



Key developments in mandatory human rights due diligence and supply chain law Considerations for employers

September 2021



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and balanced
voice for business





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List of Acronyms and Abbreviations

ACCI	Canadian Association Against Impunity
BAFA	German Federal Office for Economic Affairs and Export Control
CSRD	Corporate Sustainability Reporting Directive
DRC	Democratic Republic of Congo
EFRAG	European Financial Reporting Advisory Group
FISMA	Financial Stability, Financial Services and Capital Markets Union
ILO	International Labour Organization
IOE	International Organisation of Employers
IWG	Intergovernmental Working Group
KCM	Konkola Copper Mines
LdV	Corporate Duty of Vigilance
MNE Declaration	Multinational Enterprises and Social Policy
NAP	National Action Plan
NFRD	Non-Financial Reporting Directive
NGOs	Non-Governmental Organizations
OECD	Organization of Economic Co-operation and Economic Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
RBI	Responsible Business Initiative
SMEs	Small and Medium Size Enterprises
TFEU	Treaty on the Functioning of the European Union
UNGC	United Nations Global Compact
UNGPs	UN Guiding Principles on Business and Human Rights

Introduction

Human rights are a key concern for business. As the global voice of business, IOE is deeply engaged in the business and human rights agenda and strongly supports the UN Guiding Principles on Business and Human Rights (UNGPs). The UNGPs were endorsed by the UN Human Rights Council in its resolution 17/4 of 16 June 2011¹. They set out the existing obligations of States to respect, protect and fulfil human rights and fundamental freedoms; the role of business enterprises to comply with all applicable laws and to respect human rights; and the need for rights and obligations to be matched to appropriate and effective remedies when breached.² The corporate responsibility to respect human rights applies to all business enterprises, regardless of their size, sector, location, ownership, and structure.

The past few years have seen the emergence of several legislative developments related to the business and human rights agenda; most recently, in summer 2021, the German and the Norwegian parliaments adopted a new law on corporate due diligence in the supply chains.

An important focus in the discussions on business and human rights is on mandatory human rights due diligence.

This paper aims to support the meaningful engagement of the business community in these discussions, by clarifying what the UNGPs say on due diligence; setting out the recent legislative and judicial developments; enumerating the expectations and recommendations of stakeholders and the UN; and highlighting the critical points for business to know and consider.

What is human rights due diligence?

Human rights due diligence is a key part of the corporate responsibility to respect human rights. UNGP 15 spells out that, to meet their responsibility to respect human rights, business enterprises should have in place *“a human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights”*.

In exercising human rights due diligence business enterprises should undertake four key actions:

- Identify and assess actual or potential adverse human rights impacts with which they may be involved, either through their own activities or because of their business relationships.
- Integrate the findings arising from these assessments across relevant internal functions and processes and take appropriate action.
- Track the effectiveness of their response (e.g. risk management and mitigation efforts); and
- Account for how they address their human rights impacts (e.g. through reporting externally).

¹ The UN Human Rights Council resolution 17/4 of 16 June 2011 on Human rights and transnational corporations and other business enterprises can be found here: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>

² As found in the Guiding Principles on Business and Human Rights, accessed at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

The UNGPs also set out some parameters:

- Human rights due diligence should cover adverse human rights impacts that the business enterprise may cause, or contribute to, through its own activities, or that may be directly linked to its operations, products, or services by its business relationships.
- Human rights due diligence will vary in complexity according to the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.
- Human rights due diligence should be ongoing, recognising that the human rights risks may change over time as the business' operations and operating context evolve.

Implementation of human rights due diligence by business has been swift and widespread

Since the endorsement of the UNGPs, the implementation of human rights due diligence has been constantly improving.³ Ten years on, an ever-increasing number of companies of all sizes, sectors, structures, and geographies are carrying out human rights due diligence. Their efforts are supported by a host of industry bodies, and other international and national organisations, which have incorporated the human rights due diligence approach into their standards, guidance, and practical implementation tools. We can see that the engagement of companies is extremely dynamic and that businesses are constantly learning how to improve due diligence processes and make them more effective.

Human rights due diligence: Key topic in the debate on business and human rights

A larger ecosystem of stakeholders is actively engaged in the promotion of human rights due diligence. Non-governmental organisations (NGOs), trade unions, many policymakers, and other societal groups are demanding legislative frameworks for human rights due diligence by companies. The expectations often go beyond the UNGPs; many stakeholders, for instance, regard corporate liability for adverse impacts in global supply chains as an essential part of any legislative approach to human rights due diligence.

In September 2020, a coalition of NGOs stressed in their joint statement on the principal elements of the EU upcoming due diligence legislation (see below for more information): "Business enterprises must be liable for human rights and environmental adverse impacts in their global value chains and within their operations and business relationships."

³ See the study commissioned by the European Parliament on the Implementation of the UN Guiding Principles on business and human rights: [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU\(2017\)578031_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf). Page 14 of the study contains information on the strides made in the area of human rights due diligence.

What do the UN Guiding Principles say about supply chain liability?

UNGP principles No. 15 and 22 require remedies in cases where the enterprise has caused or contributed to human rights violation. Thus, the UNGPs do not foresee that a company is *automatically* required to provide remedies for adverse impacts in the supply chain⁴, but only where it caused or contributed to the violation. These provisions thereby reflect the basic legal premise adopted in most countries that liability should only be imposed where a clear and foreseeable link exists between the victim's harm and the business held responsible.

What do the UNGPs recommend regarding State policy and regulatory measures?

UNGP 1 explains that States have the duty to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. UNGP 2 clarifies that "States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction." UNGP 3 then gives recommendations to States on their general regulatory and policy functions. These recommendations include:

- Enforcing laws that require business enterprises to respect human rights, and periodically assessing the adequacy of such laws and addressing any gaps.
- Ensuring that existing laws and policies that govern the creation and operations of business, such as corporate law, enable business respect for human rights.
- Providing effective guidance to business on how to respect human rights throughout their operations.
- Encouraging, and where appropriate requiring, companies to communicate how they address their human rights impacts.

A changing landscape: Policy responses

Since the UN Human Rights Council endorsed the UNGPs in 2011, the topic of human rights due diligence has received much attention by policymakers:

- There has been a drive for international policy coherence to embed the UNGPs and their human rights due diligence blueprint into other applicable standards, initiatives, and guidance tools. The expectation that companies should exercise human rights due diligence is reflected in standards such as the OECD Guidelines for Responsible Business Conduct⁵ and the ILO Tripartite Declaration

⁴ UN Guiding Principle 22, commentary, third paragraph states: "Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation."

⁵ The OECD Guidelines for Responsible Business Conduct can be accessed in various languages at: <http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>.

of principles concerning multinational enterprises and social policy (MNE Declaration)⁶. It is also relevant to many other initiatives and tools such as the International Finance Corporation Performance Standards, the Global Reporting Initiative, ISO 26000 Guidance on Social Responsibility, etc.

- To date, some 28 governments have produced a national action plan (NAP) on business and human rights to implement the UNGPs, with more than 15 States reportedly in the process. These plans, among other things, articulate the government's expectations of companies operating in their jurisdiction to act responsibly with respect for human rights by encouraging them to carry out due diligence vis-à-vis their operations at home and, in some cases, abroad.
- At the international level, some States are increasingly urging companies to carry out human rights due diligence, especially in relation to their supply chains. For example, the 2015 G7 Leaders' Declaration expressed strong support for the UNGPs and stated: "*To enhance supply chain transparency and accountability, we encourage enterprises active or headquartered in our countries to implement due diligence procedures regarding their supply chains, e.g. voluntary due diligence plans or guides.*"⁷ This was followed by a similar commitment by the wider G20 in 2017 when its leaders pledged to "*work towards establishing adequate policy frameworks in our countries such as national action plans on business and human rights and underline the responsibility of businesses to exercise due diligence.*"⁸
- Furthermore, some governments have either introduced, or are considering, laws and/or other punitive measures that concern the human rights due diligence process.

