effect on people's well-being? If so, how do organizations contribute to or affect well-being, and how can they be convinced to adopt CSR policies that promote and safeguard well-being? Any measure of well-being must speak to the standards that are most salient. The standards discussed here provide a strong foundation upon which to build meaningful metrics.

### **III. French Firm Performance on Selected Rankings Related to Human Rights**

The emphasis on well-being and sustainability has already been embraced by many companies. Management seeks to create meaningful impacts both outside and within the company. The important issue remains how to document and demonstrate corporate performance on metrics that are meaningful in promoting well-being and supporting the protection of human rights. Were firms in a position to do so they could address the concerns of the NGO constituencies that present challenges and work better with NGOs interested in cooperation.

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120. *Id.*

121. *Id.*

122. *Sustainability & CSR, supra* note 43.

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This section surveys how French firms fared on new rankings measuring human rights performance to inform how indicators may provide an incentive for better CSR performance to promote well-being and protect rights. The French firms were selected for important potential impact on human rights issues relevant to industry sector and raised often by rights activists—the right to health, the right to food, and environmental rights. These rights also appear as development goals in Agenda 2030.<sup>123</sup> There are interrelationships between human rights, development, and well-being. Indicators could be used to offer insights into the impact of business on both.

Sanofi, as a pharmaceuticals firm, can influence enjoyment of the human right to health. Danone, as a food company, is positioned to impact the human right to food. Total's operations impact the environment and the livelihood of communities. Companies can have a negative influence on the enjoyment of rights. For example, Total has faced allegations of complicity in misconduct, such as murder, rape, and corruption in Burma that were associated with efforts to protect a pipeline.<sup>124</sup> Rights activists have also challenged choices made by companies in the cosmetic, food, and pharmaceutical sectors by alleging corporate complicity in abuses.<sup>125</sup>

French firms are not unique in confronting such allegations; firms in different industries across the globe are facing similar allegations. But French firms are operating under unique new obligations of vigilance and information disclosure.<sup>126</sup> In this context, this section will analyze how French corporations fare in light of existing and emerging obligations that business enterprises have to safeguard human rights and the ways in which rankings and indicators could drive compliance with respect for human rights and greater well-being. Performance on these indicators and positions in the rankings of both industry-specific and general CSR measures could shed light on what measures matter and where businesses can make a meaningful difference.

Successfully integrating well-being into business practices requires a shift in companies' behavior. A starting point could be the implementation of a shared vision of well-being objectives within the company (CEO, external investors, managers, and employees), a management model that values non-

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123. See G.A. Res. 70/1, *supra* note 42.

124. See Duncan Campbell, *Energy Giant Agrees Settlement With Burmese Villagers*, THE GUARDIAN, (Dec. 14, 2004), <https://www.theguardian.com/world/2004/dec/15/burma.duncan-campbell>; Vivienne Walt, *Chevron: Total Accused of Human-Rights Abuses in Burma*, TIME (July 6, 2010), <http://content.time.com/time/world/article/0,8599,2001962,00.html>.

125. See, e.g., *India: L'Oréal Rejects Criticism on Lack of Anti-Slavery Commitment Following NGO Report*, BUS. & HUM. RTS. RESOURCE CTR. (Oct. 6, 2017), <https://www.business-humanrights.org/en/india-l%E2%80%99or%C3%A9al-rejects-criticism-on-lack-of-anti-slavery-commitment-following-ngo-report>.

126. *New Website Launched to Identify Companies Covered by French Duty of Vigilance Law*, BUS. & HUM. RTS. RESOURCE CTR., <https://www.business-humanrights.org/en/new-website-launched-to-identify-companies-covered-by-french-duty-of-vigilance-law> (last visited Sept. 22, 2019).

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financial performance, and an organizational culture mobilized by innovation. Changing a company's culture and behavior is not a simple task, so these changes may require time, financial support, and training programs. This section analyzes how corporations are implementing measures aimed at well-being and their impact on the different stakeholders by focusing on three French multinational companies: Danone, Sanofi, and Total. These companies are constantly under assessment by international ranking on human rights performance, and, due to their leading role in their respective fields, may constitute helpful benchmarks for other corporations.

A. AN EXAMPLE FROM THE PHARMACEUTICALS INDUSTRY

1. *Sanofi and the Access to Medicines Index: Ranking Health and Well-Being*

The Access to Medicine Index (AMI) is an indicator analyzing the world's largest research based pharmaceutical companies and their accessibility in low and middle-income countries; it evaluates pharmaceutical companies on their policies regarding many subjects ranging from research and development to capacity building.<sup>127</sup> Ranking access to medicines is important because the ability to obtain needed medication influences the enjoyment of health and, in certain instances, may be a matter of life or death. According to the OECD's *How's Life? 2017* report, health status and having a job are "consistently ranked as one of the most valued aspects in people's lives . . . in surveys conducted in OECD countries."<sup>128</sup> Similarly, the right to health is defined in the preamble of the constitution of the WHO as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."<sup>129</sup> General Comment 14 of the Office of the United Nations High Commissioner for Human Rights (OHCHR) refers to "the promotion of social determinants of good health such as environmental safety, education, economic development, and gender equity"<sup>130</sup> by identifying the social determinants for good health. This approach is a step towards subjective understanding of the right to health that speaks to the overall quality of life.

In the context of the right to health, activists and practitioners have noted that restraints on medications by intellectual property rights, favored by private investors, were one of the main drivers deterring the attainment of

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127. ACCESS MED. FOUND., ACCESS TO MEDICINE INDEX 2018 13 (2018), [https://accessmedicinefoundation.org/media/uploads/downloads/5e27136ad13c9\\_Access\\_to\\_Medicine\\_Index\\_2018.pdf](https://accessmedicinefoundation.org/media/uploads/downloads/5e27136ad13c9_Access_to_Medicine_Index_2018.pdf).

128. HOW'S LIFE? 2017: MEASURING WELL-BEING, *supra* note 112, at 26.

129. INT'L HEALTH CONF., CONSTITUTION OF THE WORLD HEALTH ORGANIZATION I (1946).

130. U.N., Econ. & Soc. Council. Comm. on Right to the Highest Attainable Standard of Health, art. 12 ¶16, U.N. Doc. E/C.12/2000/4 (2000).

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good health in developing countries.<sup>131</sup> In response to human rights groups who raised access concerns, the Doha Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Public Health<sup>132</sup> allowed countries to issue a compulsory license during a public health emergency, granting unto itself or a third party the right to produce or import a patented drug without authorization from the patent holder.<sup>133</sup> The intellectual property dimension is addressed in the AMI, which analyzes twenty of the world's largest research-based pharmaceutical companies on how they make medicines, vaccines, and diagnostics more accessible in low- and middle-income countries.<sup>134</sup> Thus, constraining corporations between investor rights and human rights with the aim of facilitating access to medicines can serve as an indirect instrument to ensuring corporate behavior improves quality of life.

This section will summarize the most relevant performances of Sanofi's rankings. Sanofi ranked sixth in 2016, rising two positions from the last ranking, which is justified by a particularly strong performance in two categories: Research & Development (R&D) and Pricing, Manufacturing, & Distribution.<sup>135</sup> Sanofi moved from ninth to fourth in the Research & Development category: it has a portfolio of 158 products (the largest in the index), and thirty-two antimicrobial projects in the R&D projects pipeline (eighteen of which target priority pathogens, including one novel antimalarial candidate and six new vaccine candidates).<sup>136</sup> Curing antimicrobial resistance will become a major public health need, so by prioritizing the research to cure antimicrobial resistance, Sanofi reasserts its commitment to public health. In addition to conducting extensive research in the field, Sanofi signed the Declaration by the Pharmaceutical, Biotechnology, and Diagnostics Industries on Combating Antimicrobial Resistance, and it now engages in equitable pricing strategies for these products.<sup>137</sup> Further, Sanofi's Research & Development priorities target unmet health needs; as already stated, Sanofi is working on various programs to cure non-communicable and neglected diseases.

Sanofi made transparency a core value and displayed very high transparency rates regarding clinical trials data, which contributed to its

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131. See generally Sisule Musungu, *Intellectual Property and Access to Medicines*, in MGMT. SCIENCES FOR HEALTH, MDS-3: MANAGING ACCESS TO MEDICINES AND HEALTH TECHNOLOGIES, ch. 3 (2012).

132. See World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002).

133. Doha WTO Ministerial, Doha Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), WT/MIN(01)/DEC/2, (Nov. 14, 2001).

134. ACCESS TO MED. FOUND., ANTIMICROBIAL RESISTANCE BENCHMARK 2018 49 (2018), [https://accesstomedicinefoundation.org/media/uploads/downloads/5c46f0d1cbefe\\_Antimicrobial-Resistance-Benchmark-2018.pdf](https://accesstomedicinefoundation.org/media/uploads/downloads/5c46f0d1cbefe_Antimicrobial-Resistance-Benchmark-2018.pdf).

135. See generally ACCESS TO MED. FOUND., ANTIMICROBIAL RESISTANCE BENCHMARK 2018, *supra* note 134.

136. See *id.*

137. See *id.*

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ranking on that criteria.<sup>138</sup> Sanofi disclosed forty-three clinical trial registrations and 142 clinical trial results in 2016,<sup>139</sup> earning it a 100 percent transparency rating on Bioethics International, Inc.’s latest Good Pharma Scorecard and a first rank ex-aequo with Johnson & Johnson on this ranking.<sup>140</sup> This criterion is key to protect the right to health as R&D enables, for example, a pharmaceutical company to cure neglected diseases.

The company ranked fourth in pricing, manufacturing, and distribution, and therefore rose four places. This improvement is “due to its improved performance in equitable pricing, and disclosure of volume-of-sales and price-point information.”<sup>141</sup> Its equitable pricing applies to both non-communicable diseases and infectious diseases is in line with its commitment to both causes.

Sanofi is, however, scoring poorly on the patent and licensing criteria, ranking sixteenth with a score of 0.8.<sup>142</sup>

Even if it were hard to find communication from the brand on this criterion, it appears that Sanofi is not engaging in licensing. The Index’s scorecard indicates that Sanofi made a commitment to the Index not to enforce its patents in low income or less developed countries, which is a positive sign for universal access to health.<sup>143</sup> But it is not displayed publicly on Sanofi’s corporate communication, which is a transparency problem and partly explains the low score. Sanofi enforces its patents in other countries such as the United States, where Sanofi recently filed a patent infringement action.<sup>144</sup> This criterion is relevant to the right to health because pricing, manufacturing, and distribution are crucial parts of access to medicine for all and, thus, to universal access to health-related products.

On the Market Influence and Compliance criteria, Sanofi climbed thirteen places to fifth place—the biggest rise in rankings—which, according to the ranking, is linked to “its above-average transparency and comprehensive compliance system.”<sup>145</sup> Sanofi’s corporate communication contains a very detailed code of ethics coupled with over 190,000 Ethics & Business integrity training modules completed by employees in 2016.<sup>146</sup> But “Gilead, Novo Nordisk, Eisai and AbbVie have been singled out as the only companies that were not found by a court or regulator over the past two

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138. *Ethics & Transparency*, SANOFI, <https://www.sanofi.com/en/our-responsibility/ethics-and-transparency> (last visited Sept. 24, 2019).

139. See generally ANTIMICROBIAL RESISTANCE BENCHMARK 2018, *supra* note 134.

140. Jacob Bell, *J&J, Sanofi Ranked Best for Clinical Trial Transparency*, BIOPHARMA DIVE (Dec. 5, 2017), <https://www.biopharmadive.com/news/jj-sanofi-ranked-best-for-clinical-trial-transparency/512288>.

141. SANOFI, ACCESS TO MEDICINE INDEX 2016, at 70 (2016).

142. *Id.* at 102.

143. *Id.* at 103.

144. George Underwood, *Sanofi Files Patent Infringement Suit Against MSD in US*, PHARMATIMES (Aug. 9, 2017), [http://www.pharmatimes.com/news/sanofi\\_files\\_patent\\_infringement\\_suit\\_against\\_msd\\_in\\_us\\_1200865](http://www.pharmatimes.com/news/sanofi_files_patent_infringement_suit_against_msd_in_us_1200865).

145. ACCESS TO MEDICINE INDEX 2016, *supra* note 141, at 102.

146. *Ethics & Transparency*, *supra* note 138.

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years to have breached criminal or civil laws or codes of conduct related to corruption or unethical marketing,”<sup>147</sup> and, even in 2017 (after the last ranking), Sanofi was alleged to have price-fixed insulin products.<sup>148</sup> So even though Sanofi has done a lot of work on a governance-level to be seen as a leader in positive market influence, some behaviors of non-market compliance are shadowing its performance. This criterion is obviously very relevant to any assessment of the performance of a company regarding human rights because it concerns the respect of the law and of the safeguards to protect individuals.

Capacity building has been singled out as one of the weakest criteria in Sanofi’s assessment. Sanofi ranked eighth with a score of 2.4, falling six places.<sup>149</sup> Sanofi used to be a leader and seems to have been outperformed by fellow competitors. As explained above, Sanofi has been largely involved in philanthropic work and has invested in capacity building in less developed countries to tackle health issues. But there is an overall lack of transparency regarding investments in R&D capacity building that could justify its fall in rankings. Sanofi seems now to be trying to gain back its position by developing communication on partnerships, such as with Lonza—a leading supplier to the pharmaceutical, biotech, and specialty ingredients markets—to establish a large-scale biologics production facility.<sup>150</sup>

Over the past decades, Sanofi has shown its dedication to healthcare and well-being towards more than 150 countries.<sup>151</sup> Striving to implement health care solutions and adapt them locally, Sanofi has set for itself five goals: (1) to improve access to healthcare for the underserved; (2) to reduce health inequalities; (3) to ensure patient safety; (4) to engage with local communities; and (5) to protect the environment.<sup>152</sup> For example, in India, where diabetes is common, Sanofi has distributed over 100,000 insulin reusable pens. For example, Sanofi is actively combating infectious diseases, like malaria, distributing over 400 million malaria treatments and launching several health campaigns.<sup>153</sup> In its goal to reduce health inequalities, the

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147. Zachary Brennan, *Four Pharma Companies Lead in Regulatory, Legal Compliance*, REG. AFF. PROF. SOC’Y: REG. FOCUS (Nov. 14, 2016), <https://www.raps.org/regulatory-focus%E2%84%A2/news-articles/2016/11/four-pharma-companies-lead-in-regulatory,-legal-compliance>.

148. Lydia Ramsey, *The Makers of Insulin Are Being Accused of Price-Fixing in A Class-Action Lawsuit*, BUS. INSIDER FR. (Jan. 30, 2017).

149. ACCESS TO MEDICINE INDEX 2016, *supra* note 141, at 74.

150. Press Release, Sanofi & Lonza, Sanofi and Lonza Enter into a Strategic Partnership to Establish a Large-Scale Biologics Production Facility (Feb. 27, 2017) (on file with authors).

151. *Health and Well-Being*, SANOFI, <https://www.sanofi.com/en/your-health/consumer-health-care> (last visited Sept. 22, 2019).

152. *Serving the Needs of Patients with Non-Communicable Diseases*, SANOFI, <https://www.sanofi.com/en/our-responsibility/healthcare-for-all/serving-the-needs/> (last visited Sept. 22, 2019). See generally SANOFI, 2017 INTEGRATED REPORT (2017), [https://www.sanofi.com/-/media/project/one-sanofi-web/websites/global/sanofi-com/home/en/investors/docs/2017\\_integrated\\_report.pdf](https://www.sanofi.com/-/media/project/one-sanofi-web/websites/global/sanofi-com/home/en/investors/docs/2017_integrated_report.pdf).

153. See generally *Fighting Against Some Infectious Diseases*, SANOFI, <https://www.sanofi.com/en/our-responsibility/healthcare-for-all/contributing-to-eradication-of-some-infectious-diseases> (last visited Sept. 22, 2019).

