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Sustainable value chains – Success factors for an internationally accepted binding standard

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Towards an internationally accepted binding standard on business and human rights: Ensuring respect for human, labour and environmental rights in corporate operations and value chains

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1. The added value of a legally binding standard at international level

The globalization of supply chains has been favored since the 1980s by technological developments, by the lowering of barriers to international trade and investment flows, and by the standardization of consumption patterns. Such globalization can be a threat to human rights and to the environment, if it leads transnational corporations to segment the production process in order to put workers to work where wages are set below the level of living wages and unions repressed; to shift profits to low-tax jurisdictions; or to locate production plants where environmental rules are lax or underenforced.

In recent years however, in order to counter those risks, major jurisdictions have imposed human rights due diligence obligations on companies, either through legislative reforms, or through courts. Corporations operating transnationally are now increasingly expected to exercise human rights and environmental rights due diligence in global supply chains and throughout multinational corporate groups[1]: they should identify, prevent, mitigate and account for how they address their impacts on human rights, covering all the adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships[2]. Globalization

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is gradually humanized: through this evolution, global supply chains could become a lever for sustainable development.

These advances have been encouraged, at multilateral level, by the development of soft law standards at multilateral level, or within international organisations. The UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights in 2011.[3] The OECD Guidelines for Multinational Enterprises were amended in 2011, and the accompanying OECD Due Diligence Guidance for Responsible Business Conduct were adopted in 2018.[4] The International Finance Corporation adopted its Sustainability Framework in 2012.[5] The International Labour Organisation revised its Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 2017.[6] The UN human rights treaty bodies now routinely interpret UN human rights treaties as imposing on the States parties a duty to protect human rights by imposing human rights due diligence obligations on corporate actors over which they can exercise control.[7] These various human rights obligations include obligations related to environmental rights.

As a result of these developments, we find ourselves in a paradoxical situation in which, one the one hand, a consensus is emerging on certain parameters for the imposition of human rights and environmental due diligence obligations on companies; while, on the other hand, as illustrated in the Annex to this briefing note, in the absence of a more robust multilateral framework, diverging approaches persist between jurisdictions.

Indeed, while the trend is general, the implementation of the human rights due diligence (HRDD) obligation remains highly uneven across States or regions. A broad spectrum of approaches exist, from the more modest approaches (simple reporting obligations) to the most ambitious (including the introduction of a duty of care on the parent company or on the lead company in global supply chains). Some of the instruments that implement HRDD are sector-specific; others are trans-sectorial in scope. Some requirements apply only to companies of a certain size; others apply to all companies, whatever their size. Moreover, the various instruments implementing the HRDD obligation adopt different approaches as regards their extraterritorial reach, i.e., as regards the conditions under which such obligation applies to companies with respect to activities beyond the national territory, or to companies domiciled outside the State concerned. These various instruments also may or may not include an explicit reference to duties towards the environment, in addition to human rights duties. And they may or may not specify the duties of the company towards victims (workers or community members) affected by the activities of their subsidiaries or suppliers.

The divergences highlighted in the comparison provided in the Annex are a source of concern for a variety of reasons. First, they may result in **legal uncertainty**, particularly where the scope and content of the due diligence obligation (in the form of a duty of care) are defined by courts in ways that can be ad hoc and at times unpredictable. Such legal uncertainty is not only problematic for businesses, who may be unable to assess the conditions at which their legal liability may be engaged or the steps they should take to avoid being sued and thus to preserve their reputation. It is also problematic for potential victims, who may find it difficult to anticipate the chances of success of any claim against companies having allegedly violated their rights.

Secondly, the divergent approaches adopted by different jurisdictions require from corporations operating transnationally (whether they have established business relationships with business partners located in other jurisdictions or whether they have subsidiaries established in other jurisdictions) that they take into account different legislations, for instance in their human resources management, in the choice of their suppliers or contractors, or in their operational activities. This imposes a **burden on the development of transnational activities**. It also may lead different buyers, domiciled in different jurisdictions or present on different markets, to impose different

requirements (including reporting requirements) on their suppliers, limiting the possibilities of mutual recognition of auditing of these suppliers.