Business and human rights legislative initiatives

- 2010 Section 1502 of the Dodd-Frank Act
- 2012 The California Transparency in Supply Chains Act
- 2015 UK Modern Slavery Act
- 2017 French Law on the Corporate Duty of Vigilance
- 2018 Australian Modern Slavery Act
- 2019 Dutch Child Labour Due Diligence Law (in force 21/22)
- 2019 Finland commits to mandatory human rights due diligence at national and EU level
- 2020/2021 Swiss Supply Chain Law

⁶ The Tripartite Declaration of principles concerning multinational enterprises and social policy (MNE Declaration) can be accessed here: https://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.

⁷ The G7 statement can be accessed here: <https://www.oecd.org/investment/OECD-Report-to-G7-Leaders-on-Responsible-Business-Conduct.pdf>.

⁸ The G20 statement can be accessed here: <https://www.business-humanrights.org/pt/%C3%BA%ltimas-not%C3%ADcias/g20-leaders-declaration-sets-goal-to-take-measures-against-child-labour-modern-slavery-emphasizes-un-guiding-principles-and-oecd-ncps/>.

- 2021 Norwegian Human Rights Due Diligence Law
- 2021 German Due Diligence in Supply Chains Act
- 2021 EU Sustainable Corporate Governance and Due Diligence Directive proposal
- 2021 EU Parliament Resolution on Corporate Due Diligence and Corporate Accountability
- 2021/2022 EU Corporate Sustainability Reporting Directive
- To be determined Bill S-216 Canada

Considerations regarding mandatory human rights due diligence

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has developed guidance on mandatory human rights. The Guidance distinguishes three types of legislative approaches:

- Category 1: regimes that require companies to prevent harm through the exercise of human rights due diligence (for which the occurrence of harm is a key element of the breach);
- Category 2: regimes that require companies to carry out human rights due diligence (i.e. liability arises from the failure to exercise human rights due diligence, and whether or not that failure has resulted in actual harm is immaterial to establishing non-compliance); and
- Category 3: regimes that contain no explicit requirement to carry out human rights due diligence but which create strong incentives in that direction (e.g. regimes that permit the company to use the fact that it had carried out human rights due diligence as a defence to legal liability for causing harm, or which permit levels of compliance with human rights due diligence standards to be taken into account “in mitigation” in deciding on an appropriate sanction for a legal breach).

Key issues requiring clarification for any mandatory human rights due diligence include in view of OHCHR:

- Who should be the duty bearer? (Which natural or legal persons, with what connections to the jurisdiction).
- What kinds of relationships and activities might give rise to legal liability? (What business relationships / entities will be covered).
- What kinds of legal obligations are imposed? (Requiring companies to prevent harm vs. requiring companies to carry out human rights due diligence vs. providing other incentives to carry out human rights due diligence).
- Should the regime be comprehensive or issues-based? (Covering all internationally recognised human rights vs. specific areas of human rights).
- Should the regime seek to apply to all business activity or be sector based?

- What should the consequences of non-compliance be? (Criminal liability vs. sanctions respectively administrative enforcement vs. civil actions (and issues of standing)).
- What supporting regulatory institutions and arrangements may be needed? (Supervisory institutions to support implementation and compliance).

National policy responses

- **CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT**

The 2012 California Transparency in Supply Chains Act requires, at a minimum, disclosure of what actions the company is taking, if any, in five areas:

1. Engaging in the verification of product supply chains to evaluate and address risks of human trafficking and slavery, specifying if the verification was not conducted by a third party.
2. Conducting audits of suppliers to evaluate compliance with company standards for trafficking and slavery in supply chains, specifying if the verification was not an independent, unannounced audit.
3. Requiring direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
4. Maintaining internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
5. Providing company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.

The required disclosure should be posted on the company's website with a prominent link to the required information on the website's homepage. If the company does not have a website, consumers should be provided with written disclosures within 30 days of the company receiving a written request.

If the company answers "yes" to the following three questions, it is subject to the Act:

1. Is the company a "retail seller" or "manufacturer?" As self-reported on its California tax return, a "retail seller" is "a business entity with retail trade as its principal business activity code," and a "manufacturer" is "a business entity with manufacturing as its principal business activity code."
2. Is the company "doing business in California?" Doing business in California is defined as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit."
3. Does the company have annual worldwide "gross receipts" that exceed \$100,000,000? "Gross receipts" include "gross amounts realised ... on the sale or exchange of property, the performance of services, or the use of property or capital ... in a transaction that produces business income, in which the income, gain, or loss is recognised ... under the Internal Revenue Code..." It does not include, even if business income, items identified in California Revenue and Taxation Code Section 25120(f)(2)).

The exclusive remedy for a violation of the Act is an action brought by the Attorney General for injunctive relief, which means that a court will stop a defendant from committing one or more specified actions. This section, however, is not intended to limit remedies available for a violation of any other state or federal law. The Franchise Tax Board (the entity responsible for tax collection and ensuring that individuals and legal entities file their tax returns) will also be required to make available to the Attorney General a list of retail sellers and manufacturers that would be covered by the Act.⁹

⁹https://www.researchgate.net/publication/311585533_Human_Rights_Due_Diligence_in_Law_and_Practice_Good_Practices_and_Challenges_for_Business_Enterprises

- **UK MODERN SLAVERY ACT**

The Transparency in Supply Chains provision in the UK Modern Slavery Act of 2015¹⁰ seeks to address the role of businesses in preventing modern slavery from occurring in their supply chains and organisations. Slavery is defined in the Modern Slavery Act as ‘slavery, servitude and forced or compulsory labour’ and ‘human trafficking’. Every organisation operating a business in the UK with a total annual turnover of £36m or more will be required to produce a slavery and human trafficking statement for each financial year. If a business fails to produce a slavery and human trafficking statement for a particular financial year the Secretary of State may seek an injunction through the High Court (or, in Scotland civil proceedings for specific performance of a statutory duty under section 45 of the Court of Session Act 1988) requiring the organisation to comply. If the organisation fails to comply with the injunction, they will be in contempt of a court order, which is punishable by an unlimited fine.

A focus on tackling modern slavery not only protects vulnerable workers and helps prevent and remedy severe human rights violations but is also able to implicate a number of business benefits including:

- Protecting and enhancing an organisation’s reputation and brand.
- Protecting and growing the organisation’s customer base as more consumers seek out businesses with higher ethical standards.
- Improved investor confidence.
- Greater staff retention and loyalty based on values and respect.
- Developing more responsive, stable, and innovative supply chains.

The UK included a provision in the Modern Slavery Act which requires specific businesses to produce a record stipulating the steps they have taken to ensure there is no modern slavery in their own business and their supply chains. If an organisation has taken no steps to do this, their statement should say so.

This measure is designed to prevent modern slavery in businesses and their supply chains. A point to remember is that the expectation is that organisations will need to build on what they are doing year on year. Their first statements may show how they are starting to act on the issue and their planned actions to investigate or collaborate with others to effect change.

The seven-part Modern Slavery Act:

1. Consolidates and clarifies the existing offences of slavery and human trafficking whilst increasing the maximum penalty for such offences.
2. Provides for two new civil preventative orders, the Slavery and Trafficking Prevention Order and the Slavery and Trafficking Risk Order.
3. Provides for new maritime enforcement powers in relation to ships.
4. Establishes the office of Independent Anti-slavery Commissioner and sets out the functions of the Commissioner.

¹⁰ The Act can be accessed at: <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

5. Introduces measures focused on supporting and protecting victims, including a statutory defence for slavery or trafficking victims and special measures for witnesses in criminal proceedings.
6. Requires certain businesses to disclose what activity they are undertaking to eliminate slavery and trafficking from their supply chains and their own business.
7. Requires the Secretary of State (which is the UK's minister of interior) to publish a paper on the role of the Gangmasters Licensing Authority. and otherwise relates to general matters such as consequential provision and commencement.¹¹ The Gangmasters and Labour Abuse Authority works in partnership to protect vulnerable and exploited workers.¹²
8. Due diligence processes and reporting are regarded as essential management tools that improve risk identification and long-term social, environmental as well as financial performance. There is nothing to prevent a foreign subsidiary or parent from producing a statement, even if they are not legally obliged to do so.

The statement should include information about the organisation's structure; business and supply chains; policies in relation to slavery and human trafficking; due diligence processes in relation to slavery and human trafficking in its business and supply chains; the parts of its business and supply chains where there is a risk of incidence of slavery and human trafficking and the steps it has taken to assess and manage that risk; effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and the training and capacity building on slavery and human trafficking available to its staff.