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Sanofi Espoir Foundation supports efforts against childhood cancer and seeks to improve maternal and neonatal health.<sup>154</sup> In 2008, it created the Central Anti-Counterfeiting Laboratory in Tour to combat falsified medicines.<sup>155</sup> Finally, Sanofi also committed to reducing its CO<sub>2</sub> impact by 2020, and it favors green technology and maritime transportation.<sup>156</sup>

According to the Access to Medicine Index 2016,<sup>157</sup> Sanofi seems to have implemented significant changes, leading to better company performance. Sanofi's ranking is good regarding access to management, R&D, and compliance, which includes the emphasis on climate change and health.<sup>158</sup> In accordance with its policy of eradicating infectious disease and curing non-infectious diseases, the company's donations score is also quite high.<sup>159</sup> Finally, even if Sanofi's ranking regarding the pricing and patent is quite poor, Sanofi has improved its equitable pricing since 2014; recently, it agreed not to enforce patent rights in less developed countries. To improve its general ranking, AMI recommends Sanofi consider equitable pricing and licensing more broadly to improve access to its products.<sup>160</sup>

In sum, Sanofi performs relatively well in the AMI ranking and has risen in the rankings compared to its competitors. The ranking's criteria are relevant to assess the company's performance regarding the right to health and seem targeted to this purpose, which makes it an adequate ranking to evaluate how Sanofi, as a company, contributes to attain the objective. Sanofi's status took time and effort to earn, and it has changed over time depending on what indicators internal and external stakeholders deem significant.

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154. *Fighting Against Childhood Cancer*, SANOFI ESPOIR FOUND., [http://fondation-sanofi-espoir.com/en/fighting\\_against\\_childhood\\_cancer.php](http://fondation-sanofi-espoir.com/en/fighting_against_childhood_cancer.php) (last visited Sept. 22, 2019).

155. *Fighting Against Falsified Medicines*, SANOFI, <https://www.sanofi.com/en/our-responsibility/healthcare-for-all/fighting-against-falsified-medicines> (last visited Sept. 22, 2019).

156. *See Sanofi's Risks and Opportunities Related to Climate Change*, SANOFI (Apr. 2019), <https://www.sanofi.com/-/media/Project/One-Sanofi-Web/Websites/Global/Sanofi-COM/Home/common/docs/download-center/Sanofis-Risks-and-Opportunities-related-to-Climate-Change-2019.pdf>.

157. ACCESS TO MEDICINE INDEX 2016, *supra* note 141, at 7.

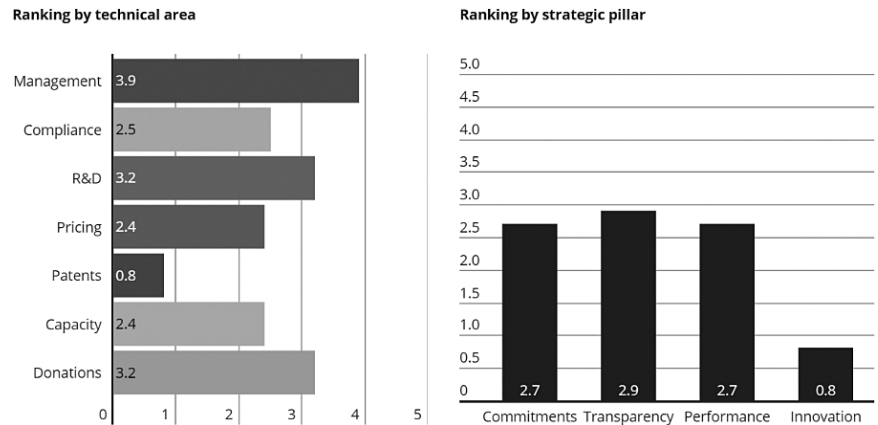
158. *See generally* ACCESS TO MEDICINE INDEX 2016, *supra* note 141.

159. *See id.*

160. *See id.*

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**Graph 1. Sanofi’s scorecard on the AMI**



While rankings now provide recognition for positive contributions, companies will continue to face criticism for perceived negative impacts. For example, Oxfam<sup>161</sup> denounced Sanofi’s CSR policy and pointed out that industrial corporations “rely too heavily [on] donations of medicines to mitigate the impact . . . of unaffordable prices in developing countries.” In its report *Investing for Life*, Oxfam reported on Sanofi’s fight against generic drugs, Sanofi’s lobby for a stricter legal framework with respect to licenses, and Sanofi’s consumers lacking access to the pharmaceutical industry’s medication because of high-priced products targeting only people who can afford them. For example, Oxfam reports Sanofi used to sell Plavix, a drug for cardiac diseases, at a price sixty times more expensive than its generic version.<sup>162</sup> Sanofi is also accused of not investing enough in R&D and only targeting diseases predominant in developed countries.<sup>163</sup> Oxfam considers this policy very harmful to poor people: eighty percent of people living in developed countries are likely to stay below the poverty line if they are facing high drug prices.<sup>164</sup>

Sanofi disputed these accusations, claiming there was a clear distinction between the donations it made through the Sanofi Foundation and its Access to Medicines program, whose new approach consists in a tiered price that

161. OXFAM INT’L, *INVESTING FOR LIFE 22* (2007), [https://s3.amazonaws.com/oxfam-us/www/static/oa3/files/OxfamInternational\\_InvestingforLife.pdf](https://s3.amazonaws.com/oxfam-us/www/static/oa3/files/OxfamInternational_InvestingforLife.pdf); see *Sanofi Aventis Statement on the Oxfam International’s Response to the Pharmaceutical Industry’s Reflections on Oxfam’s Briefing Paper*, BUS. AND HUMAN RIGHTS RES. CENTRE (Feb. 12, 2008), <https://www.business-humanrights.org/sites/default/files/media/bhr/files/Sanofi-Aventis-response-to-Oxfam-12-Feb-2008.pdf> [hereinafter *Sanofi Aventis Statement*].

162. See *INVESTING FOR LIFE*, *supra* note 161.

163. See *id.*

164. See *id.*



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include sales to governments, NGOs, and international founders.<sup>165</sup> Sanofi acknowledged however that a one-size-fits-all policy was not adequate and that a sustainable solution that benefits all stakeholders was needed.<sup>166</sup>

Since the Oxfam accusations, Sanofi has been engaged in an integrated CSR policy.<sup>167</sup> In its Access to Medicines program, it applied its new approach of tier pricing in its fight for the eradication of polio and malaria, and it did not seek patent protection for its malaria drugs.<sup>168</sup> In 2017, Sanofi, along with twenty-one companies and the World Bank, launched the Access Accelerated Initiative to speed access to affordable medicines for the poor in developing countries.<sup>169</sup>

Sanofi has also been assessed by CSRHub, a private governance network providing sustainability indicators that rate corporations according to their CSR policies, with the hope of overcoming the shortcomings of different measurements.<sup>170</sup> CSRHub relies on a wide range of ESG datasets from different data analysts that are either sector specific or general; the data is then translated into metrics using twelve different indicators that the network identifies as a central schema.<sup>171</sup> These metrics include assessments of human rights and supply chain, environment, community, and governance performance (among other topics), with space for specialized metrics when necessary.<sup>172</sup> To manufacture a metric, CSRHub requires a minimum amount of sources, data, and a certain level of conformity among the results aggregated.<sup>173</sup> To calculate scores, CSRHub aggregates the datasets relevant to each metric, and each corporation is ranked according to a numeric scale, from zero to one-hundred (with one-hundred being the highest positive rating).<sup>174</sup> The corporation's scores are then compared to other corporations within the same industries and markets.<sup>175</sup> Stakeholders, researchers, and customers can then use this information as needed.

On CSRHub, Sanofi is assessed under more general criterions than those of the AMI. As of August 2018, based on thirty-nine data sources, Sanofi scored fifty-four percent compared to other rated companies; its

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165. *Sanofi Aventis Statement*, *supra* note 161. Under its policy, Sanofi indeed fought against the sleeping disease by making donations but sees it as exceptional. However, in its malaria, epilepsy and mental diseases program, Sanofi claims to have adopted a new approach consisting in a tiered priced policy. *See id.*

166. *Id.*

167. *See* SANOFI, ACCESS TO HEALTHCARE 1 – 2 (2018).

168. *Id.* at 2.

169. *Id.*

170. *Id.* at 4.

171. *About CSRHub*, CSRHUB, <https://esg.csrhub.com/about-csrhub?> (last visited Sept. 24, 2019).

172. *Id.*

173. *Id.*

174. *CSRHub Rating Rules*, CSRHUB, <https://esg.csrhub.com/csrhub-rating-rules> (last visited Sept. 24, 2019).

175. *The CSRHub Ratings Methodology*, CSRHUB, <https://esg.csrhub.com/csrhub-ratings-methodology> (last visited Sept. 24, 2019).

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environment indicator scored the highest at sixty-three percent, while its governance indicator scored the lowest at forty-nine percent.<sup>176</sup> Issues with regards to Sanofi’s transparency seem more substantial when registering CSRhub’s rating despite it slightly reflecting the turbulence noted in the AMI with regards to its different operations; to that end, Sanofi scores very low (at forty-seven percent) in transparency when compared to other corporations.<sup>177</sup> Meanwhile, its specific performance relevant to human rights and supply chain is fifty-one percent when compared to all other corporations, fifty-eight percent when compared to corporations in the pharmaceutical and medicine sectors, and sixty-two percent when compared to other corporations in France.<sup>178</sup> This reflects considerable efforts towards well-being, but it also confirms that there is space for improvement, especially because Sanofi’s scores have been roughly in the same range for the past ten years.<sup>179</sup> This may suggest, as previously noted, a tendency towards reactionary solutions rather than root-cause solutions to the issues raised by their activities, such as the issue of donations or price fixing.

**Graph 2. Sanofi’s Scorecard on CSRHub**



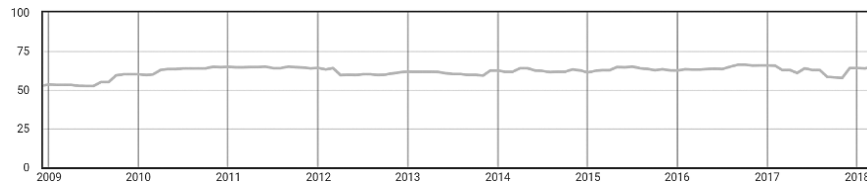
<sup>176</sup> *Id.*

<sup>177</sup> *Sanofi CSR/ESG Ranking*, CSRHUB, [https://www.csrhub.com/CSR\\_and\\_sustainability\\_in\\_formation/Sanofi](https://www.csrhub.com/CSR_and_sustainability_in_formation/Sanofi) (last visited Sept. 24, 2019).

<sup>178</sup> *Id.* at 4.

<sup>179</sup> *Id.* at 3.

**Graph 3. Sanofi's history of rating for the past ten years, according to CSRHub.**



2. *Sanofi and the Development Dimensions of Health Rights and Well-Being*

The third U.N. Sustainable Development Goal arises from the right to health, more rigorously known as every person's right to the enjoyment of the highest attainable standard of physical and mental health, which is recognized in many international instruments.<sup>180</sup> It should be defined as a fully inclusive right.<sup>181</sup> It contains freedoms that can be claimed by citizens such as freedom from non-consensual medical treatment but also entitlements such as the right to a non-discriminatory system of health protection; the rights to maternal, child and reproductive health; healthy workplace and natural environments; the prevention, treatment and control of diseases, including access to essential medicines; and access to safe and potable water.<sup>182</sup>

Being a broad right, not all aspects of the right to health can be applied to evaluate Sanofi's performance. Indeed, as a pharmaceutical company, Sanofi cannot be held responsible for non-consensual medical treatments, or for a system of health protection. But Sanofi plays a crucial role, like other pharmaceutical companies, on some key components of this right such as the right to prevention, treatment, and control of diseases and the access to essential medicines. As part of its commitment to one of the U.N.'s SDGs, Sanofi has planned to reduce premature death caused by non-communicable diseases by one-third by 2030.<sup>183</sup> Sanofi has publicly committed to addressing three top priorities: "Serving the needs of patients with non-communicable diseases, contributing to the control, elimination, and

180. See Comm. on the Elimination of All Forms of Racial Discrimination, International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. CERD/SP/40 (Jan. 4, 1969); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Jan. 3, 1976.); G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, (Sept. 3, 1981); G.A. Res. 44/25, Convention on the Rights of the Child (Sept. 2, 1990).

181. OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, THE RIGHT TO HEALTH FACT SHEET NO. 31 3 (June 2008), <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

182. *Id.* at 3 - 4.

183. *Sanofi Turkey Sustainability Report 2015-2016*, SANOFI 7, <https://www.sanofi.com/-/media/project/one-sanofi-web/websites/global/sanofi-com/home/common/docs/download-center/sanofi-turkey-sustainability-report-2015-2016.pdf> (last visited: Sept. 21, 2019).

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eradication of some infectious diseases and fighting against falsified medicines.”<sup>184</sup>

These priorities must also be placed under the scope of non-discrimination. Indeed, to perform well on an assessment of a company’s actions relative to the protection of the right to health, a pharmaceutical company should invest in medicines curing neglected diseases. Neglected diseases are those seriously disabling or life-threatening diseases for which treatment options are inadequate or non-existent such as leishmaniasis (kala-azar), onchocerciasis (river blindness), Chagas’ disease, leprosy, schistosomiasis (bilharzia), lymphatic lariais, African trypanosomiasis (sleeping sickness), and dengue fever.<sup>185</sup> Malaria and tuberculosis are also often considered to be neglected diseases.<sup>186</sup> Traditionally companies have underfunded research on these types of diseases, but the picture is progressively changing.<sup>187</sup>

Regarding the right to access essential medicines, Sanofi is the pharmaceutical company with the highest number of products on the WHO Model Essential Medicines List.<sup>188</sup> This list presents the minimum medicine required for a basic health care system based on the most cost-effective way of curing priority conditions.<sup>189</sup> Also, Sanofi is actively working on the elimination of Trypanosomiasis, which is part of the neglected diseases, and therefore proving itself as a company with an anti-discriminatory stance on R&D.<sup>190</sup>

To follow on its objective to contribute to the eradication, elimination, and control of some infectious diseases, Sanofi focuses on Malaria, Polio, and Sleeping Disease.<sup>191</sup> Regarding Polio, the company is a longstanding partner of the Global Polio Eradication Initiative; Sanofi has been delivering vaccines to eradicate the disease since 1999 and in 2016 alone delivered forty-two million doses of polio vaccines for GAVA countries.<sup>192</sup> Sanofi contributes to the eradication of Malaria by providing its ASAQ Winthrop®

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184. *Improving access to healthcare for the underserved*, SANOFI, <https://www.sanofi.com/en/our-responsibility/healthcare-for-all/> (last visited Aug. 19, 2018).

185. *Why are some tropical diseases called “neglected”?*, WORLD HEALTH ORGANIZATION (Jan. 2012) <https://www.who.int/features/qa/58/en/>.

186. Mary Moran et al., *The New Landscape of Neglected Disease Drug Development*, LONDON SCH. OF ECON. AND POLITICAL SCI. 1, 5 (Sept. 2005), [https://www.policycures.org/downloads/The\\_new\\_landscape\\_of\\_neglected\\_disease\\_drug\\_development.pdf](https://www.policycures.org/downloads/The_new_landscape_of_neglected_disease_drug_development.pdf).

187. *Id.* at 17 – 18.

188. ACCESS MED. FOUND., ACCESS TO MEDICINE INDEX 2016 100 – 04 (2016).

189. *World Health Organization Model List of Essential Medicines*, WORLD HEALTH ORGANIZATION (2019), <https://apps.who.int/iris/bitstream/handle/10665/325771/WHO-MVP-EMP-IAU-2019.06-eng.pdf?ua=1>.

190. *Breakthrough on Sleeping Sickness*, SANOFI (Feb. 1, 2019), <https://www.sanofi.com/en/our-responsibility/sanofi-and-dndi-breakthrough-on-sleeping-sickness>.

191. *Fighting against some infectious diseases*, SANOFI <https://www.sanofi.com/en/our-responsibility/healthcare-for-all/contributing-to-eradication-of-some-infectious-diseases/> (last visited Aug.19, 2018).