Thirdly, divergences between jurisdictions may lead to **unhealthy interjurisdictional regulatory competition**. Some countries or regions may be tempted to seek to attract investors by reducing the regulatory burden on companies, at times locking in commitments towards foreign investors in particular through the conclusion of investment treaties.[8] This may trap countries into an unsustainable, low-cost, low-welfare development model, in which their attractiveness to investors and the ability of corporations which they host to be competitive on global markets depend on maintaining human rights, labor rights and environmental standards low – in other terms, not ensuring that the workers and local communities will benefit from increased economic opportunities. Even when the lowering of guarantees to workers or local communities is not used as a tool to improve cost competitiveness, it may create a disincentive to improve human rights, labor rights or environmental standards.

This is one main reason for the backlash against economic globalization, particularly in the form of trade and investment agreements, in large parts of public opinion. This is also why some countries or regions are tempted to rely on **unilateral measures**, linking access to markets to compliance with certain human rights, labour rights or environmental standards, in order to counter what they see as unfair competition from firms located abroad. Such unilateral measures are a restriction to international trade and investment. Although they are in principle compatible with the non-discrimination requirements imposed under the disciplines of the World Trade Organisation's agreements (provided they do not unjustifiably differentiate between trading partners and remain proportionate to the legitimate aims of protecting universally recognized human rights or labour rights, or the "conservation of exhaustible natural resources"[9]), they are nevertheless a defeat of multilateralism.

Fourth and finally, in the absence of a harmonized standard at global level, companies (particularly in OECD countries) increasingly seek to respond to concerns of critical consumers and of socially responsible investors by imposing **private standards** in global supply chains, for instance in the form of "ethical codes" or "codes of conduct". Major buyers and retailers have thus gradually translated their role as gatekeepers to certain high-value markets into regulatory power.[10]

While this is a welcome development insofar as it can help to improve compliance with human rights, labour rights and environmental rights in global supply chains, the proliferation of such private initiatives presents its own challenges. It results in a gap between the first movers and the "laggards": some companies understand that due to the changing expectations of consumers and of investors, and the need to protect the reputational "brand" of the company, there is a strong business case for them to take all measures necessary to prevent violations of human rights, labour rights and environmental rights in their operations[11]; other companies however may remain behind, either because they specialize in "business to business" activities and therefore are less concerned by the reactions of consumers to allegations about their conduct, or because they believe their business case is better served by minimizing costs. In other terms, the "level playing field" cannot be achieved based solely on the increase of voluntary initiatives. The proliferation of voluntary initiatives moreover may create confusion among consumers and investors, faced with a number of codes of conduct and labels of highly uneven reliability.[12] In such a situation, the less credible codes of conduct or labelling schemes may drive out the more trustworthy ones: since the latter are costly to comply with and expose the company to a greater risk of its insufficiencies being brought to light, the rational choice is for the company to opt for a code of conduct or labelling scheme which imposes as few obligations as possible. In addition, the costs of ensuring compliance of suppliers with such privately imposed standards should not be underestimated: it may be prohibitively expensive for any particular busi-

ness, in particular for small and middle-size enterprises, to pay for a monitoring performed by an independent auditing company.

The growth of private standards also raises fundamental concerns about democratic accountability and about the exclusionary impacts of the imposition of such private standards, which typically are designed unilaterally by the buyers, without consultation of the suppliers or the workers impacted. International framework agreements (negotiated between transnational corporations and global unions) and multi-stakeholder initiatives have increased in recent years, mitigating the potentially negative impacts on suppliers (particularly small-scale producers of raw agricultural products and small and middle-size enterprises, who are least well equipped to respond to the rise of private standards). Yet, for all the reasons mentioned above, such initiatives are not a substitute for a multilateral framework established by States, based on the emerging international consensus on supply chain monitoring.

2. Critical success factors in building consensus

The fight against impunity of transnational corporations for the human rights or environmental rights violations they are implicated in, whether directly (by their operations) or indirectly (through their business partners' activities), has the characteristics of a **global public good**: it is an issue that all countries have an interest in addressing, although individual actions by each country will lead to sub-optimal solutions.[13] The transnationalisation of economic activities calls for increased cooperation between States. Such cooperation may seek to address positive conflicts of jurisdiction, where more than one State seeks to influence a particular situation and may impose contradictory duties on the same corporate actor. It also may prevent negative conflicts of jurisdiction, which can become a source of impunity. This occurs where no State considers it can take action, as typically may happen when the host State fears that the imposition of constraints on the foreign investor will be challenged as a form of indirect expropriation, while the home State (where the transnational corporation is domiciled) is reluctant to adopt regulation with an extra-territorial reach.[14] In the absence of inter-State cooperation, attempts by each State acting alone to address the human rights and environmental rights violations in global supply chains or in which multinational groups are implicated will therefore be less effective. In that sense, joint action can support, rather than restrict, the exercise by each State of its sovereign right to control activities over which it can exercise jurisdiction. There is no tradeoff between State sovereignty and inter-State cooperation: the two are complementary and mutually supportive.