The statement should be approved and signed by an appropriate senior person in the business. This ensures senior level accountability, leadership and responsibility for modern slavery and gives it the serious attention it deserves. The statement must be published on an organisation's website with prominent link on the homepage.

Organisations are legally required to publish a statement for each financial year as soon as possible after their financial year-end.

The Modern Slavery Act places emphasis on the reporting obligations that companies have and the manner of reporting, as this aids transparency. It further encourages compliance even where companies are not obliged to comply under the law. This indicates a move towards a system where companies are encouraged to comply because it is the right thing to do and not only for fear of sanctions.

¹¹ <https://www.legislation.gov.uk/ukpga/2015/30/notes/division/2>

¹² More information on the Gangmasters and Labour Abuse Authority can be accessed at: <https://www.gla.gov.uk/who-we-are/what-we-do/>.

- **FRANCE'S LAW ON THE CORPORATE DUTY OF VIGILANCE**

The French Law on the Corporate Duty of Vigilance (LdV)¹³ was enacted in March 2017. The LdV binds companies with more than 5,000 employees in France or 10,000 in France and/or overseas to establish, implement and publish a Vigilance Plan covering the activities of the company, its controlled subsidiaries, subcontractors, and suppliers.

The basic components of the plan should include identifying, analysing, and mapping the risks resulting from the company's activities. Secondly, it must include suitable mitigation measures addressing these risks. The mapping of risks is the most important requirement of the LdV. This risk assessment forms the basis for companies to determine mitigation measures and their implementation. It would be very important that the risk assessment reflect the actual presence of the company's activity throughout its supply and commercial chain, as well the various stakeholders affected by these activities.

Failure to comply with the LdV obligations will incur the liability of the responsible party and will require payment of damages that the execution of these obligations would have prevented. This means that the victim is responsible for proving the existence of a fault, an operative event, negligence and/or recklessness, prejudice, and a causal link between the two.

The LdV is not prescriptive on the specifics to be included in the risk assessment and mitigation measures. It can be said that the objective of the LdV is the protection of individuals and the environment, and this would suggest that the concept of due vigilance goes further than traditional risk management processes that would be focused on protecting the company itself against legal and financial risks. The OECD Due Diligence Guidance for Responsible Business Conduct as well as the UNGPs indicate that both the risk assessment and prevention measures should consider the cultural, economic, sectoral, and political context of a company's activity, and these aspects underpin the LdV.

The LdV calls for the implementation and monitoring of the efficiency of a company's plan. Again, the LdV is not prescriptive but indicates that companies must show constant vigilant behaviour and regularly assess their supply chains and subsidiaries as far as the risks in their plan are concerned.

It is important to note that a company's plan must be made public, but the LdV does not enforce consultation with stakeholders. However, it would be advisable to consult local communities to study the plan as it may have an impact on them.

The LdV provides a mechanism whereby companies would need to decide on a risk assessment and prevention measures in the company's specific context, considering the company's own activity. It also stands to reason that consultation with stakeholders could serve to enrich the risk assessment and ensure that prevention measures are effective. The implementation of the law remains challenging, as there are no public oversight measures.

¹³ Law No. 2017-399 of 27 March 2017 on the Corporate Duty of Vigilance (*'Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre'*) can be accessed at : <https://respect.international/loi-2017-399-du-27-mars-2017-relative-au-devoir-de-vigilance-des-societes-meres-et-des-entreprises-donneuses-dordre/>

It is worth mentioning that there is an LdV-related case pending before the French court involving French oil company Total and an oil project in Uganda. This project is in Lake Albert and Murchison Falls, a natural park in Uganda. The project is extremely extensive involving the proposed drilling of over 400 wells, producing approximately 200,000 barrels of oil per day. Furthermore, a 1,445 km- long pipeline will need to be built to transport the oil, impacting communities and nature in Tanzania as well as Uganda. Six NGOs issued a formal letter to Total, demanding that the company change its vigilance plan relating to the project, as it was claimed that the project would have serious consequences for local communities, including eviction and environmental repercussions. Total declined and the case was due to be heard at the Nanterre Judicial Court, which decided that the complaint against Total regarding breaches of its duty of vigilance in Uganda should be tried before the ordinary civil court, and not before a specialized commercial court. By a decision of December 10, 2020, the Versailles Court of Appeal confirmed the order of the Nanterre Judicial Court that the matter did not fall within the jurisdiction of the commercial court.

- **AUSTRALIA MODERN SLAVERY BILL**

On 29 November 2018, the Modern Slavery Act 2018¹⁴ passed both houses of the Parliament of Australia; it came into effect on 1 January 2019, requiring large entities in Australia to report annually on the risks of modern slavery in their operations and supply chains, and on their actions to assess and address those risks.

While the Act does not explicitly require businesses to conduct human rights due diligence, nor to remedy harm, its provisions on mandatory reporting criteria for modern slavery statements expressly refer, at section 16(1)(d), to both due diligence and remediation processes.

The Australian Act introduces an annual public reporting requirement which facilitates year-on-year scrutiny by external stakeholders of corporate efforts to address modern slavery. Reporting entities' slavery statements must be approved by the board, or similar, and signed-off by a director, ensuring high-level buy-in and accountability for the content of statements.

The Australian government operates a central, freely accessible register of statements which should foster greater certainty about publication.¹⁵ The lack of dialogue and interaction around the implementation of this law might prove challenging.

It does focus on transparency in the reporting guidelines but does not impose any penalties. The Act does not create direct legal liability for companies which continue to cause harm via supply chains. There is also no exclusion of non-compliant entities from public tenders; no financial penalties to induce compliance; and no explicitly mandated human rights due diligence requirement. The Act does not establish an anti-slavery commissioner to work with business to implement the law.¹⁶

¹⁴ The Act can be accessed at: <https://www.legislation.gov.au/Details/C2018A00153>.

¹⁵ The register can be accessed at: <https://modernslaveryregister.gov.au/>.

¹⁶ <https://www.business-humanrights.org/en/blog/the-australian-modern-slavery-act-2018-will-it-live-up-to-expectations/>

However, human rights abuses may lead to serious personal and adverse career consequences for executives involved in the decision making that leads to harm according to other Acts in force in Australia (in protection of the Aboriginal Heritage and the environment). One example would be the destruction of a 46,000-year-old Aboriginal holy site, the Juukan Gorge rock shelters, in May 2020 by mining company Rio Tinto in search of iron ore. After a board-led investigation that included inputs from stakeholders outside of the company and a Parliamentary Inquiry¹⁷, it was decided that executive failings that led to the destruction had to be addressed. Rio Tinto accepted that what happened at Juukan was wrong, and, in addition to reorganising its executives' positions, it committed to ensuring that the destruction of a heritage site of such exceptional archaeological and cultural significance never occurs again at a Rio Tinto operation.¹⁸

- **THE NETHERLANDS' CHILD LABOUR DUE DILIGENCE ACT AND FURTHER DEVELOPMENTS**

The Child Labour Due Diligence Act ("Wet Zorgplicht Kinderarbeid"),¹⁹ enacted in 2019, places an obligation on companies to ascertain whether their products have been produced using child labour and to address the situation if they do find child labour in their supply chains. The law imposes administrative penalties (fines) as well as criminal sanctions for non-compliance. The law is expected to come into force in 2022. Specific aspects on the implementation the law and the identity of the regulatory body in charge of supervision will be determined by a General Administrative Order, that is yet to be developed and voted in Parliament.

The Law applies to all nationally registered Multinational Enterprises and foreign companies that sell or supply goods or services to Dutch consumers more than twice in a calendar year. Exemptions for sectors or companies with low risk of child labour will most probably be specified in the General Administrative Order. Consumers are defined as natural persons or juristic persons who use or consume goods or services.

Once again, there is emphasis on a risk assessment to ascertain whether there is a reasonable suspicion that a product or service in a company's supply chain has been produced with child labour, based on sources that are reasonably known or can be determined by the company. If such a suspicion exists, the company should produce and implement an action plan to address the issue. The law does not oblige a company to end any business relationship with a supplier after an indication of child labour, but rather to implement an action plan to avoid the use of such labour in the future.