192. *Id.*

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drug at preferential price and without seeking patent protection. The ASAQ Winthrop® drug enabled the treatment of over 400 million malaria attacks, including more than 43 million in 2016.<sup>193</sup> To cure sleeping sickness, Sanofi is working as part of a partnership to develop a new drug.<sup>194</sup> Sanofi is in charge of industrial development, production, and regulatory submission. To fight against falsified medicines,<sup>195</sup> Sanofi is taking a range of actions in cooperation with local authorities and organizations, law enforcement, etc., and it set up its own dedicated Central Anti-Counterfeiting Laboratory.<sup>196</sup> Since the laboratory's creation in 2008, it has analyzed more than 35,000 suspicious products.<sup>197</sup>

To a significant extent, Sanofi's demonstrated corporate engagements for universal healthcare are met with concrete actions and results and are therefore a good example of governance-level public commitments matching actual initiatives with results by the company. Meeting these objectives enables Sanofi to play an active role in the promotion of the right to prevention, treatment, and control of diseases. Sanofi has taken concrete actions matching its corporate commitments—a key element in a company's ability to protect human rights. But there is some room for improvement: indeed Sanofi can work on expanding its equitable pricing policy to new products, market even more products from the WHO list, build more facilities, or at least communicate better on its capacity-building actions.

**B. A FOOD AND BEVERAGE INDUSTRY EXAMPLE**

**1. *Danone and Oxfam's Beyond the Brands Scorecard: Well-Being and Ranking the Right to Food***

This section will summarize the most relevant performances of Danone in several metrics, first of which is Oxfam's Behind the Brands scorecard, a human rights metric that assesses the ten largest corporations in the food and beverage manufacturing industries, focusing on a range of issues that are classified as indicator categories like water, women, labor practices, and land use in order to evaluate the way companies expect their suppliers to behave on these issues and what they do to measure and improve their impact on every worker and farmer who makes their ingredients.<sup>198</sup> This metric aims to incentivize corporations in the food industry through focusing on

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193. *Id.*

194. *Id.*

195. *The Fight Against Falsified Medicines*, SANOFI (Dec. 21, 2017), <https://www.sanofi.com/en/media-room/articles/2017/the-fight-against-falsified-medicines>.

196. *Fighting Against Falsified Medicines: A Long-Standing Commitment for Sanofi*, SANOFI, <https://www.sanofi.com/en/our-responsibility/healthcare-for-all/fighting-against-falsified-medicines> (last visited Sept. 21, 2019).

197. *Id.*

198. BEHIND THE BRANDS, THE BEHIND THE BRANDS SCORECARD METHODOLOGY 1 (Aug. 2014), [https://www.behindthebrands.org/images/media/Download-files/BtB%20Methodology%20document\\_final\\_Sept%202014.pdf](https://www.behindthebrands.org/images/media/Download-files/BtB%20Methodology%20document_final_Sept%202014.pdf).

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reputation as an element of competition.<sup>199</sup> While this approach is shared by many other metrics, it is undeniable that this incentivizing factor is essential in the food industry seeing that their customer base is individuals. The main data source of Oxfam's Behind the Brands is publicly available information; concurrently the indicators are mostly structural and process indicators that focus on the corporations' policies rather than the outcome.<sup>200</sup>

Generally, as of April 2016, Danone ranked last with thirty-six percent on factors measured in the ranking, and its general performance ranked as very weak.<sup>201</sup> While last among brands ranked, Danone did mark slight progress when compared to the twenty-nine percent it obtained in February 2013 when Danone ranked sixth.<sup>202</sup> So while Danone has improved, it improved less than other companies in that timeframe.<sup>203</sup>

In their assessment Oxfam prioritizes thirteen commodities; this prioritization is made according to the relevance of these commodities to small-scale farmers, farm workers, and local communities in developing countries,<sup>204</sup> allowing for an assessment of the effect of the corporations' activities on their well-being, and therefore is relevant to the OECD framework for well-being. Despite this relevance the ranking does not seem adequate to measure fully the respect of the right to food as defined in some other international instruments. Arguably, while highly pertinent to gender equality and labor rights, the appropriation of land and the treatment of women farm workers may not impact directly the global right to food—albeit some of these indicators, such as the appropriation of land, may have implications for local small-holders who have lost farmland to larger for-export agricultural operations. For purposes of the present analysis, only the transparency and the climate criteria in Oxfam's rankings will be analyzed for their relevance to the right to food and the thirteenth Sustainable Development on climate action, both of which are difficult to measure on an outcome basis.

The climate criteria in Oxfam's ranking evaluates actions taken by companies to reduce greenhouse gases and to help farmers adapt to a changing climate.<sup>205</sup> This criteria is relevant because climate changes and degradation of the environment affect the ability of the future generations to produce food—and, therefore, to make it available—which is one of the tenants of the right to food. In 2016, Danone got the grade of 6/10 on this criterion, which is progress from the 3/10 it received in 2013 and is likely

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199. *Id.* at 3.

200. *Id.* at 4.

201. *April 2016 Company Scorecard*, BEHIND THE BRANDS, <https://www.behindthebrands.org/company-scorecard/> (last visited Sept. 21, 2019).

202. *February 2013 Company Scorecard*, BEHIND THE BRANDS, <https://www.behindthebrands.org/company-scorecard/> (last visited Sept. 21, 2019).

203. See *April 2016 Company Scorecard*, *supra* note 201.

204. THE BEHIND THE BRANDS SCORECARD METHODOLOGY, *supra* note 198, at 5.

205. *Standing on the Sidelines: Why Food and Beverage Companies Must Do More to Tackle Climate Change*, OXFAM (May 20, 2014), [https://www-cdn.oxfam.org/s3fs-public/file\\_attachments/bp186-standing-sidelines-big10-climate-emissions-200514-summ-en\\_0.pdf](https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp186-standing-sidelines-big10-climate-emissions-200514-summ-en_0.pdf).

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due to its recent commitments in the palm oil supply chain, and its achieving zero deforestation.<sup>206</sup> Such commitments only reflect structural indicators rather than outcome indicators. Indeed, in 2012 Danone implemented a forest footprint policy to eliminate deforestation impacts from its supply chain by the year 2020 and sources 100 percent of its palm oil from suppliers certified by the Roundtable on Sustainable Palm Oil.<sup>207</sup> In 2014, the company decided to adhere to even stricter standards and source only traceable palm oil that offers guarantees of zero deforestation and exploitation.<sup>208</sup>

Danone has been praised by Greenpeace for its responsible sourcing, as 100% of its palm oil is traceable to the mill and its impact in reforming the industry on this subject.<sup>209</sup> But Greenpeace considers that Danone could improve by being able to trace its palm oil to the plantation.<sup>210</sup> According to the Oxfam Index, progress can also be made by Danone on the climate criteria by achieving more ambitious greenhouse gas emissions targets and providing a more active help to farmers facing climate changes.<sup>211</sup> Regarding greenhouse gas targets,<sup>212</sup> in 2017 Danone confirmed that its emission reduction targets received official approval by the Science Based Targets initiative “as being in line with the global measures necessary to keep global warming below 2°C” but is still being criticized as making corporate promises that are not totally in line with the actual practices.<sup>213</sup> This criterion, as used in the Oxfam’s ranking, could be improved by including in the analysis the care taken by the company regarding polluting substances put in the soil. Indeed, it affects the long-term ability to produce food from the polluted soil and is key to “promot[ing] sustainable agriculture.”

The transparency criteria in indicators relevant to this context evaluates how honest companies are about where they source their products and raw materials, as well as their tax and lobbying practices disclosure.<sup>214</sup> The latter part is less relevant to the right of food, but the former part is linked to both availability and adequacy. Indeed, displaying raw materials’ origin is often

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206. DANONE, PALM OIL POLICY: INNOVATING FOR DEFORESTATION-FREE PALM OIL 11 (2015), [https://www.danone.com/content/dam/danone-corp/danone-com/about-us-impact/policies-and-commitments/en/2018/2015\\_Palm\\_Oil\\_Policy\\_Updated2018.pdf](https://www.danone.com/content/dam/danone-corp/danone-com/about-us-impact/policies-and-commitments/en/2018/2015_Palm_Oil_Policy_Updated2018.pdf).

207. *Id.* at 4.

208. *Id.*

209. GREENPEACE, CUTTING DEFORESTATION OUT OF THE PALM OIL SUPPLY CHAIN: COMPANY SCORECARD 7 (2016), [https://www.greenpeace.org/usa/wp-content/uploads/2016/03/gp\\_IND\\_PalmScorecard\\_FINAL.pdf](https://www.greenpeace.org/usa/wp-content/uploads/2016/03/gp_IND_PalmScorecard_FINAL.pdf).

210. *Id.*

211. *Standing on the Sidelines: Why Food and Beverage Companies Must Do More to Tackle Climate Change*, *supra* note 205.

212. Press Release, Danone, Danone Reaffirms Climate Commitment with Official Recognition from the Science-Based Targets Initiative and Steps Up Focus on Regenerative Agriculture (Nov. 15, 2017), [https://danone-danonecom-prod.s3.amazonaws.com/COP\\_press\\_release\\_Final.pdf](https://danone-danonecom-prod.s3.amazonaws.com/COP_press_release_Final.pdf).

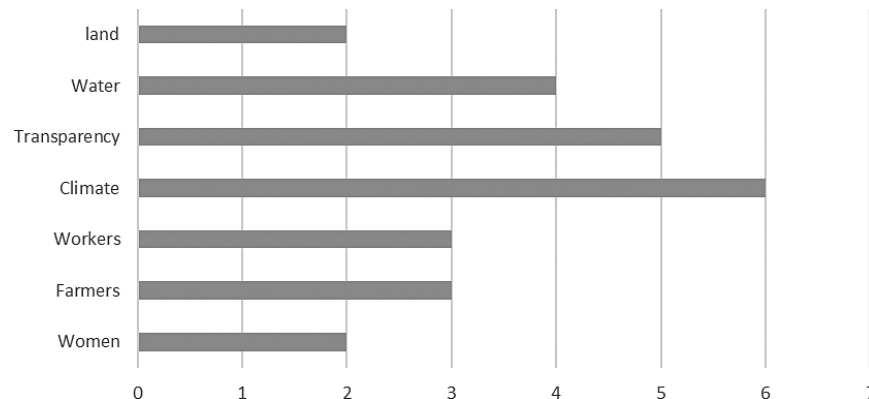
213. *Id.*

214. THE BEHIND THE BRANDS SCORECARD METHODOLOGY, *supra* note 198, at 10 – 11.

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proof of sustainable sourcing of quality materials such that the product does not harm to the planet. It could also be a sign of adequacy, as customers can verify whether the end products are dangerous to them or detrimental to their health in any way. Danone obtained a 6 out of 10 in 2013, which dropped to 5 out of 10 in February 2014 and remained that way in its transparency scorecard.<sup>215</sup> Danone’s transparency score is therefore decreasing over time. The report states that Danone has not improved on that criteria, and that is linked with the fact that it still refuses to provide the names of suppliers.<sup>216</sup> Greenpeace, in its report on deforestation, also failed Danone on the transparency criteria and recommends that Danone displays a complete list of known suppliers and sub-suppliers including the location and names of mills, plantations, and refineries.<sup>217</sup> But on a more positive note, the scorecard indicates that Danone is the only company in the ranking that discloses soy volumes used for dairy production, audit procedures and results, sources volumes, and locations.<sup>218</sup>

**Graph 4. Danone’s Scorecard on Oxfam Behind the Brands April 2016**



The Access to Nutrition Index (ANI) also rates Danone and is relevant to assessments of the right to food and well-being.<sup>219</sup> The ANI, aims to facilitate improved diets and a reduction of the serious global problems of both obesity and undernutrition and therefore evaluates nutrition-related commitments, practices, and performance of food companies.<sup>220</sup> The ANI

215. *April 2016 Company Scorecard*, *supra* note 201.

216. *Behind the Brands: Danone*, BEHIND THE BRANDS, <https://www.behindthebrands.org/brands/danone/evian/> (last visited Sept. 21, 2019).

217. GREENPEACE, *supra* note 209, at 7.

218. *Behind the Brands: Danone*, *supra* note 216.

219. ACCESS TO NUTRITION FOUND., ACCESS TO NUTRITION INDEX 3 (2016), [https://www.access tonutrition.org/sites/2015.atnindex.org/files/atni-global-index-2016\\_2.pdf](https://www.access tonutrition.org/sites/2015.atnindex.org/files/atni-global-index-2016_2.pdf).

220. *Id.*



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allows an evaluation of Danone’s policies and practices in relation to the principles of adequacy and of economic accessibility of food.

Danone ranked third overall in 2016 on the ANI, down from a ranking of first in 2013.<sup>221</sup> Again, Danone’s performance seems to be improving at a slower pace than other food companies. For instance, Danone obtained a grade of 5.3 on a ten-point scale, which leaves substantial room for progress compared to Unilever.<sup>222</sup> Unilever ranked first by obtaining a grade of 8.4 on a ten-point scale.<sup>223</sup> Danone ranked second on accessibility of healthy foods, which includes both product pricing and product distribution.<sup>224</sup> Danone has committed publicly to these issues and has actually developed commercial accessibility through the implementation of programs, and the Shokti Doi yogurt cited above is a good example of Danone’s actions on the matter.<sup>225</sup> This difference in the grading reflects the different methodologies of ranking used by each indicator, further defining standards of measurements relevant to each sector, and each concern might allow for further unification of methodologies and a clearer picture of the company’s performance with relevance to human rights and well-being.

**Graph 5. Danone’s Scorecard on the ANI 2018**

Section	Article	Topic	2018	Score 2016
1	Intro	Overarching commitments	88%	81%
2	4	Information & education	70%	42%
3	5	The general public and mothers	100%	92%
4	6	Healthcare systems	77%	57%
5	7	Healthcare workers	83%	50%
6	8	Persons employed by manufacturers and distributors	100%	75%
7	9	Labeling	73%	42%
8	10	Quality	100%	92%
9	11	Implementation	100%	82%
10		Lobbying (policy and objectives)	88%	88%
11		Disclosure	76%	40%
Initial Corporate Profile score			87%	67%

“One Planet. One Health,” Danone’s latest initiative is “a movement aimed at nurturing the adoption of healthier and more sustainable eating and drinking habits.”<sup>226</sup> Improving the performance indicators of Danone on the promotion of healthier lifestyles are the products sold in healthy

221. *Id.* at 194.

222. *Id.*

223. *Id.* at 208.

224. *Id.* at 194.

225. *Danone Foods Ltd.*, DANONE COMMUNITIES, <http://prod.danone.emakina.nbs-test.com/node/28?mode=history> (last visited Sept. 9, 2019).

226. Press Release, Danone, Danone Launches New Company Signature “One Planet. One Health,” with Call to Action to Join the Alimentation Revolution (June 22, 2017).

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categories<sup>227</sup> (eighty-eight percent in 2016) and the percentage of advertising that complies with the ICC Code of responsible marketing or equivalent local codes (ninety-seven percent). This led to ANI ranking Danone fourth on the formulation of appropriate product metric.<sup>228</sup> ANI's product formulation metric evaluates the adequacy of the products distributed by a given company by assessing how companies commit to creating more nutritious and healthy products to reduce both obesity and undernutrition.<sup>229</sup>

On CSRHub, the CSR rating of Danone compared to all companies' scores is sixty-nine percent; this score is in contrast with that of Oxfam's Behind the Brands rating; it is important to note that these variations between the metrics do not necessarily indicate their inaccuracy, as such inaccuracy can only be determined once the methodologies are inspected because different metrics focus on different issues; this is apparent in this case, as Oxfam's Behind the Brands focuses on specific aspects found in the sector as previously indicated.<sup>230</sup> CSRHub offers a more general analysis; as such, despite the rather high score attained by Danone in CSRHub, its scores with respect to community development (forty-six percent), human rights, and supply chain (fifty-six percent), when compared to other corporations in the industry, are also rather low.<sup>231</sup> According to the CSRHub, Danone's strong point is in its employee policy scoring (seventy-eight percent) when compared to all other corporations; its scores on the environment are also high; however, their product rates low (fifty-four percent) once compared to the products of other corporations in France.<sup>232</sup> Lastly, unlike Sanofi, CSRHub traces an improvement in Danone's performance over the past ten years.