Inter-State cooperation in this area should therefore aim to achieve agreement on a new international legally binding instrument, building on the emerging international consensus on certain key principles that enjoy wide support. These Nine Principles may be listed as follows:

Corporations' duties to respect human rights and environmental rights

1. All corporations have a responsibility to respect human rights and the environment. This responsibility includes practicing human rights and environmental rights due diligence (HRERDD), requiring that corporations identify, cease, prevent, and remedy adverse impacts of their activities on human rights or on the environment. This responsibility applies to all companies, regardless of their size, sector, operational context, ownership and structure. In particular, this responsibility applies both to companies that are privately owned and to companies that are fully or partially state-owned, and it applies both to companies that are part of a multinational group and to others.

2. Adverse human rights and environmental impacts occur in companies' own operations, subsidiaries, products, and in their value chains, in particular at the level of raw material sourcing, manufacturing, consumer use,

or at the level of product or waste disposal. The imposition of a human rights and environmental rights due diligence obligation should therefore apply both across multinational groups (requiring that corporations take all reasonable measures to prevent violations by companies in which they have an investment) and in supply chains (requiring that corporations take such measures vis-à-vis their business partners).

3. To comply with due diligence obligations, companies need to take appropriate measures with respect to identification, prevention and bringing to an end adverse impacts. This includes[15]: (1) embedding due diligence into policies and management systems, (2) identifying and assessing actual and potential adverse human rights and environmental impacts associated with their operations, products or services, (3) ceasing, preventing or minimising actual and potential adverse human rights, and environmental impacts, (4) assessing the effectiveness of measures on a regular basis, (5) communicating about how impacts are addressed, (6) providing remediation or cooperating in remediation processes.

4. Compliance with human rights and environmental rights due diligence (HRERDD) obligations as prescribed in legislation should not exclude the potential legal liability of corporations under general civil liability regimes, in cases where additional measures could reasonably have been taken that would have had a real chance of preventing a violation of human or environmental rights in the supply chain or in the corporate group. Such compliance however may be relied upon by courts as establishing a rebuttable presumption that the corporation concerned has not violated its duty of care towards workers or communities affected by its activities or those of its subsidiaries or business partners: where HRERDD has been complied with, potential victims seeking reparation may put forward elements demonstrating that the harm allegedly caused could have been prevented by the adoption of measures that could have reasonably been expected from the company concerned.

States' duty to protect human rights and environmental rights

5. States have a duty to protect human rights and environmental rights by establishing legal and policy frameworks providing the right incentives across different policy areas, and by controlling corporations under their jurisdiction. This requires that they provide for effective and dissuasive sanctions, whether civil, administrative, or criminal (in countries that allow for the criminal liabilty of legal persons), where violations of human rights or environmental rights occur. States face specific challenges related to the imposition of duties on corporations that operate transnationally, however, both because of the increased protection of foreign investors under customary international law and investment treaties, and because effective enforcement of legislation requires access to evidence and the possibility of freezing or seizing assets to ensure execution of judgments, which may be difficult or impossible to achieve where such evidence or assets are located in another jurisdiction. Such challenges are therefore best addressed by tools developed at a multilateral level, as they require cooperation between States, in particular in the form of mutual legal assistance.