To develop a proper risk assessment and strategic planning, the Law refers to the tool of the International Labour Organisation (ILO) – International Organisation of Employers (IOE) Child Labour Guidance Tool for

¹⁷https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024579/toc_pdf/NeverAgain.pdf;fileType=application%2Fpdf

¹⁸ <https://www.riotinto.com/en/news/releases/2020/Rio-Tinto-Executive-Committee-changes>

¹⁹ The Child Labour Due Diligence Act ('*Wet Zorgplicht Kinderarbeid*') is available here in Dutch: https://www.eerstekamer.nl/behandeling/20170207/gewijzigd_voorstel_van_wet

Business²⁰, which provides practical guidelines for companies to combat child labour in the supply chain in line with the UNGPs.

Companies must submit a declaration to the regulatory body confirming their exercise of due diligence related to child labour in their supply chain. The law doesn't specify the periodicity of submission (the General Administrative Order will probably clarify this matter). All companies that are covered by the law will have six months from the Law's entry into force to submit the required documentation demonstrating compliance with the statute.

Victims, consumers, and other stakeholders may present evidence that a company's products or services were produced using child labour to the regulatory body. However, a complaint will be filed with the offending company by the complainant asking for a response and instructing the company to resolve the issue first. If, according to the complainant, the company does not resolve the matter within six months, the regulator receiving the complaint will step in to act as a mediator. If the regulatory body finds that a company has violated the law, the regulator will provide the company with a legally binding course of action. Failure to follow the instructions or complete them within the allotted timeline may result in fines. These fines start at around €4,000 and penalties increase exponentially for companies found to have inadequate due diligence or lack of an action plan to detect and prevent the use of child labour. Companies that fail to comply can be subject to fines of up to €870,000, or 10% of total worldwide revenue if the fine is not deemed an appropriate penalty. If a company receives two fines for breaching the Law within five years, the responsible company director may be imprisoned for up to two years under the Economic Offences Act.

In addition to this Act, discussions are taking place on a broader legislation on business and human rights. In March 2021, four political parties officially submitted a draft Bill for Responsible and Sustainable International Business Conduct²¹ into the Dutch Parliament calling for a comprehensive human rights and environmental due diligence throughout the supply chain, in line with the OECD Guidelines for Multinational Enterprises. The draft Bill includes administrative enforcement but also civil and criminal liability for repeated failure to stop harmful activities.

It would apply to companies with two of those conditions: employing more than 250 employees during the financial year, or with a balance sheet of EUR20 million, or a net revenue of EUR40 million.

Value chain is defined in the Draft Bill as *"the entirety of an enterprise's activities, products, production lines, supply chain and business relationships"*.

²⁰ The Guidance Tool can be found here:

https://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/child_labour/EN/2015-12-16_ILO-IOE_Child_Labour_Guidance.pdf

²¹ An unofficial translation of the draft [Bill for Responsible and Sustainable International Business Conduct is available here:](#)

<https://www.mvopatform.nl/en/translation-of-the-bill-for-responsible-and-sustainable-international-business-conduct/>

Concerning the content of the due diligence duty: *“Human rights, labour rights or the environment are negatively affected if the value chain involves, for example:*

- a. the restriction of freedom of association and collective bargaining*
- b. discrimination*
- c. forced labour*
- d. child labour*
- e. unsafe working conditions*
- f. slavery*
- g. exploitation*
- h. environmental damage”.*

This initiative, if finalised, will repeal the existing Child Labour Due Diligence Act, that is still to enter into force.

In addition, the Government is also developing a legislation based on building blocks for mandatory human rights and environmental due diligence, to be implemented in case the EU Directive on sustainable corporate governance and due diligence will not materialise. Those building blocks are not public yet.

- **SWISS SUPPLY CHAIN LAW**

The Responsible Business Initiative (RBI), launched in 2016, sought to trigger a referendum to change the Swiss Constitution by setting out due diligence requirements for Swiss-based companies with respect to environmental and human rights, in Switzerland and overseas. The RBI also proposed that Swiss-based companies be held liable for environmental and human rights harms caused anywhere within their global supply chain.

The counterproposal²² to the RBI of the Federal Assembly (the Swiss Parliament) proposed to revise the Code of Obligations and the Criminal Law instead of changing the Constitution. It did not include new liability clauses but focused more on reporting requirements and specific due diligence obligations.

A nationwide public vote was held. On 29 November 2020 the RBI was rejected. It gained most citizens' votes (50,7 %) but did not gain the regional majorities across Switzerland's cantons (8.5 cantons voted in favour and 14.5 cantons against).

The lack of double majority meant that the counterproposal of the Federal Assembly will be implemented. It is expected to enter into force in 2022. Details of its practical application are set forth in an ordinance of the Federal Council (the House of Representatives) that has just been open to public consultations until 14 July 2021 (Draft [Ordinance](#) of 14 April 2021).

The counterproposal implements the "Due Diligence" requirement of the UNGPs at national level and refers to the standards of the OECD and other international instruments. In line with these principles,

²² The counter-proposal can be found here: <https://www.parlament.ch/centers/eparl/curia/2016/20160077/Texte%20pour%20le%20vote%20final%202%20NS%20F.pdf>

companies must first identify the potential risks throughout their business relationships and activities. On that basis they must take affective measures to address the potentially negative impacts.

Under the legislative change there are three pillars:

1. Firstly, a **broad non-financial reporting duty** in line with EU Directive 2014/95 on non-financial reporting (that is, reporting on the areas of environment, social affairs, labour, human rights and corruption, Article 964 ter) will be introduced. The standards have been adapted to conditions in Switzerland and apply to companies who, together with any subsidiaries in Switzerland or overseas, employ at least 500 people over two successive financial years and have either a balance sheet of CHF 20 million or sales revenue of CHF 40 million. The yearly report needs to be published electronically in English, French, Italian or German and signed off by the board of directors of the company and a general shareholder meeting of the company. This report must contain a description of:
 - *“The business model.*
 - *The type of social, environmental and governmental issues that are dealt with through the due diligence carried out by the company.*
 - *The measures adopted to address the challenges and an evaluation of such measures.*
 - *The risks related to social, environmental, and governmental above-mentioned issues and how they are mitigated. These risks may derive from: i) the company activity and ii) where relevant and proportionate, those arising from its business relationships, products or services.*
 - *The key performance indicators in the above-mentioned areas, which are decisive for the activity of the company”.*
2. Secondly, when into force, the legislative change will introduce a mandatory due diligence requirement specific to risks associated with the **trading of conflict minerals** in the value chain, in line with EU Regulation 2017/821 ([Regulation No. 821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas](#)). An independent expert will control its proper implementation.
3. And thirdly, the law foresees a mandatory due diligence requirement specific to companies offering “goods or services for which there is a valid suspicion of the use of **child labour**” in the value chain. The Dutch Child Labour Act served as a model.

Exempted companies include Small and Medium Size Enterprises (SMEs), companies that are controlled by another company that is already complying with this reporting obligation or companies having a very low risk in terms of child labour. Also, companies importing less than a certain amount of mineral per year will be exempted from the new obligations of reporting and due diligence. These and other specificities will be contained in the Ordinance accompanying the legislative change.

If company representatives do not comply with these new obligations, the new law could attract fines of up to CHF 100,000.

- **GERMAN ACT ON CORPORATE DUE DILIGENCE OBLIGATIONS IN SUPPLY CHAINS**

On 11 June 2021 the German Parliament (“*Bundestag*”) adopted the Act on Corporate Due Diligence Obligations in Supply Chains (“*Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*” in German)²³, which was published in the federal law gazette on 22 July 2021²⁴.

The Act will enter into force gradually: The regulations for companies will enter into force on 1st January 2023 and will initially apply to companies with 3,000 or more employees with a registered office or domestic branch in Germany, then from 1 January 2024 to companies with 1,000 or more employees. The law obliges these companies to fulfil their due diligence obligations in their supply chains with regard to respecting internationally recognized human rights and certain environmental standards. To the purpose of determining the company’s size in terms of employees, temporary agency workers must be included if the duration of the assignment exceeds six months.

The Act on Due Diligence Obligations in Supply Chains creates new legally binding human rights and environmental due diligence obligations for companies, which apply for their own business activities, their first-tier suppliers and to a certain extent to all tiers of the supply chain.