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227. DANONE, NUTRITION ACHIEVEMENTS 2016 3 (2016), [https://www.danone.com/content/dam/danone-corp/danone-com/about-us-impact/policies-and-commitments/en/2017/2017\\_06\\_20\\_Danone2016NutritionHealthAchievements.pdf](https://www.danone.com/content/dam/danone-corp/danone-com/about-us-impact/policies-and-commitments/en/2017/2017_06_20_Danone2016NutritionHealthAchievements.pdf).

228. ACCESS TO NUTRITION FOUND., *supra* note 219, at 194.

229. *Id.* at 72.

230. *Corporate Social Responsibility (CSR) & Environment, Social, Governance (ESG) Metrics*, DANONE, [https://www.csrhub.com/CSR\\_and\\_sustainability\\_information/Groupe-Danone](https://www.csrhub.com/CSR_and_sustainability_information/Groupe-Danone) (last visited Sept. 22, 2019).

231. *Id.*

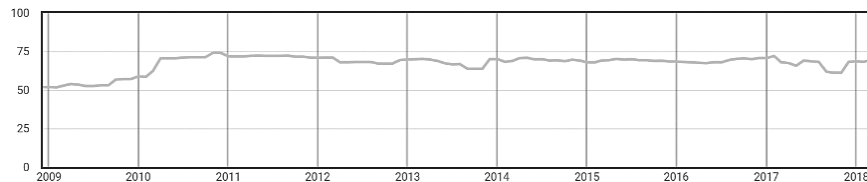
232. *Id.*

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**Graph 6. Danone's scorecard on CSRHub, 2018**



**Graph 7. Danone's history of ratings for the past ten years according to CSRHub**



In sum, Danone ranks well compared to other big players in the industry in the accessibility and adequacy categories of the right to food; however, even the leaders still have a lot of room for improvement on these aspects in the food industry. On the availability aspect, Danone should commit to provide more information on its suppliers and set more ambitious goals to protect tomorrow's agriculture in order to maintain the right to food of future generations.

The Oxfam ranking seems incomplete to assess Danone's full performance regarding Objective SGD 2: some of the components of the ranking are not directly related to the assessment of the objective, and it does not include any assessment of the quality and adequacy of the food produced. Moreover, Danone's case allows for an assessment of human rights indicators once inspected at a methodological level.

2. *Danone and the Development Dimensions of Food Rights and Well-Being*

The second development goal, which states to “end hunger, achieve food security and improve nutrition, and promote sustainable agriculture,”<sup>233</sup> cannot be achieved without the successful exercise of the right to food. The right to food appears in major international instruments, such as the Universal Declaration of Human Rights article 25 and the International Covenant on Economic, Social and Cultural Rights article 11.<sup>234</sup> It can be defined as the right to adequate food and the achievement of food security which exists when “all people, at all times, have physical and economic access to sufficient, safe, and nutritious food to meet their dietary needs and food preferences for an active and healthy life.”<sup>235</sup>

The Special Rapporteur has concluded that the right to food entails:

The right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.<sup>236</sup>

The right to food is further defined in the general comment number 12 by the Office of the High Commissioner of Human Rights (OHCHR) in the following terms: “The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement.”<sup>237</sup>

The OHCHR supports a progressive approach to the right that is not merely focused on calorie consumption per day but stresses sustainability that ensures food security.<sup>238</sup> Taking up this approach, the former rapporteur on the right to food, Olivier Du Shutter, identified three sources from which individuals can secure access to food: “(a) earning incomes from employment or self-employment; (b) through social transfers; or (c)

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233. See G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, at 26 (Sept. 25, 2015).

234. World Food Summit, *Report of the World Food Summit*, WFS 96/REP, 14, 134 (Nov. 13-17, 1996).

235. *Food Security*, INT’L FOOD P. RESEARCH INST., <http://www.ifpri.org/topic/food-security> (last visited Sept. 22, 2019).

236. Jean Ziegler, *Report of the Special Rapporteur on the Right to Food: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/7/5, ¶ 17 (Jan. 10, 2008).

237. Office of the High Comm’r for Human Rights, *CESCR General Comment No. 12: The Right to Adequate Food (Art. 11)*, U.N. Doc. E/C.12/1999/5, ¶ 6 (May 12, 1999).

238. *Id.*

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producing one's own food."<sup>239</sup> This progressive approach towards the fulfillment of the right to food has been used by researchers at the Columbia Center on Sustainable Investment in their analysis of available protections in the face of corporate agricultural investment explicitly in relation to large-scale investment. In the course of discussing the negative impacts that such investments can produce, the study demonstrates how corporate activities that result in displacement, environmental damages, and poor understanding of the land's productive use affect the quality of the life of locals and in turn their well-being. Especially in relation to their access to either one of the sources of food, this approach of assessing environmental quality and sustainability demonstrates how such a progressive approach to the right to food inspects different components of well-being.

In contrast to the role a company could play in promoting the SDG of sustainable agriculture and climate action, not everything in the right to food can be easily applied directly to Danone. There are three aspects of the right to food that can be used to assess Danone's ability to promote the objective to "[e]nd hunger, achieve food security and improved nutrition and promote sustainable agriculture"<sup>240</sup>: availability, adequacy, and accessibility.<sup>241</sup> Availability refers to the notions of sustainability and the protection of the environment, as enough food must be produced in the future and the present.<sup>242</sup> Adequacy refers to the dietary needs of an individual which must be fulfilled in terms of quantity but also in terms of nutritious quality of the accessible food.<sup>243</sup> As recommended intake and nutrition practices must be assessed on a country-specific basis, the adequacy criteria entail taking into account the cultural aspect of dietary needs. Finally, accessibility has two tenants: first, economic accessibility implies that the food-related incurred financial costs do not endanger the realization of other basic needs and rights (e.g. housing, health, education); second, physical accessibility implies that all individuals, including physically vulnerable ones, should be ensured access to adequate food.<sup>244</sup>

In 2015, Danone published a manifesto "committing to lead a revolution in alimentation by helping the communities to reconnect to their health."<sup>245</sup> Danone's public commitments are summed up in Danone's manifesto. They include providing products that are adapted to various individuals and

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239. Olivier De Schutter (Special Rapporteur on the Right to Food), *Report of the Special Rapporteur on the Right to Food: Final Report: The Transformative Potential of the Right to Food*, U.N.Doc. A/HRC/25/57, ¶ 2 (Jan. 24, 2014).

240. G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, at 14 (Sept. 25, 2015).

241. Jean Zeigler, *What is the Right to Food?*, RIGHT TO FOOD, <https://www.righttofood.org/work-of-jean-zeigler-at-the-un/what-is-the-right-to-food/> (last visited Sept. 22, 2019).

242. *Id.*

243. *Id.*

244. *Id.*

245. *Report Cites Danone's Actions Toward 'Zero Hunger'*, MEDIUM, <https://medium.com/@Danone/report-cites-danones-actions-toward-zero-hunger-d8de81aa5b33> (last visited Sept. 22, 2019).

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their dietary needs, while promoting healthy diets and protecting the environment. To achieve its aims, Danone has invested massively in research programs to promote the healthier choices relevant to the communities' habits.<sup>246</sup> Another side to their product development is observed in Danone's several initiatives across the world to fight against malnutrition: for example, in African countries, cereals have been enriched to compensate iron deficiency and several educational programs promoting a healthy diet have been launched around the world.<sup>247</sup>

In April 2017,<sup>248</sup> Danone registered Danone Wave, a new corporation where Danone put its portfolio of brands, including Danone, Ikos, and Silk among others. It is the largest Public Benefit Corporation in the United States with six billion sales, whose aim is to balance stakeholders' financial interests with broader social and environmental considerations.<sup>249</sup> On multiple occasions,<sup>250</sup> Emmanuel Faber, Danone's CEO, has expressed the corporation's willingness to be involved in the second goal of the seventeen SDGs set out by the United Nations. He asserted Danone's willingness to tackle all types of malnutrition, ensure production cycles are sustainable, and rebuild biodiversity.<sup>251</sup>

Danone has funded several social innovation platforms involved in nutrition and access to water, employment and support of local ecosystems, and improvement of farmers livelihood in a sustainable way.<sup>252</sup> Indeed, in order to achieve the second goal of the SDGs, Danone believes it needs to scale up to another level of partnership, with hybrid models where companies, philanthropy, communities, and government each play a role.<sup>253</sup> An example is "*la Laiterie du Berger*," a business producing and selling milk locally in Senegal that benefited from Danone's community support and technical advances, which improved the lives of thousands of people and traditional livestock herders.<sup>254</sup>

To adapt products to everyone's dietary needs ensuring their well-being, a food company must provide healthy food while taking into account cultural differences and age; such is a multidimensional approach advocated by the OECD. Danone has launched three programs to tackle this challenge:

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246. *Id.*

247. *Id.*

248. *DanoneWave Established as the Largest Public Benefit Corporation in the U.S.*, DANONE (April 25, 2017), <http://www.danonenorthamerica.com/wp-content/news/danonewave-largest-public-benefit-corporation.pdf>.

249. *Id.*

250. *Highlights from OECD Workshop: Measuring Business Impacts on People's Well-Being*, OECD 12 (Feb. 23, 2017), <https://www.oecd.org/statistics/Biz4WB-Highlights-OECD.pdf>.

251. Emmanuel Faber, *The Food Generation: Reconnecting Food to the People and the Planet*, DIPLOMATIC COURIER (Sept. 22, 2017), <https://www.diplomaticcourier.com/2017/09/22/food-generation-reconnecting-food-people-planet/>.

252. *Report Cites Danone's Actions Toward 'Zero Hunger'*, *supra* note 245.

253. *Id.*

254. *La Laiterie du Berger*, DANONE COMMUNITIES, [http://www.danonecommunities.com/index.php/fr/portfolio\\_page/la-laiterie-du-berger/](http://www.danonecommunities.com/index.php/fr/portfolio_page/la-laiterie-du-berger/) (Last visited Aug.20, 2018).

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Nutriplanet,<sup>255</sup> its market research of consumers' dietary preferences and needs; Nutriways,<sup>256</sup> its product reformulation program; and Nutri-Impact,<sup>257</sup> its program to study product impacts on consumer diets and health. Also, Danone has a strong commitment to cultural fitness as it actively tries to adapt each product to the market needs and cultural habits. For example, in Bangladesh, Grameen Danone Foods Ltd.<sup>258</sup> produces a yogurt called *Shokti Doi*, which contains nutritional values aimed to fill nutritional deficits of children in the country. "Shokti Doi is sold for six euro cents, a price that studies found to be affordable for the poorest families."<sup>259</sup> These products address both the adequacy and accessibility components of the right to food.<sup>260</sup>

For Danone, the sustainable diet objective is linked to its global approach of having a socially responsible production.<sup>261</sup> The company adopted an Environmental Charter in 1996 and defined a ten-year plan and objectives in 2000.<sup>262</sup> Danone is thus committed on four different levels: agriculture, climate, water, and packaging.<sup>263</sup> With respect to agriculture, Danone is promoting competitive agriculture respectful of natural ecosystems and cycles, and is developing new tools with farmers, such as pest control, cow feed, models of measurement, and solutions.<sup>264</sup> Danone also adopted a climate agenda: it has committed to reduce its carbon emissions by three to five percent per year until 2030 and intends to eliminate deforestation from its supply chain.<sup>265</sup> Since then, the company has managed to reduce its footprint by thirty percent.<sup>266</sup> Danone also intends to reduce water use by

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255. *NutriPlanet: Understanding Local Needs to Provide Relevant Nutritional Solutions*, NUTRICA RESEARCH, <https://www.nutriciaresearch.com/publication-library/nutriplanet-map-understanding-local-needs-provide-right-nutritional-solutions/?cn-reloaded=1> (last visited Sept. 15, 2018).

256. *Groupe Danone 2016 Company Scorecard*, ACCESS TO NUTRITION INDEX, <https://www.accessstonutrition.org/index/global.2016/company/danone/pdf/atnindex.global.2016.scorecard.danone.20161011.120537.pdf> (last visited Sept. 22, 2019).

257. *Id.*

258. *Grameen Danone Foods. Ltd.*, SOCIAL BUSINESS PEDIA (April 28, 2013), <http://socialbusinesspedia.com/organizations/grameen-danone-foods-ltd> (last visited Sept. 22, 2018).

259. Jonathan Rodrigues & Gregory A. Baker, *Grameen Danone Foods Limited (GDF)*, 15 INT'L FOOD & AGRIBUSINESS MGMT. REV. 127, 131 (2012); *Grameen Danone Foods Ltd.*, DANONE COMMUNITIES, <http://prod.danone.emakina.nbs-test.com/node/28?mode=history> (last visited Sept. 9, 2019).

260. U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, THE RIGHT TO ADEQUATE FOOD FACT SHEET No. 34 2 (2010), [ohchr.org/Documents/Publications/FactSheet34en.pdf](http://ohchr.org/Documents/Publications/FactSheet34en.pdf).

261. *Danone Goals by 2030*, DANONE, <https://danone-com-prod-64.content.digital4danone.com/about-danone/sustainable-value-creation/our-company-goals.html> (last visited Sept. 9, 2019).

262. DANONE, 2010 SUSTAINABILITY REPORT 40 (2010).

263. *Id.*

264. *Id.* at 41, 44, 50, 101.

265. *Towards Carbon Neutrality*, DANONE, <https://www.danone.com/impact/planet/towards-carbon-neutrality.html> (last visited Sept. 6, 2019).

266. *Danone Embraces Ambition in Push for Carbon Neutrality*, WE MEAN BUSINESS (July 23, 2018), <https://www.wemeanbusinesscoalition.org/blog/danone-embraces-ambition-push-carbon-neutrality>.

sixty percent by 2020 and has been protecting the water ecosystem.<sup>267</sup> The plan also intends to run in-market pilot tests on packaging and turn waste into resources for their packaging with an aim to produce a one-hundred-percent recyclable bottle.<sup>268</sup> Danone has formulated its intention to achieve seventy-five percent of these goals by 2020.<sup>269</sup>

While the firm has made improvements, Danone's approach to climate change has been criticized by NGOs (this is slightly reflected in CSRHub, where the corporation scores fifty-six percent when compared to all other corporations).<sup>270</sup> For example, Oxfam has accused Danone's approach to be more symbolic rather than a source of real commitments to address climate changes in its operations.<sup>271</sup> Instead, the new policy puts the "onus on consumers to change their diets and purchasing habits," rather than really shifting the company's supply chain practices.<sup>272</sup> Indeed, compared to General Mills (Yoplait brand), who committed to set an absolute science-based reduction target that includes its entire value chain, Danone's goals to reduce CO2 seems weak to Oxfam.<sup>273</sup> Moreover, Oxfam considers Danone's policy to be unfair to small scale farmers because the firm does not provide them with a fair deal which would allow those displaced to earn a better living or to adapt to climate change.<sup>274</sup>

Danone has taken some governance-level commitments on environment: for example, it recently entered into a partnership with l'Association pour la Protection de l'Impluvium de l'Eau Minérale d'Evian to promote sustainable agriculture that does not pollute underground water.<sup>275</sup> It also committed to zero net carbon and no deforestation and intends on doing so by developing new solutions.<sup>276</sup> Therefore, there are commitments in place to protect the environment which matches these objectives.<sup>277</sup> To move forward, Danone should become more transparent on how exactly it will attain these environmental goals. Danone should also attain these goals and aim at fixing even more ambitious goals. Indeed, Danone's actions seem to be lacking

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267. *Water Stewardship*, DANONE, <https://www.danone.com/impact/planet/protecting-water-cycles.html> (last visited Sept. 9, 2019).

268. *Circular Economy of Packaging*, DANONE, <https://www.danone.com/impact/planet/packaging-positive-circular-economy.html> (last visited Sept. 13, 2019).

269. DANONE, *PACKAGING POLICY 17* (2016), [https://www.danone.com/content/dam/danone-corp/danone-com/about-us-impact/policies-and-commitments/en/2016/2016\\_11\\_04\\_DanonePackagingPolicy.pdf](https://www.danone.com/content/dam/danone-corp/danone-com/about-us-impact/policies-and-commitments/en/2016/2016_11_04_DanonePackagingPolicy.pdf).