6. As part of their duty to protect human rights, States should impose on corporations that are domiciled under the State's jurisdiction (whether they are incorporated within the State, or have their principal place of business within the territory of that State) not only that they respect human rights and environmental rights, but also that they act with due diligence to ensure that their subsidiaries or their business partners comply. Consistent with general international law, States may, in addition, impose such obligations on all corporations that have a substantial presence or have substantial business interests in the State concerned, as may be the case, for instance, due to a certain volume of business activity within that State.[16]

7. This HRERDD obligation should be imposed both with respect to situations within the national territory and outside the national territory. This has been

affirmed explicitly under the OECD Guidelines for multinational enterprises,[17] but it also follows from general international law, particularly as regards environmental rights,[18] and from the interpretation by UN human rights treaty bodies of UN human rights treaties.[19] By discharging its obligation to protect human and environmental rights also as regards situations where violations take place outside its national territory, the home State strengthens the ability for the territorial (host) State to effectively enforce the regulatory measures adopted by that State in the name of public health, a healthy environment, workers' rights, or the rights of local communities.

8. Both to minimize the risk of inconsistent obligations being imposed on corporate actors in a transnational context and to avoid the imposition of unilateral standards in extraterritorial situations, the human rights and environmental rights which transnational corporations should comply with should be as defined under international human rights treaties as interpreted by human rights treaty bodies, the core ILO conventions, or multilateral environmental agreements enjoying broad support.

9. Victims of business-related human rights abuses should have access to effective remedies also in a transnational context. A number of obstacles remain in this regard, however: they relate, for instance, to the unavailability of collective redress mechanisms in mass tort litigation; to the inadmissibility of evidence collected abroad; to the unavailability of legal aid; or, unless parent-company direct liability is organized, to the restrictive conditions under which the corporate veil may be lifted.[20] By facilitating access to justice for victims of transnational corporate human rights abuses in accordance with the recommendations listed in the report of the United Nations High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse,[21] States would be facilitating the efforts of the host State to regulate the activities of business enterprises which may affect the enjoyment of human or environmental rights.

These Nine Principles are based on customary international law or international human rights law, and they should therefore be considered as the baseline for the negotiation of any new legally binding instrument on business and human rights. While such a new legally binding instrument could go further, in particular to ensure the effectiveness of the remedies to which victims of corporate harm should have access to (Principle IX) and to clarify the duties of States in providing mutual legal assistance (Principle V), it should not define the duties of States at a lower level than those already set in general international law, and under the key human rights, labour rights and environmental agreements States have ratified.

The alignment of national regulatory and policy frameworks to ensure compliance of businesses with human rights and environmental rights will present a number of advantages. For business enterprises themselves, it will ensure a level playing field, reducing the risk that businesses (particular small and middle-size enterprises) face unfair competition from companies that are not subject to similar requirements, particularly as regards their sourcing practices or their choice of business partners. It will also greatly facilitate the mutual recognition of auditing of suppliers, as the suppliers serving different clients (buyers) will have similar (if not identical) reporting requirements by these clients located in different jurisdictions. For consumers, such an alignment will provide them with a guarantee that their purchases are ethical, which will be a significant progress in comparison to the current situation in which various labels and private standards seek to provide such guarantee, but actually result in more confusion due to their number and uneven reliability. For investors, the adoption of regulatory and policy frameworks consistent with the Nine Principles will be a reassurance that they may invest in companies that are subject to such monitoring, without fear to their reputation and without facing potential critique from activist shareholders of civil society. For potential victims, finally, alignment with the Nine Principles will improve legal certainty, and will provide effective avenues for redress in cases of alleged violations.

Governments themselves have a strong interest in pursuing compliance of businesses with human rights and environmental rights through a multilateral approach ensuring a minimum degree of harmonization of domestic legislative and policy frameworks. This will reduce two risks at the same time: the risk that States be tempted to improve the cost-competitiveness of companies domiciled under their jurisdiction by reducing the requirements related to compliance with human rights, labour rights or environmental rights, especially in the most labor-intensive segments of production or in the natural resources sectors (extractive industry, agriculture and forestry); and the risk that States invoke the need to protect human rights, labour rights or environmental rights, in order to justify the adoption of protectionist trade measures. These risks are the mirror of each other: it is because the current global governance framework remains ill-equipped to prevent the former risk from materializing, that the latter risk becomes real. Agreement on a multilateral approach encouraging States to impose human rights and environmental rights due diligence obligations on transnational corporations, based on universally agreed standards, would protect States both from the temptation of unfair competition and from the temptation of protectionism through the adoption of unilateral measures.