Content: new human rights and environmental due diligence obligations

The new due diligence obligations cover human rights as expressed in the International Pact on civil and political rights, the International Pact on economic social and cultural rights, the International Labour Organization’s eight core labour conventions and three international environmental standards (Minamata Convention on Mercury, Stockholm Convention on Persistent Organic Pollutants and Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal).

These cover issues such as integrity of life, protection from torture, prohibition of child and forced labour, protection of freedom of association and the effective recognition of the right to collective bargaining, protection against discrimination in respect of employment and occupation. In addition, the new duty of care covers occupational health and safety standards according to national laws and “appropriate wages” based on the regulations applicable at the place of employment. Environmental rights refer to the prohibition of “*unlawful withdrawal of land, forests and water*” and “*the prohibition of causing harmful soil change, water pollution, air pollution, harmful noise emission or excessive water consumption*”.

This new due diligence duty obliges companies to:

²³ The Act on Corporate Due Diligence Obligations in Supply Chains (*‘Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten’*) can be accessed here in English and German:

https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf;jsessionid=40486CA301A0EE1A81E1E3764231AA03?_blob=publicationFile&v=4
https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf;jsessionid=F376AAF38BCE282B7E4F8D40F420543.delivery1-replication?_blob=publicationFile&v=2

²⁴https://www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D_1629196182059

- Establishing a risk management system and designating internal responsibilities
- Issuing a policy statement
- Regularly performing risk analyses
- Laying down preventive measures
- Taking remedial action
- Documentation and reporting
- Establishing a complaints procedure
- Implementing due diligence obligations with regard to risks at indirect suppliers

Definition of supply chain

The supply chain is understood to cover all the way from the raw material to the final product and to include services. A company must (1) include in its due diligence all its own business activity and that of its direct suppliers, i.e., a contractual partner, and (2) exercise due diligence with regard to the rest of the supply chain in cases of “substantiated knowledge” regarding potential violations of duties of sub-suppliers.

Enforcement and fines

The German Federal Office for Economic Affairs and Export Control (BAFA) will enforce the Act. Companies will have to submit annually a report about the fulfilment of their due diligence obligations to this agency. The Agency can claim access to documentation and will be entitled to access company premises, collect evidence, and issue fines.

Fines can be high, to a maximum of EUR8 million and for companies with annual revenue over EUR400 million, up to 2% of their annual turnover for specific violations of the law. Moreover, a company receiving a fine over EUR175,000 should be excluded from public procurement for up to three years.

Lawsuits

The Act did not introduce a new legal basis for civil liability. However, through a “derivative right of action”, victims will be able to provide German NGOs and trade unions with power of attorney, so that they may formally represent them in court (“*Prozessstandschaft*”).

- **CANADA BILL S-216**

To date, Canada has largely taken a policy approach to corporate human rights due diligence. However, on 29 October 2020, Bill S-216 was introduced in the Canadian senate. If passed, Bill S-216 would enact the Modern Slavery Act, which will impose an obligation on large entities to report annually on the measures taken to prevent and reduce the risk that forced labour or child labour is used at any step in: (1) the production of goods in Canada or elsewhere by the entity; or (2) the production of goods imported into Canada.

In addition, the Modern Slavery Act would provide the government with broad investigative powers to determine whether non-compliance has occurred. Non-compliance could lead to significant fines. At

present, Bill S-216 has proceeded to second reading in the Canadian senate. The legislative progress of this Bill should be monitored closely.

- **NORWEGIAN HUMAN RIGHTS AND DUE DILLIGENCE LAW**

On 10 June 2021, the Norwegian Parliament adopted the Act on business transparency and work with fundamental human rights and decent work (Proposition 150 L (2020-2021), also known as the Transparency Law).

The law covers all large and mid-size companies headquartered or have physical presence in Norway and extends to all foreign companies selling products and services in Norway. *“Companies meeting at least two out of the following three criteria are covered by the act: company is at least 50 man-years; has turnover of at least 70 million NOK; has balance of at least 35 million NOK”.*

According to the law companies are required to implement due diligence assessments, and to document how they operate to prevent or limit these adverse risks to human rights, including workers’ rights. The baseline is the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises. (The law does not cover environmental due diligence).

“The due diligence assessments cover the entire supply chain and business partners, and the law requires companies to provide or cooperate to ensure remedy. Companies must report on their assessments, including cases of severe risk or harmful incidents that they uncover in their due diligence assessments. The law grants to any stakeholder the right to request information from a company on how it manage its human rights due diligence – including in relation to a particular item or service offered”²⁵.

Enforcement

Compliance of the provisions of the law are supervised by the Norwegian Consumer Agency. Promoting companies’ respect for human rights and decent working conditions are given strong consideration in the audit process. *“The Consumer Agency shall, on its own initiative, or at the request of others, seek to influence the companies to comply with the law, including by conducting negotiations with the companies or their organizations”.*

If business is found to be in violation of the law the Norwegian Consumer Agency may acquire written authorization to terminate the illegal relationship or take a decision. The Market Council processes such complaints about the Consumer Agency's decision. *“In other respects, section 32, section 33, section 37 of the Marketing Act and regulations issued pursuant to section 38 apply correspondingly to control and enforcement pursuant to this Act”²⁶.*

Regional legislative advancements and the UN Treaty on Business and Human Rights

²⁶<https://stortinget.no/no/Saker-og-publikasjoner/Vedtak/Beslutninger/Lovvedtak/2020-2021/vedtak-202021-176/>

Today there is significant pressure in terms of mandatory human rights due diligence at the levels of the EU and while there is no certain outcome yet, a proposal is anticipated towards the end of 2021.

Three initiatives are worth of note, two relate to due diligence and sustainable corporate governance and the third to non-financial reporting, by means of EU Directives or Parliamentary resolutions²⁷.

- **EUROPEAN UNION INITIATIVE ON SUSTAINABLE CORPORATE GOVERNANCE AND DUE DILIGENCE**

Context

The European Commission (Directorate General (DG) Justice) is aiming to release an initiative on sustainable corporate governance.²⁸

The goal of this initiative is to *“improve the EU regulatory framework on company law and corporate governance. It would enable companies to focus on long-term sustainable value creation rather than short-term benefits. It aims to better align the interests of companies, their shareholders, managers, stakeholders, and society. It would help companies to better manage sustainability-related matters in their own operations and value chains as regards social and human rights, climate change, environment, etc”*.

In short, the initiative seeks to:

1. Introduce a new corporate duty for human rights and environmental due diligence, meaning that companies must take measures to address their adverse sustainability impacts, such as *“harm in their own operations and in their value chain by identifying and preventing relevant risks and mitigating negative impacts (due diligence duty). Such duty could be designed by building on existing authoritative guidelines using well-established definitions as developed by the UN and later expanded by the OECD”*. Remedy would also be part of this duty.
2. Reform directors’ duties, to include sustainability matters in directors’ acts that *“take into account all stakeholders’ interests which are relevant for the long-term sustainability of the firm, or which belong to those affected by it (employees, environment, other stakeholders affected by the business, etc.)”* and integrate stakeholders’ interests into the corporate strategy (also with measurable targets).

This initiative is connected with another EU Commission initiative, that is about revising the Directive on Non-Financial Reporting (reported below). Indeed, while the first is about introducing a corporate obligation to carry out due diligence, including mitigation of adverse impact, the latter will clarify the requirements to report on due diligence processes. It is also directly interacting with the European Parliament Resolution mentioned below that was adopted with a large majority on 10 March 2021 (see below).

²⁷ <https://shiftproject.org/resource/mhrdd-europe-map/>

²⁸ Information on the initiative and timeline can be found here: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Governo-societario-sostenibile_it

Legal basis and timeline

The legal basis for proposing a new Directive is to be found in Article 50(1) and (2)(g) TFEU, which gives “EU competence to coordinate safeguards for the protection of interests of companies' members and other stakeholders in order to attain freedom of establishment” and in Article 114 TFEU, which allows the “EU to approximate legislation with the object of ensuring the proper functioning of the internal market”.

The public consultation for this initiative was closed in February 2021²⁹. The European Commission proposal was scheduled for publication in June 2021 but was postponed for a couple of months. The debate on the proposal could take place end 2021 and could extend to 2022.