270. *Group Danone CSR/ESG Ranking*, CSRHUB, [https://www.csrhub.com/CSR\\_and\\_sustainability\\_information/Groupe-Danone](https://www.csrhub.com/CSR_and_sustainability_information/Groupe-Danone) (last visited Sept. 13, 2019).

271. *Danone's Approach to Climate Change Leaves Sour Taste*, OXFAM INT'L (Nov. 20, 2015), <https://www.oxfam.org/en/pressroom/reactions/danones-approach-climate-change-leaves-sour-taste>.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Strategy & Key Figures*, DANONE, <https://www.danone.com/brands/waters/strategy-and-key-figures.html> (last visited Sept. 13, 2019).

276. *Towards Carbon Neutrality*, *supra* note 265.

277. *Id.*



around the environmental issues compared to the nutritional issues: for the latter, Danone displays many concrete actions and results.<sup>278</sup>

C. AN EXTRACTIVE INDUSTRY EXAMPLE

1. *Total and the Corporate Human Rights Benchmark: Environmental Rights and Well-Being*

The Corporate Human Rights Benchmark (CHRB) was founded in the context of the guiding principles: to grow awareness of the role of corporations in human rights violations and to grow aptitude for the use of indicators in the field of human rights and global governance.<sup>279</sup> CHRB is a tool that defines indicators upon which the world's largest transnational corporations are compared in relation to their efforts to respect the most "salient" human rights issues in the course of their operations.<sup>280</sup>

The Pilot methodology of the CHRB was initially designed in 2016 and later updated in 2018,<sup>281</sup> placing 100 of the biggest corporations in the world and their different parts in three different sectors at specific stages of their production cycle in its indicator framework.<sup>282</sup> The pilot methodology indicates that the assessment will be carried out annually, changing the methodology slightly every year and conducting a more comprehensive review every three years where the benchmarking features are assessed so as to be up-to-date with the latest trends in the indicators and to facilitate its expansion as it grows in popularity with the aim of including a total of 500 corporation in future assessments.<sup>283</sup>

The CHRB derives its benchmarks from international and industry standards aligning the guiding principles alongside other instruments of international law like the ILO core conventions and the OECD Guidelines for Multinational Enterprises; likewise, it identifies key industry-specific risks chosen via extensive research and multi-stakeholder consultations.<sup>284</sup> As to the data used to make the assessment, CHRB mainly relies on two sources: the data made public by the corporation through their policy statements or speeches of their board members and, secondly, its disclosure program where companies are given the chance to disclose information as

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278. DANONE, NUTRITION COMMITMENTS 3 (April 2017), [https://www.danone.com/content/dam/danone-corp/danone-com/about-us-impact/policies-and-commitments/en/2017/2017\\_04\\_NutritionCommitments.pdf](https://www.danone.com/content/dam/danone-corp/danone-com/about-us-impact/policies-and-commitments/en/2017/2017_04_NutritionCommitments.pdf).

279. CORP. HUMAN RIGHTS BENCHMARK, CORPORATE HUMAN RIGHTS BENCHMARK METHODOLOGY 2018 11 (2018), <https://www.corporatebenchmark.org/sites/default/files/documents/CHRB%202018%20Methodology%20Web%20Version.pdf> [hereinafter CHRB METHODOLOGY 2018].

280. *Id.*

281. *Id.* at 5.

282. *Id.* at 4.

283. *Id.* at 16 – 17, 19, 34.

284. *Id.* at 31, 36, 44.

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per their practices and policies; to that end, the CHRB only relies on external sources of data in cases of serious allegations.<sup>285</sup>

With the aim of focusing on corporate activities with the highest impact on local societies, the scope of the companies assessed by the CHRB is not only defined by capital and geographic standards but according to sector-specific parts of their cycles providing subjective assessment of the human vulnerabilities associated with each of the following: (1) the agriculture industry, from production to processing; (2) the extractive industry, from exploration, production, development, decommissioning, and closure; and (3) the apparel industry in production and manufacturing.<sup>286</sup> The limitations to the scope were made in accordance with research results that indicate the severity of human rights violations in these sectors and the previous cases related to them, in addition to their significance to the global economy by size.<sup>287</sup> In the next expansion, the CHRB is planned to include the heavy machinery and engineering sector, the ICT sector, and the electronics and light manufacturing industries.<sup>288</sup>

After the corporations are chosen per the outlined scope, they are assessed on the basis of six measurement themes, each of which weighs a specific percentage; at each level there are general scoring measurements and then specific measurements for each industry sectors with an extended focus on other actors (partners or subsidiaries, for example) depending on the theme.<sup>289</sup> Likewise, there are several categories that are assessed in each theme. For each category in each theme there are three possible scores (0, 1, and 2), and the methodology outlines the requirements for attaining these scores for each theme, category, and industry. At times there will be multiple requirements to attain a score; these requirements may be cumulative (indicated by “AND”) or they may be a requirement of either condition to attain the score (indicated by “OR”), later cumulating the score for each theme and giving it weight according to the prescribed percentage.<sup>290</sup>

These measurement themes can be roughly categorized under several kinds of indicators, including structural indicators that address the corporation’s public statements on its governance scheme and policy in one theme and its remedies and grievance mechanisms in another.<sup>291</sup> Also included are performance indicators that assess the corporation’s operational efforts towards embedding respect and human rights due diligence as well as

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285. CHRB METHODOLOGY 2018, *supra* note 279, at 33.

286. *Id.* at 26.

287. *Id.*

288. CORP. HUMAN RIGHTS BENCHMARK, CORPORATE HUMAN RIGHTS BENCHMARK: FULL PILOT METHODOLOGY 2016 35 (March 2016) <https://www.corporatebenchmark.org/sites/default/files/documents/Full%20Combined%20CHRB%20Pilot%20Methodology%2026Sep2017.pdf> [hereinafter CHRB METHODOLOGY 2016].

289. CHRB METHODOLOGY 2018, *supra* note 279, at 31.

290. *Id.* at 31 – 34.

291. *Id.* at 32.

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its performance and human rights practices.<sup>292</sup> Lastly, some themes can be classified as outcome indicators despite the fact that they measure procedural outcomes in the corporation rather than outcomes on the affected stakeholders; these themes include a measurement of performance as per response to serious allegations, a measurement of transparency in communicating their policies to the public, as well a measurement of performance with respect to effects on human rights.<sup>293</sup>

The CHRБ scoring scheme touches upon several dimensions of the well-being of corporate workers as well as local communities affected by the activities of the corporations assessed; first in its general measurement themes and then in its sector-specific scoring criteria, many of these aspects are reflective of the statistical scores used in the OECD's *How's Life?* report in 2011<sup>294</sup> to measure well-being in OECD and partner states. The following are some of the dimensions addressed by the CHRБ.

Well-being of the employees:

Jobs and Earnings: according to the OECD: "the availability of jobs and the earnings they pay are essential to individual well-being."<sup>295</sup> "Not only do good jobs increase people's command over resources, but they also provide people with a chance to fulfil their own ambitions [and] to develop skills and abilities . . . ."<sup>296</sup> The CHRБ assesses the corporation's policy on living wage in all three sectors by comparing ratios of standard entry level wage at the corporation (by gender) compared to local minimum wage at significant locations of operation.<sup>297</sup>

Working Conditions: according to the OECD, "[w]orking conditions can be as important as job availability in terms of their consequences on people's lives, as people spend a considerable amount of time at work. Work represents many people's main recognized contribution to the community where they live, and it is a source of pride and dignity; the quality of their jobs is therefore fundamental for them."<sup>298</sup> To assess corporate performance in this respect, the CHRБ assesses the health and safety policies in the workplace with a focus on the extractive industry, taking into consideration the number of fatalities, lost days, and rate of injuries.<sup>299</sup> Likewise, attention is paid to the general working conditions of more vulnerable groups of employees identified

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292. *Id.*

293. *Id.*

294. *HOW'S LIFE? 2011: MEASURING WELL-BEING*, *supra* note 20, at 21 – 24.

295. *Id.* at 58.

296. *Id.*

297. *Id.* at 18.

298. *Id.* at 58.

299. CHRБ METHODOLOGY 2018, *supra* note 279, at 123.

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according to the nature of the industry's work (e.g. women and children in the extractive industry).<sup>300</sup>

Well-being of the local communities:

Access to grievance mechanisms: The OECD stresses the importance of an effective justice system that ensures people's rights. On a private level, this translates to accessibility to grievance mechanisms that allow for smoother procedures with the aim of protecting the rights of those affected by the corporation's activities.<sup>301</sup> As such in measurement theme C "Remedies and Grievance Mechanisms," CHRБ assesses whether the corporation has easy and publicly available mechanisms that users can choose from to receive complaints and concerns coming from either workers or external individuals; and to remedy the effects of any problems found, it also includes involvement in state-based judicial and non-judicial mechanisms.<sup>302</sup>

Environmental quality: according to the OECD "environmental quality is a key dimension of people's well-being, as quality of life is strongly affected by a healthy physical environment."<sup>303</sup> "The impact of environmental pollutants, hazardous substances, and noise on people's health is sizeable: environmental factors play a role in more than eighty percent of the major diseases, and worldwide around one-fourth of diseases and overall deaths are due to poor environmental conditions."<sup>304</sup> To this end, the CHRБ includes water and sanitation indicators that assess the effects of the water withdrawal on local water sources in agricultural operations (and their supply chain) and extractive operations.<sup>305</sup>

Governance: Good governance, to the OECD, is generally characterized by accessibility and transparency among other things.<sup>306</sup> Focusing on these two aspects, the CHRБ takes into consideration whether extractive industries have taken into consideration indigenous people's rights and free prior and informed consent before commencing a project.<sup>307</sup>

Security: the OECD asserts that there are different kinds of physical security, as "physical security is a broad concept,"<sup>308</sup> and calls for security indicators that go beyond simply measuring crime rates.<sup>309</sup> The

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300. *Id.* at 47.

301. *How's LIFE? 2011: MEASURING WELL-BEING*, *supra* note 20, at 192.

302. *CHRБ METHODOLOGY 2018*, *supra* note 279, at 69.

303. *How's LIFE? 2011: MEASURING WELL-BEING*, *supra* note 20, at 211.

304. *Id.*

305. *CHRБ METHODOLOGY 2018*, *supra* note 279, at 86, 97.

306. *How's LIFE? 2011: MEASURING WELL-BEING*, *supra* note 20, at 191.

307. *CHRБ METHODOLOGY 2018*, *supra* note 279, at 96.

308. *How's LIFE? 2011: MEASURING WELL-BEING*, *supra* note 20, at 240.

309. *Id.*

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CHRB measures a specific type of physical security; in relation to extractive industries the CHRB measures the corporation's performance as per the security measures it takes to ensure the safety of its own operations and that of the local community.<sup>310</sup>

While the CHRB provides a good tool for assessing corporation's adherence to human rights with an intake on well-being as well, it is composed mostly of structural and performance indicators that rely on the information made public by the corporation with the absence of outcome indicators; meaning that the results of the CHRB only provide measurement of the company's willingness to adhere to human rights, rather than its actual effects on the community, producing invisible gaps in disaggregated information.<sup>311</sup> Such a data gap is observable in other human rights indicators; despite the vast improvement in the quality of data available for developing countries on multidimensional indicators of well-being, data availability still poses a challenge in the sense of operation costs and verification.<sup>312</sup> In addition, data difficulties are not only limited to difficulty of attainment, for even with the availability of data, the balance between subjectivity and comparability would still present a challenge for the composition of an indicator; such data attainment and comparability issues can be addressed by utilizing several data sources, for example "Ethical Ratings" by "Ethical Consumer," which rate corporations' respect of several human rights, refer to stakeholder surveys to collect data.<sup>313</sup>

On the development of indicators to rank rights performance, in their report to the General Assembly of the U.N. in 2015, the Working Group on the issue of human rights and transnational corporations and other business enterprises advised committees creating indicators to include individuals and communities potentially or actually harmed by the business operations, encouraging a balance between quantitative approaches that aim at precision and qualitative approaches that are more assertive of people's dignity.<sup>314</sup> Despite the fact that the CHRB assesses reactions to serious allegations by such stakeholders, its approach falls short from addressing this data discourse all together: instead of aiming to collect at least a percentage of the data from other sources to be later compared with the results of other corporations as per the committee's direction, the same issue is observable in other indicators like the 100 Best Corporate Citizens List and the previously mentioned Oxfam's Behind the Brands.<sup>315</sup>

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310. CHRB METHODOLOGY 2018, *supra* note 279, at 97.

311. *Id.* at 33.

312. U.N. Secretary-General, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/70/216, at 14 – 16 (July 30, 2015).

313. *Our Ethical Ratings*, ETHICAL CONSUMER (June 1, 2018), <https://www.ethicalconsumer.org/about-us/our-ethical-ratings>.

314. *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, *supra* note 312, at 19.

315. *Id.* at 12.

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Another aspect of the concerns raised by the Working Group is the lack of measurements on the pillar of remedy despite the availability of data on the topic.<sup>316</sup> The CHRB responds to this concern by providing an assessment of the corporation's policy on grievance mechanisms and their response to allegations.<sup>317</sup> Moreover, the prioritization of well-being measures in the CHRB seems to be lacking as they are not always placed as a criterion for gaining the minimal score of one; at times they are placed as a criterion for gaining a score of two. For example, despite being identified as a key industry risk in 2018, health and safety were a criterion for getting a score of two in commitment to respect the human rights of workers that is a part of the measurement theme on governance scheme and policy.<sup>318</sup> In other words, a corporation can still get a score of one in some measurements without having addressed an essential aspect of well-being. Nonetheless even with the shortcomings of the CHRB, it is an attestation to a development in the use of indicators to assess corporate behavior in relation to human rights.<sup>319</sup> Such models can be later developed to include measurements of a larger arena of data: the OECD's vision of well-being.

Moving on to Total's performance on the CHRB, its overall score in 2017 was forty-nine out of one hundred.<sup>320</sup> Total has a really good score when it comes to embedding respect for human rights in the company culture as well as its policy commitments.<sup>321</sup> Total scores very well regarding governance and policy commitments, and, as we have seen before, it has provided extensive communication on its corporate core values such as individual security, respect of human rights as an employer that are displayed in its Code of Conduct, and its Human Rights Guide.<sup>322</sup> Both of these documents explain the relatively good performance of Total on the "Embedding Respect & Human Rights Due Diligence" criteria. Total therefore seems to be performing well on its ability to include the respect and the promotion of human rights in its core values and communicate as a corporation on these points.

Indeed, concerned about its image, Total has developed in recent years a targeted communication internally and externally about issues of social and environmental responsibility.<sup>323</sup> It also adopted several codes and guides, such as the code of conduct setting out a frame of values and principles

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316. *Id.* at 23.

317. CHRB METHODOLOGY 2018, *supra* note 279, at 67.

318. *Id.* at 44.

319. *Id.* at 12.

320. CORP. HUMAN RIGHTS BENCHMARK, CORPORATE HUMAN RIGHTS BENCHMARK: KEY FINDINGS 2017 11 (2017), [https://www.corporatebenchmark.org/sites/default/files/2017-03/CHRB\\_Findings\\_web\\_pages.pdf](https://www.corporatebenchmark.org/sites/default/files/2017-03/CHRB_Findings_web_pages.pdf).

321. *Id.* at 21.

322. CORPORATE HUMAN RIGHTS BENCHMARK: KEY FINDINGS 2017, *supra* note 320, at 24 – 25; TOTAL, CODE OF CONDUCT 4 (2015), [https://www.total.com/sites/default/files/atoms/files/total\\_code\\_of\\_conduct\\_va.pdf](https://www.total.com/sites/default/files/atoms/files/total_code_of_conduct_va.pdf); TOTAL, HUMAN RIGHTS GUIDE 4 (2015), [https://www.total.com/sites/default/files/atoms/files/human\\_rights\\_internal\\_guide\\_va.pdf](https://www.total.com/sites/default/files/atoms/files/human_rights_internal_guide_va.pdf).