3. Recommendations to the G7

The G7 could usefully:

- Commit its members to lead by example by moving towards the adoption of regulatory and policy frameworks on business and human rights that are based on the Nine Principles set out above, as a set of minimum requirements imposed on all countries;
- Encourage the G7 countries to engage constructively in the search for multilateral solutions to the challenges raised by the transnationalisation of economic activities, including in the negotiation launched since 2014 under the auspices of the Human Rights Council for a new legally binding instrument on business and human rights and in the development of the ILO programme of action to address decent work in global supply chains.[22] They should seek inspiration, in defining their negotiating position in these processes, from the Nine Principles set out above;
- Encourage all countries, in designing and adopting a regulatory and policy framework to ensure compliance of business with human rights, to ensure that such a framework complies minimally with the Nine Principles set out above, since any derogation from such minimum standards would be inconsistent with the evolving requirements of international law.
- Express a clear preference for multilateral solutions rather than unilateral responses to the challenges created by the transnationalisation of economic activities, and warn both against the use of human rights, labour rights and environmental standards for protectionist trade purposes, and against the risks of derogating from such rights or of lowering such standards in order to gain an undue advantage in global competition or to improve the cost-competitiveness of companies operating within a State's jurisdiction.

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Endnotes

1 While the focus has been on human rights due diligence, this extends to environmental rights as they may be derived from human rights law. Such environmental rights include the right to be protected from environmental degradation, that may impair the natural bases for the preservation and production of food or deny a person access to safe and clean drinking water; makes it difficult for a person to access sanitary facilities or destroys them; harms the health, safety, the normal use of property or land or the normal conduct of economic activity of a person; or affects ecological integrity, such as deforestation, in accordance with Article 3 of the Universal Declaration of Human Rights, Article 5 of the International Covenant on Civil and Political Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights. They also include a protection from unlawful evictions from land, forests and waters the use of which secures the livelihood of a person in accordance with Article 11 of the International Covenant on Economic, Social and Cultural Rights. They include, finally, the indigenous peoples' right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired in accordance with Article 25, 26 (1) and (2), 27, and 29 (2) of the United Nations Declaration on the Rights of Indigenous Peoples. Moreover, the UN Human Rights Council affirmed an autonomous human right to a safe, clean, healthy and sustainable environment at its 48th session (September-October 2021) (A/HRC/48/L.23/Rev.1) (for the content of such a right to safe, clean, healthy and sustainable environment, see the report Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment presented at the 43rd session of the Human Rights Council (A/HRC/43/53 (Dec. 2019)).

2 This formulation paraphrases principles 15, b) and 17, b) of the the Guiding Principles on Business and Human Rights (A/HRC/17/31), approved by the Human Rights Council in Res. 17/4 of 16 June 2011.

3 See footnote 2.

4 The Guidance was approved by the OECD Working Party on Responsible Business Conduct on 6 March 2018 and by the OECD Investment Committee on 3 April 2018. On 30 May 2018, the OECD Ministerial Meeting recommended that the OECD Member States and other States adhering to the recommendation 'actively support and monitor the adoption of' the due diligence framework set out in the OECD Due Diligence Guidance for Responsible Business Conduct.

5 Performance Standard 1 (Assessment and Management of Environmental and Social Risks and Impacts) requires that the IFC clients design and maintain an Environmental and Social Management System (ESMS) to mitigate risks, including risks associated with human rights impacts of specific projects financed by the IFC.

6 The Tripartite Declaration was adopted by the Governing Body of the ILO at its 204th session (Geneva, November 1977). It was most recently revised in 2017 by the ILO Governing Body at its 329th session, see: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf

7 Committee on the Rights of the Child, General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights (CRC/C/GC/16); Committee on Economic, Social and Cultural Rights, General Comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24); Human Rights Committee, comm. n°2285/2013, Yassin et al. v. Canada, Views of 26 July 2017.

8 Some evidence points to the links between increased protection of investors' rights and the ability for the host States to protect human rights: see Cristina Bodea and Fangjin Ye, "Investor Rights versus Human Rights: Do Bilateral Investment Treaties Tilt the Scale?", B.J.Pol.S. 50(2018): 955–977, doi:10.1017/S0007123418000042.

9 Olivier De Schutter, Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards (Hart/Bloomsbury, 2015).

10 Lara C. Backer, "Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator", Univ. of Connecticut L. Rev., 39(4)(2007): 1739–1784; A. Oleinik, "Market as a weapon: Domination by virtue of a constellation of interests", Forum for Social Economics 40(2)(2011): 157–177.