- **EUROPEAN PARLIAMENT RESOLUTION WITH RECOMMENDATIONS TO THE COMMISSION ON CORPORATE DUE DILIGENCE AND CORPORATE ACCOUNTABILITY**

A second initiative at the EU level is driven by the European Parliament. With this initiative, the Parliament is encouraging the European Commission to adopt a Directive that would include a new corporate duty to due diligence on human rights, environmental and governance issues, in line with the United Nations Guiding Principles (UNGPs).

The Resolution on due diligence (based on the report prepared by Rapporteur MEP Lara Wolters (S&D)) was adopted with the strong majority of Parliament in March 2021. It received 504 votes in favor, 79 votes against and 112 abstentions³⁰. Thus, the European Parliament is already ready for a discussion on the upcoming European Commission proposal for a Directive on sustainable corporate governance and due diligence.

Content

The Resolution was prepared based on the so-called Wolters report³¹. In its proposal for a Directive contained in Annex I, the Wolters report refers to binding due diligence duty for companies that have to identify, address and remedy situations in the value chain that could cause or contribute to human rights, environmental or good governance harm. These include social, trade unions and labour rights, contribution to climate change, and bribery, for instance.

The value chain includes all operations, for direct business partners, but also with the indirect business relations and investment chains.

The obligation to make efforts to prevent adverse impact on human rights is based on the likelihood and severity of the impact, the sector of activity, size, and length of the value chain. The draft proposal for a Directive “lays down the value chain due diligence obligations of undertakings under its scope, namely, to

²⁹ The website on the public consultation can be accessed here: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en

³⁰ Here is the link to the text of the Resolution: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html

³¹ The Wolters report: https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.pdf

take all proportionate and commensurate measures and make efforts within their means to prevent adverse impacts on human rights, the environment and good governance from occurring in their value chains, and to properly address such adverse impacts when they occur”.

The Wolters Report also calls for companies to be held liable civilly for harms they have directly caused or contributed to or that companies that it directly controls cause or contribute to, unless they can prove that they have acted in line with due diligence obligations and taken measures to prevent such harm. Fines should be determined by Member States (*“the sanctions provided for shall be effective, proportionate and dissuasive and shall take into account the severity of the infringements committed and whether or not the infringement has taken place repeatedly”*) and could include excluding undertakings from public procurement, state aid, public support schemes and loans.

It covers large companies and small businesses listed in regulated markets, as well as small businesses operating in high-risk sectors and foreign companies active in the internal market.

- **EUROPEAN COMMISSION REVISION OF THE DIRECTIVE ON NON-FINANCIAL REPORTING, RENAMED CORPORATE SUSTAINABILITY REPORTING DIRECTIVE**

Context and timeline

On 21 April 2021, the European Commission (led by Directorate General FISMA) published a proposal to amend the Non-Financial Reporting Directive (NFRD) (2014/95/EU Directive)³², renamed the ‘corporate sustainability reporting directive’ (CSRD)³³.

According to the EU Commission, the existing Directive needed to be amended because the sustainability information that companies were reporting annually were insufficient to investors and other stakeholders or of limited quality.

The proposed Directive was sent to the European Parliament and the Council in the course of the European legislative procedure. There is no fixed timeline, however, it is expected that companies apply the new standards in 2024, covering financial year 2023.

³² Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095>

³³ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0189>

Content

The CSRD proposal:

- Extends the scope of reporting to all large companies (not only large companies listed on regulated markets with more than 500 employees) and listed SMEs (albeit with simpler standards of reporting).
- Introduces an obligation to report on how business models and strategies take account of the stakeholders' interests, to describe the principal adverse impacts connected to the company and supply chain, and to include quantitative, qualitative, retrospective and forward-looking information and to describe the due diligence process implemented with regard to sustainability matters.
- Introduces a mandatory EU-wide auditing.
- Introduces specific reporting requirements based on mandatory new EU sustainability reporting standards.
- Requires companies to report digitally so that data can be more easily accessed and used.
- Allows to omit certain information, albeit with repercussion on the commercial position of the company and after justification of the company's board.
- Clarifies on the content of "double materiality". The NFRD indeed introduced a requirement for companies to report both on how sustainability issues affect their performance, position and development (the 'outside-in' perspective), and on their impact on people and the environment (the 'inside-out' perspective).

Concerning the matters for reporting, these remain broadly the same and refer to social matters, respect for human rights, environmental matters, anti-corruption, and anti-bribery issues.

The new sustainability reporting standards (to be drafted in the second half of 2021) should *"aim to incorporate the essential elements of globally accepted standards currently being developed. EU standards should go further where necessary to meet the EU's own ambitions and be consistent with the EU's legal framework"*. The European Financial Reporting Advisory Group (EFRAG) will oversee the elaboration of these draft standards. EFRAG is a private association established in 2001, working on public private partnership model and fulfilling the role of advisor for the Commission on the adoption of international financial reporting standards into EU law.

- **ONGOING WORK ON A LEGALLY-BINDING UN TREATY ON BUSINESS AND HUMAN RIGHTS**

In June 2014, the UN Human Rights Council established an open-ended intergovernmental working group (IWG) on transnational corporations and other business enterprises with respect to human rights, to elaborate an international, legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. The IWG, which is chaired by the Permanent Representative of Ecuador to the UN in Geneva, has so far held six sessions and in its last session in October 2020 negotiated a second revised draft of the treaty. Key elements of the second revised draft include:

- Mandatory due diligence.
- Liability of natural and legal persons.
- Liability for the entire supply chain.
- Explicit elimination of any “safe harbour” for companies which conduct solid due diligence, that may still result in human rights incidents.
- Vast extraterritorial jurisdiction / Rejection of the *forum non conveniens* (a principle of redistribution of cases between different Courts if the Court required to settle the case considers that another Court should be dealing with the case, to avoid forum shopping); and
- Plaintiffs select the applicable law.

The Permanent Mission of Ecuador in Geneva will release the third revised draft in June 2021, which will be the basis for negotiations at the next session of the IWG in October 2021.

Developments in case law impacting corporate supply chain liability

Developing due diligence infrastructures, let alone publishing statements or enacting policy around these infrastructures, are fraught and complex endeavours. This complexity has increased as courts have begun to attach legal significance to a Company’s actual or perceived failure to act in accordance with its own infrastructures or related policy.

For instance, courts in the US and Canada have considered whether any public pronouncement relating to human rights instrument or endeavour can serve as a basis for assigning liability. The following prominent cases have addressed this very issue. The law in the US and Canada surrounding these issues remains very much in flux while the trends continue to reflect an increasing willingness by courts to extend liability to companies in this context.

• VEDANTA V. LUNGOWE – UK

In April 2019, the UK Supreme Court ruled that a claim brought by Zambian villagers against UK-based Vedanta and its Zambian subsidiary KCM can proceed to a trial in the UK.³⁴ The villagers claimed that waste discharged from a mine owned and operated by KCM had polluted the local waterways. The claims were founded in common law negligence, as well as in violations of Zambian environmental laws.

The court considered whether Vedanta sufficiently intervened in the management of its subsidiary’s mine, such that a common law duty of care was imposed on it. In answering in the affirmative, the Court analysed Vedanta’s public pronouncements, including a report stating that oversight of all Vedanta’s subsidiaries rested with the board of Vedanta itself, and which referred to the problems arising at the Zambian mine. The Court found that these pronouncements indicated that Vedanta “asserted its own

³⁴ *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Ors.* [2019] UKSC 20.

assumption of responsibility” over KCM’s actions by not only making the statement, but also in implementing standards “by training, monitoring, and enforcement.”

The Court left unanswered whether bare pronouncements on standards – without implementation and enforcement of those standards on business partners – will extend the duty of care to the parent company.

In any event, the case of *Vedanta* suggests that if a company makes a public statement explicitly assuming responsibility for ensuring certain standards, then UK courts may consider claims sounding in tort when those standards are not met. It remains unclear as to what precise language within an applicable statement can create such responsibility.

- **CALIFORNIA CONSUMER PROTECTION CASES**

In August and September 2015, consumers brought six class actions in California federal courts against Mars, Costco, Nestlé, P&G, and Hershey, based on their purported failure to disclose alleged forced labour in their respective supply chains.³⁵ In contrast to *Vedanta* and the Canadian cases cited below, these claims were not grounded in the alleged labour violations themselves, but rather in the companies’ purported failure to *disclose* to California consumers the use of forced labour or the “likelihood of forced labour” in supply chains. Thus, these claims were brought under consumer protection theories under California’s Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act.