323. HUMAN RIGHTS GUIDE, *supra* note 322, at 42.

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relating to safety; environment; health; and human rights or integrity, as provided by internationally recognized documents, to be followed by every business unit of Total for all of its operations.<sup>324</sup> But Total has an average score in terms of its human rights due diligence.<sup>325</sup> Despite its human rights code of conduct, CHRB reveals that Total has not adopted any mechanisms to address human rights infringements, implemented a grievance mechanism, or disclosed such infringements.<sup>326</sup> In terms of responding to serious allegations, unlike many companies, Total often exercises its right of reply at every press scandal or NGO's accusations to show its receptiveness to critics.<sup>327</sup> However, Total scores very poorly regarding its response to serious allegations (rated 7.5 out of 20); indeed, although it replied publicly to allegations of an oil spill in the Niger Delta, it did not take any actions aimed at correcting the ongoing pollution.<sup>328</sup> Total's score is also average in terms of transparency (rated 5.6 out of 10): CHRB criticizes Total for not disclosing or for disclosing only non-exhaustive information to the different stakeholders relating to human rights, health and safety, security, and local communities.<sup>329</sup>

But when it comes to actual corporate practices, Total does not seem, according to the ranking, to be rising up to expectations: on the remedies and grievance mechanisms criteria, Total obtained a score of three out of fifteen.<sup>330</sup> Indeed, Total states in its Human Rights Guide that "the grievance procedure should be designed in collaboration with representatives from the local community to reflect their needs and interests and to create ownership and trust in this mechanism."<sup>331</sup> But this way of doing does not lead to transparency for individuals, who do not know and are not able to find any information on the procedure to file a complaint or obtain reparation from Total. Moreover, in acting this way, Total avoids providing any procedural safeguards to individuals in their grievance procedure.

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324. CODE OF CONDUCT, *supra* note 322, at 9.

325. CORPORATE HUMAN RIGHTS BENCHMARK: KEY FINDINGS 2017, *supra* note 320, at 21.

326. *Id.* at 28.

327. For example, Total has immediately published a press release following the accusations of three NGO's, explaining a \$100 million difference between the government's income tax returns and Total's one; a significant loss of profits for one of the poorest countries in the world. See *Total Company Profile*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/total/?dateorder=datedesc&page=0&componenttype=1> (last visited Nov. 17, 2019).

328. According to CHRB, Total did not provide evidences of corrective actions, implement complain mechanisms internally, undertake actions with external stakeholders, nor provided compensations to those affected as well as demonstrate a clear rehabilitation plan. *Corporate Human Rights Benchmark 2017 Company Scoresheet*, CHRB (2017), <https://www.corporatebenchmark.org/download-benchmark-data>; *French Oil Firm Natural Gas Leak Niger Delta*, CITY NEWS (Apr. 14, 2012), <https://www.citynews1130.com/2012/04/14/french-oil-firm-total-says-natural-gas-leak-ongoing-at-a-plant-in-nigerias-niger-delta-2/>.

329. *Corporate Human Rights Benchmark 2017 Company Scoresheet*, *supra* note 328.

330. *Id.*

331. HUMAN RIGHTS GUIDE, *supra* note 322, at 30.

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Total has long been at the heart of human rights scandals, having been accused of contributing to human rights infringement in Burma, benefiting from the tense situation,<sup>332</sup> and having been more recently cited as an infringer of environmental and collective human rights in Argentina;<sup>333</sup> the positive corporate communication seems to be overshadowed by many negative allegations. In the ranking, Total performs well regarding business processes that concern its employees.<sup>334</sup> Therefore, we can conclude that Total has more difficulty enforcing promises that are out of the scope of internal processes. And indeed, Total was able to get an above average score for transparency but fails regarding responses to serious allegations.<sup>335</sup>

On Total's website, the "News/Media/Press release" section includes 286 articles related to "Our Commitments."<sup>336</sup> However there is no category to research allegations or Total's response to them, and when searching "Allegation" on the website only two results appear regarding the Oil-For-Food trial. There are only two entries relevant to allegations or trials when searching for "spills."<sup>337</sup> Therefore, there seems to be a massive lack of transparency and communication on this point which is crucial to the assessment of the respect of human rights.

By splitting policy commitments and remedies into different categories, the ranking manages to highlight the gap that can exist between the corporate communication dictated by the governance and the actual actions and processes in place of the companies to remedy any case of human rights breach.<sup>338</sup> The impact of the ranking has been significant, with media qualifying it as "the new tracker for corporate human rights" and already reporting companies' urge and actions to do better.<sup>339</sup>

With regard to Total's performance on CSR Hub, Total ranks fifty-nine percent when compared to all companies.<sup>340</sup> Overall, Total scores low on community development (forty-eight percent) as well as the quality of its products (forty-nine percent) compared to all other corporations.<sup>341</sup> Meanwhile its performance on matters relevant to human rights and supply

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332. Vivienne Walt, *Chevron, Total Accused of Human-Rights Abuses in Burma*, TIME MAG. (Jul. 6, 2010) <http://content.time.com/time/world/article/0,8599,2001962,00.html>.

333. U.N. Human Rights Council, *Violations of collective human rights and environmental rights by the Chevron, Total and Shell oil companies in Argentine Patagonia*, U.N. Doc. A/HRC/33/NGO/62 (Sept. 6, 2016).

334. *Corporate Human Rights Benchmark 2017 Company Scoresheet*, *supra* note 328.

335. *Id.*

336. *Search page*, TOTAL, <https://www.total.com/en/search/content/our%20commitments> (last visited Aug. 28, 2018).

337. *Search page*, TOTAL, <https://www.total.com/en/search/content/spills> (last visited Aug. 28, 2018).

338. *Corporate Human Rights Benchmark 2017 Company Scoresheet*, *supra* note 328.

339. Mara Lemos Stein, *The Morning Risk Report: A New Tracker for Corporate Human Rights*, WALL ST. J.: L. BLOG (Mar. 20, 2017, 7:15 AM), <https://blogs.wsj.com/riskandcompliance/2017/03/20/the-morning-risk-report-a-new-tracker-for-corporate-human-rights/>.

340. *Corporate Human Rights Benchmark 2017 Company Scoresheet*, *supra* note 328.

341. *See id.*

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chain is good in comparison to corporations in France (sixty-two percent) and the overall average of corporations (fifty-seven percent).<sup>342</sup>

Two previous issues affecting the company and referred to by CSRHub are its involvement in Sudan and Burma.<sup>343</sup> Indeed, in 2010, Total has been accused by the NGO Earth Rights International for its activities in Burma by several NGO's who reported forced labor, corruption, murder, and rape on Total sites.<sup>344</sup> A report published by SIGWATCH classifies Total as nineteen out of twenty in a ranking about corporations criticized by NGOs in 2015.<sup>345</sup> Yet, since then, Total's projects in Myanmar provided employment for more than 1000 people, who benefit from insurance, pension, and benefit packages.<sup>346</sup> It also provided its employees with adequate training and has set up a technical training center for local technicians and operators.<sup>347</sup> These measures have been applied as part of the CSR program aiming at the local community.<sup>348</sup> According to CSRHub, Total's performance was at its worst in 2012 as well as 2013 and has more or less improved ever since except for some declines towards the end of 2017.<sup>349</sup>

**Graph 8. Total's Scorecard on CSRHub, 2018**



342. *See id.*

343. *CSRHub Special Issues*, CSRHUB, <https://esg.csrhub.com/csrhub-special-issues> (last visited Jan. 20, 2019).

344. EARTH RIGHTS INT'L, *TOTAL IMPACT 2.0 6* (2009), <https://earthrights.org/wp-content/uploads/publications/total-impact-2-0.pdf>.

345. SIGWATCH, *CORPORATIONS THAT NGOs LOVED AND HATED IN 2015 12* (2015), [https://www.sigwatch.com/fileadmin/Free\\_downloads/SIGWATCH\\_-\\_Corporations\\_NGOs\\_loved\\_and\\_hated\\_in\\_2015\\_FREE.pdf](https://www.sigwatch.com/fileadmin/Free_downloads/SIGWATCH_-_Corporations_NGOs_loved_and_hated_in_2015_FREE.pdf).

346. *Total in Myanmar: Continuous Development*, TOTAL (Jan. 31, 2017), <https://www.total.com/en/news/total-myanmar-continuous-development?folder=7683>.

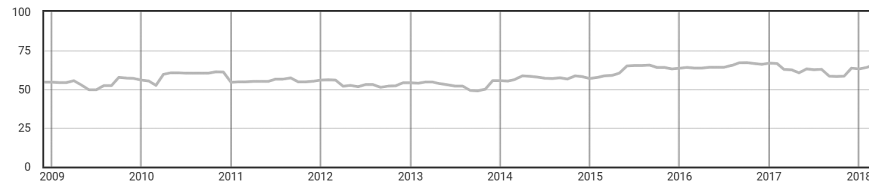
347. *Id.*

348. *Id.*

349. *See CSR & ESG Metrics: Total Petrochemicals*, CSRHUB, [https://www.csrhub.com/CSR\\_and\\_sustainability\\_information/Total-Petrochemicals](https://www.csrhub.com/CSR_and_sustainability_information/Total-Petrochemicals) (last visited Nov. 17, 2019).

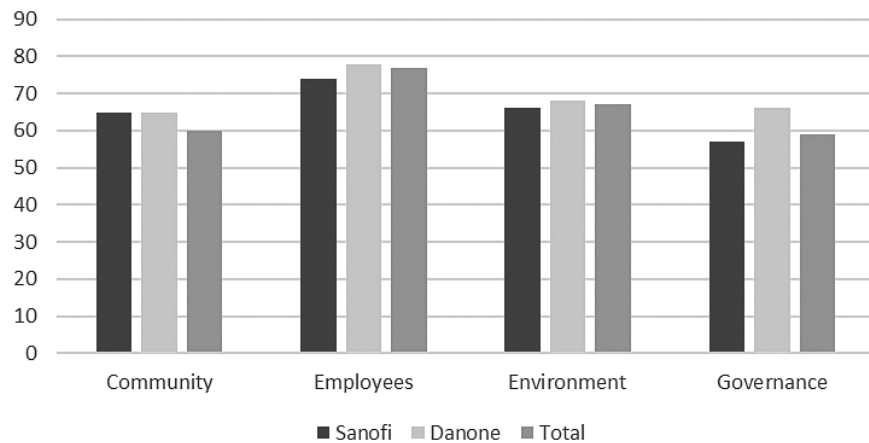
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**Graph 9. Total’s history of rating for the past ten years according to CSRHub**



As with Sanofi and Danone, Total’s highest ratings are those relevant to employees (seventy-seven percent) compared to all corporations and specifically a very high rating in diversity and labor rights (eighty-one percent) compared to all corporations; this employee-centered mentality can be interpreted in light of the high labor standards in France that reflects on the well-being of their employees, especially those working in the corporations’ offices in France.<sup>350</sup> As per other categories, Total has the lowest rating in the community indicator when compared to Sanofi and Danone; in the comparison overall Danone has the highest rating in all categories.

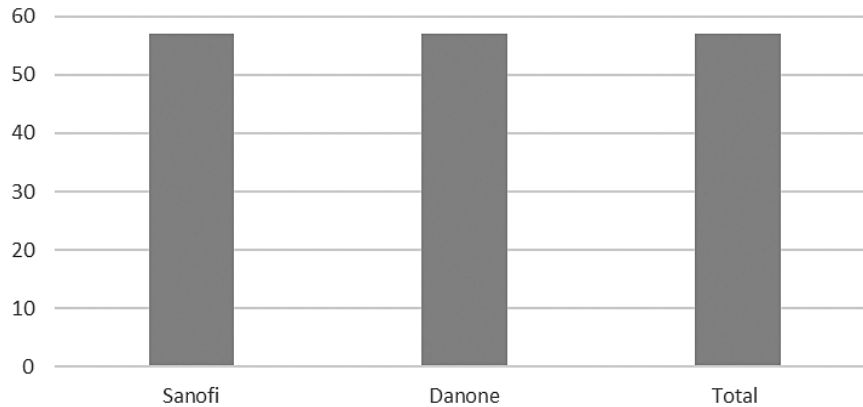
**Graph 10. Comparison of the ratings of Sanofi, Danone and total on CSRHub**



350. Compare *id.*, with *CSR & ESG Metrics: Sanofi*, CSRHUB, [https://www.csrhub.com/CSR\\_and\\_sustainability\\_information/Sanofi](https://www.csrhub.com/CSR_and_sustainability_information/Sanofi) (last visited Nov. 17, 2019), and *CSR & ESG Metrics: Groupe Danone*, CSRHUB, [https://www.csrhub.com/CSR\\_and\\_sustainability\\_information/Groupe-Danone](https://www.csrhub.com/CSR_and_sustainability_information/Groupe-Danone) (last visited Nov. 17, 2019).

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**Graph 11. Comparison of Sanofi, Danone and Total based on the human rights and supply chain indicator on CSRHub**



2. *Total and Development Dimensions of Environmental Concerns and Well-Being*

The objectives of SDG 12 are concerned with “promoting resource and energy efficiency, sustainable infrastructure, and providing access to basic services, green and decent jobs, and a better quality of life for all,” which also complements environmental rights and labor rights.<sup>351</sup> SDG 13 concerns climate action.<sup>352</sup> Total has the capacity to contribute to both for better or worse.

SDG 12 is linked to promoting the right to just and favorable conditions of work and therefore stems from article 23.1 of the Universal Declaration of Human Rights, which states “Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.”<sup>353</sup> Total is committed to providing safety and health to employees and other individuals affected by its activities, as well as being a responsible employer.<sup>354</sup> As an employer, Total is rated 3.6 on Glassdoor and also signed a global agreement with the IndustriALL Global Union federation;<sup>355</sup> it is therefore committing to promote human

351. *Goal 12: Ensure Sustainable Consumption and Production Patterns*, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/sustainable-consumption-production> (last visited Oct. 8, 2019).

352. *Goal 13: Climate Action*, UNITED NATIONS DEV. PROGRAMME, <https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-13-climate-action.html> (last visited Oct. 8, 2019).

353. *Article 23 of the Universal Declaration of Human Rights*, UNITED FOR HUMAN RIGHTS, <https://www.humanrights.com/course/lesson/articles-19-25/read-article-23.html>.

354. TOTAL & INDUSTRIALL GLOBAL UNION, CORPORATE SOCIAL RESPONSIBILITY: TOTAL GLOBAL AGREEMENT 3 (Jan. 22, 2015), [https://www.total.com/sites/default/files/atoms/files/total\\_global\\_agreement\\_va.pdf](https://www.total.com/sites/default/files/atoms/files/total_global_agreement_va.pdf).

355. *Id.* at 3; *Working at Total*, GLASS DOOR, [https://www.glassdoor.com/Overview/Working-at-TOTAL-EI\\_IE1038.11,16.htm](https://www.glassdoor.com/Overview/Working-at-TOTAL-EI_IE1038.11,16.htm).

rights, diversity, health, and safety in the workplace. It is also providing a life insurance scheme to all Total employees.<sup>356</sup> Moreover, because Total makes safety one of its core values, there has been a sixty-five percent decline in the total recordable injury rate; Total also inspects ninety-eight percent of its subcontracted carriers.<sup>357</sup> So, Total seems to be taking many positive steps to ensure “decent jobs and a better quality of life” for its employees.<sup>358</sup> The next steps for Total would be to attain the zero fatal accidents target and to improve some of its RH policy and management to get better feedback from employees.<sup>359</sup>

SGD 12 is also linked to the right to a healthy environment, and as an extractives firm Total can influence the enjoyment of this right.<sup>360</sup> Total works on reducing its impact on climate and on local environments by committing to reduce its greenhouse gas and SO<sub>2</sub> emissions, increasing the portion of natural gas in its hydrocarbons mix, by becoming a major player in renewable energies such as solar energy, by limiting oil content of aqueous waste, and by recovering industry’s waste.<sup>361</sup> Regarding renewable energies, Total has been taking participation in key actors of the sector: after becoming a major shareholder in Sunpower, a leader in solar panels, it became a twenty-three percent shareholder in Eren Renewable Energy, a company building wind power infrastructures.<sup>362</sup> It also ceased coal production.<sup>363</sup> Therefore, Total seems to be taking steps in the right direction to increase its share of renewable energy.