11 Başak Bağlayan, Ingrid Landau, Marisa McVey, Kebene Wodajo, Good Business: The Economic Case for Protecting Human Rights (Business and Human Rights Young Researchers Summit, ICAR and Frank Bold, 2018).

12 See, e.g., European Commission, Green paper, Promoting a European Framework for Corporate Social Responsibility, COM(2001) 366 final, of 28 July 2001, para. 82 ("the growing number of social labels schemes in Europe may be detrimental to their effectiveness as confusion may arise among consumers, from the conflicting diversity of criteria used and lack of clarity of meaning among various labels").

13 For a detailed argument in this regard, see O. De Schutter, 'Rapport général – La responsabilité des Etats dans le contrôle des sociétés transnationales: vers une Convention internationale sur la lutte contre les atteintes aux droits de l'homme commises par les sociétés transnationales', in La responsabilité des entreprises multinationales en matière de droits de l'homme, Bruxelles, Bruylant-Némésis, 2010, pp. 19–100; Id., 'Sovereignty-plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations', in Making Transnational Law work in the Global Economy: Essays in Honour of Detlev Vagts (P. Bekker, R. Dolzer and M. Waibel (eds)), Cambridge University Press, 2010, pp. 245–284.

14 Committee on Economic, Social and Cultural Rights, General Comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), paras. 34–35 ("Improved international cooperation should reduce the risks of positive and negative conflicts of jurisdiction, which may result in legal uncertainty and in forum-shopping by litigants, or in an inability for victims to obtain redress. The Committee welcomes, in this regard, any efforts at the adoption of international instruments that could strengthen the duty of States to cooperate in order to improve accountability and access to remedies for victims of violations of Covenant rights in transnational cases.")

15 OECD Due Diligence Guidance for Responsible Business Conduct.

16 Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights (CRC/C/GC/16), para. 43 (noting that the States parties to the Convention on the Rights of the Child have a duty "to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned"). See also, at regional level, Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business (adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers' Deputies), para. 20 (recommending that Member States of the Council of Europe impose that "business enterprises conducting substantial activities within their jurisdiction carry out human rights due diligence in respect of such activities").

17 The OECD Guidelines on Multinational Enterprises and the Due Diligence Guidance for Responsible Business Conduct are addressed to adhering countries and to "enterprises operating in or from their territories", which at a minimum implies that States are expected to apply these guidelines to activities conducted outside the national territory, by all companies domiciled within their jurisdiction. The extraterritorial reach of the OECD Guidelines for Multinational Enterprises was confirmed when the Guidelines were revised in 2000, inter alia to introduce a general obligation on multinational enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments" (para. 2 of the Chapter on 'General Policies'). It was stated on that occasion that the OECD Member States and the other countries adhering to the guidelines were to encourage their multinationals to observe these guidelines wherever they operate. In the introduction to the OECD Declaration on International Investment and Multinational Enterprises, the OECD Member States "jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines". Para. 2 of the operative part, under the chapter of the Guidelines relating to the 'Concepts and principles', states: "Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries. Governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country".

18 The environment is one area in which international law has been classicly imposing on the State a prohibition to allow the use of its territory to cause damage on the territory of another State (Trail Smelter Case (United States v. Canada), 3 R.I.A.A. 1905 (1941)). The International Court of Justice referred to the principle in the advisory opinions it adopted on the issue of the Legality of the Threat or Use of Nuclear Weapons and, in contentious proceedings, in the Gabčíkovo-Nagymaros Project case opposing Hungary to Slovakia. In these cases, the Court affirmed that "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), pp. 241–242, para. 29; Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 78). The principle was again referred to by the Court in its judgment of 20 April 2010 delivered in the Pulp Mills case opposing Argentina to Uruguay (Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, par. 193). Expert opinion has derived from these statements a more general rule: that the State "is under the duty to control the activities of private persons within its [...] territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another State" (I. Brownlie, System of the Law of Nations. State responsibility, Clarendon Press, Oxford, 1983, p. 165. See also N. Jägers, Corporate Human Rights Obligations: in Search of Accountability, Intersentia, Antwerpen-Oxford-New York, 2002, p. 172 (deriving from 'the general principle formulated in the Corfu Channel case – that a State has the obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States – that home State responsibility can arise where the home State has not exercised due diligence in controlling parent companies that are effectively under its control').