In particular, the plaintiffs argued that the companies’ various corporate statements should have included these disclosures, especially since those corporate statements contained statements such as the following:

- “[Nestlé] fully support[s] the United Nations Global Compact’s (UNGC) guiding principles on human rights and labour and aim to provide an example of good human rights and labour practices throughout our business activities.”
- “In accordance with the UN Guiding Principles [on Business and Human Rights], we will implement a due diligence process to identify, mitigate and prevent adverse impacts on human rights and appropriate mechanisms for remediation.”
- “[Mars’ Supplier Code of Conduct] sets our global expectations prohibiting the use of child labour in accordance with International Labour Organization (ILO) Minimum Age Convention No. 138 and in the areas of health and safety, the environment and ethical business practices.”
- “P&G respects internationally recognized human rights as defined by the Universal Declaration of Human Rights and Associated Covenants, and the ILO Declaration on the Fundamental Principles and Rights at Work.”

³⁵ See *Wirth v. Mars, Inc.*, No. 15-cv-1470, 2016 U.S. Dist. LEXIS 14552 (C.D. Cal.); *Sud v. Costco Wholesale Corp.*, No. 15-cv-03783 (N.D. Cal.); *Barber v. Nestle USA, Inc.*, 154 F. Supp. 3d 954 (C.D. Cal.); *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016 (N.D. Cal.); *Dana v. The Hershey Co.*, 2016 U.S. Dist. LEXIS 41594, No. 15-cv-04453 (N.D. Cal.); *McCoy v. Nestle USA, Inc.*, 2016 U.S. Dist. LEXIS 41601, No. 15-cv-04451 (N.D. Cal.).

The California courts consistently rejected each of the six consumer protection-based cases by granting the respective defendant-companies' motions to dismiss. Each of these dismissals was later affirmed by the Court of Appeals.

The courts found that the companies had no duty to disclose the information at issue. In doing so, the courts determined that the plaintiffs could not pursue claims based on the companies' public statements because, crucially, the plaintiffs had not alleged that they read or relied on those statements when they purchased those products. As such, there was no evidence of reliance – a required element of the consumer protection claims under discussion.

The courts also held that the companies had no duty to disclose the alleged labour violations at issue because this type of duty arises only when the information addresses a safety risk to the consumer or where the information discloses a “product defect” – neither of which were true with the products at issue. Further, the courts opined that the “duty to disclose does not extend to situations where, as here, information may persuade a customer to make different purchasing decisions.”

- **CANADIAN CASE LAW**

Over the course of the last decade, Canadian courts have considered several claims relating to injury (including human rights abuses) allegedly committed by, or with the complicity of, Canadian extractive companies operating in developing countries. While none of these cases have yet to be decided on their merits, the courts have considered when it will be appropriate for a claim of this nature to proceed through the Canadian judicial process and the types of claims that plaintiffs can bring.

For a claim to proceed in Canadian courts, plaintiffs must first demonstrate that the subject matter of the proceedings has a real and substantial connection with the province in which the case is being brought. For example, in a case brought to Quebec courts against Anvil Mining Ltd.³⁶ the plaintiffs alleged that the company provided the Congolese army with logistical and other support to put down an uprising in a town (Kilwa) that was strategically important to Anvil for the export of the silver it was extracting. The army, tortured, raped, summarily executed, and otherwise killed, many civilians. According to a UN Report, the company acknowledged that it had used its chartered planes, company vehicles and drivers to transport Congolese soldiers to Kilwa. The Quebec Court of Appeal held that in October 2004, the time of the alleged

³⁶ Canadian Association Against Impunity (ACCI) v. Anvil Mining Ltd. 2011 QCCS 1966 (accessed at http://citoyens.soquij.qc.ca/php/decision.php?ID=91AB79FB4C5D463A59072D8BD1DBA8850F8F6231D3BAAC0A0B304B6532013AB2&captchaToken=03AGdBq25qJUuhx5nYyGr0FDvNCf74Xw447Wwn-S2xE5ndj9XApFzt9lrNfQ_dX2RpqIBtNe6mVolv2aiO-NYr2Eyqlsop5XJlznZAWnzUsM9nftedfxNEQIwf86I5eBUGPF8doaTe-h5o3N93gTkJB2iAmjbp1LD3649XBrEQyboBxf6GMQ3Vio5u1jbqtHFXfeNqVAtbYgkiCk13Ru-zq6LHEQ1s7fCk-U5os2PKNX-YkBDPPvfYXBLqVrk-N93BC8d2DAIXao7d27vza6IUhyT1yoBdpLoutMrhrqM0BxiIjXZb3fQoFVM_tnkb0bJ9z5zCXQqVFPjNCHBOckYhxsapYzutPeEz!smtWtWRvvp9pvW6jQ27klA3l5afYjoXDS2mVPU4bhELAgHKUztOTO-9Rg0XE0qrALv0rmKIF4NO0hDLBlzF-3ddo5485dTwxHQe76kn)

acts, Anvil was neither established nor engaged in activity in the province of Quebec. The plaintiffs' application for leave to appeal to the Supreme Court of Canada was denied.³⁷

In the recent Nevsun case³⁸ Eritrean workers claimed that they were conscripted through Eritrea's military service into a forced labour regime where they were required to work at a mine. They claim they were subjected to violent, cruel, inhuman, and degrading treatment. The mine in question was owned by Nevsun Resources Ltd., a Canadian Company. The Eritrean workers sued Nevsun in the province of British Columbia and sought damages for breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity. They also sought damages for breaches of domestic (Canadian) torts including conversion, battery, unlawful confinement, conspiracy, and negligence.

Nevsun brought a motion to strike the pleadings based on the "act of state" doctrine, which precludes domestic courts from assessing the sovereign acts of a foreign government. Nevsun also took the position that the claims based on customary international law should be struck because they have no reasonable prospect of success. Both the lower court and the British Columbia Court of Appeal dismissed Nevsun's motion to strike. The Supreme Court of Canada dismissed Nevsun's appeal in February 2020. Importantly, it stated that the "act of state" doctrine has no application in Canada. In addition, the Supreme Court held that customary international law is automatically adopted into Canada's domestic law without the need for legislative action. It further stated that it was not "plain and obvious" that Canada's domestic law cannot recognise a remedy for a breach of customary international law. The Eritrean workers' claims will now proceed on the merits in the lower courts.

● **GERMAN CASE LAW**

In 2015, four plaintiffs filed a lawsuit against the German clothing retail company Kik for a 2012 fatal textile factory fire in Pakistan at the regional court in Dortmund, Germany. They claimed the company should bear responsibility for the fire safety deficiencies of a local supplier. The four plaintiffs are members of the Ali Enterprises Factory Fire Affectees Association and were seeking €30,000 each in compensation from Kik.

In August 2016, the court had issued an initial decision: it accepted jurisdiction and granted legal aid to the claimants to cover their costs. The only court hearing in the case was held in November 2018, which did address the question of statutory limitation in Pakistani law. In 2019, the court rejected the lawsuit on the basis that the statute of limitations had expired.³⁹ The court found the claims were statute barred. The case was thus decided on issues of process rather than content. In February 2019, the applicants filed an application for legal aid for the second instance with the Oberlandesgericht Hamm. The court rejected the application in May 2019.⁴⁰

³⁷https://www.researchgate.net/publication/282132362_Canada's_Enhanced_CSR_Strategy_Human_Rights_Due_Diligence_and_Access_to_Justice_for_Victims_of_Extraterritorial_Corporate_Human_Rights_Abuses

³⁸ Nevsun Resources Ltd. v. Araya, 2020 SCC 5 (CanLII), <http://canlii.ca/t/j5k5j>, retrieved on 2020-12-08

³⁹ http://www.justiz.nrw.de/nrwe/lgs/dortmund/lg_dortmund/j2019/7_O_95_15_Urteil_20190110.html

⁴⁰ http://www.justiz.nrw.de/nrwe/olgs/hamm/j2019/9_U_44_19_Beschluss_20190521.html

Key issues linked to legislative due diligence approaches

Human rights due diligence is an integral part of a company's responsibility to respect human rights. However, it is neither a simple exercise, nor a silver bullet to the world's business-related human rights problems.