Energy is a basic necessity; however, according to the World Bank, more than 1.3 billion people are still lacking access to electricity.<sup>364</sup> Therefore, the right to energy is a principle that needs to be included as part of the objective of providing a better quality of life for all. Total commits to shared development with a goal to reach twenty-five million Africans with

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356. TOTAL & INDUSTRIALL GLOBAL UNION, *supra* note 354, at 9.

357. *Health and Safety Indicators*, TOTAL, <https://www.sustainable-performance.total.com/en/health-and-safety-indicators> (last visited Sept. 20, 2019); *Safety & Health*, TOTAL, <https://www.sustainable-performance.total.com/en/health-safety> (last visited Sept. 20, 2019).

358. *Goal 12: Ensure Sustainable Consumption and Production Patterns*, *supra* note 351.

359. *Sharing our Safety Culture*, TOTAL, <https://www.total.com/en/commitment/protecting-people/industrial-safety/culture> (last visited Sept. 20, 2019). *Cf. Working at Total*, *supra* note 355.

360. *Id.*

361. *Developing Sustainable Biofuels*, TOTAL, <https://www.total.com/en/commitment/environmental-issues-challenges/climate-change/sustainable-biofuels> (last visited Sept. 15, 2019).

362. Jean-Michael Bezat, *Total se renforce dans les énergies renouvelables [Total Strengthens in Renewable Energies]*, LE MONDE (Sept. 19, 2017), [https://www.lemonde.fr/economie/article/2017/09/19/total-se-renforce-dans-les-energies-renouvelables\\_5187806\\_3234.html](https://www.lemonde.fr/economie/article/2017/09/19/total-se-renforce-dans-les-energies-renouvelables_5187806_3234.html).

363. *Total Confirms Its Withdrawal from Coal Production and Marketing*, TOTAL (Aug. 24, 2015), <https://www.total.com/en/media/news/press-releases/total-confirms-its-withdrawal-coal-production-and-marketing>.

364. *Extending Energy Access to as Many People as Possible*, TOTAL, <https://www.total.com/en/commitment/shared-development/access-to-energy> (last visited Sept. 15, 2019).

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decentralized energy by 2020.<sup>365</sup> To reach that goal, Total has launched the Total Access to Energy program, from which the solutions, Awango by Total, originated. Awango is “a range of solar solutions designed to provide energy in places where access to energy is lacking.”<sup>366</sup>

Total seems to be implementing corporate-level action to match its commitments that are necessary to attain objective SGD12. But there is a lack of overall transparency on what the processes in place in case of breach are, as some breaches are inherent risks to Total’s activity. Total has published an index table<sup>367</sup> where it shows the actions it took to comply with the seventeenth SDG. In terms of sustainable production and production patterns, Total took several measures regarding the following: air quality, energy efficiency, environmental investments, material efficiency, procurement practices, product and service, information and labelling, resources, efficiency of products and services, spills, transport, waste, and water quality.<sup>368</sup>

When it comes to air quality,<sup>369</sup> Total is committed to preserving air quality everywhere it operates and has set targets to reduce atmospheric emissions from its installations and products. While it aims at reducing its SO<sub>2</sub> emissions between 2010 and 2020, quantitative indicators published by Total revealed that its SO<sub>2</sub> emissions have decreased by thirty-seven percent since 2012, and its NO<sub>x</sub> emissions have decreased by seventeen percent over the same period.<sup>370</sup> Total has taken preventive measures,<sup>371</sup> curatives measures,<sup>372</sup> and has also developed a new automotive production that is more effective and less polluting<sup>373</sup> To reduce gas emissions, Total is working on the optimization of the energy efficiency of its facilities and intends to improve them by one percent every year from 2010 to 2020.<sup>374</sup> Total invests significantly in research and development to find eco-efficient

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365. *Id.*

366. *Awango by Total, In Brief*, TOTAL, <https://www.total.com/en/media/video/awango-total-brief> (last visited Sept. 15, 2019); *Extending Energy Access to as Many People as Possible*, *supra* note 364.

367. TOTAL, TOTAL – SDG REPORTING FOR PERIOD 2016-2017 (July 2017), [https://www.sustainable-performance.total.com/sites/g/files/wompnd1016/f/atoms/files/total\\_-\\_2016-2017\\_sdg\\_reporting\\_-\\_july\\_2017.pdf](https://www.sustainable-performance.total.com/sites/g/files/wompnd1016/f/atoms/files/total_-_2016-2017_sdg_reporting_-_july_2017.pdf).

368. *Id.*

369. *Air: Protecting Residents’ Health and Local Ecosystems*, TOTAL, <https://www.total.com/en/commitment/environmental-issues-challenges/environment-protection/air> (last visited Sept. 7, 2019).

370. *Id.*

371. Total uses dedicated tools to be able to anticipate peaks in So<sub>2</sub> and adjust their production accordingly. *Id.*

372. *Id.*

373. *Id.*

374. *Improving Energy Efficiency*, TOTAL, <https://www.total.com/en/commitment/environmental-issues-challenges/climate-change/energy-efficiency-carbon-reduction> (last visited Sept. 15, 2019).

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solutions to reduce the environmental impacts of its products;<sup>375</sup> as an example, Total Excellium fuels and Fuel Economic lubricants are two products developed through research that reduce energy consumption and CO<sub>2</sub> emissions. It also makes an effort to introduce eco-efficient products at every stage of its value chain.<sup>376</sup>

Total also integrates the climate in its environment strategy: it has committed to reduce the carbon intensity in its energy mix and wants to develop a sixty-percent share of natural gas in its hydrocarbon mix.<sup>377</sup> Ten percent of its R&D budget will be allocated to carbon capture.<sup>378</sup> As part of the diversification strategy, Total is investing in renewables and has the ambition to reach a twenty-percent low carbon business in twenty-years time.<sup>379</sup> The company has developed bio energies since 1924 and invests in R&D in this respect.<sup>380</sup>

With regard to sustainable procurement,<sup>381</sup> Total promotes respect for human rights in its supply chain; for these purposes, a working group was created by Total in 2011. The group proceeded to map the main categories of purchasers and pilot the integration of human rights through the purchasing process.<sup>382</sup> Total is also an active member of the IPIEC human rights task force to engage with contractors in line with its policy.<sup>383</sup> Total implemented several programs in its different affiliates to raise its employees' or suppliers' awareness on CSR in customer relationship management.<sup>384</sup> It also received the "responsible supplier relationship" label awarded by the French authorities, which recognizes companies that maintain a sustainable and balanced relationship with their suppliers.<sup>385</sup>

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375. *Total Committed to Sustainable Mobility*, TOTAL, <https://www.total.com/en/energy-expertise/ship-market/products-services/eco-efficiency> (last visited Sept. 15, 2019).

376. *Id.*

377. Scott DiSavino, *France's Total Sees Natural Gas Demand Far Outpacing Oil*, REUTERS (June 25, 2018), <https://www.reuters.com/article/us-gas-conference-total/frances-total-sees-natural-gas-demand-far-outpacing-oil-idUSKBN1JM026>.

378. *Fighting Climate Change with Carbon Capture Technology*, GOVERNMENT EUROPA (Dec. 18, 2018), <https://www.governmenteuropa.eu/carbon-climate-change-capture-technology/91580/>.

379. Michael Stothard, *Total Aims to be 20% Low-Carbon by 2035*, FIN. TIMES (May 24, 2016), <https://www.ft.com/content/04985ba4-21c8-11e6-aa98-db1e01fab0c>.

380. *Total – Energy is Our History*, TOTAL, <https://www.total.com/en/group/identity/history> (last visited Sept. 15, 2019).

381. TOTAL, HUMAN RIGHTS: BRIEFING PAPER 21 (July 2016), [https://www.total.com/sites/default/files/atoms/files/total\\_human\\_rights\\_briefing\\_paper\\_july\\_2016\\_0.pdf](https://www.total.com/sites/default/files/atoms/files/total_human_rights_briefing_paper_july_2016_0.pdf).

382. *Id.*

383. *Id.*

384. In 2016, Total implemented the Corporate Purchasing training for its new purchasing hires. In Congo, Total organized training sessions for welders; in the UK, it organized a Supplier Day event in 2016. TOTAL, HUMAN RIGHTS: BRIEFING PAPER (April 2018), [https://www.sustainable-performance.total.com/sites/g/files/wompond1016/f/atoms/files/total\\_-\\_human\\_rights\\_briefing\\_paper\\_update\\_april\\_2018.pdf](https://www.sustainable-performance.total.com/sites/g/files/wompond1016/f/atoms/files/total_-_human_rights_briefing_paper_update_april_2018.pdf).

385. TOTAL, REGISTRATION DOCUMENT 175 (2016), [https://www.sustainable-performance.total.com/sites/shared/sustainable/files/atoms/files/ddr2016\\_va\\_web.pdf](https://www.sustainable-performance.total.com/sites/shared/sustainable/files/atoms/files/ddr2016_va_web.pdf); *Supplier Relationships Underpinned by Ethics and Sustainability*, TOTAL, <https://www.total.com/en/commitment/shared->

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In terms of product and services information and labelling,<sup>386</sup> Total identifies the risks to its products and their uses and informs users about the risks and their prevention. The product labels and a material safety data sheet accompanying the products are the two main sources of information.<sup>387</sup> Regarding spills, waste, and water quality, Total has published quantitative indicators to measure them.<sup>388</sup> The quality of water has generally improved.<sup>389</sup> With respect to waste, the total waste treated has been reduced by one hundred kilo tonnes from 2012 to 2016, and Total now recycles fifty-eight percent of its waste, compared to forty-seven percent in 2012.<sup>390</sup> Regarding the spill, Total has managed to monitor efficiently its hydrocarbon spill and reduced it by sixty-six percent.<sup>391</sup> Although the number of sites identified as risky with respect to oil spills has diminished to twenty and the number of contingency plans has increased since 2012, the proportion of sites that performed anti-pollution did not experience a great evolution.<sup>392</sup>

#### **IV. Meaningful Metrics to Make a Difference in Well-Being and Business Operations**

Indicators linked to international human rights standards have introduced a language that relies on data gathering, benching, marking, and auditing practices, through which complex socio-economic factors can be integrated in macro- and micro-policy decision making in a transnational environment; this language has allowed decision makers and private investors to tailor their choices to the context in which they will be applied to optimize goals consistent with increasing well-being.<sup>393</sup> With the growing sophistication of indicators to assess the policies, practices, and performance of business

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development/supplier-relationships-underpinned-by-ethics-and-sustainability (last visited Sept. 15, 2019).

386. REGISTRATION DOCUMENT, *supra* note 385, at 171.

387. *Id.*

388. *Environmental Indicators*, TOTAL, <https://www.sustainable-performance.total.com/en/environmental-indicators> (last visited Sept. 15, 2019); Reporting Scopes and Method, TOTAL, <https://www.sustainable-performance.total.com/en/indicators/reporting-scopes-and-method> (last visited Sept. 7, 2019).

389. It has improved in respect of water discharges offshore, because its content of hydrocarbon has diminished of 2,1 mg/l since 2014, while the content of hydrocarbon on onshore discharges had only diminished by 0,1 mg/l. But the water quality both comply with the target for the quality of onshore discharges. *Id.*

390. REGISTRATION DOCUMENT, *supra* note 385, at 156; *Waste: Developing Our Approach to the Circular Economy*, TOTAL, <https://www.total.com/en/commitment/environmental-issues-challenges/environment-protection/waste> (last visited Sept. 15, 2019).

391. REGISTRATION DOCUMENT, *supra* note 385, at 154; *Environmental Indicators*, *supra* note 388.

392. An average growth of 1% between 2012 and 2016. REGISTRATION DOCUMENT, *supra* note 385, at 154.

393. SIOBHAN MCINERNEY-LANKFORD & HANS- OTTO SANO, HUMAN RIGHTS INDICATORS IN DEVELOPMENT 15 – 16, 18 (1st ed. 2010).

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enterprises relative to human rights and sustainable development, their use will go beyond the attainment of the goals of actors interested in a limited range of concerns towards optimizing approaches to human rights and, to a certain degree, well-being by making due diligence and assessment of impacts important for firms.<sup>394</sup>

A. COMPARISONS BETWEEN CSR, RESPECT FOR HUMAN RIGHTS,  
AND WELL-BEING

If the ambition “to support social and economic development around the world”<sup>395</sup> by companies like Sanofi, Danone, and Total are laudable goals, one might wonder whether voluntary measures as well as national and international standards, in their effects, have a particular impact over the well-being of the different stakeholders of a business, as defined by OECD. As aforementioned, the OECD defines well-being as a multidimensional concept encompassing life aspects as diverse as civic engagement, housing, household income, balance between social and professional life, skill, or even health status.<sup>396</sup> It divides well-being into three domains: quality of life, material conditions, and sustainability.<sup>397</sup> By preserving human, economic, social, and environmental capital, sustainability actually creates resources for future well-being.

There is no doubt that today corporate conduct can have significant impacts over our lives. In many cases, human rights infringements by companies have been proven to contribute to a significant deterioration of people’s livelihood over time. In the extractive industry, several NGO reports have emphasized the negative effects of companies failing to respect human rights and environmental impacts on the local community’s well-being. For example, in the Democratic Republic of the Congo, many expropriations have reportedly significantly reduced the livelihood of the communities affected by the projects;<sup>398</sup> indeed, violent expropriations, inadequate compensations, and isolated resettlements have caused the standard of living of these populations to decrease, particularly because it was difficult for them to access social and cultural services, or health care or because they were even deprived from their livelihood resources.

Of course, the extractive industry can be particularly aggressive and provides an extreme example, but this is a striking illustration of how the

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394. *Id.*

395. *Our Commitment*, TOTAL, <https://www.total.com/en/commitment> (last visited Sept. 25, 2019).

396. *Measuring Well-Being and Progress: Well-Being Research*, OECD, <http://www.oecd.org/statistics/measuring-well-being-and-progress.htm> (last visited Sept. 15, 2019).

397. *Id.*

398. *A State Affair: Privatizing Congo’s Copper Sector*, THE CARTER CENTER 3, 19 (Nov. 2017), [https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/democracy/congo-report-carter-center-nov-2017.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/congo-report-carter-center-nov-2017.pdf). See also Andoni Maiza-Larrarte & Gloria Claudio-Quiroga, *The Impact of Sicomines on Development in the Democratic Republic of Congo*, 95(2) INT’L AFFAIRS 443 (March 1, 2019).

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failure to ensure the protection of human rights can lead to deterioration of a range of factors important to well-being, such as housing, healthcare, environment quality, and employment. Other industry sectors also have influence on human rights risks. Compromising these factors and failing to recognize risks can have a direct and negative impact of well-being as defined by OECD. There is an opportunity to make a positive impact. For example, a poll recently conducted by the Viavoice Institute<sup>399</sup> revealed that business leaders and executives now perceive CSR as a tool which directly aims at improving well-being. Taking into account employees' well-being in the company "comes at the top of the list (fifty-one percent) among the priority issues of CSR."<sup>400</sup> If there seems to be a strong link between the way companies conduct business and its impacts over people's lives, measuring precisely this impact over well-being appears to be a harder exercise and, in some instances, a hard sell to some members of the business community more interested in other matters.<sup>401</sup>

**B. CONVINCING COMPANIES TO IMPLEMENT HUMAN RIGHTS  
COMPLIANCE: LINKING WELL-BEING AND CORPORATE  
PERFORMANCE AND QUANTIFYING HUMAN RIGHTS'  
INFRINGEMENTS IN TERMS OF COMPANIES'  
PERFORMANCE**

In order to be considered as a source of efficient competitiveness, human rights compliance and its impact over well-being must be economically valued.<sup>402</sup> No matter how difficult it is to quantify reputational risk due to the failure to comply with international standards governing the respect of human rights by businesses, once such risk materializes (through NGO reports, press releases, and social media campaigns), it can alter companies' reputation for years. For example, two decades ago, Nike was caught in a worldwide scandal related to abusive labor practices in its supply chain.<sup>403</sup> The scandal affected Nike's reputation and sales, and it took more than a decade of significant efforts and investments from Nike to rebuild its image.<sup>404</sup>

Human rights violations can also be measured in indirect costs. This can include local communities' opposition to the companies' activities resulting in strikes, vandalism, or legal or financial loss such as delays, profit loss due

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399. Laurence Jaffre, *Le bien-être des salariés, une priorité » pour une majorité de décideurs*, QUEST FRANCE (Dec. 2, 2018), <https://www.ouest-france.fr/economie/entreprises/rse/rse-le-bien-etre-des-salaries-une-priorite-pour-une-majorite-de-decideurs-5559193>.