19 On the extraterritorial reach of States' duty to protect human rights, see Committee on Economic, Social and Cultural Rights, 'Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights' (E/C.12/2011/1 (20 May 2011)), para. 5; Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017): State parties' obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 31; and Human Rights Committee, Yassin et al. v. Canada, Comm. n°2285/2013, final views of 26 July 2017, para. 3.10 ('The extraterritorial obligation to protect or to ensure human rights also entails regulating corporations incorporated under a State's jurisdiction. Since the two corporations are incorporated in Canada, the State party has an obligation to ensure that they do not violate human rights at home or abroad, including human rights protected by the Covenant.'). The Human Rights Committee routinely has encouraged States parties to the International, Covenant on Civil and Political Rights, in various Concluding Observations to 'set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations', and to 'take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad' (Concluding Observations: Germany (CCPR/C/DEU/CO/6 (2012)), para. 16). See also, within the regional framework, Recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, on human rights and business, adopted on 2 March 2016 at the 1249th meeting of the Ministers' Deputies, Annex, para. 13.

20 O. De Schutter, G. Skinner and R. McCorquodale The Third Pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Business, International Corporate Accountability Roundtable, CORE and European Coalition for Corporate Justice (ECCJ), December 2013.

21 A/HRC/32/19 and Add.1. The Human Rights Council welcomed the report at its 32nd session (2016), A/HRC/RES/32/10, OP 1.

22 International Labour Conference, 105th session, resolution concerning decent work in global supply chains, adopted on 10 June 2016, paras. 22–23.

Annex: Comparative overview of existing human rights and environmental rights due diligence requirements in major jurisdictions

1. European Union: the 2010 Timber Regulation (No. 995/2010) and the 2017 Conflict Minerals Regulation (No. 2017/821)

Source	Scope (companies concerned)		Disclosure/ reporting requirement		Due diligence requirement		Relationship between HRDD and legal liability
	Size/sector	Domicile (jurisdiction)	Duty	Sanction	Parent-subsidiary	Lead company-sub-contractor	
Reg. (EU) 995/2010 (Timber Reg.)	Any natural or legal person that places timber or timber products on the market	The operators or traders concerned may or may not be domiciled in the EU	None, however the operators should maintain documentation for inspection by public authorities	EU Member States set penalties that are effective, proportionate and dissuasive. Where shortcomings are detected, remedial actions should be taken by the operator. Additionally, interim measures may include (a) seizure ot timber and timber products; (b) prohibiting the marketing thereof.		The due diligence requirement operates throughout the supply chain; obligations of traceability are imposed in this regard	None
Reg. (EU) 2017/821 (Conflict Minerals Reg.)	'Union importers' of certain minerals or metals, defined as any natural or legal person declaring minerals or metals for release for free circulation in the EU	Union importers may or may not be domiciled in the EU	Union importers shall publicly report on an annual basis, on their supply chain due diligence policies and practices for responsible sourcing.	The EU Member States are responsible for monitoring compliance; where an infringement is found, they shall issue a notice of remedial action to be taken by the Union importer.		Union importers should monitor suppliers and operate a chain of custody or supply chain traceability system	None

2. France: Law of 27 March 2017 on due diligence

Source	Scope (companies concerned)		Disclosure/ reporting requirement		Due diligence requirement		Relationship between HRDD and legal liability
	Size/sector	Domicile (jurisdiction)	Duty	Sanction	Parent-subsidiary	Lead company-sub-contractor	
French Law of 27 March 2017 on due diligence	Companies of > 5,000 employees (domiciled in France) or > 10,000 employees (foreign but operating in France)/across all sectors	Extends to companies either domiciled in France or operating in France	Present a "vigilance plan" including five components	May be enforced through judicial injunctions	Parent 'controlling' the subsidiary must include the subsidiary in its vigilance plan	Lead company to extend the vigilance plan to suppliers/ sub-contractors in a permanent business relationship	Civil liability engaged where vigilance plan might have prevented an abuse; liability may not be engaged where a vigilance plan was adopted