A key challenge is how to address deep-rooted and complex human rights challenges which companies face in many States. A company on its own will not be able to address systemic issues deep-down in the supply chain. The UN Working Group's report to the UN General Assembly states in this regard: *"A lack of government leadership in addressing governance gaps remains the biggest challenge. A fundamental issue is that host Governments are not fulfilling their duty to protect human rights, either failing to pass legislation that meets international human rights and labour standards, passing legislation that is inconsistent, or failing to enforce legislation that would protect workers and affected communities."*⁴¹ This statement resonates with the report of the Alliance 8.7 on child labour and forced labour in Global Supply Chains. The report finds that the vast majority of child and forced labour has no link to Global Supply Chains but is purely domestic. In fact, in North Africa, for instance, 91% of child labour is purely domestic.⁴² Thus, in order to address all workers, and not only the small fraction which is linked to global supply chains, much more holistic approaches are needed. Any due diligence regulation can be only one piece of a much bigger puzzle, in which support is given to address weak governance, informality, lacking access to basic services, corruption and insufficient judicial systems at local level.

Experiences have also shown that due diligence regulations can result in a *de facto* embargo, undermine business engagement in regions with developmental challenges, and run counter to the UNGPs' spirit.

Case study Dodd-Frank Act

When US Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), the Bill included a provision aimed at curbing the violence caused by sourcing minerals from conflict-ridden parts of the world. At the time, the intention of the Bill was to cut off the funding of militias who control mining, especially in the eastern DRC.⁴³ A new provision called Section 1502 was included in Dodd-Frank, requiring companies registered with the U.S. Securities and Exchange Commission to disclose whether they are receiving minerals from the DRC, and whether those minerals are connected to sites of conflict. The determination of connection to sites of conflict is obtained through an expensive certification process on a mine-by-mine basis by the Regional Certification Mechanism of the Intergovernmental International Conference on the Great Lakes Region. Companies had to file their first disclosures in May 2014.⁴⁴

⁴¹ Working Group on the issue of human rights and transnational corporations and other business enterprises: Report to the UN General Assembly 2018, A73/163, p. 9

⁴² Alliance 8.7: Ending child labour, forced labour and human trafficking in global supply chains, 2019, p.10

⁴³ <https://www.wsj.com/articles/how-dodd-frank-led-to-more-mayhem-in-africa-1479076081>.

⁴⁴ <https://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/>.

However, it seems that the legislative intervention has had unintended consequences: now that one source of the militia's income has been cut off, plundering attacks on civilians have doubled. A report published in the Wall Street Journal likens the situation at some mines in the DRC before Dodd-Frank to that of a mafia arrangement: in exchange for a cut of mineworkers' wages, the militias afforded workers some protection. However, rather than try to establish whether minerals came from conflict areas within the DRC, companies largely boycotted minerals from the DRC. This led to a drop of 90% in exports of these minerals. Furthermore, research indicated that only 8% of the ongoing conflict in the DRC could be connected to minerals, and that the blanket assumption that all mines are controlled by militias ignores prevalent artisanal mining entirely.⁴⁵ There is general consensus that the slowdown of mining activities had an immediate and negative effect on living conditions of artisanal miners and the local economies around artisanal mines. These effects are also recognised but are deemed a necessary evil for a greater good, namely the reduction of the black market in minerals and its assumed stabilising effect without any evidence.⁴⁶

The militias in question did not disappear. Instead, they moved around and started plundering and perpetrating violence against civilians to make up for lost revenue due to the mineral boycott. Advocacy groups have claimed that Dodd-Frank was successful, based on the argument that a reduction in revenues from mining leads to a reduction in the financing and strength of armed groups. Many scholars on the other hand have argued that Dodd-Frank has done little to improve the security situation in the eastern DRC, and that armed groups have looked for alternative sources of income, including the trade in charcoal, cannabis, and palm oil.⁴⁷

The operation of section 1502 was suspended in 2017 pending a review of the legislation. Interestingly, it seems that the suspension of the "conflict minerals" legislation has had no effect on the prevalence of conflict in the DRC, and various companies have publicly stated that they intend to follow the requirements of the legislation even if it is officially removed from U.S. law. This implies that some companies perceive consumers to demand "conflict free" products.⁴⁸

There are also questions, whether due diligence laws really create the clarity what exactly is required from companies. The lawsuits against companies under the French Due Diligence law highlight that the question "How good is good enough?" when it comes to due diligence will not be answered by a law, but that differences in the understanding what sufficient due diligence mean will remain.

⁴⁵ <https://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/>.

⁴⁶ <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0201783>.

⁴⁷ <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0201783>.

⁴⁸ <https://blogs.worldbank.org/impactevaluations/unintended-consequences-regulating-conflict-minerals-africas-great-lakes-region>.

Key considerations going forward

The trend towards mandatory human rights due diligence will not be reversed and a coordinated business response is necessary in the face of these legislative developments. Key considerations for business to consider in the debates on legislation include:

- Liability vs sanctions: Will the legislation, such as for instance the French due diligence law, create liabilities for adverse impacts in the supply chain, or will it impose sanctions for non-compliance, such as the Dutch and German law? If liabilities are created, for which tiers of companies, and in which circumstances? Creating liabilities for adverse human rights impacts in supply chains will create huge legal uncertainties for companies. In the case of sanctions, what will those be?
- Safe Harbour - Clause: A key question will be whether any legislation includes a “safe harbour” for companies that conduct due diligence, but still find themselves in situations where there are adverse human rights impacts. An erosion of a safe harbour defence may fail to reward good faith efforts by companies to conduct due diligence, and therefore eliminate an important incentive for companies to conduct due diligence. The approach of many jurisdictions to corporate due diligence includes safe harbour clauses. For example, courts have found that the CA Transparency in Supply Chains Act creates a safe harbour against consumer protection claims against companies that make disclosures under that law. As another example, in a slightly different context, in the UK, if a company has “adequate procedures” in place to prevent bribery, it will have a complete defence against a claim under the UK Bribery Act.
- Liability of natural and legal persons: where liability is extended to natural persons, this would open the door for States to hold responsible multinational companies’ directors.
- Reversal of burden of proof: The reversal of the burden of proof such as was initially considered in the Swiss supply chain legislation proposal, contravenes a fundamental and well-established legal principle of “innocent until proven guilty” and the notion that “he who asserts must prove.” Indeed, requiring that the accused party prove its innocence violates due process principles and fundamental notions of fairness in most jurisdictions.
- Extraterritorial Jurisdiction: Does the legislation include provisions on extraterritorial jurisdiction? Which laws apply in cases of extraterritorial jurisdiction? In addition to the fact that extraterritorial jurisdiction creates grave uncertainties as to where the accused may be taken into court, and to which laws they may be subject, there are other shortcomings which are too often overlooked, including the tremendously higher costs of pursuing remedies in foreign courts and sustaining such cases over several years; the challenges presented to foreign courts when they must rule according to foreign legal principles; the difficulties in obtaining evidence and testimony abroad; as well as the question of which court is the right forum for the case to be heard. Independently of all the arguments for the need to ensure access to remedy and the limited responsibility of business partners, because of the inherent challenges, extraterritorial jurisdiction is not a suitable tool to address gaps in access to remedy in a vast majority of cases.

We can say with some degree of certainty that greater mandatory due diligence or disclosure regulations will come to pass. What is less certain is how courts and lawmakers will continue to assess the outcomes and, more specifically, whether companies can be held liable for alleged inconsistencies within their own infrastructures and whether companies will be provided any legal incentive to create and refine these infrastructures.

It also remains to be seen whether legislation will provide the level playing field which many actors are calling for. Most likely, laws will continue to differ widely from each other. The fact that we will continue to see very dynamic developments in the business and human rights arena will additionally contribute to a trend where governments, at different speeds and via a variety of means, try to catch up and legislate on issues linked to due diligence, reporting, liability, and others. European legislation may not put an end to these unilateral national approaches.

As this arena remains in a state of flux, all companies should be consulting with experienced legal counsel to understand, best prepare for, and eventually mitigate against, these growing legal considerations.

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