400. *Id.*

402. GHK CONSULTING LTD., HUMAN RIGHTS AND ECONOMICS: TENSIONS AND POSITIVE RELATIONSHIPS, [http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/Report\\_Development\\_Fragility\\_Human\\_Rights.pdf](http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/Report_Development_Fragility_Human_Rights.pdf).

403. *Nike and Child labor*, MALLEN BAKER (Feb. 29, 2016), <http://mallenbaker.net/article/clear-reflection/nike-and-child-labour-how-it-went-from-laggard-to-leader>.

404. *Id.*

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to shutdowns, material damages, or even withdrawal of a permit for activities requiring administrative authorization. When it comes to Finance Project, a company operating in a large-scale project as Total might require international funding.<sup>405</sup> One of the key criteria for a project's bankability is its compliance with human rights. International financial institutions such as the World Bank or the IFC condition their funding to the respect of international standards, in particular the Equator principles, including human rights.<sup>406</sup> Violating the terms of a financing agreement providing for the respect of the aforementioned policies can be extremely costly for a company. As an example, the World Bank decided very recently to cancel the remainder of a loan allocated to a road project in Uganda, because of human rights violations by a contractor's employees.<sup>407</sup>

Another impact of human rights violations that can be quantified is the legal risk. Indeed, due to increasing international and national regulations, legal risks keep multiplying. They can include criminal and civil litigations against companies and their directors, as well as administrative sanctions (such as suspension of works, withdrawal of existing rights, etc.). For example, on November 2013, Total accepted as a settlement with the American Justice to pay a fine of 400 billion dollars after bribing public agents between 1990 and 2000 to obtain production rights in oil fields.<sup>408</sup> Several studies assessing the correlation between CSR and companies' profits (and thus stock price value) have concluded in a positive link between a sustainable policy and increase in profits.<sup>409</sup> Finally, and most importantly, the greatest cost of violating human rights can be identified as opportunity costs, defined as the lost value relating to a future project, expansion plans or missed sales.

According to Bob Willard,<sup>410</sup> there are seven significant business advantages that companies can earn from adopting CSR initiatives. Among them, two can actually capture well-being's impacts over performance: easy hiring and higher retention of top talents can be used as two indicators assessing workers well-being on the company.<sup>411</sup> The first one reflects a

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405. *The Finance Project*, COMMUNITY WEALTH, <https://community-wealth.org/content/finance-project> (last visited Sept. 15, 2019).

406. *Equator Principles Financial Institutions*, IFC, [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/company-resources/sustainable-finance/equator+principles+financial+institutions](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/company-resources/sustainable-finance/equator+principles+financial+institutions) (last visited Sept. 15, 2019).

407. Press Release, World Bank, World Bank Statement on Cancellation of Uganda Transport Sector Development Project (TSDP), <https://www.worldbank.org/en/news/press-release/2015/12/21/wb-statement-cancellation-uganda-transport-sector-development-project>.

408. TOTAL, *LE VÉRITABLE BILAN ANNUEL* (2013).

409. Ron Robins, *Does Corporate Social Responsibility Increase Profits?*, INVESTING FOR THE SOUL (May 12, 2011), <http://investingforthesoul.com/Editorials/does-corporate-social-responsibility-increase-profits.htm>.

410. BOB WILLARD, *THE SUSTAINABILITY ADVANTAGE 21* (New Society Publishers 2002).

411. *Id.*

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future employees' perception of well-being in the company.<sup>412</sup> The second one reflects the current employees' perception of the company and their ability to see it as a meaningful work place where they feel valued and consider the company sensitive to work/life balance issues (one of the OECD indicators).<sup>413</sup> More than giving a global idea on how companies achieve a better work place for their employees, those indicators provide a significant competitive advantage to the company by saving the cost of recruiting and the cost of turnover.<sup>414</sup> Respecting workers' rights can also increase employees' productivity, another competitive advantage.<sup>415</sup> According to Bob Willard, companies that are complying with human rights can yield higher return compared to other companies.<sup>416</sup> For instance, in the mining industry, less human rights related conflicts mean more positive prospects in terms of sales, company valuation, and ultimately an increase in revenue and jobs on the field.<sup>417</sup>

Relationships with external stakeholders are at the heart of the issue of responsible management of the supply chain, which aims to integrate CSR into the whole business process and extend it beyond the border of the company. Consumers are more and more mindful of the origin of their products and whether they are manufactured in compliance with human rights.<sup>418</sup> Bob Willard sees market share increase as another business advantage the company can obtain from the well-being of external stakeholders (specifically, consumers).<sup>419</sup> Indeed, complying with CSR and being respectful of human rights not only increases the retention rate and willingness to pay of current customers, it also allows the business to gain new market shares by attracting consumers sensitive to products' origins.<sup>420</sup> In this regard, companies are prompted to track human rights abuses along

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412. According to the Millennium Poll on CSR, forty-nine percent of the respondents consider that a corporation's overall image is most affected by perceptions of how it is fulfilling its social responsibility and that top leaders are more likely to punish a socially irresponsible company by not accepting a job offer. ENVIRONICS INT'L, THE MILLENNIUM POLL ON CORPORATE SOCIAL RESPONSIBILITY 1, 36 (1999) [https://globescan.com/wp-content/uploads/2018/01/GlobeScan\\_MillenniumPoll\\_1999\\_FullReport.pdf](https://globescan.com/wp-content/uploads/2018/01/GlobeScan_MillenniumPoll_1999_FullReport.pdf).

413. *Id.* at 19.

414. Achieved through employee health and safety, equal treatment between employees and absence child of labor. *Id.* at 20 – 21. For a quantification of these costs, *see id.* at 43.

415. WILLARD, *supra* note 410, at 50 – 51.

416. *Id.* at 139.

417. The report shows that “a major, world-class mining project with capital expenditure of U.S. \$3-5 billion will suffer costs of roughly U.S. \$20 million per week of delayed production in Net Present Value (NPV) terms, largely due to lost sales.” Rachel Davis & Daniel Franks, *Costs of Company-Community Conflict in the Extractive Sector*, SHIFT PROJECT 8 (2014), <https://www.shiftproject.org/resources/publications/costs-company-community-conflict-extractive-sector>.

418. Jessi Baker, *The Rise of the Conscious Consumer: Why Businesses Need to Open Up*, THE GUARDIAN (April 2, 2015), <https://www.theguardian.com/women-in-leadership/2015/apr/02/the-rise-of-the-conscious-consumer-why-businesses-need-to-open-up>.

419. WILLARD, *supra* note 410, at 110.

420. *Id.*

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their supply chain in light of investor and consumer demands, international standards, and domestic laws.

**C. THE MEANING OF WELL-BEING RELATED METRICS TO  
BUSINESS**

As aforementioned, metrics rely on various aspects of incentivizing corporations towards compliance. It can be said that these aspects work in parallel to the strategies put forward by the OECD guidelines;<sup>421</sup> metrics communicate their results and touch upon the corporations' reputation as an ethical actor, a strategy that also works to incentivize corporations via competition between corporations to adopt ethical practices.

There is no denying that metrics have raised awareness among corporations and assisted them in developing policies that foster human rights and well-being; they have introduced the language with which to address human rights and well-being from a corporate perspective as well as a platform where corporations can compare their performance to that of other corporations in the sector, thereby developing a better view of the market.<sup>422</sup> To that end, these metrics have played a positive role towards normalizing reporting, due diligence, and grievance practices among corporations over the past few years.<sup>423</sup> But the combination of incentives for which metrics are used is likely most effective in relation to big multinational actors that have a wide customer base or ethically-driven shareholders, and as such the effect of these metrics is most visible in these corporations.

For their part, multinational corporations seem to be responsive to the standards and their measurements, publishing enormous amounts of data in their efforts to comply, responding to inquiries as per their practices,<sup>424</sup> and hiring human rights experts in their compliance units. Meanwhile, as aforementioned, these metrics are problematic to corporations, as they vary in their methods, their data collection capabilities, and data selection policies; these variances leave margin for indeterminacy that could harm the corporations' reputation. In other words, corporate actors have noted that

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421. "Under the OECD Guidelines, the only incentive for companies to comply resides in the adverse publicity they will be subjected to if they refuse to cooperate in identifying a solution to the 'specific instance.'" INT'L FEDERATION FOR HUMAN RIGHTS, COMMENTS TO THE INTERIM REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, FEBRUARY 22, 2006 5 (Mar. 15, 2006), [https://www.fidh.org/IMG/pdf/business\\_442a.pdf](https://www.fidh.org/IMG/pdf/business_442a.pdf); OLIVIER DE SHUTTER, TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 9, 34 (Hart Publishing 2006).

422. *Benchmarking Business: How Are Top Companies Being Assessed on Human Rights?*, LEXOLOGY, (Nov. 8, 2017), <https://www.lexology.com/library/detail.aspx?g=c96d201d-e11b-4526-b00f-e28013fda7b4>.

423. *Id.*

424. *Does Your Company Have a Publicly Available Commitment to Respect Human Rights?*, DANONE, <https://www.business-humanrights.org/en/danone-0> (last visited Sept. 7, 2019).

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the wide range of methodologies adopted by the different benchmarks inherently fosters the risk of causing confusion that can come about with difficulties of producing data or conveying context;<sup>425</sup> indeed this is inescapable considering that the industry of benchmarking is still of an evolving nature. These problems were already noted in the aforementioned report by the U.N. working group on transnational corporations and other business enterprises,<sup>426</sup> where the working group addressed the need for more equilibrium between standardization and subjectivity. In addition, indicators such as the CHRB conduct consultations with corporations to address these concerns.<sup>427</sup>

In addition, corporations have noted that complicated supply chains are a hurdle that reflects on their ranking despite their limited control over some parts of the chain.<sup>428</sup> This is harmful in relation to well-being as some of the most salient well-being related issues happen at different levels of the supply chain.<sup>429</sup> Nonetheless, some corporations have taken action against this lack of control, at least with relation to the well-being of their employees, by joining the Better Than Cash Alliance; this alliance of corporations commits to paying the employees in their supply chains through banks to secure the financial access of their employees and to avoid any lack of transparency in the process by their suppliers.<sup>430</sup>

On the extreme end of the spectrum, some corporations completely discredited human rights metrics; most notably the corporation Energy Transfer filed a lawsuit against Greenpeace, BankTrack,<sup>431</sup> and Earth First claiming that “this group of co-conspirators manufactured and disseminated materially false and misleading information about Energy Transfer for the purpose of fraudulently inducing donations, interfering with pipeline construction activities and damaging Energy Transfer’s critical business and financial relationships.”<sup>432</sup> In effect, Energy Transfers refused to

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425. Casey O’Connor, *Measuring Human Rights Performance Commentary*, NYU STERN CENTER FOR BUS. & HUM. RIGHTS (May 12, 2016), <https://nyusternbhr.squarespace.com/blogs/tag/Metrics>.

426. *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, *supra* note 312, at 2.

427. *Benchmarking Business: How Are Top Companies Being Assessed on Human Rights?*, *supra* note 422.

428. Leon Kay, *The World’s Leading Companies on Human Rights*, TRIPLE PUNDIT (Mar. 13, 2017), <https://www.triplepundit.com/2017/03/worlds-leading-companies-human-rights/>.

429. Especially with middle and small suppliers who are not incentivized by compliance mechanisms presented in the recent human rights and well-being discourse. *Respecting Human Rights Through Global Supply Chains*, SHIFT PROJECT (Aug. 2012), <https://www.shiftproject.org/resources/publications/respecting-human-rights-global-supply-chains/>.

430. *About the Better Than Cash Alliance*, BETTER THAN CASH ALL., <https://www.betterthancash.org/about> (last visited Sept. 7, 2019).

431. BankTrack is the international tracking, campaigning, and CSO support organization targeting private sector commercial banks (“banks”) and the activities they finance. *About BankTrack*, BANKTRACK (Apr. 30, 2019), [https://www.banktrack.org/page/about\\_banktrack](https://www.banktrack.org/page/about_banktrack).

432. *Energy Transfer Files Federal Lawsuit Against Greenpeace International, Greenpeace, Inc., Greenpeace Fund, Inc., BankTrack and Earth First! For Violation of Federal and State Racketeering*

acknowledge some of the negative effects caused by the construction of their pipeline. In response to the allegations, NGOs claimed that the corporation is attempting to censor free speech; in a memorandum submitted by the Center for Constitutional Rights, they claimed that NGOs such as Earthrights represent a “philosophy” in and of themselves.<sup>433</sup> The North Dakota District court later dismissed the claims by the plaintiffs.<sup>434</sup>

As benchmarking continues to evolve, despite their various concerns, multinational corporations often admit that it is in their best interest to respond to data collectors and to abide by the human rights and well-being standards.<sup>435</sup>

## V. Conclusion

Although a significant number of international companies over the world have widely adopted Corporate Social Responsibility (CSR) initiatives, a recent study found that only fifteen percent of French companies are seriously involved in responsible business practices.<sup>436</sup> One of the reasons explaining some companies’ reluctance to adopt CSR is that a wide majority still see CSR as a brake rather than a tool for performance. Indeed, in the economic literature on CSR, its benefits are mainly identified as financial benefits generated by investing in sustainable practices. A paradigm shift in the benefits of CSR is needed to create a structural change in companies’ behavior. According to some authors, this shift can be induced by introducing well-being as a core value a business should embed.<sup>437</sup> This reorientation is not unnatural to CSR’s aims because well-being had always been at the heart of sustainable development and human rights, as originally conceived as their underlying goal.

A real game changer to creating a revolution in CSR implementation would be to translate well-being in terms of positive benefit and convince

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*Statutes*, ENERGY TRANSFER (Aug. 22, 2017), <http://ir.energytransfer.com/phoenix.zhtml?c=106094&p=irol-newsArticle&ID=2295068>.

433. Memorandum from Energy Transfer Equity, L.P., and Energy Transfer Partners, L.P., v. Greenpeace International, N.D.R. 17-CV-00173-DLH-CSM (Dec. 4, 2017).

434. On July 24, 2018, the North Dakota District Court dismissed Energy Transfer’s lawsuit against BankTrack, ruling that the company failed to state a plausible claim against the defendant. On August 3, 2018, the court blocked Energy Transfer Partners from continuing a lawsuit against the environmental movement Earth First! *Energy Transfer Lawsuit (re Dakota Access Pipeline, USA)*, BUS. & HUM. RIGHTS RES. CTR., <https://www.business-humanrights.org/en/energy-transfer-lawsuit-re-dakota-access-pipeline-usa> (last visited Sept. 8, 2019).

435. *What Do In-House Counsel Need to Know About Business Human Rights Benchmarking*, KING & SPALDING CLIENT ALERT (Jan. 25, 2018), <https://www.kslaw.com/attachments/000/005/596/original/ca012518.pdf>; 1516889768.

436. See generally *Les pratiques environnementales des entreprises [Environmental Business Practices]*, INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES (Nov. 14, 2017), <https://www.insee.fr/fr/statistiques/3197097>.

437. Chris Laszlo & David L. Cooperrider, *Creating Sustainable Value: A Strength-Based Whole System Approach*, in 3 POSITIVE DESIGN & APPRECIATIVE CONSTRUCTION: FROM SUSTAINABLE DEVELOPMENT TO SUSTAINABLE VALUE 17 – 33 (2010).

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companies that well-being and economic performance are aligned—put another way, linking well-being and sustainable advantage.

Indeed, complying with human rights has proven in many cases to be an efficient tool that can lead to a significant competitive advantage to the firm. For long-term activities, social “licenses” are essential to ensure, throughout the business life, that companies’ activities are accepted by all the stakeholders. Ranking the good and the better, or ranking for good, could have a positive impact on well-being where what gets measured gets managed and is understood to matter and make a difference in the quality of people’s lives.

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