3. Germany: 2021 Act on Corporate Due Diligence in Supply Chains

Source	Scope (companies concerned)		Disclosure/ reporting requirement		Due diligence requirement		Relationship between HRDD and legal liability
	Size/sector	Domicile (jurisdiction)	Duty	Sanction	Parent-subsidiary	Lead company-sub-contractor	
2021 Act on Corporate Due Diligence in Supply Chains (Lieferkettengesetz)	Companies with more than 3,000 employees, across all sectors (more than 1,000 employees after 2024)	Companies which have their head office, principal place of business, administrative headquarters or registered seat in Germany; as well as foreign companies that have a branch office in Germany	Companies should: 1° adopt a policy statement on respect for human rights and environmental rights (linked to the prevention of the use of persistent organic pollutants (POP Convention)and mercury emissions (Minamata Convention) and control of transboundary movements of hazardous wastes (Basel Convention); 2° identify potential adverse impacts on human rights; 3° set up a risk management system (including remedial measures) to avoid potential adverse impacts on human rights; 4° establish a grievance mechanism; and 5° report publicly.	Fines may be imposed by the German Federal Office of Economics and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle); exclusion from public tenders for up to three years may be considered for the most serious violations (which lead to fines of at least 175,000 euros)	Subsidiaries belong to the parent company's own business area insofar as the parent company exercises a determining influence	Scope of human rights due diligence depends on the degree of influence of the company over the supply-chain entity potentially committing the violation and the expected severity of the human rights impact: due diligence duty extends to indirect suppliers if the company gains "substantiated knowledge" of a potential abuse	Compliance with the due diligence obligations does not exclude application of normal civil liability rules

4. The Netherlands: the 2019 Child Labour Due Diligence Law (Wet Zorgplicht Kinderarbeid)

Source	Scope (companies concerned)		Disclosure/ reporting requirement		Due diligence requirement		Relationship between HRDD and legal liability
	Size/sector	Domicile (jurisdiction)	Duty	Sanction	Parent-subsidiary	Lead company-sub-contractor	
Dutch Child Labour Due Diligence Law of 24 October 2019	All companies, whatever their size, across all sectors	Extends to all companies doing business in the NL, whether or not physically (i.e., companies selling online to Dutch consumers are included)	Provide a declaration that the company has assessed the risks of child labour in the supply chain and, if such a risk is deemed to exist, adopted a plan of action	May be enforced through administrative fines, and exceptionally criminal sanctions	Unclear	Buyer should practice due diligence vis-à-vis all suppliers	Unclear

5. United Kingdom: the 2015 Modern Slavery Act

Source	Scope (companies concerned)		Disclosure/ reporting requirement		Due diligence requirement		Relationship between HRDD and legal liability
	Size/sector	Domicile (jurisdiction)	Duty	Sanction	Parent-subsidiary	Lead company-sub-contractor	
UK 2015 Modern Slavery Act	Companies with a turnover > £36m	Companies doing business in the UK, whether incorporated in the UK or foreign; as well as subsidiaries provided they are part of the supply chain or business operations of the parent company.	Present an annual "slavery and human trafficking statement"	May be enforced through judicial injunctions	Parent must include the subsidiary in its statement provided the subsidiary is part of the parent company's supply chain or own business	Statement from the lead company must describe the due diligence processes in relation to slavery and human trafficking in its business and supply chains	None

6. United States: conflict Minerals in the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act (2010)

Source	Scope (companies concerned)		Disclosure/ reporting requirement		Due diligence requirement		Relationship between HRDD and legal liability
	Size/sector	Domicile (jurisdiction)	Duty	Sanction	Parent-subsidiary	Lead company-sub-contractor	
Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act	Companies trading in "conflict minerals" originating in the Democratic Republic of the Congo or an adjoining country	All companies with securities registered with the Securities and Exchange Commission	To submit a report to the SEC (a report that is also to be made public on the company's website) that includes a description of the measures it took to exercise due diligence on the conflict minerals' source and chain of custody. Such report should follow a nationally or internationally recognized due diligence framework, such as the OECD's "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas".	If a Company is unable to determine, after conducting due diligence, whether its products are "DRC conflict free," it must report that they are "DRC conflict indeterminable". Issuers with "DRC conflict undeterminable" products are required to provide a Conflict Minerals Report describing the measures taken by the issuer to exercise due diligence on the source and chain of custody of the conflict minerals.	Unclear	Buyer should practice due diligence vis-à-vis all suppliers	Unclear